

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of )
)
Amendment of Part 0 of the Commission's Rules )
Regarding Public Information, the Inspection of )
Records, and Implementing the Freedom of )
Information Act )
)
Amendment of Part 0 of the Commission's Rules )
regarding Delegations of Authority )

ORDER

Adopted: December 14, 2016

Released: December 15, 2016

By the Commission:

I. INTRODUCTION

1. By this Order, we amend Part 0 of the Commission's rules to update various sections implementing the Freedom of Information Act (FOIA). These amendments constitute changes to rules of agency organization, procedure, or practice. As such, their promulgation does not require notice and comment prior to adoption.

II. BACKGROUND

2. On June 30, 2016, the President signed into law the FOIA Improvement Act of 2016 (FOIA Improvement Act). The law went into effect July 1, 2016, and requires, inter alia, that agencies review their FOIA regulations and promulgate new rules in accordance with the substantive provisions of the law. These provisions included providing 90 days for requesters to file appeals of FOIA requests, ensuring that requesters are informed of avenues for FOIA dispute resolution, and providing for public posting of materials that are requested multiple times. The Commission has completed review of its

1 5 U.S.C. § 553(b)(A) (notice requirements inapplicable to "interpretive rules, general statements of policy, or rules of agency organization, procedure or practice"). See Amendment of Part 0 of the Commission's Rules Regarding Public Information, the Inspection of Records, and Implementing the Freedom of Information Act, Order, 24 FCC Rcd 6904, 6914 (2008) (amending FOIA rules after 2007 OPEN Government Act without notice and comment). See also Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 20128, 20131 (1999) (amending 47 CFR §§ 0.459 and 0.461 without notice and comment), citing Aluminum Co. of America v. FTC, 589 F. Supp. 169, 178 (S.D.N.Y. 1984) (holding FOIA rules are procedural rules); United States ex rel. O'Keefe v. McDonnell Douglas Corp., 132 F.3d 1252, 1255 (8th Cir. 1998) (Touhy regulations deal exclusively with internal administrative procedure). The substantive standards for obtaining agency records are set forth in the FOIA. See generally 5 U.S.C. § 552.

2 Pub. L. 114-185.

3 Id. § 3(a). "Not later than 180 days after the date of enactment of this Act, the head of each agency (as defined in section 551 of title 5, United States Code) shall review the regulations of such agency and shall issue regulations on procedures for the disclosure of records under section 552 of title 5, United States Code, in accordance with the amendments made by section 2."

FOIA regulations and in this Order adopts amendments to the rules, thus fulfilling the requirements of section 3(a) of the FOIA Improvement Act.

3. The amendments made by this Order can generally be grouped into two categories. First are rule amendments that are required by or flow directly from changes made by the FOIA Improvement Act.<sup>4</sup> These include regulatory changes specifically mandated by the FOIA Improvement Act, as well as changes that are informed by the FOIA Improvement Act. Second are rule amendments designed to conform the rules to existing Commission FOIA practice, streamline FOIA procedures, and provide for clerical corrections.<sup>5</sup> A number of years have passed since the Commission's FOIA regulations were last updated, and new technology, practices, and procedures have arisen since that time. We update the regulations to reflect the current state of the Commission's FOIA process.

### III. AMENDMENTS TO FOIA IMPLEMENTING RULES

4. The Commission's FOIA implementing rules are presently found at 47 CFR §§ 0.441-0.470. The amended rules are set forth in the Appendix to this Order and are described in more detail below.

#### A. Rule Changes Required By or Derived From the FOIA Improvement Act

5. The following rule changes are either required by the text of the FOIA Improvement Act or are made in response to issues raised in the FOIA Improvement Act.

6. **Section 0.251 – Authority Delegated.** Section 0.251 describes the authorities delegated to the General Counsel by the Commission. We add to the rule by delegating to the General Counsel the authority to act as the Chief FOIA Officer.<sup>6</sup> The position of Chief FOIA Officer was created by the Open Government Act of 2007 and expanded upon by the FOIA Improvement Act.<sup>7</sup>

7. **Section 0.441 – General.** Section 0.441 sets forth general information related to the Commission's FOIA practice. We make two changes to this section that are required by the FOIA Improvement Act. First, we include a notice that FOIA requesters may seek the assistance of the FOIA Public Liaison or the Office of Government Information Services to assist in resolving disputes, along with the procedure for engaging such assistance. These changes are specifically required by the FOIA Improvement Act.<sup>8</sup> Second, in light of the FOIA Improvement Act's emphasis on the duties of the Chief

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<sup>4</sup> *Infra* paras. 5-11.

<sup>5</sup> *Infra* paras. 12-34.

<sup>6</sup> The Chief FOIA Officer's responsibilities include: (1) having agency-wide responsibility for efficient and appropriate compliance with the FOIA; (2) monitoring implementation of the FOIA throughout the agency and keeping the head of the agency and the Attorney General appropriately informed of the agency's performance in implementing this section; (3) recommending to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of the FOIA; (4) reviewing and reporting to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing the FOIA; (5) facilitating public understanding of the purposes of the statutory exemptions of the FOIA by including concise descriptions of the exemptions in both the agency's handbook and the agency's annual report, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply; (6) offering training to agency staff regarding their responsibilities under the FOIA; (7) serving as the primary agency liaison with the Office of Government Information Services and the Office of Information Policy; and (8) designating one or more FOIA Public Liaisons. 5 U.S.C. § 552(j)(2). The Chief FOIA Officer also reviews all aspects of the agency's administration of the FOIA to ensure compliance with the statute, 5 U.S.C. § 552(j)(3), and serves as the agency's representative on the Chief FOIA Officers Council, 5 U.S.C. § 552(k).

<sup>7</sup> Prior to this rulemaking, the General Counsel was already designated as the Chief FOIA Officer by agency directive. FCC Directive, Freedom of Information Act Requests, 1179.2 (April 16, 2012).

<sup>8</sup> FOIA Improvement Act § 3(b).

FOIA Officer, including new responsibilities to offer training to agency staff and to serve as the liaison with the National Archives and Records Administration's Office of Government Information Services and the Department of Justice's Office of Information Policy, we clarify that the General Counsel serves as the Commission's Chief FOIA Officer and may exercise the responsibilities assigned to that position in the FOIA statute.<sup>9</sup>

8. **Section 0.445 – Publication, availability, and use of opinions, orders, policy statements, interpretations, administrative manuals, staff instructions, and frequently requested records.** Section 0.445 instructs the public how to access certain publicly available documents. This rule implements various statutory requirements concerning the public availability of these documents.<sup>10</sup> We amend the rule to make electronically available records that have been or are likely to be the subject of multiple FOIA requests, pursuant to the FOIA Improvement Act.<sup>11</sup>

9. **Section 0.457 – Records not routinely available for public inspection.** Section 0.457 addresses some of the types of records that are routinely withheld from public inspection. We change the introductory paragraph to the section to articulate the reasonably foreseeable harm standard codified in the FOIA Improvement Act.<sup>12</sup> We also amend section 0.457(e) to reflect changes brought about by the FOIA Improvement Act eliminating the deliberative process privilege of FOIA Exemption 5 for records more than 25 years old.<sup>13</sup>

10. **Section 0.461 – Requests for inspection of materials not routinely available for public inspection.** Section 0.461 sets forth the rules for filing requests to view records that are not routinely available to the public. These rules govern the majority of requests under the FOIA. We extend the amount of time for requesters to file FOIA appeals (called applications for review under Commission practice) from 30 days to 90 days, consistent with the requirements of the FOIA Improvement Act.<sup>14</sup> We will also make a conforming edit to section 1.115(d) of our rules.<sup>15</sup>

11. **Section 0.470 – Assessment of fees.** Section 0.470 sets out the three fee categories of FOIA requests and the rules regarding fee waivers. Consistent with the FOIA Improvement Act, we make modifications to make clear that the agency may not charge otherwise applicable search and duplication fees when it fails to meet the notice requirements and time limits under the FOIA, unless more than 5,000 pages are necessary to respond to a single request or exceptional circumstances apply.<sup>16</sup>

## B. Other Changes to FOIA Rules

12. The following rule changes are not specifically required by the FOIA Improvement Act. Instead, we adopt these rule changes to conform the rules to existing Commission FOIA practice, streamline FOIA procedures, and provide for clerical corrections.

13. **Section 0.251 – Authority Delegated.** Section 0.251 describes the authorities delegated to the General Counsel by the Commission. We grant to the General Counsel the authority to dismiss FOIA applications for review that are untimely, repetitious, or fail to articulate specific grounds for

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<sup>9</sup> See *id.* § 2(6); 5 U.S.C. § 552(j); *supra* note 6.

<sup>10</sup> See 5 U.S.C. § 552(a)(2)(A)-(C).

<sup>11</sup> FOIA Improvement Act § 2(1)(A)(ii), 5 U.S.C. § 552(a)(2)(D).

<sup>12</sup> FOIA Improvement Act § 2(1)(D); 5 U.S.C. § 552(a)(8)(A).

<sup>13</sup> FOIA Improvement Act § 2(2); 5 U.S.C. § 552(b)(5).

<sup>14</sup> FOIA Improvement Act § 2(1)(C); 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa).

<sup>15</sup> 47 CFR § 1.115(d).

<sup>16</sup> FOIA Improvement Act § 2(1)(B); 5 U.S.C. § 552(a)(4)(A)(vii)(II)(bb).

review.<sup>17</sup> By giving the General Counsel this authority, procedurally defective requests can be dealt with efficiently and expediently without compromising substantive appeal rights, consistent with other regulations.<sup>18</sup>

14. **Section 0.441 – General.** Section 0.441 sets forth general information related to the Commission’s FOIA practice. We make two clerical changes to this rule. First, we amend this section to remove facsimile as a method of contacting the Commission regarding FOIA requests.<sup>19</sup> Second, we remove a reference to the Commission’s copy contractor, as the Commission no longer employs a copy contractor.<sup>20</sup>

15. **Section 0.442 – Disclosure to other Federal government agencies of information submitted to the Commission in confidence.** Section 0.442 applies to the sharing of confidential third-party information with other Federal agencies.<sup>21</sup> We make no changes to this section.

16. **Section 0.445 – Publication, availability, and use of opinions, orders, policy statements, interpretations, administrative manuals, staff instructions, and frequently requested records. Section 0.445 instructs the public how to access certain publicly available documents.** This rule implements various statutory requirements concerning the public availability of these documents.<sup>22</sup> To reflect current Commission practice, we eliminate a reference to records being held by the Office of Media Relations. We also include a reference to the availability of records on the Electronic Document Management System (EDOCS) and through the Commission’s website. Lastly, we remove a reference to the Commission’s copy contractor, as the Commission no longer employs a copy contractor.

17. **Section 0.451 – Inspection of records: Generally.** Section 0.451 provides an introduction to the broad category of records that are or are not available to the public, along with specifying where in the rules the procedures for requesting those records can be found. We modify section 0.451(b)(4) (previously numbered section 0.451(b)(5)) to reflect current Commission practice, which permits the release of certain non-internal documents without requiring the filing of a FOIA request. This will facilitate the bureaus’ and offices’ sharing of non-internal documents without the need for a formal FOIA request. We also amend the rules to simplify the language used and consolidate related subsections.

18. **Section 0.453 – Public reference rooms.** Section 0.453 currently provides a listing of records routinely available in the Commission’s public reference room. It derives from a time that various bureaus and offices of the Commission had individual reference rooms containing paper records for public access. These locations no longer exist, having been supplanted by one central Reference Information Center and the Commission’s website. We amend the rule to add references to the resources

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<sup>17</sup> See 47 CFR § 0.251(b) (granting authority to the General Counsel to dismiss petitions for rulemaking or petitions for reconsideration that are repetitious, moot, fail to rely on new or changed circumstances, or otherwise do not warrant consideration by the Commission), 47 CFR § 0.331(c) (granting authority to the Chief of the Wireless Telecommunications Bureau to dismiss certain defective applications for review), 47 CFR § 1.106(p) & 1.429(l) (granting authority to relevant bureaus offices to dismiss petitions for reconsideration that do not warrant consideration by the Commission).

<sup>18</sup> In the last five years, the Commission has dismissed 49 FOIA appeals that were procedurally defective (37 of which were filed by a single requester).

<sup>19</sup> 47 CFR § 0.441(a)(6) previously provided for contacting the Commission via facsimile at 1-866-418-0232. This fax number is no longer in use, and given the limited use and associated costs of communicating via fax, we eliminate it from the rules.

<sup>20</sup> A separate order will be issued by the Managing Director removing references to the copy contractor from various other Commission rules.

<sup>21</sup> See 44 U.S.C. § 3510.

<sup>22</sup> See 5 U.S.C. § 552(a)(2)(A)-(C).

available on the Commission's website.<sup>23</sup> It is often simpler and more efficient for members of the public to access this information on the Commission's website rather than traveling to the Commission to inspect the records in person. Also, we delete the list of types of documents available in the reference room, and instead provide that a regularly updated list of records will be posted to the Commission's electronic reading room.<sup>24</sup> Using an online list, as opposed to a list set forth in the Code of Federal Regulations, will give staff more flexibility to add to the list of routinely available records, consistent with the FOIA Improvement Act's emphasis on proactive release of records.<sup>25</sup> It will also ensure that the posted list accurately reflects the current routinely available records. Lastly, we include additional information about the types of records available through the Commission's Electronic Comment Filing System (ECFS).

19. **Section 0.455 – Other locations at which records may be inspected.** Section 0.455 listed the various bureaus and offices of the Commission at which certain other types of records could be inspected. We delete this section in its entirety. As with section 0.453, we conclude it is more efficient to specify these records on a regularly updated online list rather than on a list in the Code of Federal Regulations.

20. **Section 0.457 – Records not routinely available for public inspection.** Section 0.457 articulates some of the types of records that are routinely withheld from public inspection. We update section 0.457(b)(2) in conformance with the Supreme Court's holding in *Milner v. Department of the Navy*, reading the plain language of FOIA Exemption 2.<sup>26</sup> Consistent with existing Commission practice, we remove several outdated or inapplicable references to types of records that are generally withheld.<sup>27</sup> We add a reference to withholding of some copyrighted materials, in accordance with Department of Justice guidance.<sup>28</sup> Also, we make several minor clerical changes to the rules.<sup>29</sup>

21. **Section 0.458 – Nonpublic information.** Section 0.458 contains the rules for persons who come into possession of nonpublic information as the result of an inadvertent or unauthorized release. We make no changes to this section.

22. **Section 0.459 – Requests that materials or information submitted to the Commission be withheld from public inspection.** Section 0.459 applies to third-party requests for confidential treatment of information given to the Commission. We make no changes to this section.

23. **Section 0.460 – Requests for inspection of records which are routinely available to the public.** Section 0.460 provides the rules for access to records which are routinely already available to the public. We streamline the process for requesting such records by removing the requirement that initial requests be specifically labeled and include the requester's mailing address, phone number, and e-mail address in order to be considered valid. Instead, we provide that Commission staff may contact the

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<sup>23</sup> On [fcc.gov](http://fcc.gov), individual bureau and office sites provide valuable resources regarding their programs and initiatives.

<sup>24</sup> This approach is used for updating the FOIA fee schedule, *see* 47 CFR § 0.467(a)(1) note.

<sup>25</sup> *See, e.g.*, FOIA Improvement Act § 2(1)(A); 5 U.S.C. § 552(a)(2).

<sup>26</sup> 562 U.S. 562 (2011) (modifying the scope of Exemption 2).

<sup>27</sup> These include removing a reference in the introductory paragraph noting that the Commission will entertain requests for inspection of records, except for records that are not the property of the Commission or where disclosure of the records is prohibited by law. This exception has been removed as it is current Commission practice to entertain such requests, even if the records are ultimately withheld.

<sup>28</sup> FOIA Update, Vol. IV, No. 4 (1983) ("OIP Guidance: Copyrighted Materials and the FOIA").

<sup>29</sup> For example, section 0.457(a) was updated to reflect the current Executive Order on classified information and in 0.457(c)(3), and "sec." was changed to "section," consistent with other parts of the rule.



requester if this information becomes necessary.<sup>30</sup> We replace references to the copy contractor and instead direct parties to the Commission's Reference Information Center. We delete section 0.460(i), which provided that records inspected in person be available for seven days. Given the limited number of persons who seek to inspect records in person, this limitation is unnecessary. We also make several minor clerical changes to improve accuracy and readability.<sup>31</sup>

24. **Section 0.461 – Requests for inspection of materials not routinely available for public inspection.** Section 0.461 sets forth the rules for filing requests to view records that are not routinely available to the public. These rules govern the majority of requests under the FOIA. Consistent with section 0.460, we remove the requirement that requests be specifically labeled and include the requester's mailing address, phone number, and e-mail address in order to be considered valid.

25. We also amend subsection (d)(1) to remove the use of facsimile or e-mail to file FOIA requests; instead, requesters are directed to submit their requests either via the postal mail or through the Commission's FOIAonline portal. In section 0.461(d)(2), we clarify that the responsibility to sign FOIA response letters may be delegated to staff of the bureau or office that is the custodian of the records. We amend the provisions of section 0.461(e)(1) concerning date stamping of incoming initial requests to reflect the current procedure as implemented through FOIAonline. In section 0.461(e)(2)(i)(B)(1), we modify the situations in which the processing time may be tolled pending the outcome of a fee matter, explicitly providing that the time for processing a FOIA request will be tolled in cases where the amount of fees authorized is less than the estimated cost for completing the production. This is consistent with existing practice.<sup>32</sup> We update section 0.461(e)(3) to reflect the new methods for FOIA requesters to check on the status of their requests. We also provide for consultation with other agencies regarding records in which other agencies have equities in the Commission's decision concerning the disposition of a FOIA request for those records.<sup>33</sup>

26. In section 0.461(f)(4)-(5), we update the language regarding the use of discretionary authority and segregation of records, to conform it to existing Commission practice. We modify section 0.461(g)(2) to clarify how records will be provided if a requester is unwilling to provide for an extension of time necessary to complete the production. Similar to our rules for FOIA fee waivers<sup>34</sup> and confidentiality requests,<sup>35</sup> in section 0.461(h)(2), we note that merely claiming that a request should be expedited is insufficient to warrant consideration. We also delete section 0.461(n), which provided that records inspected in person be available for only seven days. Given the limited number of persons who seek to inspect records in person, this limitation is unnecessary.<sup>36</sup>

27. We also make modifications to our FOIA appeals rules in section 0.461(i)-(j). Consistent with section 1.7 of the Commission's rules,<sup>37</sup> appeals are considered filed upon receipt. We also note the

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<sup>30</sup> We similarly remove a requirement that requests for publicly available records be separate from requests for other records. 47 CFR § 0.460(g). Commission staff are able to readily handle combined requests.

<sup>31</sup> For example, the URL for the Commission's FOIA reading room has been updated. 47 CFR § 0.460(a).

<sup>32</sup> The prior language provided that time could be tolled for any request involving a fee waiver petition, unless the requester provided a written statement agreeing to pay some or all of the fees pending the outcome of the fee waiver decision. In practice, the Commission has not employed this provision.

<sup>33</sup> Department of Justice, Office of Information Policy, *Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest in Them*, <https://www.justice.gov/oip/blog/foia-guidance-13> (last visited Aug. 18, 2016).

<sup>34</sup> See 47 CFR § 0.470(e)(1).

<sup>35</sup> 47 CFR § 0.459(c).

<sup>36</sup> See also *supra* para. 23, deleting similar provisions in 47 CFR 0.460(i).

<sup>37</sup> 47 CFR § 1.7.

availability of the FOIA-Appeal@fcc.gov e-mail inbox. Lastly, we take additional steps to limit repetitious or deficient FOIA appeals. Petitions for reconsideration will not be entertained after full Commission decisions on FOIA Applications for Review.<sup>38</sup> Such an approach is more consistent with review process in the FOIA, beginning with an initial agency decision, followed by review of that decision by the head of the agency, and finally appeal to the district court.<sup>39</sup>

28. **Section 0.463 – Disclosure of Commission records and information in legal proceedings in which the Commission is a non-party.** Section 0.463 covers the Commission’s procedures for responding to *Touhy* requests.<sup>40</sup> We make no changes to this section.

29. **Section 0.465 – Request for copies of materials which are available, or made available, for public inspection.** Section 0.465 specifies the rules for obtaining physical copies of documents. As the Commission does not currently employ a copy contractor, we replace references to the copy contractor and instead direct requesters to the Reference Information Center. We update the types of other media referred to in section 0.465(c)(2) to reflect current technology. We also make other minor adjustments to the language of the section to improve accuracy and readability.

30. **Section 0.466 – Definitions.** We make no changes to section 0.466, which sets forth definitions applicable to sections 0.467-0.468.

31. **Section 0.467 – Search and review fees.** Section 0.467 explains what types of fees a requester might be charged in responding to a FOIA request. We delete section 0.467(h), which provided that records inspected in person be available for seven days,<sup>41</sup> and additional fees may be charged if the records are requested again after that seven day period. Given the limited number of persons who seek to inspect records in person, this rule is unnecessary.

32. **Section 0.468 – Interest.** Section 0.468 specifies how interest will be calculated for unpaid FOIA fees. We make no changes to this section.

33. **Section 0.469 – Advance payments.** Section 0.469 states the circumstances where the Commission may require advance payment of estimated fees. We make no changes to this section.

34. **§ 0.470 – Assessment of fees.** Section 0.470 sets out the three fee categories of FOIA requests and the rules regarding fee waivers. We make minor clerical changes to section 0.470(a)-(b), ensuring consistent use of the term “duplication” or “duplicating,” the terms used in the FOIA.<sup>42</sup> In section 0.470(c), we remove a requirement that FOIA requesters include an explanation and certification when requesting a fee status other than commercial. As a matter of practice, the Commission does not require this. If not evident from the face of the request, staff may require the requester to provide additional information regarding his or her fee status. We delete the last sentence from section 0.470(d), as it only pertains to in person inspection of records, which, as noted above, is uncommon.<sup>43</sup> Lastly, to improve consistency with the FOIA and in line with current Commission practice, we modify section

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<sup>38</sup> Petitions for reconsideration are not commonly filed in relation to FOIA appeal decisions. Those that the Commission has received generally fail to rely on any new facts or arguments. *See* 47 CFR § 1.106(b)(2). We could rely on the Office of General Counsel’s power to dispose of such matters on delegated authority. *See* 47 CFR § 0.251(b)(2)&(4). We conclude, however, that given the opportunities for review already provided by the FOIA, simply eliminating petitions for reconsideration of FOIA appeals would better promote administrative efficiency.

<sup>39</sup> 5 U.S.C. § 552(a)(6)(A).

<sup>40</sup> *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

<sup>41</sup> *See also supra* paras. 23 and 26, deleting similar provisions in 47 CFR 0.460(i) & 0.461(n).

<sup>42</sup> *See* 5 U.S.C. § 552(a)(4)(A)(iv).

<sup>43</sup> *See supra* paras. 23, 26, and 31.

0.470(f) to provide that fees will not be charged if the cost of collecting and processing the fees are greater than the actual amount of fees to be recovered.<sup>44</sup>

#### IV. PROCEDURAL MATTERS

35. ***No Notice and Comment Required.*** We have determined that the changes we adopt here are general statements of policy, interpretive rules, or rules of agency organization, procedure, or practice, and are therefore exempt from the notice and comment requirements of the Administrative Procedure Act.<sup>45</sup>

36. ***Regulatory Flexibility Act, Paperwork Reduction Act, and Congressional Review Act.*** Section 603 of the Regulatory Flexibility Act, as amended, requires a regulatory flexibility analysis in notice and comment rulemaking proceedings.<sup>46</sup> As we are adopting these rules without notice and comment, no regulatory flexibility analysis is required. This document does not contain any new proposed information collection(s) subject to the Paperwork Reduction Act of 1995.<sup>47</sup> In addition, therefore, it does not contain any new or modified “information collection burden for small business concerns with fewer than 25 employees,” pursuant to the Small Business Paperwork Relief Act of 2002.<sup>48</sup> The Commission will not send a copy of this Order pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A), because the adopted rules are rules of agency organization, procedure, or practice that do not “substantially affect the rights or obligations of non-agency parties.”<sup>49</sup>

#### V. ORDERING CLAUSE

37. Accordingly, IT IS ORDERED that pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the Freedom of Information Act, 5 U.S.C. § 552, as amended, this ORDER is hereby ADOPTED and the rules set forth in the Appendix are hereby AMENDED effective 30 days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>44</sup> 5 U.S.C. § 552(a)(4)(A)(iv)(I) (“No fee may be charged by an agency under this section . . . if the costs of routine collection and processing of the fees are likely to equal or exceed the amount of the fee.”) Previously, the de minimis fee standard was a fixed \$15 amount.

<sup>45</sup> *See supra* note 1.

<sup>46</sup> 5 U.S.C. § 603(a).

<sup>47</sup> 44 U.S.C. §§ 3501-3520.

<sup>48</sup> *See* 44 U.S.C. § 3506(c)(4).

<sup>49</sup> 5 U.S.C. § 804(3)(C) (rules subject to the Congressional Review Act do not include “any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties”).



## APPENDIX

**§0.251 Authority Delegated**

(j) The General Counsel is delegated authority to act as the Commission's Chief FOIA Officer, as specified in 5 U.S.C. § 552(j). In this role, the General Counsel is delegated authority to dismiss FOIA applications for review that are untimely, repetitious, or fail to articulate specific grounds for review.

**§0.441 General.**

(a) Any person desiring to obtain information from the Commission may do so by contacting the Consumer and Governmental Affairs Bureau (CGB). Requests for information and general inquiries may be submitted by:

(1) Internet at <http://www.fcc.gov/consumer-governmental-affairs> or <http://www.fcc.gov/foia>.

(2) Telephone at 1-888-CALL-FCC (1-888-225-5322).

(3) TDD/TDY at 1-888-TELL-FCC (1-888-835-5322).

(4) Correspondence to: Consumer and Governmental Affairs Bureau, 445 12th Street, SW., Washington, DC 20554.

(5) Visiting the Reference Information Center of the Consumer and Governmental Affairs Bureau at Room CY-A257 of the Commission's main office at 445 12th Street, SW., Washington, DC 20554.

(b) The Commission's FOIA Public Liaison is available to assist any person requesting information from the Commission in resolving any concerns related to a Freedom of Information Act request. Requesters may contact the FOIA Public Liaison to seek assistance on resolving disputes related to FOIA requests. See <http://www.fcc.gov/foia/>.

(c) The Office of Government Information Services is available to provide mediation services to help resolve disputes between FOIA requesters and Federal agencies. FOIA requesters may contact the Office of Government Information Services directly to seek its assistance. See <http://ogis.archives.gov/>.

(d) The General Counsel shall, subject to the authority of the Chairman, exercise the responsibilities of the Chief FOIA Officer specified in 5 U.S.C. §552(j).

**§0.442 Disclosure to other Federal government agencies of information submitted to the Commission in confidence.**

(a) The disclosure of records to other Federal government agencies is generally governed by the Paperwork Reduction Act, 44 U.S.C. 3510, rather than the Freedom of Information Act. The acceptance of materials in confidence under §0.457 or §0.459, or any other statute, rule or Commission order, does not preclude their disclosure to other federal agencies.

(b) Information submitted to the Commission in confidence pursuant to §0.457(c)(2) and (3), (d) and (g) or §0.459, or any other statute, rule or order, may be disclosed to other agencies of the Federal government upon request or upon the Commission's own motion, provided:

(1) Specific Commission assurances against such disclosure have not been given;

- (2) The other agency has established a legitimate need for the information;
- (3) Disclosure is made subject to the provisions of 44 U.S.C. 3510(b); and
- (4) Disclosure is not prohibited by the Privacy Act or other provisions of law.

(c) The Commission's staff may give assurances against disclosure of information to other Federal agencies only with the prior written approval of the General Counsel. In no event will assurance against disclosure to other agencies be given in advance of submission of the information to the Commission if submission is required by statute or by the provisions of this chapter; but the notice provisions of paragraph (d) of this section will apply to such required submissions.

(d)(1) Except as provided in paragraphs (d)(2) and (d)(3) of this section, a party who furnished records to the Commission with a request for confidential treatment, see §0.459, will be notified at the time that the request for disclosure is submitted and will be afforded ten calendar days in which to submit an opposition to disclosure. This notification may be made either individually or by public notice.

(2) If the agency requesting the records provides in writing to the satisfaction of the Commission that notice to the party who furnished the records to the Commission will interfere unduly with its law enforcement, national security or homeland defense activities and further states that it will notify that party of the Commission's disclosure once the potential for such interference is eliminated, the Commission will not give notice of disclosure.

(3) A party who furnished records to the Commission in confidence will not be afforded prior notice when the disclosure is made to the Comptroller General of the United States, in the Government Accountability Office. Such a party will instead be notified of disclosure of the records to the Comptroller General either individually or by public notice.

(4) If disclosure is opposed and the Commission decides to make the records available to the other agency, the party who furnished the records to the Commission will be afforded ten calendar days from the date of the ruling to move for a judicial stay of the Commission's action. If the party does not move for stay within this period, the records will be disclosed.

(e) Except as provided in paragraph (d)(3) of this section, nothing in this section is intended to govern disclosure of information to Congress or the Comptroller General.

**§0.445 Publication, availability, and use of opinions, orders, policy statements, interpretations, administrative manuals, staff instructions, and frequently requested records.**

(a) Adjudicatory opinions and orders of the Commission, or its staff acting on delegated authority, are mailed or delivered by electronic means to the parties, and as part of the record, are available for inspection in accordance with §0.453.

(b) Documents adopted by the Commission or a member of its staff on delegated authority and released through the Office of Media Relations are published in the FCC Record. Older materials of this nature are available in the FCC Reports. In the event that such older materials are not published in the FCC Reports, reference should be made to the FEDERAL REGISTER or Pike and Fischer Communications Regulation.

(c) All rulemaking documents or summaries thereof are published in the FEDERAL REGISTER and are available on the Commission's Web site. The complete text of the Commission decision also is released

by the Commission and is available for inspection and copying during normal business hours in the Reference Information Center, via the Electronic Document Management System (EDOCS), or as otherwise specified in the rulemaking document published in the FEDERAL REGISTER.

(d) Formal policy statements and interpretations designed to have general applicability are published on the Commission's website and in the FEDERAL REGISTER, the FCC Record, FCC Reports, or Pike and Fischer Communications Regulation. Commission decisions and other Commission documents not entitled formal policy statements or interpretations may contain substantive interpretations and statements regarding policy, and these are published as part of the document in the FCC Record, FCC Reports or Pike and Fischer Communications Regulation. General statements regarding policy and interpretations furnished to individuals, in correspondence or otherwise, are not ordinarily published.

(e) Copies of all records that have been released to any person under § 0.461 and that because of the nature of their subject matter, the Commission determines have become or are likely to become the subject of subsequent requests for substantially the same records, or that have been requested three or more times, are made available in electronic format.

(f) If the documents described in paragraphs (a) through (d) of this section are published in the FEDERAL REGISTER, the FCC Record, FCC Reports, or Pike and Fischer Communications Regulation, they are indexed, and they may be relied upon, used or cited as precedent by the Commission or private parties in any manner. If they are not so published, they may not be relied upon, used or cited as precedent, except against persons who have actual notice of the document in question or by such persons against the Commission. No person is expected to comply with any requirement or policy of the Commission unless he or she has actual notice of that requirement or policy or a document stating it has been published as provided in this paragraph. Nothing in this paragraph, however, shall be construed as precluding a reference to a recent document that is pending publication.

(g) Subparts A and B of this part describe the functions of the staff and list the matters on which authority has been delegated to the staff. All general instructions to the staff and limitations upon its authority are set forth in those subparts or in decisions of the Commission published in the FEDERAL REGISTER. Instructions to the staff in particular matters or cases are privileged and/or protected and are not published or made available for public inspection.

(h) To the extent required to prevent a clearly unwarranted invasion of personal privacy, or to prevent disclosure of information required or authorized to be withheld by another statute, the Commission may delete identifying details or confidential information when it makes available or publishes any document described in this section. The justification for any such deletion will be fully explained in a preamble to the document.

#### **§0.451 Inspection of records: Generally.**

(a) *Records which are routinely available for public inspection.* Section 0.453 specifies those Commission records which are routinely available for public inspection and where those records may be inspected. Procedures governing requests for inspection of such records are set out in §0.460.

(b) *Records which are not routinely available for public inspection.* Records which are not specified in §0.453 are not routinely available for public inspection. Such records fall into three categories.

(1) The first category consists of categories of records listed in §0.457, and of particular records withheld from public inspection under §0.459. The Commission has determined that there is a statutory basis for withholding these records from public inspection. In some cases, the Commission is prohibited from permitting the inspection of records. This category also includes records that are the property of

another agency that the Commission has no authority to release for inspection. In still other cases, the Commission is authorized, for reason of policy, to withhold records from inspection, but is not required to do so. As applicable, procedures governing demands by competent authority for inspection of these records are set forth in §0.463.

(2) The second category consists of records that are not specified in §0.453 or §0.457 and have not been withheld from inspection under §0.459. In some cases, these records have not been identified for listing. In other cases an individualized determination is required. Procedures governing requests for inspection of these records are set forth in §0.461. Procedures governing demands by competent authority for inspection of these records are set forth in §0.463.

(3) The third category consists of material previously released consistent with the agency's rules that the agency determines is not likely to become the subject of a subsequent FOIA request or otherwise likely to be of broader public interest.

(4) Except as provided in §0.461 and §0.463, or pursuant to §19.735-203 of this chapter, no officer or employee of the Commission shall permit the inspection of records which are not routinely available for public inspection under §0.453, or disclose information contained therein. This provision does not restrict the inspection or disclosure of records described in §0.453 (b)(3).

(c) *Copies.* Section 0.465 applies to requests for copies of Commission records which are routinely available for public inspection under §0.453 and those which are made available for inspection under §0.461. Sections 0.467 and 0.465(c)(3) apply to requests for certified copies of Commission records.

(d) *Search and copying fees.* Section 0.465(c)(2) prescribes the per page fee for copying records made available for inspection under §0.460 or §0.461. Section 0.466 prescribes fees to cover the expense of searching for and reviewing records made available for inspection under §0.460 or §0.461. Review of initial fee determinations under §0.467 through §0.470 and initial fee reduction or waiver determinations under §0.470(e) may be sought under §0.461(j).

### **§0.453 Public reference rooms.**

The Commission's main website at <http://www.fcc.gov> and its electronic reading room at <http://www.fcc.gov/general/freedom-information-act-electronic-reading-room> host the Commission's online public reference room. The Commission also maintains the FCC Reference Information Center as its public reference room at its offices in Washington, DC.

- (a) The Reference Information Center maintains files containing the record of all docketed cases, petitions for rule making and related papers. A file is maintained for each docketed hearing case and for each docketed rule making proceeding. Cards summarizing the history of such cases for the years before 1984 are available for inspection. Information summarizing the history of such cases for the years from 1984 through present is available online on the Electronic Comment Filing System (ECFS). ECFS serves as the repository for official filings in the FCC's docketed proceedings from 1992 to the present. The public can use ECFS to retrieve any document in the system, including selected pre-1992 documents.
- (b) The Commission will maintain a regularly updated listing of other routinely available records in its electronic reading room at <http://www.fcc.gov/general/freedom-information-act-electronic-reading-room>.

### **§0.457 Records not routinely available for public inspection.**

The records listed in this section are not routinely available for public inspection pursuant to 5 U.S.C. 552(b). The records are listed in this section by category, according to the statutory basis for withholding those records from inspection; under each category, if appropriate, the underlying policy considerations affecting the withholding and disclosure of records in that category are briefly outlined. The Commission will entertain requests from members of the public under §0.461 for permission to inspect particular records withheld from inspection under the provisions of this section, and will weigh the policy considerations favoring non-disclosure against the reasons cited for permitting inspection in the light of the facts of the particular case. In making such requests, there may be more than one basis for withholding particular records from inspection. The Commission will permit inspection of records unless Commission staff reasonably foresees that disclosure would harm an interest protected by the exemptions described in 5 U.S.C. 552(b) or where disclosure is prohibited by law. The listing of records by category is not intended to imply the contrary but is solely for the information and assistance of persons making such requests. Requests to inspect or copy the transcripts, recordings or minutes of closed agency meetings will be considered under §0.607 rather than under the provisions of this section.

*(a) Materials that are specifically authorized under criteria established by Executive Order (E.O.) to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order, 5 U.S.C. 552(b)(1).*

(1) Classified materials and information will not be made available for public inspection, including materials classified under E.O. 10450, "Security Requirements for Government Employees"; E.O. 10501, as amended, "Safeguarding Official Information in the Interests of the Defense of the United States"; and E.O. 13526, "Classified National Security Information," or any other executive order concerning the classification of records. See also 47 U.S.C. 154(j).

(2) Materials referred to another Federal agency for classification will not be disclosed while such a determination is pending.

*(b) Materials that are related solely to the internal personnel rules and practices of the Commission, 5 U.S.C. 552(b)(2).*

*(c) Materials that are specifically exempted from disclosure by statute (other than the Government in the Sunshine Act, 5 U.S.C. 552b, provided that such statute either requires that the materials be withheld from the public in such a manner as to leave no discretion on the issue, or establishes particular criteria for withholding or refers to particular types of materials to be withheld), 5 U.S.C. 552(b)(3).* The Commission is authorized under the following statutory provisions to withhold materials from public inspection.

(1) Section 4(j) of the Communications Act, 47 U.S.C. 154(j), provides, in part, that, "The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense." Pursuant to that provision, it has been determined that the following materials should be withheld from public inspection (see also paragraph (a) of this section):

- (i) Maps showing the exact location of submarine cables.
- (ii) Minutes of Commission actions on classified matters.
- (iii) Maps of nation-wide point-to-point microwave networks.

(2) Under section 213 of the Communications Act, 47 U.S.C. 213(f), the Commission is authorized to order, with the reasons therefor, that records and data pertaining to the valuation of the property of



common carriers and furnished to the Commission by the carriers pursuant to the provisions of that section, shall not be available for public inspection. If such an order has been issued, the data and records will be withheld from public inspection, except under the provisions of §0.461. Normally, however, such data and information is available for inspection.

(3) Under section 412 of the Communications Act, 47 U.S.C. 412, the Commission may withhold from public inspection certain contracts, agreements and arrangements between common carriers relating to foreign wire or radio communication. Any person may file a petition requesting that such materials be withheld from public inspection. To support such action, the petition must show that the contract, agreement or arrangement relates to foreign wire or radio communications; that its publication would place American communication companies at a disadvantage in meeting the competition of foreign communication companies; and that the public interest would be served by keeping its terms confidential. If the Commission orders that such materials be kept confidential, they will be made available for inspection only under the provisions of §0.461.

(4) Section 605 of the Communications Act, 47 U.S.C. 605(a), provides, in part, that, “no person not being authorized by the sender shall intercept any communication [by wire or radio] and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communications to any person.” In executing its responsibilities, the Commission regularly monitors radio transmissions. Except as required for the enforcement of the communications laws, treaties and the provisions of this chapter, or as authorized in sec. 605, the Commission is prohibited from divulging information obtained in the course of these monitoring activities; and such information, and materials relating thereto, will not be made available for public inspection.

(5) The Trade Secrets Act, 18 U.S.C. 1905, prohibits the unauthorized disclosure of certain confidential information. See paragraph (d) of this section and §19.735-203 of this chapter.

*(d) Trade secrets and commercial or financial information obtained from any person and privileged or confidential—categories of materials not routinely available for public inspection, 5 U.S.C. 552(b)(4) and 18 U.S.C. 1905.*

(1) The materials listed in this paragraph have been accepted, or are being accepted, by the Commission on a confidential basis pursuant to 5 U.S.C. 552(b)(4). To the extent indicated in each case, the materials are not routinely available for public inspection. If the protection afforded is sufficient, it is unnecessary for persons submitting such materials to submit therewith a request for non-disclosure pursuant to §0.459. A persuasive showing as to the reasons for inspection will be required in requests submitted under §0.461 for inspection of such materials.

(i) Financial reports submitted by radio or television licensees.

(ii) Applications for equipment authorizations (type acceptance, type approval, certification, or advance approval of subscription television systems), and materials relating to such applications, are not routinely available for public inspection prior to the effective date of the authorization. The effective date of the authorization will, upon request, be deferred to a date no earlier than that specified by the applicant. Following the effective date of the authorization, the application and related materials (including technical specifications and test measurements) will be made available for inspection upon request (see §0.460). Portions of applications for equipment certification of scanning receivers and related materials will not be made available for inspection.

(iii) Information submitted in connection with audits, investigations and examination of records pursuant to 47 U.S.C. 220.

(iv) Programming contracts between programmers and multichannel video programming distributors.

(v) The rates, terms and conditions in any agreement between a U.S. carrier and a foreign carrier that govern the settlement of U.S.-international traffic, including the method for allocating return traffic, except as otherwise specified by the Commission by order or by the International Bureau under delegated authority. *See, e.g., International Settlements Policy Reform*, IB Docket Nos. 11-80, 05-254, 09-10, RM-11322, Report and Order, FCC 12-145 (rel. Nov. 29, 2012).

(vi) Outage reports filed under Part 4 of this chapter.

(vii) The following records, relating to coordination of satellite systems pursuant to procedures codified in the International Telecommunication Union (ITU) Radio Regulations:

(A) Records of communications between the Commission and the ITU related to the international coordination process, and

(B) Documents prepared in connection with coordination, notification, and recording of frequency assignments and Plan modifications, including but not limited to minutes of meetings, supporting exhibits, supporting correspondence, and documents and correspondence prepared in connection with operator-to-operator arrangements.

(viii) Information submitted with a 911 reliability certification pursuant to 47 CFR §12.4 that consists of descriptions and documentation of alternative measures to mitigate the risks of nonconformance with certification elements, information detailing specific corrective actions taken with respect to certification elements, or supplemental information requested by the Commission with respect to such certification.

(ix) Confidential Broadcaster Information, as defined in §1.2206(d) of this chapter, submitted by a broadcast television licensee in a broadcast television spectrum reverse auction conducted under section 6403 of the Middle Class Tax Relief and Job Creation Act of 2012 (Pub. L. 112-96) (the “Spectrum Act”), or in the application to participate in such a reverse auction, is not routinely available for public inspection until the reassignments and reallocations under section 6403(b)(1)(B) of the Spectrum Act become effective or until two years after public notice that the reverse auction is complete and that no such reassignments and reallocations shall become effective. In the event that reassignments and reallocations under section 6403(b)(1)(B) of the Spectrum Act become effective, Confidential Broadcaster Information pertaining to any unsuccessful reverse auction bid or pertaining to any unsuccessful application to participate in such a reverse auction will not be routinely available for public inspection until two years after the effective date.

(x) Copyrighted materials the release of which would have a substantial adverse effect on the copyright holder’s potential market, except to the extent such a release can be considered fair use.

NOTE TO SUBPARAGRAPH (d)(v): The content of the communications described in paragraph (d)(1)(vii)(A) of this section is in some circumstances separately available through the ITU's publication process, or through records available in connection with the Commission's licensing procedures.

(2) Unless the materials to be submitted are listed in paragraph (d)(1) of this section and the protection thereby afforded is adequate, any person who submits materials which he or she wishes withheld from public inspection under 5 U.S.C. 552(b)(4) must submit a request for non-disclosure pursuant to §0.459. If it is shown in the request that the materials contain trade secrets or privileged or

confidential commercial, financial or technical data, the materials will not be made routinely available for inspection; and a persuasive showing as to the reasons for inspection will be required in requests for inspection submitted under §0.461. In the absence of a request for non-disclosure, the Commission may, in the unusual instance, determine on its own motion that the materials should not be routinely available for public inspection.

(e) *Interagency and intra-agency memoranda or letters, 5 U.S.C. 552(b)(5)*. Interagency and intra-agency memoranda or letters and the work papers of members of the Commission or its staff will not be made available for public inspection, except in accordance with the procedures set forth in §0.461. Normally such papers are privileged and not available to private parties through the discovery process, because their disclosure would tend to restrain the commitment of ideas to writing, would tend to inhibit communication among Government personnel, and would, in some cases, involve premature disclosure of their contents. The Commission will not use this deliberative process exemption to withhold records created 25 years or more before the date on which the request was received.

(f) *Personnel, medical and other files whose disclosure would constitute a clearly unwarranted invasion of personal privacy, 5 U.S.C. 552(b)(6)*. Under E.O. 12107, the Commission maintains an Official Personnel Folder for each of its employees. Such folders are under the jurisdiction and control, and are a part of the records, of the U.S. Office of Personnel Management. Except as provided in the rules of the Office of Personnel Management (5 CFR 293.311), such folders will not be made available for public inspection by the Commission. In addition, other records of the Commission containing private, personal or financial information will be withheld from public inspection.

(g) *Under 5 U.S.C. 552(b)(7), records compiled for law enforcement purposes, to the extent that production of such records:*

- (1) Could reasonably be expected to interfere with enforcement proceedings;
- (2) Would deprive a person of a right to fair trial or an impartial adjudication;
- (3) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;
- (4) Could reasonably be expected to disclose the identity of a confidential source;
- (5) Would disclose investigative techniques or procedures or would disclose investigative guidelines if such disclosure could reasonably be expected to risk circumvention of the law; or
- (6) Could reasonably be expected to endanger the life or physical safety of any individual.

#### **§0.458 Nonpublic information.**

Any person regulated by or practicing before the Commission coming into possession of written nonpublic information (including written material transmitted in electronic form) as described in §19.735-203(a) of this chapter under circumstances where it appears that its release was inadvertent or otherwise unauthorized shall be obligated to and shall promptly return the information to the Commission's Office of Inspector General without further distribution or use. See 47 CFR 19.735-203.

#### **§0.459 Requests that materials or information submitted to the Commission be withheld from public inspection.**

- (a)(1) *Procedures applicable to filings in non-electronic proceedings*. Any person submitting

information or materials to the Commission may submit therewith a request that such information not be made routinely available for public inspection. (If the materials are specifically listed in §0.457, such a request is unnecessary.) A copy of the request shall be attached to and shall cover all of the materials to which it applies and all copies of those materials. If feasible, the materials to which the request applies shall be physically separated from any materials to which the request does not apply; if this is not feasible, the portion of the materials to which the request applies shall be identified. In the latter circumstance, where confidential treatment is sought only for a portion of a document, the person submitting the document shall submit a redacted version for the public file.

(2) *Procedures applicable to filings in electronic proceedings.* In proceedings to which the electronic filing requirements set forth in §1.49(f) of this chapter apply, a party seeking confidential treatment of a portion of a filing must submit in electronic format either a redacted version of the document or an affidavit that it is impossible to submit a redacted document consistent with the filing requirements of this section. Where a party demonstrates that even the fact of a filing must remain confidential, and that this is consistent with the requirements of this section, this affidavit may be filed in paper format under seal.

(3) Comments and other materials may not be submitted by means of the Commission's Electronic Comment Filing System (ECFS) with a request for confidential treatment under this section.

(4) The Commission may use abbreviated means for indicating that the submitter of a record seeks confidential treatment, such as a checkbox enabling the submitter to indicate that the record is confidential. However, upon receipt of a request for inspection of such records pursuant to §0.461, the submitter will be notified of such request pursuant to §0.461(d)(3) and will be requested to justify the confidential treatment of the record, as set forth in paragraph (b) of this section.

(b) Except as provided in §0.459(a)(3), each such request shall contain a statement of the reasons for withholding the materials from inspection (see §0.457) and of the facts upon which those records are based, including:

- (1) Identification of the specific information for which confidential treatment is sought;
- (2) Identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission;
- (3) Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged;
- (4) Explanation of the degree to which the information concerns a service that is subject to competition;
- (5) Explanation of how disclosure of the information could result in substantial competitive harm;
- (6) Identification of any measures taken by the submitting party to prevent unauthorized disclosure;
- (7) Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties;
- (8) Justification of the period during which the submitting party asserts that material should not be available for public disclosure; and

(9) Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted.

(c) Casual requests (including simply stamping pages “confidential”) which do not comply with the requirements of paragraphs (a) and (b) of this section will not be considered.

(d)(1) If a response in opposition to a confidentiality request is filed, the party requesting confidentiality may file a reply within ten business days. All responses or replies filed under this paragraph must be served on all parties.

(2) Requests which comply with the requirements of paragraphs (a) and (b) of this section will be acted upon by the appropriate custodian of records (see §0.461(d)(1)), who is directed to grant the request if it demonstrates by a preponderance of the evidence that non-disclosure is consistent with the provisions of the Freedom of Information Act, 5 U.S.C. 552. If the request for confidentiality is granted, the ruling will be placed in the public file in lieu of the materials withheld from public inspection.

(3) The Commission may defer acting on requests that materials or information submitted to the Commission be withheld from public inspection until a request for inspection has been made pursuant to §0.460 or §0.461. The information will be accorded confidential treatment, as provided for in §0.459(g) and §0.461, until the Commission acts on the confidentiality request and all subsequent appeal and stay proceedings have been exhausted.

(e) If the materials are submitted voluntarily (*i.e.*, absent any requirement by statute, regulation, or the Commission), the person submitting them may request the Commission to return the materials without consideration if the request for confidentiality should be denied. In that event, the materials will ordinarily be returned (e.g., an application will be returned if it cannot be considered on a confidential basis). Only in the unusual instance where the public interest so requires will the materials be made available for public inspection. However, no materials submitted with a request for confidentiality will be returned if a request for inspection has been filed under §0.461. If submission of the materials is required by the Commission and the request for confidentiality is denied, the materials will be made available for public inspection once the period for review of the denial has passed.

(f) If no request for confidentiality is submitted, the Commission assumes no obligation to consider the need for non-disclosure but, in the unusual instance, may determine on its own motion that the materials should be withheld from public inspection. *See* §0.457(d).

(g) If a request for confidentiality is denied, the person who submitted the request may, within ten business days, file an application for review by the Commission. If the application for review is denied, the person who submitted the request will be afforded ten business days in which to seek a judicial stay of the ruling. If these periods expire without action by the person who submitted the request, the materials will be returned to the person who submitted them or will be placed in a public file. Notice of denial and of the time for seeking review or a judicial stay will be given by telephone, with follow-up notice in writing. The first day to be counted in computing the time periods established in this paragraph is the day after the date of oral notice. Materials will be accorded confidential treatment, as provided in §0.459(g) and §0.461, until the Commission acts on any timely applications for review of an order denying a request for confidentiality, and until a court acts on any timely motion for stay of such an order denying confidential treatment.

(h) If the request for confidentiality is granted, the status of the materials is the same as that of materials listed in §0.457. Any person wishing to inspect them may submit a request for inspection under §0.461.



(i) Third party owners of materials submitted to the Commission by another party may participate in the proceeding resolving the confidentiality of the materials.

**§0.460 Requests for inspection of records which are routinely available for public inspection.**

(a) Section 0.453 specifies those Commission records which are routinely available for public inspection and the places at which those records may be inspected. Subject to the limitations set out in this section, a person who wants to inspect such records need only appear at the Reference Information Center and ask to see the records. Many records also are available on the Commission's Web site, <http://www.fcc.gov> and the Commission's electronic reading room, <http://www.fcc.gov/general/freedom-information-act-electronic-reading-room>. Commission documents are generally published in the FCC Record, and many of these documents or summaries thereof are also published in the FEDERAL REGISTER.

(b) A person who wishes to inspect the records must appear at the specified location during the office hours of the Commission and must inspect the records at that location. (Procedures governing requests for copies are set out in §0.465.) However, arrangements may be made in advance, by telephone or by correspondence, to make the records available for inspection on a particular date, and there are many circumstances in which such advance arrangements will save inconvenience. If the request is for a large number of documents, for example, a delay in collecting them is predictable. Current records may be in use by the staff when the request is made. Older records may have been forwarded to another location for storage.

(c) The records in question must be reasonably described by the person requesting them to permit their location by staff personnel. The information needed to locate the records will vary, depending on the records requested. Advice concerning the kind of information needed to locate particular records will be furnished in advance upon request. Members of the public will not be given access to the area in which records are kept and will not be permitted to search the files.

(d) If it appears that there will be an appreciable delay in locating or producing the records (as where a large number of documents is the subject of a single request or where an extended search for a document appears to be necessary), the requester may be directed to submit or confirm the request in writing in appropriate circumstances.

(e)(1) Written requests for records routinely available for public inspection under §0.453 shall be directed to the Commission's Reference Information Center pursuant to the procedures set forth in §0.465. Requests shall set out all information known to the person making the request which would be helpful in identifying and locating the document, including the date range of the records sought, if applicable. Upon request by Commission staff, the requester shall provide his or her street address, phone number (if any), and e-mail address (if any). Written requests shall, in addition, specify the maximum search fee the person making the request is prepared to pay (*see* §0.467).

(2) Written requests shall be delivered or mailed directly to the Commission's Reference Information Center (*see* §0.465(a)).

(f) When a written request is received by the Reference Information Center, it will be date-stamped.

(g) All requests limited to records listed in §0.453 will be granted, subject to paragraph (j) of this section.

(h) The records will be produced for inspection at the earliest possible time.

(i) In addition to the other requirements of this section, the following provisions apply to the reports filed with the Commission pursuant to 5 CFR parts 2634 and 3902.

(1) Such reports shall not be obtained or used:

(i) For any unlawful purpose;

(ii) For any commercial purpose, other than by news and communications media for dissemination to the general public;

(iii) For determining or establishing the credit rating of any individual; or

(iv) For use, directly or indirectly, in the solicitation of money for any political, charitable, or other purpose.

(2) Such reports may not be made available to any person nor may any copy thereof be provided to any person except upon a written application by such person stating:

(i) That person's name, occupation and address;

(ii) The name and address of any other person or organization on whose behalf the inspection or copying is requested; and

(iii) That such person is aware of the prohibitions on the obtaining or use of the report. Further, any such application for inspection shall be made available to the public throughout the period during which the report itself is made available to the public.

(Secs. 4, 303, 307, 48 Stat., as amended, 1066, 1082, 1083; 47 U.S.C. 154, 303, 397; 18 U.S.C. 207(j))

#### **§0.461 Requests for inspection of materials not routinely available for public inspection.**

Any person desiring to inspect Commission records that are not specified in §0.453 shall file a request for inspection meeting the requirements of this section. The FOIA Public Liaison is available to assist persons seeking records under this section. See §0.441(a).

(a)(1) Records include:

(i) Any information that would be an agency record subject to the requirements of the Freedom of Information Act when maintained by the Commission in any format, including an electronic format; and

(ii) Any information maintained for the Commission by an entity under Government contract.

(2) The records in question must be reasonably described by the person requesting them to permit personnel to locate them with a reasonable amount of effort. Whenever possible, a request should include specific information about each record sought, such as the title or name, author, recipient, and subject matter of the record. Requests must also specify the date or time period for the records sought. The custodian of records sought may contact the requester to obtain further information about the records sought to assist in locating them.

(3) The person requesting records under this section may specify the form or format of the records to be produced provided that the records may be made readily reproducible in the requested form or format.

(b)(1) Requests shall reasonably describe, for each document requested (see §0.461(a)(1)), all information known to the person making the request that would be helpful in identifying and locating the document, including the date range of the records sought, if applicable, and the persons/offices to be searched, if known. Upon request by Commission staff, the requester shall provide his or her street address, phone number (if any), and e-mail address (if any).

(2) The request shall, in addition, specify the maximum search fee the person making the request is prepared to pay or a request for waiver or reduction of fees if the requester is eligible (see §0.470(e)). By filing a FOIA request, the requester agrees to pay all applicable fees charged under §0.467, unless the person making the request seeks a waiver of fees (see §0.470(e)), in which case the Commission will rule on the waiver request before proceeding with the search.

(c) If the records are of the kinds listed in §0.457 or if they have been withheld from inspection under §0.459, the request shall, in addition, contain a statement of the reasons for inspection and the facts in support thereof. In the case of other materials, no such statement need accompany the request, but the custodian of the records may require the submission of such a statement if he or she determines that the materials in question may lawfully be withheld from inspection.

(d)(1) Requests shall be

(i) Filed electronically through the Internet at <http://foiaonline.regulations.gov/>; or

(ii) Delivered or mailed to the Managing Director, Attn: FOIA Request, FCC, 445 12th Street, SW., Room 1-A836, Washington, DC 20554.

(2) For purposes of this section, the custodian of the records is the Chief of the Bureau or Office where the records are located. The Chief of the Bureau or Office may designate an appropriate person to act on a FOIA request. The Chief of the Bureau or Office may also designate an appropriate person to sign the response to any FOIA request. *See* § 0.461(m).

(3) If the request is for materials submitted to the Commission by third parties and not open to routine public inspection under §0.457(d), §0.459, or another Commission rule or order, or if a request for confidentiality is pending pursuant to §0.459, or if the custodian of records has reason to believe that the information may contain confidential commercial information, one copy of the request will be provided by the custodian of the records (*see* §0.461(e)) to the person who originally submitted the materials to the Commission. If there are many persons who originally submitted the records and are entitled to notice under this paragraph, the custodian of records may use a public notice to notify the submitters of the request for inspection. The submitter or submitters will be given ten calendar days to respond to the FOIA request. *See* §0.459(d)(1). If a submitter has any objection to disclosure, he or she is required to submit a detailed written statement specifying all grounds for withholding any portion of the information (*see* §0.459). This response shall be served on the party seeking to inspect the records. The requester may submit a reply within ten calendar days unless a different period is specified by the custodian of records. The reply shall be served on all parties that filed a response. In the event that a submitter fails to respond within the time specified, the submitter will be considered to have no objection to disclosure of the information.

NOTE TO PARAGRAPH (d)(3): Under the *ex parte* rules, §1.1206(a)(7) of this chapter, a proceeding involving a FOIA request is a permit-but-disclose proceeding, but is subject to the special service rules in this paragraph. We also note that while the FOIA request itself is a permit-but-disclose proceeding, a pleading in a FOIA proceeding may also constitute a presentation in another proceeding if it addresses the merits of that proceeding.

(e)(1) When the request is received by the Managing Director, it will be assigned to the Freedom of Information Act (FOIA) Control Office, where it will be entered into the FOIAonline system. The request will be reviewed and, if it is determined that the request meets all the requirements of a proper FOIA request, will be designated as perfected. A FOIA request is then considered properly received. This will occur no later than ten calendar days after the request is first received by the agency.

(2)(i) Except for the purpose of making a determination regarding expedited processing under paragraph (h) of this section, the time for processing a request for inspection of records will be tolled

(A) While the custodian of records seeks reasonable clarification of the request;

(B) Until clarification with the requester of issues regarding fee assessment occurs, including:

(1) Where the amount of fees authorized is less than the estimated cost for completing the production;

(2) Following the denial of a fee waiver, unless the requester had provided a written statement agreeing to pay the fees if the fee waiver was denied;

(3) Where advance payment is required pursuant to §0.469 and has not been made.

(ii) Only one Commission request for information shall be deemed to toll the time for processing a request for inspection of records under §0.461(e)(2)(i)(A). Such request must be made no later than ten calendar days after a request is properly received by the custodian of records under §0.461(e)(1).

(3) The FOIA Control Office will send an acknowledgement to the requester notifying the requester of the control number assigned to the request, the due date of the response, and the telephone contact number (202-418-0440) to be used by the requester to obtain the status of the request. Requesters may also obtain the status of an FOIA request via e-mail at [foia-public-liaison@fcc.gov](mailto:foia-public-liaison@fcc.gov) or by viewing their request at <http://foiaonline.regulations.gov/>.

(4) Multiple FOIA requests by the same or different FOIA requesters may be consolidated for disposition. See also §0.470(b)(2).

(f) Requests for inspection of records will be acted on as follows by the custodian of the records.

(1) If the Commission is prohibited from disclosing the records in question, the request for inspection will be denied with a statement setting forth the specific grounds for denial.

(2)(i) If records in the possession of the Commission are the property of another agency, the request will be referred to that agency and the person who submitted the request will be so advised, with the reasons for referral.

(ii) If it is determined that the FOIA request seeks only records of another agency or department, the FOIA requester will be so informed by the FOIA Control Officer and will be directed to the correct agency or department.

(iii) If the records in the possession of the Commission involve the equities of another agency, the Commission will consult with that agency prior to releasing the records.

(3) If it is determined that the Commission does not have authority to withhold the records from

public inspection, the request will be granted.

(4) If it is determined that the Commission has authority to withhold the records from public inspection, the considerations favoring disclosure and non-disclosure will be weighed in light of the facts presented, and the Commission may, at its discretion, grant the request in full or in part, or deny the request.

(5) If there is a statutory basis for withholding part of a document from inspection, to the extent that portion is reasonably segregable, that part will be deleted and the remainder will be made available for inspection. Unless doing so would harm an interest protected by an applicable exemption, records disclosed in part shall be marked or annotated, if technically feasible, to show the amount of information deleted, the location of the information deleted, and the exemption under which the deletion is made.

(6) In locating and recovering records responsive to an FOIA request, only those records within the Commission's possession and control as of the date a request is perfected shall be considered.

(g)(1) The custodian of the records will make every effort to act on the request within twenty business days after it is received and perfected by the FOIA Control Office. However, if a request for clarification has been made under §0.461(e)(2)(i)(A) or an issue is outstanding regarding the payment of fees for processing the FOIA request is pending under §0.461(e)(2)(i)(B), the counting of time will start upon resolution of these requests. If it is not possible to locate the records and to determine whether they should be made available for inspection within twenty business days, the custodian may, upon timely notice to the requester, extend the time for action by up to ten business days, in any of the following circumstances:

(i) It is necessary to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.

(ii) It is necessary to search for, collect and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) It is necessary to consult with another agency having a substantial interest in the determination of the request, or among two or more components of the Commission having substantial subject matter interest therein.

(2) The custodian of the records will notify the requester in writing of any extension of time exercised pursuant to paragraph (g) of this section. The custodian of the records may also call the requester to extend the time provided a subsequent written confirmation is provided. If it is not possible to locate the records and make the determination within the extended period, the person or persons who made the request will be provided an opportunity to limit the scope of the request so that it may be processed within the extended time limit, or an opportunity to arrange an alternative time frame for processing the request or a modified request, and asked to consent to an extension or further extension. If the requester agrees to an extension, the custodian of the records will confirm the agreement in a letter or e-mail specifying the length of the agreed-upon extension. If he or she does not agree to an extension, the request will be denied, on the grounds that the custodian has not been able to locate the records and/or to make the determination within the period for a ruling mandated by the Freedom of Information Act, 5 U.S.C. 552. In that event, the custodian will provide the requester with the records, if any, that could be located and produced within the allotted time. The requester may file an application for review by the Commission.

(3) If the custodian of the records grants a request for inspection of records submitted to the Commission in confidence under §0.457(d), §0.459, or some other Commission rule or order, the



custodian of the records will give the submitter written notice of the decision and of the submitter's right to seek review pursuant to §0.461(i).

(h)(1) Requesters who seek expedited processing of FOIA requests shall submit such requests, along with their FOIA requests, to the Managing Director, as described in §0.461(d).

(2) Expedited processing shall be granted to a requester demonstrating a compelling need that is certified by the requester to be true and correct to the best of his or her knowledge and belief. Simply stating that the request should be expedited is not a sufficient basis to obtain expedited processing.

(3) For purposes of this section, *compelling need* means—

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

(ii) With respect to a request made by a person primarily engaged in disseminating information, there is an urgency to inform the public concerning actual or alleged Federal Government activity.

(4)(i) Notice of the determination whether to grant expedited processing shall be provided to the requester by the custodian of records within ten calendar days after receipt of the request by the FOIA Control Office. Once the determination has been made to grant expedited processing, the custodian shall process the FOIA request as soon as practicable.

(ii) If a request for expedited processing is denied, the person seeking expedited processing may file an application for review within five business days after the date of the written denial. The application for review shall be delivered or mailed to the General Counsel. (For general procedures relating to applications for review, see §1.115 of this chapter.) The Commission shall act expeditiously on the application for review, and shall notify the custodian of records and the requester of the disposition of such an application for review.

(i)(1) If a request for inspection of records submitted to the Commission in confidence under §0.457(d), §0.459, or another Commission rule or order is granted in whole or in part, an application for review may be filed by the person who submitted the records to the Commission, by a third party owner of the records or by a person with a personal privacy interest in the records, or by the person who filed the request for inspection of records within the ten business days after the date of the written ruling. The application for review shall be filed within ten business days after the date of the written ruling, shall be delivered or mailed to the General Counsel, or sent via e-mail to FOIA-Appeal@fcc.gov, and shall be served on the person who filed the request for inspection of records and any other parties to the proceeding. The person who filed the request for inspection of records may respond to the application for review within ten business days after it is filed.

(2) The first day to be counted in computing the time period for filing the application for review is the day after the date of the written ruling. An application for review is considered filed when it is received by the Commission. If an application for review is not filed within this period, the records will be produced for inspection.

(3) If an application for review is denied, the person filing the application for review will be notified in writing and advised of his or her rights. A denial of an application for review is not subject to a petition for reconsideration under §1.106.

(4) If an application for review filed by the person who submitted, owns, or has a personal privacy

interest in the records to the Commission is denied, or if the records are made available on review which were not initially made available, the person will be afforded ten business days from the date of the written ruling in which to move for a judicial stay of the Commission's action. The first day to be counted in computing the time period for seeking a judicial stay is the day after the date of the written ruling. If a motion for stay is not made within this period, the records will be produced for inspection.

(j) Except as provided in paragraph (i) of this section, an application for review of an initial action on a request for inspection of records, a fee determination (*see* §0.467 through §0.470), or a fee reduction or waiver decision (*see* §0.470(e)) may be filed only by the person who made the request. The application shall be filed within 90 calendar days after the date of the written ruling by the custodian of records. An application for review is considered filed when it is received by the Commission. The application shall be delivered or mailed to the General Counsel, or sent via e-mail to FOIA-Appeal@fcc.gov. If the proceeding involves records subject to confidential treatment under §0.457 or §0.459, or involves a person with an interest as described in §0.461(i), the application for review shall be served on such persons. That person may file a response within 14 calendar days after the application for review is filed. If the records are made available for review, the person who submitted them to the Commission will be afforded 14 calendar days after the date of the written ruling to seek a judicial stay. *See* paragraph (i) of this section. The first day to be counted in computing the time period for filing the application for review or seeking a judicial stay is the day after the date of the written ruling.

NOTE TO PARAGRAPHS (i) AND (j): The General Counsel may review applications for review with the custodian of records and attempt to informally resolve outstanding issues with the consent of the requester. For general procedures relating to applications for review, *see* §1.115 of this chapter

(k)(1)(i) The Commission will make every effort to act on an application for review of an action on a request for inspection of records within twenty business days after it is filed. In the following circumstances and to the extent time has not been extended under paragraphs (g)(1)(i), (ii), or (iii) of §0.461(g) of this section, the Commission may extend the time for acting on the application for review up to ten business days. (The total period of extensions taken under this paragraph and under paragraph (g) of this section without the consent of the person who submitted the request shall not exceed ten business days.):

(A) It is necessary to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(B) It is necessary to search for, collect and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(C) It is necessary to consult with another agency having a substantial interest in the determination of the request or among two or more components of the Commission having substantial subject matter interest therein.

(ii) If these circumstances are not present, the person who made the request may be asked to consent to an extension or further extension. If the requester or person who made the request agrees to an extension, the General Counsel will confirm the agreement in a letter specifying the length of the agreed-upon extension. If the requestor or person who made the request does not agree to an extension, the Commission will continue to search for and/or assess the records and will advise the person who made the request of further developments; but that person may file a complaint in an appropriate United States district court.

(2) The Commission may at its discretion or upon request consolidate for consideration related applications for review filed under §0.461(i) or §0.461(j).

(l)(1) Subject to the application for review and judicial stay provisions of paragraphs (i) and (j) of this section, if the request is granted, the records will be produced for inspection at the earliest possible time.

(2) If a request for inspection of records becomes the subject of an action for judicial review before the custodian of records has acted on the request, or before the Commission has acted on an application for review, the Commission may continue to consider the request for production of records.

(m) Staff orders and letters ruling on requests for inspection are signed by the official (or officials) who give final approval of their contents. Decisions of the Commission ruling on applications for review will set forth the names of the Commissioners participating in the decision.

**§0.463 Disclosure of Commission records and information in legal proceedings in which the Commission is a non-party.**

(a) This section sets forth procedures to be followed with respect to the production or disclosure of any material within the custody and control of the Commission, any information relating to such material, or any information acquired by any person while employed by the Commission as part of the person's official duties or because of the person's official status.

(b) In the event that a demand is made by a court or other competent authority outside the Commission for the production of records or testimony (e.g., a subpoena, order, or other demand), the General Counsel shall promptly be advised of such demand, the nature of the records or testimony sought, and all other relevant facts and circumstances. The General Counsel, in consultation with the Managing Director, will thereupon issue such instructions as he or she may deem advisable consistent with this subpart.

(c) A party in a court or administrative legal proceeding in which the Commission is a non-party who wishes to obtain records or testimony from the Commission shall submit a written request to the General Counsel. Such request must be accompanied by a statement setting forth the nature of the proceeding (including any relevant supporting documentation, e.g., a copy of the Complaint), the relevance of the records or testimony to the proceeding (including a proffer concerning the anticipated scope and duration of the testimony), a showing that other evidence reasonably suited to the requester's needs is not available from any other source (including a request submitted pursuant to §0.460 or §0.461 of the Commission's rules), and any other information that may be relevant to the Commission's consideration of the request for records or testimony. The purpose of the foregoing requirements is to assist the General Counsel in making an informed decision regarding whether the production of records or the testimony should be authorized.

(d) In deciding whether to authorize the release of records or to permit the testimony of present or former Commission personnel, the General Counsel, in consultation with the Managing Director, shall consider the following factors:

(1) Whether the request or demand would involve the Commission in issues or controversies unrelated to the Commission's mission;

(2) Whether the request or demand is unduly burdensome;

(3) Whether the time and money of the Commission and/or the United States would be used for private purposes;

- (4) The extent to which the time of employees for conducting official business would be compromised;
- (5) Whether the public might misconstrue variances between personal opinions of employees and Commission policy;
- (6) Whether the request or demand demonstrates that the records or testimony sought are relevant and material to the underlying proceeding, unavailable from other sources, and whether the request is reasonable in its scope;
- (7) Whether, if the request or demand were granted, the number of similar requests would have a cumulative effect on the expenditure of Commission resources;
- (8) Whether the requestor has agreed to pay search and review fees as set forth in §0.467 of this subpart;
- (9) Whether disclosure of the records or the testimony sought would otherwise be inappropriate under the circumstances; and
- (10) Any other factor that is appropriate.

(e) Among those demands and requests in response to which compliance will not ordinarily be authorized are those with respect to which any of the following factors exist:

- (1) Disclosure of the records or the testimony would violate a statute, Executive Order, rule, or regulation;
- (2) The integrity of the administrative and deliberative processes of the Commission would be compromised;
- (3) Disclosure of the records or the testimony would not be appropriate under the rules of procedure governing the case or matter in which the demand arose;
- (4) Disclosure of the records, including release *in camera*, or the testimony, is not appropriate or required under the relevant substantive law concerning privilege;
- (5) Disclosure of the records, except when *in camera* and necessary to assert a claim of privilege, or of the testimony, would reveal information properly classified or other matters exempt from unrestricted disclosure; or
- (6) Disclosure of the records or the testimony could interfere with ongoing Commission enforcement proceedings or other legal or administrative proceedings, compromise constitutional rights, reveal the identity of an intelligence source or confidential informant, or disclose trade secrets or similarly confidential commercial or financial information.

(f) The General Counsel, following consultation with the Managing Director and any relevant Commission Bureau or Office, is authorized to approve non-privileged testimony by a present or former employee of the Commission or the production of non-privileged records in response to a valid demand issued by competent legal authority, or a request for records or testimony received under this section, and to assert governmental privileges on behalf of the Commission in litigation that may be associated with any such demand or request.

(g) Any employee or former employee of the Commission who receives a demand for records of the Commission or testimony regarding the records or activities of the Commission shall promptly notify the General Counsel so that the General Counsel may take appropriate steps to protect the Commission's rights.

(Secs. 4(i), 303(r), Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303(r); 5 U.S.C. 301; 47 CFR 0.231(d))

**§0.465 Request for copies of materials which are available, or made available, for public inspection.**

(a) The Commission may award a contract to a commercial duplication firm to make copies of Commission records and offer them for sale to the public. In addition to the charge for copying, the contractor may charge a search fee for locating and retrieving the requested documents from the Commission's files.

NOTE TO PARAGRAPH (a): The name, address, telephone number, and schedule of fees for the current copy contractor, if any, are published at the time of contract award or renewal in a public notice and periodically thereafter. Current information is available at <http://www.fcc.gov/foia> and <http://www.fcc.gov/consumer-governmental-affairs>. Questions regarding this information should be directed to the Reference Information Center of the Consumer and Governmental Affairs Bureau at 202-418-0270.

(b)(1) Records routinely available for public inspection under §0.453 are available to the public through the Commission's Reference Information Center. Section 0.461 does not apply to such records.

(2) Audio or video recordings or transcripts of Commission proceedings are available to the public through the Commission's Reference Information Center. In some cases, only some of these formats may be available.

(c)(1) Contractual arrangements which have been entered into with commercial firms, as described in this section, do not in any way limit the right of the public to inspect Commission records or to retrieve whatever information may be desired. Coin-operated and debit card copy machines are available for use by the public.

(2) The Commission has reserved the right to make copies of its records for its own use or for the use of other agencies of the U.S. Government. When it serves the regulatory or financial interests of the U.S. Government, the Commission will make and furnish copies of its records free of charge. In other circumstances, however, if it should be necessary for the Commission to make and furnish copies of its records for the use of others, the fee for this service shall be ten cents (\$0.10) per page or \$5 per computer disk in addition to charges for staff time as provided in §0.467. For copies prepared with other media, such as thumb drives or other portable electronic storage, the charge will be the actual direct cost including operator time. Requests for copying should be accompanied by a statement specifying the maximum copying fee the person making the request is prepared to pay. If the Commission estimates that copying charges are likely to exceed the greater of \$25 or the amount which the requester has indicated that he/she is prepared to pay, then it shall notify the requester of the estimated amount of fees. Such a notice shall offer the requester the opportunity to confer with Commission personnel with the object of revising or clarifying the request.

NOTE TO PARAGRAPH (c)(2): The criterion considered in acting on a waiver request is whether "waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public." 5 U.S.C. 552(a)(4)(A). A request for a waiver or

reduction of fees will be decided by the General Counsel as set forth in §0.470(e).

(3) *Certified Documents.* Copies of documents which are available or made available, for inspection under §§0.451 through 0.465, will be prepared and certified, under seal, by the Secretary or his or her designee. Requests shall be in writing, specifying the exact documents, the number of copies desired, and the date on which they will be required. The request shall allow a reasonable time for the preparation and certification of copies. The fee for preparing copies shall be the same as that charged by the Commission as described in §0.465(c)(2). The fee for certification shall be \$10 for each document.

(d)(1) Computer maintained databases produced by the Commission and routinely available to the public (*see* § 0.453) may be obtained from the FCC's Web site at <http://www.fcc.gov> or if unavailable on the Commission's Web site, from the Reference Information Center.

(2) Copies of computer generated data stored as paper printouts or electronic media and available to the public may also be obtained from the Commission's Reference Information Center (*see* paragraph (a) of this section).

(3) Copies of computer source programs and associated documentation produced by the Commission and available to the public may be obtained from the Office of the Managing Director.

(e) This section does not apply to records available on the Commission's Web site, <http://www.fcc.gov>, or printed publications which may be purchased from the Superintendent of Documents or private firms (*see* §§0.411 through 0.420), nor does it apply to application forms or information bulletins, which are prepared for the use and information of the public and are available upon request (*see* §§0.421 and 0.423) or on the Commission's Web site, <http://www.fcc.gov/formpage.html>.

#### **§0.466 Definitions.**

(a) For the purpose of §§0.467 and 0.468, the following definitions shall apply:

(1) The term *direct costs* means those expenditures which the Commission actually incurs in searching for and duplicating (and in case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include the salary of the employee performing the work (the basic rate of pay for the employee plus twenty percent of that rate to cover benefits), and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses, such as costs of space, and heating or lighting the facility in which the records are stored.

(2) The term *search* includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material contained within documents. Such activity should be distinguished, however, from "review" of material in order to determine whether the material is exempt from disclosure (*see* paragraph (a)(3) of this section).

(3) The term *review* refers to the process of examining documents located in response to a commercial use request (*see* paragraph (a)(4) of this section) to determine whether any portion of a document located is exempt from disclosure. It also includes processing any documents for disclosure, e.g., performing such functions that are necessary to excise them or otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of FOIA exemptions.

(4) The term *commercial use* request refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial interests of the requester. In determining



whether a requester properly falls within this category, the Commission shall determine the use to which a requester will put the documents requested. Where the Commission has reasonable cause to question the use to which a requester will put the documents sought, or where that use is not clear from the request itself, the Commission shall seek additional clarification before assigning the request to a specific category. The dissemination of records by a representative of the news media (*see* §0.466(a)(7)) shall not be considered to be for a commercial use.

(5) The term *educational institution* refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of professional education and an institution of vocational education, which operates a program or programs of scholarly research.

(6) The term *non-commercial scientific institution* refers to an institution that is not operated on a commercial basis as that term is referenced in paragraph (a)(4) 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.

(7) The term *representative of the news media* refers to 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. In this clause, 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 are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of news) who make their products available for purchase or subscription by, or free distribution to, the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Commission may also consider the past publication record of the requester in making such a determination. See 5 U.S.C. 552(a)(4)(A)(ii).

(8) The term *all other requester* refers to any person not within the definitions in paragraphs (a)(4) through (a)(7) of this paragraph.

(b) [Reserved]

#### **§0.467 Search and review fees.**

(a)(1) Subject to the provisions of this section, an hourly fee shall be charged for recovery of the full, allowable direct costs of searching for and reviewing records requested under §0.460 or §0.461, unless such fees are reduced or waived pursuant to §0.470. The fee is based on the pay grade level of the FCC's employee(s) who conduct(s) the search or review, or the actual hourly rate of FCC contractors or other non-FCC personnel who conduct a search.

NOTE TO PARAGRAPH (a)(1): The fees for FCC employees will be modified periodically to correspond with modifications in the rate of pay approved by Congress and any such modifications will be announced by public notice and will be posted on the Commission's Web site, <http://www.fcc.gov/foia/#feeschedule>.

(2) The fees specified in paragraph (a)(1) of this section are computed at Step 5 of each grade level based on the General Schedule or the hourly rate of non-FCC personnel, including in addition twenty percent for personnel benefits. Search and review fees will be assessed in  $\frac{1}{4}$  hour increments.

(b) Search fees may be assessed for time spent searching, even if the Commission fails to locate responsive records or if any records located are determined to be exempt from disclosure.

(c) The Commission shall charge only for the initial review, *i.e.*, the review undertaken initially when the Commission analyzes the applicability of a specific exemption to a particular record. The Commission shall not charge for review at the appeal level of an exemption already applied. However, records or portions of records withheld in full under an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs of such a subsequent review, under these circumstances, are properly assessable.

(d) The fee charged will not exceed an amount based on the time typically required to locate records of the kind requested.

(e)(1) If the Commission estimates that search charges are likely to exceed the greater of \$25 or the amount which the requester indicated he/she is prepared to pay, then it shall notify the requester of the estimated amount of fees. Such a notice shall offer the requester the opportunity to confer with Commission personnel with the object of revising or clarifying the request. See §0.465(c)(2) and §470(d).

(2) The time for processing a request for inspection shall be tolled while conferring with the requester about his or her willingness to pay the fees required to process the request. See §0.461(e).

(f) When the search has been completed, the custodian of the records will give notice of the charges incurred to the person who made the request.

(g) The fee shall be paid to the Financial Management Division, Office of Managing Director, or as otherwise directed by the Commission.

#### **§0.468 Interest.**

Interest shall be charged those requesters who fail to pay the fees charged. The agency will begin assessing interest charges on the amount billed starting on the 31st day following the day on which the billing was sent. The date on which the payment is received by the agency will determine whether and how much interest is due. The interest shall be set at the rate prescribed in 31 U.S.C. 3717.

#### **§0.469 Advance payments.**

(a) The Commission may not require advance payment of estimated FOIA fees except as provided in paragraph (b) or where the Commission estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250.00 and the requester has no history of payment. Where allowable charges are likely to exceed \$250.00 and the requester has a history of prompt payment of FOIA fees the Commission may notify the requester of the estimated cost and obtain satisfactory assurance of full payment. Notification that fees may exceed \$250.00 is not, however, a prerequisite for collecting fees above that amount.

(b) Where a requester has previously failed to pay a fee charged in a timely fashion (*i.e.*, within 30 days of the date of the billing), the Commission may require the requester to pay the full amount owed plus any applicable interest as provided in §0.468, and to make an advance payment of the full amount of the estimated fee before the Commission begins to process a new request or a pending request from that requester.

(c) When the Commission acts under paragraph (a) of this section, the administrative time limits

prescribed in §§0.461(g) and (k) (*i.e.*, twenty business days from receipt of initial requests and twenty business days from receipt of appeals from initial denials, plus permissible extensions of these time limits (see §0.461(g)(1)(i) through (iii) and §0.461(k)(1)(i) through (iii)) will begin only after the agency has received the fee payments described in this section. See §0.461(e)(2)(ii) and §0.467(e)(2).

#### **§0.470 Assessment of fees.**

(a)(1) *Commercial use requesters.* (i) When the Commission receives a request for documents for commercial use, it will assess charges that recover the full direct cost of searching for, reviewing and duplicating the records sought pursuant to §0.466 and §0.467, above.

(ii) Commercial use requesters shall not be assessed search fees if the Commission fails to comply with the time limits under §0.461(g), except as provided in §0.470(a)(1)(iii) below.

(iii) Commercial requesters may still be assessed search fees when the Commission fails to comply with the time limits under §0.461(g) if the Commission determines that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, so long as the Commission has provided a timely written notice to the requester and has discussed with the requester (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request. Additionally, if a court has determined that exceptional circumstances exist, a failure to comply with a time limit under §0.461(g) will be excused for the length of time provided by the court order.

(2) *Educational and non-commercial scientific institution requesters and requesters who are representatives of the news media.* (i) The Commission shall provide documents to requesters in these categories for the cost of duplication only, pursuant to §0.465 above, excluding duplication charges for the first 100 pages, provided however, that requesters who are representatives of the news media shall be entitled to a reduced assessment of charges only when the request is for the purpose of distributing information.

(ii) Educational requesters or requesters who are representatives of the news media shall not be assessed fees for the cost of duplication if the Commission fails to comply with the time limits under §0.461(g), except as provided in §0.470(a)(2)(iii) below.

(iii) Educational requesters or requesters who are representatives of the news media may still be assessed duplication fees when the Commission fails to comply with the time limits under §0.461(g) if the Commission determines that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, so long as the Commission has provided a timely written notice to the requester and has discussed with the requester (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request. Additionally, if a court has determined that exceptional circumstances exist, a failure to comply with a time limit under §0.461(g) will be excused for the length of time provided by the court order.

(3) *All other requesters.* (i) The Commission shall charge requesters who do not fit into any of the categories above fees which cover the full, reasonable direct cost of searching for and duplicating records that are responsive to the request, pursuant to §0.465 and §0.467, except that the first 100 pages of duplication and the first two hours of search time shall be furnished without charge.

(ii) All other requesters shall not be assessed search fees if the Commission fails to comply with the time limits under §0.461(g), except as provided in §0.470(a)(3)(iii) below.

(iii) All other requesters may still be assessed search fees when the Commission fails to comply with

the time limits under §0.461(g) if the Commission determines that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, so long as the Commission has provided a timely written notice to the requester and has discussed with the requester (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request. Additionally, if a court has determined that exceptional circumstances exist, a failure to comply with a time limit under §0.461(g) will be excused for the length of time provided by the court order.

(b)(1) The 100 page restriction on assessment of duplication fees in paragraphs (a)(2) and (3) of this section refers to 100 paper copies of a standard size, which will normally be “8½ × 11” or “11 × 14.”

(2) When the agency reasonably believes that a requester or group of requesters is attempting to segregate a request into a series of separate individual requests for the purpose of evading the assessment of fees, the agency will aggregate any such requests and assess charges accordingly.

(c) When a requester believes he or she is entitled to a waiver pursuant to paragraph (e) of this section, the requester must include, in his or her original FOIA request, a statement explaining with specificity, the reasons demonstrating that he or she qualifies for a fee waiver. Included in this statement should be a certification that the information will not be used to further the commercial interests of the requester.

(d) If the Commission reasonably believes that a commercial interest exists, based on the information provided pursuant to paragraph (c) of this section, the requester shall be so notified and given an additional ten business days to provide further information to justify receiving a reduced fee. See §0.467(e)(2).

(e)(1) Copying, search and review charges shall be waived or reduced by the General Counsel when “disclosure of the 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.” 5 U.S.C. 552(a)(4)(A)(iii). Simply repeating the fee waiver language of section 552(a)(4)(A)(iii) is not a sufficient basis to obtain a fee waiver.

(2) The criteria used to determine whether disclosure is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government include:

(i) Whether the subject of the requested records concerns the operations or activities of the government;

(ii) Whether the disclosure is likely to contribute to an understanding of government operations or activities; and

(iii) Whether disclosure of the requested information will contribute to public understanding as opposed to the individual understanding of the requester or a narrow segment of interested persons.

(3) The criteria used to determine whether disclosure is primarily in the commercial interest of the requester include:

(i) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(ii) 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.

(4) This request for fee reduction or waiver must accompany the initial request for records and will be decided under the same procedures used for record requests.

(5) If no fees or de minimis fees would result from processing a FOIA request and a fee waiver or reduction has been sought, the General Counsel will not reach a determination on the waiver or reduction request.

(f) Whenever Commission staff determines that the total fee calculated under this section likely is less than the cost to collect and process the fee, no fee will be charged.

(g) Review of initial fee determinations under §0.467 through §0.470 and initial fee reduction or waiver determinations under §0.470(e) may be sought under §0.461(j).

**§ 1.115 Application for review of action taken pursuant to delegated authority.**

\* \* \* \* \*

(d) Except as provided in paragraph (e) of this section and in §0.461(j), the application for review and any supplemental thereto shall be filed within 30 days of public notice of such action, as that date is defined in section 1.4(b). Opposition to the application shall be filed within 15 days after the application for review is filed. Except as provided in paragraph (e)(3) of this section, replies to oppositions shall be filed within 10 days after the opposition is filed and shall be limited to matters raised in the opposition.

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