



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1610

RIN 3046-AB05

Availability of Records

AGENCY: Equal Employment Opportunity Commission.

ACTION: Interim final rule.

SUMMARY: The Equal Employment Opportunity Commission (EEOC or Commission) proposes to revise its Freedom of Information Act (FOIA) regulations in order to implement the substantive and procedural changes to the FOIA identified in the FOIA Improvement Act of 2016 and update two district offices addresses and the Office of Legal Counsel's fax number.

DATES: This interim final rule is effective on [INSERT DATE OF PUBLICATION]. Comments must be received on or before [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION].

ADDRESSES: Written comments should be submitted to Executive Secretariat, Equal Employment Opportunity Commission, 131 M Street, NE, Suite 6NE03F, Washington, DC 20507. As a convenience to commenters, the Executive Secretariat will accept

comments by facsimile (“FAX”) machine. The telephone number of the FAX receiver is (202) 663-4114. (This is not a toll-free FAX number). Only comments of six or fewer pages will be accepted via FAX transmittal to ensure access to the equipment. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 663-4070 (voice) or (202) 663-4074 (TTY). (These are not toll-free telephone numbers.) You may also submit comments and attachments electronically at <https://www.regulations.gov>, which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments. Copies of comments submitted by the public will be available for review by prior appointment at the Commission’s Library, 131 M Street, NE, Suite 4NW08R, Washington, D.C. 20507, or can be reviewed anytime at <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Stephanie D. Garner, Assistant Legal Counsel (202) 663-4642 or Draga G. Anthony, Senior Attorney Advisor, Office of Legal Counsel (216) 522-7452(voice) or (202) 663-7026 (TTY). (These are not toll free numbers.) Requests for this document in an alternative format should be made to the Office of Communications and Legislative Affairs at (202) 663-4191 (voice) or (202) 663-4494 (TTY).

SUPPLEMENTARY INFORMATION:

Executive Summary

The interim final rule, as directed by the FOIA Improvement Act of 2016, Pub. L. 114-185, updates the Commission’s FOIA regulations to reflect substantive and

procedural changes to the FOIA and updates the addresses of two district offices and the Office of Legal Counsel's fax number.

Background

On June 30, 2016, President Obama signed the FOIA Improvement Act of 2016 ("Act"). The Act requires agencies to update FOIA regulations to conform to the Act by:

- requiring federal agencies to make available their disclosable records and documents for public inspection in an electronic format;
- making available for inspection in an electronic format records that have been requested three or more times (frequently requested records);
- requiring that the Annual FOIA data be downloadable;
- prohibiting agencies from charging a fee for providing records if the agency misses a deadline for complying with a FOIA request unless unusual circumstances apply and more than 5,000 pages are necessary to respond to the request;
- prohibiting agencies from withholding information requested under FOIA Exemption (b)(5) unless the agency reasonably foresees that disclosure would harm an interest protected by a FOIA exemption or disclosure is prohibited by law;
- codifying the Administration's presumption of openness;
- requiring that agencies consider partial disclosures;
- requiring that agencies take steps to segregate and release nonexempt information;

- limiting the FOIA exemption for agency communications, (b)(5), to allow the disclosure of agency “deliberative process” records created 25 years or more before the date of a FOIA request;
- requiring the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between agencies and FOIA requesters;
- expanding the authority and duties of the Chief FOIA Officer of each agency to require officers to serve as the primary agency liaison with OGIS and the Office of Information Policy;
- establishing a Chief FOIA Officer Council to develop recommendations for increasing compliance and efficiency in responding to FOIA requests; disseminating information about agency experiences; identifying, developing, and coordinating initiatives to increase transparency and compliance; and promoting performance measures to ensure agency compliance with FOIA requirements; and
- requiring the Director of the Office of Management and Budget to ensure the operation of a consolidated online request portal that allows a member of the public to submit a request for records to any agency from a single website;

Summary of Changes

In order to assist agencies and encourage consistency in FOIA practices across the government, the Department of Justice, Office of Information Policy (OIP), created a FOIA template for agencies to use as agencies publish and update their regulations. The template, which is located at <https://www.justice.gov/oip/template-agency-foia-regulations>, provides sample regulation language. The proposed language contained in these revised FOIA regulations utilizes the language provided in the Act or contained in

OIP's template. In order to conform the Commission's FOIA regulations to the requirements of the Act, the proposed rule revises the following sections of 29 CFR Part 1610:

- §1610.1 (Definitions section is revised to utilize OIP's FOIA template);
- §1610.2 (Statutory requirements section is revised to utilize OIP's template language);
- §1610.3 (Purpose and scope section is revised to utilize OIP's template language);
- §1610.4 (Public reference facilities and current index section is revised to utilize OIP's template language, reflect requirements of the Act, and update District Office addresses);
- §1610.5 (Request for records section is revised to utilize OIP's template language);
- §1610.6 (Records of other agencies section is deleted; the information is moved to another section and utilizes OIP's template language);
- §1610.7 (Where to make request: form section is revised to utilize OIP's template language);
- §1610.8 (Authority to determine section is revised to utilize OIP's template language);
- §1610.9 (Responses: timing section is revised to utilize OIP's template language);
- §1610.10 (Responses: form and content section is revised to utilize OIP's template language and as required by the Act);
- §1610.11 (Appeals to the Legal Counsel from initial denials section is revised to utilize OIP's template language and as required by the Act);

- §1610.13 (Maintenance of files section is revised to utilize OIP’s template language);
- §1610.15 (Schedule of fees and method of payment for services section is revised to utilize OIP’s template and as required by the Act);
- §1610.17 (Exemptions section is revised to utilize OIP’s template language and as required by the Act);
- §1610.19 (Predisclosure notification procedures for confidential commercial information section is revised to utilize OIP’s template language); and
- §1610.21 (Annual report section is revised to utilize OIP’s template language and as required by the Act).

Comments

The Commission invites comments. At the conclusion of the comment period, the Commission will review the comments received, and, if appropriate, will revise the regulation to ensure it aligns with the Act.

Regulatory Procedures

Executive Orders 13563 and 12866

In promulgating this interim final rule, the Commission has adhered to the regulatory philosophy and applicable principles set forth in Executive Order 13563, 3 CFR 215 (2011.) The proposed interim final rule has been drafted and reviewed in accordance with Executive Order 12866, 3 CFR 638 (1993). The rule is not a “significant regulatory action” under section 3(f) of Executive Order 12866.

Paperwork Reduction Act

The proposed rule contains no new information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

Regulatory Flexibility Act

The Commission certifies under 5 U.S.C. 605(b) that the proposed rule will not have a significant economic impact on a substantial number of small entities because the proposed revisions do not impose any burdens upon FOIA requesters, including those that might be small entities. Therefore, a regulatory flexibility analysis is not required by the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

The proposed rule will not result in the expenditure by State, local, or tribal governments in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501).

Congressional Review Act

The proposed rule is not subject to the reporting requirement of 5 U.S.C. 801 because it does not substantially affect the rights or obligations of non-agency parties and therefore is not a “rule” as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1998.)

List of Subjects in 29 CFR Part 1610

Freedom of information.

For the reasons set forth in the preamble, the Equal Employment Opportunity Commission amends 29 CFR part 1610 as follows:

PART 1610—PRODUCTION OR DISCLOSURE UNDER 5 U.S.C. 552

1. The authority citation for Part 1610 continues to read as follows:

Authority: 42 U.S.C. 2000e-12(a), 5 U.S.C. 552 as amended by Pub. L. 93-502, Pub. L. 99-570 and Pub. L. 105-231; for § 1610.15, non-search or copy portions are issued under 31 U.S.C. 9701.

§ 1610.1 [Amended]

2. In §1610.1, remove paragraphs (d), (e), (f), (g), (k), (l), (n), and (o) and redesignate paragraphs (h), (i), (j), and (m) as paragraphs (d) through (g), respectively.

3. Revise §1610.2 to read as follows:

§ 1610.2 Statutory requirements.

(a) This subpart contains the rules that the Commission will follow in processing requests for records under the Freedom of Information Act (“FOIA”), 5 U.S.C. 552. These rules should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget (“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 the Commission's Privacy Act regulations as well as under this subpart. The Commission should administer the FOIA with a presumption of openness. As a matter of policy, the Commission may make discretionary disclosures of records or information exempt from disclosure under the FOIA whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption. This policy does not create any right enforceable in court.

(b) As referenced in this subpart, "component" means each separate office within the Commission that is responsible for processing FOIA requests. The rules described in this regulation that apply to the Commission also apply to its components.

4. Revise §1610.3 to read as follows:

§ 1610.3 Purpose and scope.

(a) This subpart contains the regulations of the Equal Employment Opportunity Commission implementing 5 U.S.C. 552. The regulations of this subpart provide information concerning the procedures by which records may be obtained from all organizational units within the Commission. Official records of the Commission made available pursuant to the requirements of 5 U.S.C. 552 shall be furnished to members of the public only as prescribed by this subpart. Officers and employees of the Commission may continue to furnish to the public, informally and without compliance with the procedures prescribed herein, information and records which prior to the enactment of 5 U.S.C. 552 were furnished customarily in the regular performance of their duties.

(b) 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.

5. In §1610.4, revise paragraphs (a), (b)(6) and (7), add paragraph (b)(8), and revise paragraph (c) to read as follows:

§ 1610.4 Public reference facilities and current index.

(a) Records that the FOIA requires the Commission to make available for public inspection in an electronic format may be accessed through the Commission's website. The Commission is responsible for determining which of its records must be made publicly available, for identifying additional records of interest to the public that are appropriate for public disclosure, and for posting and indexing such records. The Commission must ensure that its website of posted records and indices is reviewed and updated on an ongoing basis. The Commission has a FOIA Requester Service Center or FOIA Public Liaison who can assist individuals in locating records particular to the Commission. Contact information is located at <https://www.eeoc.gov/eeoc/foia/index.cfm>. A list of agency FOIA Public Liaisons is available at <http://www.foia.gov/report-makerequest.html>.

(b) * * *

(6) "CCH Equal Employment Opportunity Commission Decisions" (1973 and 1983);

(7) Commission awarded contracts; and

(8) Copies of all records, regardless of form or format, that because of the nature of their subject matter—

(i) The Commission determines have become, or are likely to become, the subject of subsequent requests for substantially the same records; or

(ii) That have been requested 3 or more times.

(c) The Commission's District Offices with public reading areas are:

Atlanta District Office, Sam Nunn Atlanta Federal Center, 100 Alabama Street, SW, Suite 4R30, Atlanta, GA 30303 (includes the Savannah Local Office).

Birmingham District Office, Ridge Park Place, 1130 22nd Street South, Suite 2000, Birmingham, AL 35205-2397 (includes the Jackson Area Office and the Mobile Local Office).

Charlotte District Office, 129 West Trade Street, Suite 400, Charlotte, NC 28202 (includes the Raleigh Area Office, the Greensboro Local Office, the Greenville Local Office, the Norfolk Local Office, and the Richmond Local Office).

Chicago District Office, 500 West Madison Street, Suite 2000, Chicago, IL 60661 (includes the Milwaukee Area Office and the Minneapolis Area Office).

Dallas District Office, 207 S. Houston Street, 3rd Floor, Dallas, TX 75202-4726 (includes the San Antonio Field Office and the El Paso Area Office).

Houston District Office, Mickey Leland Building, 1919 Smith Street, 6th Floor, Houston, TX 77002 (includes the New Orleans Field Office).

Indianapolis District Office, 101 West Ohio Street, Suite 1900, Indianapolis, IN 46204-4203 (includes the Detroit Field Office, the Cincinnati Area Office, and the Louisville Area Office).

Los Angeles District Office, Roybal Federal Building, 255 East Temple Street, 4th Floor, Los Angeles, CA 90012 (includes the Fresno Local Office, the Honolulu Local Office, the Las Vegas Local Office, and the San Diego Local Office).

Memphis District Office, 1407 Union Avenue, 9th Floor, Memphis, TN 38104 (includes the Little Rock Area Office, and the Nashville Area Office).

Miami District Office, Miami Tower, 100 SE 2nd Street, Suite 1500, Miami, FL 33131 (includes the Tampa Field Office, and the San Juan Local Office).

New York District Office, 33 Whitehall Street, 5th Floor, New York, NY 10004 (includes the Boston Area Office, the Newark Area Office, and the Buffalo Local Office).

Philadelphia District Office, 801 Market Street, Suite 1300, Philadelphia, PA 19107-3127 (includes the Baltimore Field Office, the Cleveland Field Office, and the Pittsburgh Area Office).

Phoenix District Office, 3300 N. Central Avenue, Suite 690, Phoenix, AZ 85012-2504 (includes the Denver Field Office, and the Albuquerque Area Office).

San Francisco District Office, 450 Golden Gate Avenue, 5 West, P.O. Box 36025, San Francisco, CA 94102-3661 (includes the Seattle Field Office, the Oakland Local Office, and the San Jose Local Office).

St. Louis District Office, Robert A. Young Federal Building, 1222 Spruce Street, Room 8100, St. Louis, MO 63103 (includes the Kansas City Area Office, and the Oklahoma City Area Office).

6. Revise §1610.5 to read as follows:

§ 1610.5 Request for records.

(a) General information. (1) To make a request for records, a requester should write directly to the Commission's FOIA office that maintains the records sought. A request will receive the quickest possible response if it is addressed to the Commission FOIA office that maintains the records sought. Information concerning the Commission's FOIA offices is listed at: <https://www.eeoc.gov/eeoc/foia/index.cfm> and any additional requirements for submitting a request to the agency are listed at paragraphs (b) and (d) of this section. The Commission's website contains instructions for submitting FOIA requests and other resources to assist requesters in determining where to send their requests.

(2) A requester who is making a request for records about himself or herself must comply with the verification of identity requirements as determined by the Commission.

(3) Where a request for records pertains to another individual, a requester may receive greater access by submitting either a notarized authorization signed by that individual or a declaration made in compliance with the requirements set forth in 28 U.S.C. 1746 by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual is deceased (for example, a copy of a death certificate or an obituary). As an exercise of administrative discretion, the Commission can 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 Commission personnel to locate them with a reasonable amount of effort. To the extent possible, requesters should include specific

information that may help the Commission 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. Before submitting their requests, requesters may contact the Commission's District Office FOIA contact or FOIA Public Liaison to discuss the records they seek and to receive assistance in describing the records. If after receiving a request the Commission determines that it does not reasonably describe the records sought, the Commission must 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 Commission's FOIA contact or FOIA Public Liaison. If a request does not reasonably describe the records sought, the agency's response to the request may be delayed.

(1) A written request for inspection or copying of a record of the Commission may be presented in person, by mail, by fax, by email at FOIA@eoc.gov, online at <https://publicportalfoiapal.eoc.gov/palMain.aspx>, or through the Commission employee designated in §1610.7.

(2) A request must be clearly and prominently identified as a request for information under the "Freedom of Information Act." If submitted by mail, or otherwise submitted under any cover, the envelope or other cover must be similarly identified.

(3) A respondent must always provide a copy of the "Filed" stamped court complaint when requesting a copy of a charge file. The charging party must provide a copy of the "Filed" stamped court complaint when requesting a copy of the charge file if the Notice of Right to Sue has expired as of the date of the charging party's request.

(4) Each request must contain information which reasonably describes the records sought and, when known, should contain date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number and location for the records requested in order to permit the records to be promptly located.

(5) Where a request is not considered reasonably descriptive or requires the production of voluminous records, or necessitates the utilization of a considerable number of work hours to the detriment of the business of the Commission, the Commission may require the person making the request or such person's agent to confer with a Commission representative in order to attempt to verify the scope of the request and, if possible, narrow such request.

(c) Format. Requests may specify the preferred form or format (including electronic formats) for the records the requester seeks. The Commission will accommodate the request if the records are readily reproducible in that form or format.

(d) Requester information. Requesters must provide contact information, such as their phone number, email address, and/or mailing address, to assist the agency in communicating with them and providing released records

§ 1610.6 [Removed and Reserved]

7. Remove and reserve §1610.6.
8. Revise §1610.7 to read as follows:

§1610.7 Where to make request; form.

(a) In general. The Commission or component that first receives a request for a record and maintains that record is responsible for responding to the request. In determining which records are responsive to a request, the Commission ordinarily will

include only records in its possession as of the date that it begins its search. If any other date is used, the Commission must 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. Requests for the following types of records, however, should be submitted to the District Director for the pertinent district, field, area, or local office, at the district office address listed in §1610.4(c) or, in the case of the Washington Field Office, shall be submitted to the Field Office Director at 131 M Street, NE, Fourth Floor, Washington, DC 20507:

- (1) Information about current or former employees of an office;
- (2) Existing non-confidential statistical data related to the case processing of an office;
- (3) Agreements between the Commission and State or local fair employment agencies operating within the jurisdiction of an office; or
- (4) Materials in office investigative files related to charges under: Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); the Equal Pay Act (29 U.S.C. 206(d)); the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.); the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.); or the Genetic Information Nondiscrimination Act of 2008 (42 U.S.C. 2000ff et seq.).

(b) Request for other records. A request for any record which does not fall within the ambit of paragraph (a) of this section, or a request for any record the location of which is unknown to the person making the request, shall be submitted in writing to the Assistant Legal Counsel, FOIA Programs, U.S. Equal Employment Opportunity Commission, by mail to 131 M Street, NE, Suite 5NW02E, Washington, DC 20507, by

fax to (202) 653-6034, by email to FOIA@eoc.gov, or by Internet to <https://publicportalfoiapal.eoc.gov/palMain.aspx>.

(c) Authority to grant or deny requests. The Commission has granted this authority to the Legal Counsel. The Legal Counsel is authorized to grant or to deny any requests for records that are maintained by the Commission.

(d) Re-routing of misdirected requests. Where the Commission determines that a request was misdirected within the agency, the receiving component's FOIA office must route the request to the FOIA office of the proper component(s) within the Commission.

(e) Consultation, referral, and coordination. When reviewing records located by the Commission in response to a request, the Commission 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, the Commission must proceed in one of the following ways:

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

(2) Referral. (i) When the Commission believes that a different agency or component is best able to determine whether to disclose the record, the Commission typically will 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 the Commission is

processing the request and the originating agency agrees that the Commission is in the best position to respond regarding the record, then the record may be handled as a consultation.

(ii) Whenever the Commission refers any part of the responsibility for responding to a request to another agency, it must 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 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 the Commission locates within its files material originating with an Intelligence Community agency and the involvement of that agency in the matter is classified and not publicly acknowledged, 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, the Commission will 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 will then be conveyed to the requester by the Commission.

(e) Classified information. On receipt of any request involving information that is marked classified, the Commission must determine whether the information is currently and properly classified in accordance with applicable classification rules. Whenever a request involves a record containing information that has been marked as classified or may be appropriate for classification by another agency under any applicable executive order concerning the classification of records, the Commission must refer the 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), the Commission must refer the responsibility for responding to that portion of the request to the agency that classified the underlying information.

(f) Timing of responses to consultations and referrals. All consultations and referrals received by the Commission will be handled according to the date that the referring agency received the perfected FOIA request.

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

9. Revise §1610.9 to read as follows:

§1610.9 Responses: timing.

(a) In general. The Commission ordinarily will respond to requests according to their order of receipt. The various ways in which to submit a request to, or check on the status of a request with, EEOC are listed at: <https://www.eeoc.gov/eeoc/foia/index.cfm>. The information located at www.foia.gov/report-makerequest.html contains a list of all agencies and components that are designated to accept requests. In instances involving misdirected requests that are re-routed pursuant to §1610.7(d), the response time will commence on the date that the request is received by the proper component office that is designated to receive requests, but in any event not later than 10 working days after the request is first received by the component office that is designated by these regulations to receive requests.

(b) Multitrack processing. The Commission designates a specific track for requests that are granted expedited processing, in accordance with the standards set forth in paragraph (f) of this section. The Commission also designates additional processing tracks that distinguish between simple and more complex requests based on the estimated amount of work or time needed to process the request. Among the factors considered are the number of records requested, the number of pages involved in processing the request and the need for consultations or referrals. The Commission must advise requesters of the track into which their request falls and, when appropriate, will offer the requesters an opportunity to narrow or modify their request so that it can be placed in a different processing track.

(c) Acknowledgment. The Assistant Legal Counsel, FOIA Programs, the District Director, or the District Director's designee shall, within 10 days from receipt of a request, notify the requester in writing of the date the Commission received the request,

the expected date of issuance of the determination, the individualized FOIA tracking number assigned to the request, and the telephone number or Internet site where requesters may inquire about the status of their request.

(d) Unusual circumstances. Whenever the Commission cannot meet the statutory time limit for processing a request because of “unusual circumstances,” as defined in the FOIA, and the Commission extends the time limit on that basis, the Commission must, before expiration of the 20-day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which the agency estimates processing of the request will be completed. Where the extension exceeds 10 working days, the agency must, as described by the FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. The Commission must make available its designated FOIA contact or its FOIA Public Liaison for this purpose. The contact information for the EEOC FOIA Public Liaison is located at: <https://www.eeoc.gov/eeoc/foia/index.cfm>. A list of agency FOIA Public Liaisons is available at: <http://www.foia.gov/report-makerequest.html>. The Commission must also alert requesters to the availability of the Office of Government Information Services (OGIS) to provide dispute resolution services.

(e) Aggregating requests. To satisfy unusual circumstances under the FOIA, the Commission 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. The Commission cannot aggregate multiple requests that involve unrelated matters.

(f) Expedited processing. (1) The Commission must process requests and appeals 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; or

(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. Requests based on paragraphs (f)(1)(i) and (ii) of this section must be submitted to the Commission or component of the Commission that maintains the records requested. When making a request for expedited processing of an administrative appeal, the request should be submitted to the Commission's Office of Legal Counsel, the office that adjudicates appeals.

(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. Depending on the circumstances, the existence of numerous recently published articles on a given subject may be helpful in establishing the requirement that

there be an “urgency to inform” the public on the topic. This factor is not dispositive. As a matter of administrative discretion, the Commission may waive the formal certification requirement.

(4) The Commission must notify the requester within 10 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 must be given priority, placed in the processing track for expedited requests, and must be processed as soon as practicable. If a request for expedited processing is denied, the Commission must act on any appeal of that decision expeditiously.

(g) Tolling. The Commission may toll the statutory time period to issue its determination on a FOIA request one time during the processing of the request to obtain clarification from the requester. The statutory time period to issue the determination on disclosure is tolled until EEOC receives the information reasonably requested from the requester. The agency may also toll the statutory time period to issue the determination to clarify with the requester issues regarding fees. There is no limit on the number of times the agency may request clarifying fee information from the requester.

10. Revise §1610.10 to read as follows:

§ 1610.10 Responses: form and content.

(a) In general. The Commission, to the extent practicable, will communicate with requesters having access to the Internet electronically, such as email or web portal.

(b) Acknowledgments of requests. The Commission must acknowledge the request in writing and assign it an individualized tracking number if it will take longer than 10 working days to process. The Commission must include in the acknowledgment

a brief description of the records sought to allow requesters to more easily keep track of their requests.

(c) Estimated dates of completion and interim responses. Upon request, the Commission will provide an estimated date by which it expects to provide a response to the requester. If a request involves a voluminous amount of material, or searches in multiple locations, the Commission may provide interim responses, releasing the records on a rolling basis.

(d) Grants of requests. Once the Commission determines it will grant a request in full or in part, it must notify the requester in writing. The agency must also inform the requester of any fees charged under §1610.15 of this part and must disclose the requested records to the requester promptly upon payment of any applicable fees. The Commission must inform the requester of the availability of its FOIA Public Liaison to offer assistance.

(e) Adverse determinations of requests. If the Commission makes an adverse determination denying a request in any respect, it must notify the requester of that determination in writing. 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.

- (f) Content of denial. The denial must be signed by the head of the Commission or designee and must 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 exemption applied by the Commission in denying the request;
 - (3) An estimate of the volume of any records or information withheld, such as the number of pages or some other reasonable form of estimation (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);
 - (4) A statement that the denial may be appealed under paragraph 1610.11 of this section, and a description of the appeal requirements; and
 - (5) A statement notifying the requester of the assistance available from the Commission's FOIA Public Liaison and the dispute resolution services offered by OGIS.
- (g) 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. The location of the information deleted must also be indicated on the record, if technically feasible.

11. Amend §1610.11 as follows:
 - a. Revise paragraphs (a) through (c);
 - b. Remove paragraph (g);
 - c. Redesignate paragraphs (d) through (f) as paragraphs (f) through (h); and

- d. Add new paragraphs (d) and (e).

The revisions and additions read as follows:

§ 1610.11 Appeals to the legal counsel from initial denials.

(a) Requirements for making an appeal. A requester may appeal any adverse determination to the Legal Counsel, or the Assistant Legal Counsel, FOIA Programs. Any appeal of a determination issued by a District Director or the District Director's designee must include a copy of the District Director's or the District Director's designee's determination. If a FOIA appeal is misdirected to a District Office, the District Office shall forward the appeal to the Legal Counsel, or the Assistant Legal Counsel, FOIA Programs, as appropriate, within 10 business days. Examples of adverse determinations are provided in §1610.10(e). Requesters can submit appeals by mail, by fax to (202) 653-6034, by e-mail to FOIA@eoc.gov, or online at <https://publicportalfoiapal.eoc.gov/palMain.aspx>. The requester must make the appeal in writing and to be considered timely it must be postmarked, or in the case of electronic submissions, transmitted, within 90 calendar days after the date of the response. The appeal should clearly identify the Commission determination that is being appealed and the assigned request number. To facilitate handling, 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. (1) The Legal Counsel or designee, or the Assistant Legal Counsel, FOIA Programs, as appropriate, will decide all appeals under this section.

(2) An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation.

(c) Decisions on appeals. The Commission must provide its decision on an appeal in writing. A decision that upholds the Commission's determination in whole or in part must contain a statement that identifies the reasons for the affirmance, including any FOIA exemptions applied. The decision must provide the requester with notification of the statutory right to file a lawsuit and will inform the requester of the mediation services offered by the Office of Government Information Services of the National Archives and Records Administration as a non-exclusive alternative to litigation. If the Commission's decision is remanded or modified on appeal, the Commission will notify the requester of that determination in writing. The Commission will then further process the request in accordance with that appeal determination and will respond directly to the requester.

(d) Engaging in dispute resolution services provided by OGIS. Mediation is a voluntary process. If the Commission 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 review by a court of the Commission's adverse determination, a requester generally must first submit a timely administrative appeal.

* * * * *

12. Revise §1610.13 to read as follows:

§ 1610.13 Maintenance of files.

The Commission must preserve all correspondence pertaining to the requests that it receives under this subpart, 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. The Commission must not dispose of or destroy records while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

13. Revise §1610.15 to read as follows:

§ 1610.15 Schedule of fees and method of payment for services rendered.

(a) In general. (1) The Commission 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 requesters:

(i) Commercial use requesters;

(ii) Non-commercial scientific or educational institutions or news media requesters; and

(iii) All other requesters.

(2) Different fees are assessed depending on the category. Requesters may seek a fee waiver. The Commission must consider requests for fee waiver in accordance with the requirements in paragraph (k) of this section. To resolve any fee issues that arise under this section, the Commission may contact a requester for additional information. The Commission must ensure that searches, review, and duplication are conducted in the most efficient and the least expensive manner. The Commission 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, or through Pay.gov.

(b) Definitions. For purposes of this section:

(1) Commercial use request refers to 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. An agency'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. The Commission will notify requesters of their placement in this category.

(2) Direct costs refers to those expenses that the Commission incurs 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 (for example, 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 refers to 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.

(4) Educational institution refers to any school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with his or her role at the educational institution. The Commission may seek

verification from the requester that the request is in furtherance of scholarly research, and the Commission will advise requesters of their placement in this category.

Example 1. A request from a professor of sociology at a university for records relating to women in the workplace, written on letterhead of the Department of Sociology, would be presumed to be from an educational institution.

Example 2. A request from the same professor of sociology seeking candidate correspondence from the Commission in furtherance of a mystery book she is writing would not be presumed to be an institutional request, regardless of whether it was written on institutional stationery.

Example 3. A student who makes a request in furtherance of her 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.

(5) Noncommercial scientific institution is an institution that is not operated on a “commercial basis,” as defined in paragraph (b)(1) 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 are not for a commercial use. The Commission will advise requesters of their 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. A request for records supporting the news-dissemination function of the requester will not be considered to be for a commercial use. “Freelance journalists” who demonstrate a solid basis for expecting publication through a news media entity will be considered representatives of the news media. A publishing contract would provide the clearest evidence that publication is expected; however, the Commission can also consider a requester’s past publication record in making this determination. The Commission will advise requesters of their placement in this category.

(7) 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 §1610.19, 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 expended to locate and retrieve information from electronic records.

(c) Charging fees. In responding to FOIA requests, the Commission will charge the following fees unless a waiver or reduction of fees has been granted under paragraph (k) of this section. Because the fee amounts provided below already account for the direct costs associated with a given fee type, the Commission will 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. The Commission will charge search fees for all other requesters, subject to the restrictions of paragraph (d) of this section. The Commission may properly charge for time spent searching even if it does not locate any responsive records or if it determines that the records are 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 charged as follows:

- (A) By clerical personnel—at the rate of \$5.00 per quarter hour.
- (B) By paralegals—at the rate of \$9.00 per quarter hour.
- (C) By professional personnel—at the rate of \$10.00 per quarter hour.
- (D) By managers—at the rate of \$17.50 per quarter hour.
- (E) By SES employees—at the rate of \$20.00 per quarter hour.

(iii) The Commission will charge the direct costs associated with conducting any search that requires the creation of a new computer program to locate the requested records. The Commission must notify the requester of the costs associated with creating such a program, and the requester must agree to pay the associated costs before the costs may be incurred.

(iv) For requests that require the retrieval of records stored by the Commission at a Federal Records Center operated by the National Archives and Records Administration (NARA), the Commission will charge additional costs in accordance with the Transactional Billing Rate Schedule established by NARA:

<http://www.archives.gov/dc-metro/suitland/delivery-fees.html>

(2) Duplication. The Commission will charge duplication fees to all requesters, subject to the restrictions of paragraph (d) of this section. The Commission must honor a requester's preference for receiving a record in a particular form or format where the Commission can readily reproduce it in the form or format requested. Where photocopies are supplied, the Commission will provide one copy per request at the cost of \$.15/page. For copies of records produced on tapes, disks, or other media, agencies 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, the Commission will charge the direct costs.

(3) Review. The Commission will charge review fees to requesters who make commercial use requests. Review fees will be assessed in connection with the initial

review of the record, for example, the review conducted by an agency 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 a particular exemption is deemed to no longer apply, any costs associated with an agency's 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 (c)(1)(ii) of this section.

(d) Restrictions on charging fees. (1) When the Commission determines that a requester is an educational institution, non-commercial scientific institution, or representative of the news media, and the records are not sought for commercial use, it will not charge search fees.

(2)(i) If the Commission fails to comply with the FOIA's time limits in which to respond to a request, it may not charge search fees, or, in instances of requests from requesters described in paragraph (d)(1) of this section, may not charge duplication fees, except as described in paragraphs (d)(2)(ii) through (iv) of this section.

(ii) If the Commission has determined that unusual circumstances as defined by the FOIA apply and the Commission 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 10 days.

(iii) If the Commission has determined that unusual circumstances, as defined by the FOIA, apply and more than 5,000 pages are necessary to respond to the request, the Commission may charge search fees, or, in the case of requesters described in paragraph (d)(1) of this section, may charge duplication fees, if the following steps are

taken. The Commission must have provided timely written notice of unusual circumstances to the requester in accordance with the FOIA, and the Commission must have discussed with the requester via written mail, e-mail or telephone (or not made 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). If this exception is satisfied, the Commission may charge all applicable fees incurred in the processing of the request.

(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, the Commission must 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) No fee will be charged when the total fee, after deducting the 100 free pages (or its cost equivalent) and the first two hours of search, is equal to or less than \$25.00.

(e) Notice of anticipated fees in excess of \$25.00. (1) When the Commission determines or estimates that the fees to be assessed in accordance with this section will exceed \$25.00, the Commission must notify the requester of the actual or

estimated amount of the fees, including a breakdown of the fees for search, review, or 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, the Commission will advise the requester accordingly. If the request is not 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 the agency 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. The Commission is not required to accept payments in installments.

(3) If the requester has indicated a willingness to pay some designated amount of fees, but the Commission estimates that the total fee will exceed that amount, the Commission will toll the processing of the request when it notifies the requester of the estimated fees in excess of the amount the requester has indicated a willingness to pay. The Commission 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, the time to respond will resume from where it was at the date of the notification.

(4) The Commission must make available its FOIA Public Liaison or other FOIA professional to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(f) Charges for other services. Although not required to provide special services, if the Commission 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. The Commission charges for the following special services:

(1) For attestation of documents—\$25.00 per authenticating affidavit or declaration. Additionally, there may be search and review charges assessed in accordance with the rates listed in paragraph (c)(1) of this section.

(2) For certification of document—\$50.00 per authenticating affidavit or declaration. Additionally, there may be search and review charges assessed in accordance with the rates listed in paragraph (c)(1) of this section.

(g) Charging interest. The Commission may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. 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 the agency. Agencies must follow the provisions of the Debt Collection Act of 1982, 5 U.S.C. 5514, as amended, and its administrative

procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(h) Aggregating requests. When the Commission 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, the Commission may aggregate those requests and charge accordingly. The Commission 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, the Commission 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 cannot be aggregated.

(i) Advance payments. (1) For requests other than those described in paragraph (i)(2) or (3) of this section, the Commission cannot require the requester to make an advance payment before work is commenced or continued on a request. Payment owed for work already completed (for example, payment before copies are sent to a requester) is not an advance payment.

(2) When the Commission 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. The Commission 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 the Commission within 30 calendar days of the billing date, the Commission may require that the requester pay the full amount due, plus any applicable interest on that prior request, and the Commission may require that the requester make an advance payment of the full amount of any anticipated fee before the Commission begins to process a new request or continues to process a pending request or any pending appeal. Where the Commission has a reasonable basis to believe that a requester has misrepresented the requester's identity in order to avoid paying outstanding fees, it may require that the requester provide proof of identity.

(4) In cases in which the Commission requires advance payment, the request will not be considered received and further work will not be completed until the required payment is received. If the requester does not pay the advance payment within 30 calendar days after the date of the Commission's fee determination, the request will be closed.

(j) 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, the Commission must inform the requester of the contact information for that program.

(k) Requirements for waiver or reduction of fees. (1) 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 or activities of the government and is not primarily in the commercial interest of the requester.

(2) The Commission must 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 (k)(2)(i) through (iii) of this section are satisfied.

(i) 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.

(ii) Disclosure of the requested information would be likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(A) 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.

(B) 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 the requester's ability and intention to effectively convey information to the public must be considered. The Commission will presume that a representative of the news media will satisfy this consideration.

(iii) 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, the Commission will consider the following criteria:

(A) The Commission must 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 must be given an opportunity to provide explanatory information regarding this consideration.

(B) If there is an identified commercial interest, the Commission must determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of paragraphs (k)(2)(i) and (ii) of this section are satisfied and any commercial interest is not the primary interest furthered by the request. The Commission ordinarily will presume that when a news media requester has satisfied factors set forth in paragraphs (k)(2)(i) and (ii) of this section, 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.

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

(4) Requests for a waiver or reduction of fees should be made when the request is first submitted to the Commission 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 must pay any costs incurred up to the date the fee waiver request was received.

§ 1610.16 [Removed and Reserved]

14. Remove and reserve §1610.16.

15. In §1610.17, redesignate paragraphs (b) through (h) as paragraphs (e) through (k) and add new paragraphs (b) through (d) and paragraph (l) to read as follows:

§ 1610.17 Exemptions.

* * * * *

(b) The Commission shall withhold information under the FOIA only if:

(1) It reasonably foresees that disclosure would harm an interest protected by an exemption; or

(2) Disclosure is prohibited by law.

(c)(1) The Commission shall consider whether partial disclosure of information is possible whenever it determines that a full disclosure of a requested record is not possible; and

(2) Take reasonable steps necessary to segregate and release nonexempt information.

(d) Paragraph (c) of this section does not require disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under Exemption 3.

* * * * *

(l) The deliberative process privilege attached to Exemption 5 shall not apply to records created 25 years or more before the date on which the records were requested.

16. Revise §1610.19 to read as follows:

§ 1610.19 Predisclosure notification procedures for 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, 5 U.S.C. 552(b)(4).

(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, either directly or indirectly to the Federal Government.

(b) Designation of confidential commercial information. A submitter of confidential commercial information must use good faith efforts to designate by appropriate markings, at the time of submission, any portion of its submission that it considers to be protected from disclosure under Exemption 4. These designations expire 10 years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(c) When notice to submitters is required. (1) The Commission must promptly provide written notice to the submitter of confidential commercial information whenever records containing such information are requested under the FOIA if the Commission determines that it may be required 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; or

(ii) The Commission has a 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) The notice must either 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, the Commission may post or publish a 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 do not apply if:

(1) The Commission 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, the Commission must give the submitter written notice of any final decision to disclose the information within 10 days prior to a specified disclosure date.

(e) Opportunity to object to disclosure. (1) The Commission must 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 the agency a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is confidential.

(3) A submitter who fails to respond within the time period specified in the notice will be considered to have no objection to disclosure of the information. The Commission 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.

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

(g) Notice of intent to disclose. Whenever the Commission decides to disclose information over the objection of a submitter, the Commission must provide the submitter written notice, which must 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 copies of the records as the Commission intends to release them; and

(3) A specified disclosure date, which must be 10 days after the notice.

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

(i) Requester notification. The Commission must notify the 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.

17. Amend §1610.21 as follows:

- a. Revise the first sentence of paragraph (a);
- b. Redesignate paragraph (b) as paragraph (c); and
- c. Add new paragraph (b).

The revision and addition read as follows:

§ 1610.21 Annual report.

(a) The Legal Counsel shall, on or before February 1, submit individual Freedom of Information Act reports for each principal agency FOIA component and one for the entire agency covering the preceding fiscal year to the Attorney General of the United States and to the director of the Office of Information Government Services. * * *

(b) The Commission will make each such report available for public inspection in an electronic format. In addition, the Commission will make the raw statistical data used in each report available in a timely manner for public inspection in an electronic format, which will be available—

- (1) Without charge, license, or registration requirement;

- (2) In an aggregated, searchable format; and
- (3) In a format that may be downloaded in bulk.

* * * * *

Dated: December 22, 2016

For the Commission

/s/

Jenny R. Yang

Chair

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