



[BILLING CODE 6760-01-P]

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

5 CFR Part 1631

Freedom of Information Act Regulations

AGENCY: Federal Retirement Thrift Investment Board.

ACTION: Proposed rule with request for comments.

SUMMARY: The Federal Retirement Thrift Investment Board (Board) is proposing to amend its Freedom of Information Act (FOIA) regulations to implement recommendations made by the National Archives and Records Administration's (NARA) Office of Government Information Services (OGIS) and reflect the amendments required by the FOIA Improvement Act of 2016.

DATES: Comments must be received on or before **[Please insert date 30 days after date of publication in the FEDERAL REGISTER]**.

ADDRESSES: You may submit comments using one of the following methods:

- **Federal eRulemaking Portal:** <http://www.regulations.gov> at Docket ID number FRTIB-2017-0001. Follow the website instructions for submitting comments.

- Facsimile: 202-942-1676.
- Mail or Hand Deliver/Courier: Office of General Counsel, Federal Retirement Thrift Investment Board, 77 K Street NE, Suite 1000, Washington, DC 20002.

FOR FURTHER INFORMATION CONTACT: Dharmesh Vashee, Deputy General Counsel, Federal Retirement Thrift Investment Board, Office of General Counsel, 77 K Street NE, Suite 1000, Washington, DC 20002, 202-639-4424. You may also contact Amanda Haas, FOIA Officer, Office of General Counsel, at the above address and by phone at 202-942-1660.

SUPPLEMENTARY INFORMATION: The Board administers the Thrift Savings Plan (TSP), which was established by the Federal Employees' Retirement System Act of 1986 (FERSA), Public Law 99-335, 100 Stat. 514. The TSP provisions of FERSA are codified, as amended, largely at 5 U.S.C. 8351 and 8401-79. The TSP is a tax-deferred retirement savings plan for Federal civilian employees and members of the uniformed services. The TSP is similar to cash or deferred arrangements established for private-sector employees under section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)).

Regulatory Flexibility Act

I certify that this regulation will not have a

significant economic impact on a substantial number of small entities. This regulation will affect Federal employees and members of the uniformed services who participate in the TSP.

Paperwork Reduction Act

I certify that these regulations do not require additional reporting under the criteria of the Paperwork Reduction Act.

Unfunded Mandates Reform Act of 1995

Pursuant to the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 602, 632, 653, and 1501-1571, the effects of this regulation on state, local, and tribal governments and the private sector have been assessed. This regulation will not compel the expenditure in any one year of \$100 million or more by state, local, and tribal governments, in the aggregate, or by the private sector. Therefore, a statement under 2 U.S.C. 1532 is not required.

List of Subjects in 5 CFR Part 1631

Courts, Freedom of information, Government employees, Records.

For the reasons stated in the preamble, the Board proposes to amend 5 CFR Part 1631 as follows:

PART 1631 -- AVAILABILITY OF RECORDS

1. The authority citation for part 1631 continues to read as follows:

Authority: 5 U.S.C. 552.

2. Amend § 1631.1 to add new paragraphs (j), (k), and (l) to read as follows:

§ 1631.1 Definitions.

* * * * *

(j) FOIA Public Liaison means the Board official who is responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

(k) Requestor category means one of the three categories that agencies place requesters in for the purpose of determining whether a requester will be charged fees for search, review, and/or duplication, including:

(1) Commercial use requestors;

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

(3) All other requestors.

(l) Fee waiver means the waiver or reduction of processing fees if a requester can demonstrate that certain statutory standards are satisfied including that the information is in the public interest and is not requested

for a commercial interest.

3. Amend § 1631.4 by revising the section heading and paragraph (a) to read as follows:

§ 1631.4 Proactive disclosure of Board records.

(a) Records that are required by the FOIA to be made available for public inspection and copying may be accessed through the Board's Web site at *https://www.frtib.gov*. The Board is responsible for determining which of its records are required to be made publicly available, as well as identifying additional records of interest to the public that are appropriate for public disclosure, and for posting and indexing such records. The Board shall ensure that its Web site of posted records and indices is reviewed and updated on an ongoing basis. The Board has a FOIA Public Liaison who can assist individuals in locating records particular to a component. The FOIA Public Liaison can be contacted at *frtibfoialiaison@tsp.gov*.

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4. Revise § 1631.5 to read as follows:

§ 1631.5 Records of other agencies.

Requests for records that originated in another agency and that are in the custody of the Board may, in appropriate circumstances, be referred to that agency for consultation

or processing, and the requestor shall be notified of the part or parts of the request that have been referred and provided with a point of contact within the receiving agency.

5. Amend § 1631.6 paragraphs (a)(1), (a)(2) and (a)(3) to remove the word "must" and add in its place the word "should" and revise the last sentence in paragraph (e) to read as follows:

§ 1631.6 How to request records-form and content.

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(e) * * * Any Board employee or official who receives an oral request for records shall inform the requestor that FOIA requires requests to be in writing according to the procedures set out herein.

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6. Amend § 1631.8 by revising paragraph (b) to read as follows:

§ 1631.8 Prompt response.

* * * * *

(b) The FOIA Officer will either approve or deny a reasonably descriptive request for records within 20 workdays after receipt of the request. Whenever the Board cannot meet the statutory time limit for processing a

request because of "unusual circumstances," as defined in the FOIA, and the Board extends the time limit on that basis, the Board 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 Board estimates processing of the request will be completed. Where the extension exceeds 10 working days, the Board 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 through the Board's FOIA Public Liaison or FOIA Officer.

7. Amend § 1631.9 by revising the last sentence of paragraph (a), and paragraph (b) (5) to read as follows:

§ 1631.9 Responses-form and content

(a) * * * The notification shall also provide the requestor with an estimated amount of fees assessed under § 1631.13 of this part, including a breakdown of the fees for search, review, and/or duplication.

(b) * * *

(5) A statement that the denial may be appealed to the Executive Director within 90 calendar days of receipt

of the denial or partial denial, that the requestor has the option to contact the Agency's FOIA Liaison at *firtibfoialiaison@tsp.gov*, and that the requestor has the option to contact the Office of Government Information Service (OGIS) as a non-exclusive alternative to litigation. *****

8. Amend § 1631.10 by revising paragraph (a), adding two sentences to the end of paragraph (e), and adding paragraphs (h) and (i) to read as follows:

§ 1631.10 Appeals to the Executive Director from initial denials.

(a) A requestor may appeal any adverse determinations to the Executive Director. The appeal must be made in writing and for it to be considered timely it must be postmarked, or in the case of electronic submissions, transmitted, within 90 calendar days of receipt of the denial or partial denial. The appeal should be addressed to the Executive Director, Federal Retirement Thrift Investment Board, 77 K Street NE., Suite 1000, Washington, DC 20002, and should be clearly labeled as a "Freedom of Information Act Appeal."

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(e) * * * The denial will also inform the requester of

the mediation services offered by the Office of Government Information Services (OGIS) of the National Archives and Records Administration as a non-exclusive alternative to litigation. If the FOIA Officer's decision is remanded or modified on appeal, the requestor will be notified of that determination in writing.

* * * * *

(h) Seeking mediation and dispute resolution services through OGIS is a voluntary process. If the requestor chooses to use these services, the Board will work with OGIS to resolve disputes between requestors and the Board as a non-exclusive alternative to litigation.

(i) Before seeking review by a court of the FOIA Officer's adverse determination, a requestor generally must first submit a timely administrative appeal to the Executive Director.

9. Amend § 1631.11 by revising paragraph (a) introductory text, paragraphs (a) (1) through (a) (3), and the first sentence of paragraph (a) (4), and adding paragraph (d) to read as follows:

§ 1631.11 Fees to be charged-categories of requestors.

(a) In general, the Board 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 there are three categories of FOIA requestors -- commercial use requestors, non-commercial scientific or educational institutions or news media requesters, and all other requestors.

(1) Fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use. Commercial users are not entitled to two hours of free search time or 100 free pages of reproduction of documents. The full allowable direct cost of searching for, and reviewing records will be charged even if there is ultimately no disclosure of records. 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. The Board'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 Board will notify requesters of their placement in this category.

(2) Fees shall be limited to reasonable standard charges for document duplication when records are not

sought for commercial use and the request is made by a representative of the news media. A 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. The Board will advise requesters of their placement in this category.

(3) Fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research. A noncommercial scientific institution is an institution that is not operated on a "commercial" basis, as defined in paragraph (a)(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 Board will advise requesters of their placement in this category.

(4) For any request which does not meet the criteria contained in paragraphs (a)(1) through (3) of this section, fees shall be limited to reasonable standard charges for document search and duplication, except that the first 100 pages of reproduction and the first two hours of search time will be furnished without charge. * * *

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(d) Except as provided in paragraphs (d)(1) through (d)(3) of this section, the Board will not assess any search fees (or duplication fees for requesters under (a)(2) or (3) of this section) if the Board fails to comply with the time limits set forth in § 1631.8.

(1) If the Board determines that "unusual circumstances," as defined in the FOIA, apply and the Board provided a timely written notice to the requester in accordance with § 1631.8, the Board is excused for an additional 10 days from the restrictions of this section.

(2) If the Board has determined that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, the Board may charge search fees (or duplication fees for requesters under (a)(2) or (3) of

this section) if the Board provided a timely written notice to the requester in accordance with § 1631.8 and the Board has discussed with the requester, or made not less than 3 good-faith attempts to do so, how the requester could effectively limit the scope of the request.

(3) If a court has determined that exceptional circumstances exist, as defined in the FOIA, the Agency's delay shall be excused in accordance with the court order.

10. Amend § 1631.14 by revising the first sentence of paragraph (c) (3) to read as follows:

§ 1631.14 Fee schedule.

* * * * *

(c) * * *

(3) For copies prepared by computer, such as tapes, printouts, or CD's the Board shall charge the actual cost, including operator time, of producing the tapes, printouts, or CD's. * * *

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11. Amend § 1631.15 by adding a sentence at the end of paragraph (a), and revising paragraph (b) (1) to read as follows:

§ 1631.15 Information to be disclosed.

(a) * * * Nevertheless, the Board will consider

whether partial disclosure of information is possible whenever full disclosure of the record is not and take reasonable steps to segregate and release nonexempt information.

(b) *Records from non-U.S. Government source.* (1) (i) Board personnel will generally consider two of the nine exemptions in the FOIA in deciding whether to withhold from disclosure material from a non-U.S. Government source.

(1) (ii) Exemption 4 permits withholding of "trade secrets and commercial or financial information obtained from a person as privileged or confidential." The term "person" refers to individuals as well as to a wide range of entities, including corporations, banks, state governments, agencies of foreign governments, and Native American tribes or nations, who provide information to the government. Exemption 6 permits withholding certain information, the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy."

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12. Revise § 1631.17 to read as follows:

§ 1631.17 Deletion of exempted information.

Where requested records contain matters which are exempted under 5 U.S.C. 552(b) but which matters are

reasonably segregable from the remainder of the records, they shall be disclosed by the Board with deletions. To each such record, the Board shall indicate, if technically feasible, the precise amount of information deleted and the exemption under which the deletion is made, at the place in the records where the deletion is made, unless including that indication would harm an interest protected by the exemption.

13. Add § 1631.19 to subpart A to read as follows:
§ 1631.19 Preservation of records.

(a) The Board must preserve all correspondence pertaining to the requests that it receives as well as copies of all requested records, until disposition or destruction is authorized by the Board's General Records Schedule of the National Archives and Records Administration (NARA) or other NARA-approved records retention schedule.

(b) Materials that are identified as responsive to a FOIA request will not be disposed of or destroyed while the request or a related appeal of lawsuit is pending. This is true even if they would otherwise be authorized for disposition under the Board's General Records Schedule of NARA or other NARA-approved records schedule.

Dated: March 29, 2017

Gregory T. Long,

Executive Director.

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