



BILLING CODE 7565-01-U

NATIONAL INDIAN GAMING COMMISSION

25 CFR Part 517

RIN 3141-AA21

Freedom of Information Act Procedures

AGENCY: National Indian Gaming Commission.

ACTION: Final rule.

SUMMARY: This rule amends the procedures followed by the National Indian Gaming Commission when processing a request under the Freedom of Information Act, as amended. These amendments update certain Commission information, conform to changes made in the Freedom of Information Act Improvements Act of 2016, and streamline how the Commission processes its Freedom of Information Act requests.

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Tana Fitzpatrick at (202) 632-7003 or by fax (202) 632-7066 (these numbers are not toll free).

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I. Background

In 1966, Congress enacted the Freedom of Information Act (FOIA). Later, on October 17, 1988, Congress enacted the Indian Gaming Regulatory Act (IGRA), which established the National Indian Gaming Commission (Commission). On August 23, 1993, the Commission adopted FOIA procedures and, on April 19, 2006, subsequently amended its FOIA procedures. Since that time, the United States Congress has amended the FOIA twice, and the Commission has changed the location of its headquarters office and streamlined the way it processes its FOIA requests.

On October 17, 2017, the Commission published a proposed rule (82 FR 48205) that proposed changes to the Commission's regulations and requested public comments for 30 days. This final rule implements the proposed changes and responds to public comments received on the proposed rule. This rule updates the location of the Commission's headquarters, conforms to changes made in the FOIA Improvements Act of 2016, and streamlines how the Commission processes its FOIA requests.

II. Contents of Final Rule

This rule finalizes updates in each section of the Commission's FOIA regulations. Under 25 CFR 517.1, *General provisions*, the Commission incorporates revisions providing that

requests for information under this part may also be simultaneously processed under the Privacy Act regulation under 25 CFR part 515. Additionally, under 25 CFR 517.2, *Public reading room*, the Commission updates its headquarters to its new address.

This rule also updates certain definitions under 25 CFR 517.3 to conform to case law and statutory requirements. The Commission made the following changes:

- 1) Changed definition of ‘record.’ The Commission revised the definition because the present definition of ‘record’ is too narrow based on the Supreme Court’s interpretation of what constitutes a ‘record’ under FOIA;
- 2) Expanded ‘representatives of the news media’ to comport with the FOIA’s definition;
- 3) Updated ‘confidential commercial information’ to be consistent with case law;
- 4) Updated ‘direct costs’ to incorporate statutory and OMB guidelines;

In addition, this rule updates the definition of ‘duplication’ to incorporate newer technologies and references to electronic records.

Section 517.4, *Requirements for making requests*, includes additional updates, as well. Section 517.4 updates include providing an electronic means of submitting FOIA requests and clarifying language for NIGC’s search criteria. Finally, this section notifies requesters of their right to obtain the records they seek in their preferred form or format.

This rule updates section 517.5, *Responsibility for responding to requests*, by amending the standard the Commission uses when referring or consulting with another federal agency by providing the Commission’s FOIA Office with broader discretion. In addition, the present § 517.6(d) is now § 517.5(c), which has been updated to remove a provision that suggests that requesters are required to make advance payments for FOIA requests. This rule also includes a

modified provision under the new § 517.5(d), presently located under 25 CFR 517.6(e), which now defines ‘adverse determination’ and requires the Commission to inform the requester of dispute resolution services. Finally, § 517.5 now includes a new provision for ‘coordination’, which is designed to protect the personal privacy interests of certain individuals.

This rule incorporates several updates to § 517.6, *Timing of responses to requests*. First, the Commission must now notify the requester of his or her right to seek dispute resolution services from the Office of Government Information Services, which is now consistent with the FOIA Improvements Act of 2016. Second, this section expands methods of communication to include electronic methods. Finally, this rule removes duplicative timeline information in this section and inserts requirements for expedited review that codify provisions under FOIA.

Section 517.7, *Confidential commercial information*, is updated to include the requirements of Executive Order 12600, *Pre-disclosure Notification Procedures for Confidential Commercial Information*. Exec. Order No. 12600, 52 FR 23781 (June 23, 1987). Section 517.7(a) is revised to state that when a submitter provides confidential commercial information to the Commission, rather than solely the FOIA Officer, then the FOIA Officer shall provide notice of a FOIA request or administrative appeal encompassing the confidential commercial information if required to be disclosed under FOIA. Section 517.7(b) is amended to remove ‘substantial harm’ as there is more than one standard for allowing information to be withheld under FOIA. Additionally, § 517.7(c) is amended to allow the FOIA Officer additional flexibility in determining whether to notify a submitter, particularly on whether or not other FOIA exemptions may apply to their request.

Section 517.8, *Appeals*, is updated to lengthen the amount of time a requester has to appeal an adverse agency determination from 30 working days after notification to 90 days after

the date of the adverse determination. In addition, this section is amended to include a notice of the availability of dispute resolution services. Section 517.8 also updates the methods by which the Commission accepts appeals by including an option for electronic submission of appeals. Finally, this section now includes the addition of an exhaustion requirement, stating that requesters must generally seek an administrative appeal prior to filing a complaint in federal court.

Last, § 517.9, *Fees*, is updated to conform to requirements of the FOIA Improvements Act of 2016 that restrict when agencies are permitted to charge fees when statutory timelines are not met. This section is also updated to include references to additional methods of duplication and a statement that the requester may select the form or format in which a record is provided. Section 517.9(b)(2) is amended to include a reference to 16% as the appropriate percentage for benefits, on top of the employee's basic pay, being charged for search fees. Additionally, § 517.9(b)(2)(ii) is amended by removing language stating that the Commission is not required to alter or develop programming to conduct computer searches. Finally, this section now includes a reference to the Commission's debt collection regulations.

III. Responses to Comments

A. Removal of the Definition 'Record'

Commenters on the proposed rule expressed concern for the removal of the definition 'record.' Commenters noted that the term 'record' is used throughout the regulation and 'describes what is being sought in a FOIA request.' Commenters also stated that federal agencies have the discretion to adopt their own definitions of 'record,' including the Department of Interior. Finally, commenters suggest the Commission re-insert its present definition of 'record,' as it adequately describes the scope of materials that can be requested under FOIA.

Response: The Commission agrees with commenters that a definition of “record” is needed, but disagrees that the current definition should be maintained because the present definition does not adequately encompass the Supreme Court’s interpretation of ‘record’ for the purposes of FOIA requests. The current regulation uses the definition of record from the Federal Records Act (FRA), 44 U.S.C.A. section 3301. However, under *Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144-145 (1989), the Supreme Court construed agency records requested under FOIA to be 1) either created or obtained by an agency and 2) under agency control at the time the request is made. Although the Supreme Court’s definition overlaps with the FRA definition, Congress created the FRA for record management purposes and not for purposes of providing the public information on public policy, as is the purpose of FOIA. Thus, if information is under the control of the agency, it will be subject to the FOIA regardless of whether it would otherwise be ‘appropriate for preservation.’ See Department of Justice, *FOIA Update Vol. II, No. 1: What is an “Agency Record?”* (January 1, 1980).

Rather than maintain the current definition, then, the Commission adopts a definition of ‘record’ that reflects these considerations.

IV. Regulatory Matters

A. Regulatory Flexibility Act

The Commission certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). The factual basis for this certification is as follows: This rule is procedural in nature and will not impose substantive requirements that would be considered impacts within the scope of the Act.

B. Unfunded Mandates Reform Act

The Commission is an independent regulatory agency, and, as such, is exempt from the Unfunded Mandates Reform Act, 2 U.S.C. 1501 et seq.

C. Takings

In accordance with Executive Order 12630, the Commission has determined that this proposed rule does not have significant takings implications. A takings implication assessment is not required.

D. Civil Justice Reform

In accordance with Executive Order 12988, the Commission has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

E. Small Business Regulatory Enforcement Fairness Act

The proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The proposed rule will not result in an annual effect on the economy of more than \$100 million per year; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S. based enterprises.

F. Paperwork Reduction Act

The proposed rule does not contain any information collection requirements for which the Office of Management and Budget approval under the Paperwork Reduction Act (44 U.S.C. 3501-3520) would be required.

G. National Environmental Policy Act

The Commission has determined that the proposed rule does not constitute a major Federal Action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969.

H. Tribal Consultation

The National Indian Gaming Commission is committed to fulfilling its tribal consultation obligations—whether directed by statute or administrative action such as Executive Order (EO) 13175 (Consultation and Coordination with Indian Tribal Governments)—by adhering to the consultation framework described in its Consultation Policy published July 15, 2013. The NIGC’s consultation policy specifies that it will consult with tribes on Commission Action with Tribal Implications, which is defined as: Any Commission regulation, rulemaking, policy, guidance, legislative proposal, or operational activity that may have a substantial direct effect on an Indian tribe on matters including, but not limited to the ability of an Indian tribe to regulate its Indian gaming; an Indian Tribe’s formal relationship with the Commission; or the consideration of the Commission’s trust responsibilities to Indian tribes. The changes proposed in this final rule do not fall into any of those categories. Many of the changes are required by law and those that are not are being done to improve our FOIA process, which affects the public in general. Accordingly, the Commission did not consult with tribal governments on these changes. The Commission, though, requested and welcomed any and all tribal comments to the final rule.

List of Subjects in 25 CFR Part 517

Administrative practice and procedure, Freedom of information.

For the reasons set forth in the preamble, the Commission revises 25 CFR part 517 to read as follows:

PART 517 -- FREEDOM OF INFORMATION ACT PROCEDURES

Sec.

517.1 General provisions.

517.2 Public reading room.

517.3 Definitions.

517.4 Requirements for making requests.

517.5 Responsibility for responding to requests.

517.6 Timing of responses to requests.

517.7 Confidential commercial information.

517.8 Appeals.

517.9 Fees.

Authority: 5 U.S.C. 552

§ 517.1 General provisions.

This part contains the regulations the National Indian Gaming Commission (Commission) follows in implementing the Freedom of Information Act (FOIA), 5 U.S.C. 552. These regulations provide procedures by which you may obtain access to records compiled, created, and maintained by the Commission, along with procedures the Commission must follow in response to such requests for records. These regulations should be read together with the FOIA, which provides additional information about access to records maintained by the Commission. Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552(a), are processed in accordance with the Commission's Privacy Act regulations, 25 CFR part 515, as well as under this part.

§ 517.2 Public reading room.

Records that are required to be maintained by the Commission shall be available for public inspection and copying at 90 K Street, NE, Suite 200, Washington, DC 20002. Reading room records created on or after November 1, 1996, shall be made available electronically via the Commission's website.

§ 517.3 Definitions.

(a) *Commercial use requester* means a requester seeking information for a use or purpose that furthers the commercial, trade, or profit interests of himself or the person on whose behalf the request is made, which can include furthering those interests through litigation. In determining whether a request properly belongs in this category, the FOIA Officer shall determine the use to which the requester will put the documents requested. Where the FOIA Officer has reasonable cause to doubt the use to which the requester will put the records sought, or where that use is not clear from the request itself, the FOIA Officer shall contact the requester for additional clarification before assigning the request to a specific category.

(b) *Confidential commercial information* means records or information provided to the government by a submitter that arguably contains material exempt from disclosure under Exemption 4 of the FOIA.

(c) *Direct costs* mean those expenditures by the Commission actually incurred in searching for and duplicating (and, in the case of commercial use requests, reviewing) records in response to the FOIA request. Direct costs include the salary of the employee or employees performing the work (i.e., the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating computers and other electronic equipment, such as

photocopiers and scanners. Direct costs do not include overhead expenses, such as the cost of space, heating, or lighting of the facility in which the records are stored.

(d) *Duplication* refers to the process of making a copy of a record, or the information contained in it, necessary to respond to a FOIA request. Such copies can take the form of, among other things, paper copy, microfilm, audio-visual materials, or electronic records (e.g., compact discs or USB flash drives). The copies provided shall be in a form that is reasonably usable by the requester.

(e) *Educational institution* refers to a preschool, a public or private elementary school, an institute of undergraduate higher education, an institute of graduate higher education, an institute of professional education, or an institute of vocational education which operates a program of scholarly research. To qualify for this category, the requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought to further scholarly research.

(f) *Freedom of Information Act Officer* means the person designated by the Chairman to administer the FOIA.

(g) *Non-commercial scientific institution* refers to an institution that is not operated on a “commercial” basis as that term is used in paragraph (a) of this section, and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. To qualify for this category, the requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought to further scholarly research.

(h) *Record* means an agency record that is either created or obtained by an agency and is under agency control at the time of the FOIA request.

(i) *Representative of the news media* means any person or entity that gathers information of potential interest to a segment of the public, uses 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 for purchase by or free distribution to the general public, including news organizations that disseminate solely on the Internet. For a “freelance journalist” to be regarded as working for a news organization, the requester must demonstrate a solid basis for expecting publication through that organization, such as a publication contract. Absent such showing, the requester may provide documentation establishing the requester’s past publication record. To qualify for this category, the requester must not be seeking the requested records for a commercial use. However, a request for records supporting a news-dissemination function shall not be considered to be for a commercial use.

(j) *Requester* means any person, including an individual, Indian tribe, partnership, corporation, association, or public or private organization other than a Federal agency, that requests access to records in the possession of the Commission.

(k) *Review* means the process of examining a record in response to a FOIA request to determine if any portion of that record may be withheld under one or more of the FOIA Exemptions. It also includes processing any record for disclosure, for example, redacting

information that is exempt from disclosure under the FOIA. Review time includes time spent considering any formal objection to disclosure made by a business submitter under § 517.7(c). Review time does not include time spent resolving general legal or policy issues regarding the use of FOIA Exemptions.

(l) *Search* refers to the time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within a document and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. The FOIA Officer shall ensure that searches are conducted in the most efficient and least expensive manner reasonably possible.

(m) *Submitter* means any person or entity who provides information directly or indirectly to the Commission. The term includes, but is not limited to, corporations, Indian tribal governments, state governments and foreign governments.

(n) *Working day* means a Federal workday that does not include Saturdays, Sundays, or Federal holidays.

§ 517.4 Requirements for making requests.

(a) *How to make a FOIA request.* Requests for records made pursuant to the FOIA must be in writing. Requests may be mailed, dropped off in person, or faxed to (202) 632-7066 (not a toll free number). Requests that are dropped off in person should be made at 90 K Street, NE, Suite 200, Washington, DC 20002 during the hours of 9 a.m. to 12 noon and 2 p.m. to 5 p.m. Requests that are mailed should be sent to NIGC Attn: FOIA Officer, 1849 C Street NW, Mail Stop #1621, Washington, DC 20240. Requests may also be sent via electronic mail addressed to FOIARequests@nigc.gov or submitted through the Commission's web site.

(b) *First person requests for records.* If the requester is making a request for records about himself/herself, the requester must provide verification of identity. Verification requirements are described in 25 CFR 515.3.

(c) *Requests for records about another individual.* If the requester is making a request for records about another individual, the requester may receive greater access by submitting either a notarized authorization signed by that individual, 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 the death certificate or a copy of the obituary).

(d) *Description of records sought.* Requests for records shall describe the records requested with as much specificity as possible to enable Commission employees to locate the information requested with a reasonable amount of effort. Whenever possible, the request should describe the subject matter of the records sought, the time periods in which the records were generated, and any tribe or tribal gaming facility with which they were associated. Before submitting a request, requesters may contact the Commission's FOIA contact or FOIA Public Liaison to discuss the records being sought and receive assistance describing the records. If after receiving a request the FOIA Officer determines that it does not reasonably describe the records sought, the FOIA Officer must inform the requester of 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.

(e) *Agreement to pay fees.* Requests shall also include a statement indicating the maximum amount of fees the requester is willing to pay to obtain the requested information, or a request for a waiver or reduction of fees. If the requester is requesting a waiver or reduction of fees the requester must include justification for such waiver or reduction (see § 517.9(c) for more information). If the request for a fee waiver is denied, the requester will be notified of this decision and advised that fees associated with the processing of the request will be assessed. The requester must send an acknowledgment to the FOIA Officer indicating his/her willingness to pay the fees. Absent such acknowledgment within the specified time frame, the request will be considered incomplete, no further work shall be done, and the request will be administratively closed.

(f) *Form or format of records requested.* Requesters may specify their preferred form or format (including electronic formats) for the records sought. The Commission will accommodate such requests where the record is readily reproducible in that form or format.

(g) *Types of records not available.* The FOIA does not require the Commission to:

(1) Compile or create records solely for the purpose of satisfying a request for records;

(2) Provide records not yet in existence, even if such records may be expected to come into existence at some future time; or

(3) Restore records destroyed or otherwise disposed of, except that the FOIA Officer must notify the requester that the requested records have been destroyed or disposed.

§ 517.5 Responsibility for responding to requests.

(a) *In general.* In determining which records are responsive to a request, the Commission ordinarily will include only records in its possession as of the date it begins its search for records. If any other date is used, the FOIA Officer shall inform the requester of that date.

(b) *Authority to grant or deny requests.* The FOIA Officer shall make initial determinations either to grant or deny in whole or in part a request for records.

(c) *Granting of requests.* When the FOIA Officer determines that the requested records shall be made available, the FOIA Officer shall notify the requester in writing and provide copies of the requested records in whole or in part. Records disclosed in part shall be marked or annotated to show the exemption applied to the withheld information and the amount of information withheld unless to do so would harm the interest protected by an applicable exemption. If a requested record contains exempted material along with nonexempt material, all reasonable segregable material shall be disclosed.

(d) *Adverse Determinations.* If the FOIA Officer makes an adverse determination denying a request in any respect, it must notify the requester of that adverse determination in writing. Adverse determinations include decisions that: the requested record is exempt from release, 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; denials involving fees or fee waiver matters; and denials of requests for expedited processing.

(e) *Content of adverse determination.* Any adverse determination issued by the FOIA Officer must include:

(1) A brief statement of the reasons for the adverse determination, including any FOIA exemption applied by the agency in denying access to a record unless to do so would harm the interest protected by an applicable exemption;

(2) An estimate of the volume of any records or information withheld, such as the number of pages or other reasonable form of estimation, although such an estimate is not required if the volume is otherwise indicated by deletions marked on records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption;

(3) A statement that the adverse determination may be appealed under § 517.8 of this part and a description of the appeal requirements; and

(4) A statement notifying the requester of the assistance available from the Commission's FOIA Public Liaison and the dispute resolution services offered by the Office of Government Information Services.

(f) *Consultation, referral, and coordination.* When reviewing records located in response to a request, the FOIA Officer 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 record determined to be better suited for review by another Federal Government agency, the FOIA Officer must proceed in one of the following ways.

(1) *Consultation.* When records originating with the Commission contain information of interest to another Federal Government agency, the FOIA Officer should typically consult with that other entity prior to making a release determination.

(2) *Referral.* (i) When the FOIA Officer believes that a different Federal Government agency is best able to determine whether to disclose the record, the FOIA Officer should 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. If the Commission and another Federal Government agency jointly agree that the agency processing the request is in the best position to respond regarding the record, then the record may be handled as a consultation.

(ii) Whenever the FOIA Officer refers any part of the responsibility for responding to a request to another agency, he or she must document the referral, maintain a copy of the record that it refers, and notify the requester of the referral.

(iii) After the FOIA Officer refers a record to another Federal Government agency, the agency receiving the referral shall make a disclosure determination and respond directly to the requester. The referral of a record is not an adverse determination and no appeal rights accrue to the requester by this act.

(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 interests. For example, if the FOIA Officer in responding to a request for records on a living third party locates records originating with a criminal 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. In such instances, in order to avoid harm to an interest protected by an applicable exemption, the FOIA Officer should coordinate with the originating agency to obtain its views on whether the record may be disclosed. The FOIA Officer should then convey the determination as to whether the record will be released to the requester.

§ 517.6 Timing of responses to requests.

(a) *In general.* The FOIA Officer ordinarily shall respond to requests according to their order of receipt. All statutory and regulatory timelines will commence on the date that the request is received by the Commission's Headquarters FOIA Office that is designated to receive requests in § 517.4(a). In instances of requests misdirected to Commission field offices, the response time will commence on the date that the request is received by the Commission's Headquarters FOIA Office, but in any event no later than 10 working days after the request is first received by any Commission office.

(b) *Multitrack processing.* (1) The FOIA Officer may use multi-track processing in responding to requests. Multi-track processing means placing simple requests requiring rather limited review in one processing track and placing more voluminous and complex requests in one or more other tracks. Requests in either track are processed on a first-in/first-out basis.

(2) The FOIA Officer may provide requesters in its slower track(s) with an opportunity to limit the scope of their requests in order to qualify for faster processing within the specified limits of faster track(s). The FOIA Officer will do so either by contacting the requester by letter, telephone, electronic mail, or facsimile whichever is more efficient in each case. When

providing a requester with the opportunity to limit the scope of their request, the FOIA Officer shall also advise the requester of the availability of the Commission's FOIA Public Liaison to aid in the resolution of any dispute arising between the requester and the Commission as well as the requester's right to seek dispute resolution services from the Office of Government Information Services.

(c) *Initial determinations.* (1) The FOIA Officer shall make an initial determination regarding access to the requested information and notify the requester within twenty (20) working days after receipt of the request. This 20 day period may be extended if unusual circumstances arise. If an extension is necessary, the FOIA Officer shall promptly notify the requester of the extension, briefly stating the reasons for the extension, and estimating when the FOIA Officer will respond. Unusual circumstances warranting extension are:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) The need to search for, collect, and appropriately examine a voluminous amount of records which are demanded in a single request; or

(iii) The need for consultation with another agency having a substantial interest in the determination of the request, which consultation shall be conducted with all practicable speed.

(2) If the FOIA Officer decides that an initial determination cannot be reached within the time limits specified in paragraph (c)(1) of this section, the FOIA Officer shall notify the requester of the reasons for the delay and include an estimate of when a determination will be made. The requester will then have the opportunity to modify the request or arrange for an alternative time frame for completion of the request. To assist in this process, the FOIA Officer

shall advise the requester of the availability of the Commission's FOIA Public Liaison to aid in the resolution of any disputes between the requester and the Commission, and notify the requester of his or her right to seek dispute resolution services from the Office of Government Information Services.

(3) If no initial determination has been made at the end of the 20 day period provided for in paragraph (c)(1) of this section, including any extension, the requester may appeal the action to the FOIA Appeals Officer.

(d) *Expedited processing of request.* (1) A requester may make a request for expedited processing at any time.

(2) When a request for expedited processing is received, the FOIA Officer must determine whether to grant the request for expedited processing within ten (10) calendar days of its receipt. Requests will receive expedited processing if one of the following compelling needs is met:

(i) The requester can establish that failure to receive the records quickly could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) The requester is primarily engaged in disseminating information and can demonstrate that an urgency to inform the public concerning actual or alleged Federal Government activity exists.

(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. As a matter of administrative discretion, the FOIA Officer may waive the formal certification requirement.

(4) Administrative appeals of denials of expedited processing will be given expeditious consideration. If the denial of expedited processing is upheld by the FOIA Appeals Officer, that decision is immediately subject to judicial review in the appropriate Federal district court.

§ 517.7 Confidential commercial information.

(a) *Notice to submitters.* The FOIA Officer shall, to the extent permitted by law, provide a submitter who provides confidential commercial information to the Commission, with prompt notice of a FOIA request or administrative appeal encompassing the confidential commercial information if the Commission may be required to disclose the information under the FOIA. Such notice shall either describe the exact nature of the information requested or provide copies of the records or portions thereof containing the confidential commercial information. The FOIA Officer shall also notify the requester that notice and opportunity to object has been given to the submitter.

(b) *Where notice is required.* Notice shall be given to a submitter when:

(1) The information has been designated by the submitter as confidential commercial information protected from disclosure. Submitters of confidential commercial information shall use good faith efforts to designate, either at the time of submission or a reasonable time thereafter, those portions of their submissions they deem protected from disclosure under Exemption 4 of the FOIA. Such designation shall be deemed to have expired ten years after the

date of submission, unless the requester provides reasonable justification for a designation period of greater duration; or

(2) The FOIA Officer has reason to believe that the information may be protected from disclosure under Exemption 4 of the FOIA.

(c) *Where notice is discretionary.* If the FOIA Officer has reason to believe that information submitted to the Commission may be protected from disclosure under any other exemption of the FOIA, the FOIA Officer may, in his or her discretion, provide the submitter with notice and an opportunity to object to the release of that information.

(d) *Opportunity to object to disclosure.* The FOIA Officer shall afford a submitter a reasonable period of time to provide the FOIA Officer with a detailed written statement of any objection to disclosure. The statement shall specify all grounds for withholding any of the information under any exemption of the FOIA, and if Exemption 4 applies, shall demonstrate the reasons the submitter believes the information to be confidential commercial information that is exempt from disclosure. Whenever possible, the submitter's claim of confidentiality shall be supported by a statement or certification by an officer or authorized representative of the submitter. In the event a submitter fails to respond to the notice in the time specified, the submitter will be considered to have no objection to the disclosure of the information. Information provided by the submitter that is received after the disclosure decision has been made will not be considered. Information provided by a submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA.

(e) *Notice of intent to disclose.* The FOIA Officer shall carefully consider a submitter's objections and specific grounds for nondisclosure prior to determining whether to

disclose the information requested. Whenever the FOIA Officer determines that disclosure is appropriate, the FOIA Officer shall, within a reasonable number of days prior to disclosure, provide the submitter with written notice of the intent to disclose which shall include a statement of the reasons for which the submitter's objections were overruled, a description of the information to be disclosed, and a specific disclosure date. The FOIA Officer shall also notify the requester that the requested records will be made available.

(f) *Notice of lawsuit.* If the requester files a lawsuit seeking to compel disclosure of confidential commercial information, the FOIA Officer shall promptly notify the submitter of this action. If a submitter files a lawsuit seeking to prevent disclosure of confidential commercial information, the FOIA Officer shall notify the requester.

(g) *Exceptions to the notice requirements under this section.* The notice requirements under paragraphs (a) and (b) of this section shall not apply if:

(1) The FOIA Officer determines that the information should not be disclosed pursuant to Exemption 4 and/or any other exemption of the FOIA;

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

(3) Disclosure of the information is required by law (other than the FOIA);

(4) The information requested is not designated by the submitter as exempt from disclosure in accordance with this part, when the submitter had the opportunity to do so at the time of submission of the information or within a reasonable time thereafter, unless the agency

has substantial reason to believe that disclosure of the information would result in competitive harm; or

(5) The designation made by the submitter in accordance with this part appears obviously frivolous. When the FOIA Officer determines that a submitter was frivolous in designating information as confidential, the FOIA Officer must provide the submitter with written notice of any final administrative disclosure determination within a reasonable number of days prior to the specified disclosure date, but no opportunity to object to disclosure will be offered.

§ 517.8 Appeals.

(a) *Right of appeal.* The requester has the right to appeal to the FOIA Appeals Officer any adverse determination.

(b) *Notice of Appeal—(1) Time for appeal.* To be considered timely, an appeal must be postmarked, or in the case of electronic submissions, transmitted, no later than ninety (90) calendar days after the date of the response or after the time limit for response by the FOIA Officer has expired. Prior to submitting an appeal any outstanding fees associated with FOIA requests must be paid in full.

(2) *Form of appeal.* An appeal shall be initiated by filing a written notice of appeal. The notice shall be accompanied by copies of the original request and adverse determination. To expedite the appellate process and give the requester an opportunity to present his/her arguments, the notice should contain a brief statement of the reasons why the requester believes the adverse determination to have been in error. Requesters may submit appeals by mail, facsimile, or electronically. Appeals sent by mail shall be addressed to the National Indian Gaming

Commission, Attn: FOIA Appeals Officer, 1849 C Street NW, Mailstop #1621, Washington, DC 20240. Appeals may also be submitted via electronic mail at FOIARequests@nigc.gov or through the NIGC's web site. 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."

(c) *Final agency determinations.* The FOIA Appeals Officer shall issue a final written determination, stating the basis for its decision, within twenty (20) working days after receipt of a notice of appeal. If the determination is to provide access to the requested records, the FOIA Officer shall make those records immediately available to the requester. If the determination upholds the adverse determination, the FOIA Appeals Officer shall notify the requester of the determination, the ability to obtain mediation services offered by the Office of Government Information Services as a non-exclusive alternative to litigation, and the right to obtain judicial review in the appropriate Federal district court.

(d) *When appeal is required.* Before seeking review by a court of the FOIA Officer's adverse determination, a requester generally must first submit a timely administrative appeal.

§ 517.9 Fees.

(a) *In general.* Fees pursuant to the FOIA shall be assessed according to the schedule contained in paragraph (b) of this section for services rendered by the Commission in response to requests for records under this part. All fees shall be charged to the requester, except where the charging of fees is limited under paragraph (d) or (e) of this section or where a waiver or reduction of fees is granted under paragraph (c) of this section. Payment of fees should be by check or money order made payable to the Treasury of the United States..

(b) *Charges for responding to FOIA requests.* The following fees shall be assessed in responding to requests for records submitted under this part, unless a waiver or reduction of fees has been granted pursuant to paragraph (c) of this section:

(1) *Duplication.* The FOIA Officer will honor a requester's preference for receiving a record in a particular form or format where he or she can readily reproduce the record in the form or format requested. When photocopies are supplied, the FOIA Officer shall charge \$0.15 per page for copies of documents up to 8 ½ x 14. For copies of records produced on tapes, compact discs, or other media, the FOIA Officer shall 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 electronic format, the requester must also pay the direct costs associated with scanning those materials. For other methods of reproduction, the FOIA Officer shall charge the actual direct costs of producing the documents.

(2) *Searches*—(i) *Manual searches.* Whenever feasible, the FOIA Officer will charge at the salary rate (basic pay plus 16% percent for benefits) of the employee or employees performing the search. However, where a homogenous class of personnel is used exclusively in a search (e.g., all administrative/clerical or all professional/executive), the FOIA Officer shall charge \$4.45 per quarter hour for clerical time and \$7.75 per quarter hour for professional time. Charges for search time less than a full hour will be in increments of quarter hours.

(ii) *Computer searches.* The FOIA Officer will charge the actual direct costs of conducting computer searches. These direct costs shall include the cost of operating the central processing unit for that portion of operating time that is directly attributable to searching for requested records, as well as the costs of operator/programmer salary apportionable to the search.

For requests that require the creation of a new computer program to locate requested records, the Commission will charge the direct costs associated with such program's creation. The FOIA Officer 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.

(3) *Review fees.* Review fees shall be assessed only with respect to those requesters who seek records for a commercial use under paragraph (d)(1) of this section. Review fees shall be assessed at the same rates as those listed under paragraph (b)(2)(i) of this section. Review fees shall be assessed only for the initial record review, for example, review undertaken when the FOIA Officer analyzes the applicability of a particular exemption to a particular record or portion thereof at the initial request level. No charge shall be assessed at the administrative appeal level of an exemption already applied.

(c) *Statutory waiver.* Documents shall be furnished without charge or at a charge below that listed in paragraph (b) of this section where it is determined, based upon information provided by a requester or otherwise made known to the FOIA Officer, that disclosure of the requested information is in the public interest. Disclosure is in the public interest if it is likely to contribute significantly to public understanding of government operations and is not primarily for commercial purposes. Requests for a waiver or reduction of fees shall be considered on a case by case basis. In order to determine whether the fee waiver requirement is met, the FOIA Officer shall consider the following six factors:

(1) *The subject of the request.* Whether the subject of the requested records concerns the operations or activities of the government;

(2) *The informative value of the information to be disclosed.* Whether the disclosure is likely to contribute to an understanding of government operations or activities;

(3) *The contribution to an understanding of the subject by the general public likely to result from disclosure.* Whether disclosure of the requested information will contribute to public understanding;

(4) *The significance of the contribution to public understanding.* Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities;

(5) *The existence and magnitude of commercial interest.* Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(6) *The primary interest in disclosure.* Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(d) *Types of requesters.* There are four categories of FOIA requesters: Commercial use requesters, educational and non-commercial scientific institutional requesters; representative of the news media; and all other requesters. These terms are defined in § 517.3. The following specific levels of fees are prescribed for each of these categories:

(1) *Commercial use requesters.* The FOIA Officer shall charge commercial use requesters the full direct costs of searching for, reviewing, and duplicating requested records.

(2) *Educational and non-commercial scientific institutions requesters.* The FOIA Officer shall charge educational and non-commercial scientific institution requesters for

document duplication only, except that the first 100 pages of copies shall be provided without charge.

(3) *News media requesters.* The FOIA Officer shall charge news media requesters for document duplication costs only, except that the first 100 pages of paper copies shall be provided without charge.

(4) *All other requesters.* The FOIA Officer shall charge requesters who do not fall into any of the categories in paragraphs (d)(1) through (3) of this section fees which cover the full reasonable direct costs incurred for searching for and reproducing records if that total costs exceeds \$15.00, except that the first 100 pages and the first two hours of manual search time shall not be charged. To apply this term to computer searches, the FOIA Officer shall determine the total hourly cost of operating the central processing unit and the operator's salary (plus 16 percent for benefits). When the cost of the search equals the equivalent dollar amount of two hours of the salary of the person performing the search, the FOIA Officer will begin assessing charges for the computer search.

(e) *Restrictions on charging fees.* (1) Ordinarily, no charges will be assessed when requested records are not found or when records located are withheld as exempt. However, if the requester has been notified of the estimated cost of the search time and has been advised specifically that the requested records may not exist or may be withheld as exempt, fees may be charged.

(2) If the Commission fails to comply with the FOIA's time limits for responding to a request, it may not charge search fees or, in cases where records are not sought for commercial use and the request is made by an educational institution, non-commercial scientific institution,

or representative of the news media, duplication fees, except as described in paragraphs (e)(2)(i)-(iii) of this section.

(i) If the FOIA Officer determines that unusual circumstances, as defined by the FOIA, apply and provides timely written notice to the requester in accordance with the FOIA, then a failure to comply with the statutory time limit shall be excused for an additional 10 days.

(ii) If the FOIA Officer determines that unusual circumstances, as defined by the FOIA, apply and more than 5,000 pages are necessary to respond to the request, then the Commission may charge search fees and duplication fees, where applicable, if the following steps are taken. The FOIA Officer must:

(A) Provide timely written notice of unusual circumstances to the requester in accordance with the FOIA and

(B) Discuss 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).

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

(f) *Charges for interest.* The FOIA Officer may assess interest charges on an unpaid bill, accrued under previous FOIA request(s), starting the 31st day following the day on which the bill was sent to you. A fee received by the FOIA Officer, even if not processed will result in a stay of the accrual of interest. The Commission shall follow the provisions of the Debt Collection

Act of 1982, as amended, its implementing procedures, and the Commission's debt collection regulations located in 25 CFR part 513 to recover any indebtedness owed to the Commission.

(g) *Aggregating requests.* The requester or a group of requesters may not submit multiple requests at the same time, each seeking portions of a document or documents solely in order to avoid payment of fees. When the FOIA Officer reasonably believes that a requester is attempting to divide a request into a series of requests to evade an assessment of fees, the FOIA Officer may aggregate such request and charge accordingly.

(h) *Advance payment of fees.* Fees may be paid upon provision of the requested records, except that payment may be required prior to that time if the requester has previously failed to pay fees or if the FOIA Officer determines that total fee will exceed \$250.00. When payment is required in advance of the processing of a request, the time limits prescribed in § 517.6 shall not be deemed to begin until the FOIA Officer has received payment of the assessed fee.

(i) *Payment of fees.* Where it is anticipated that the cost of providing the requested record will exceed \$25.00 after the free duplication and search time has been calculated, and the requester has not indicated in advance a willingness to pay a fee greater than \$25.00, the FOIA Officer shall promptly notify the requester of the amount of the anticipated fee or a portion thereof, which can readily be estimated. The notification shall offer the requester an opportunity to confer with agency representatives for the purpose of reformulating the request so as to meet the requester's needs at a reduced cost.

Dated: January 12, 2018.

Jonodev O. Chaudhuri
Chairman

Kathryn Isom-Clause
Vice Chair

E. Sequoyah Simermeyer
Associate Commissioner
[FR Doc. 2018-01433 Filed: 1/25/2018 8:45 am; Publication Date: 1/26/2018]