

# ORIGINAL

ORDER NO. 1253

UNITED STATES OF AMERICA  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268-0001

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POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

Before Commissioners:

Edward J. Gleiman, Chairman;  
W.H. "Trey" LeBlanc III, Vice Chairman;  
Dana B. Covington, Sr.; Ruth Y. Goldway; and  
George A. Omas

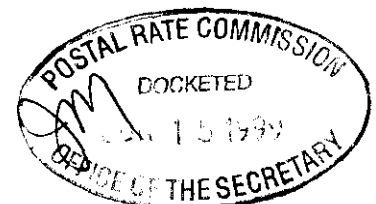
Amendments to FOIA Rules

Docket No. RM99-2

NOTICE AND ORDER ON PROPOSED REVISIONS  
TO COMMISSION RULES IMPLEMENTING  
THE FREEDOM OF INFORMATION ACT

(June 15, 1999)

The Commission's rules implementing the requirements of the Freedom of Information Act, 5 U.S.C. § 552, have not been amended since 1993. Consequently, they do not incorporate changes in applicable law since that time, most notably the requirements added by the Electronic Freedom of Information Act, Public Law 104-231. Additionally, the current rules do not reflect recent changes in the Commission's methods of information management, which have become increasingly computer-based, as well as other administrative changes affecting access to information at the Commission. The proposed rules are intended to address and accommodate these interim changes. They also incorporate a major structural change—transfer of all provisions describing Freedom of Information Act access and processes at the Commission to a new Part 3004—for the convenience of persons interested in obtaining information by various means.



A. Compliance with Public Inspection and Copying Requirements as Modified by the Electronic FOIA Amendments

Subsection (a)(2) of the Freedom of Information Act [5 U.S.C. § 552(a)(2)] requires an agency to make available for public inspection and copying its final opinions in adjudicated cases, policy statements and interpretations not published in the Federal Register, and administrative staff manuals and instructions to staff that affect members of the public. The 1996 Electronic FOIA amendments extended this requirement by directing agencies to make such records created on or after November 1, 1996, available by computer telecommunications or other electronic means.

The proposed rules reflect the actions the Commission has taken to achieve compliance with the amended public inspection and copying requirements. Beginning in 1996, the Commission has operated a website linked to the Internet for the purposes of telecommunication and publication of official information. Recently, the Commission has expanded the material available on its website to include all its decisions issued on or after January 1, 1996; orders, notices and other documents issued in proceedings pending before the Commission; the Domestic Mail Classification Schedule, which is a compilation of all provisions that define the categories of mail and postal services available in the national postal system; and the rules of practices which govern the conduct of proceedings before the Commission. All these materials are now available for viewing and downloading from the Commission's website at [<www.prc.gov>](http://www.prc.gov). Accordingly, proposed § 3004.2(c) identifies that domain as the location of the Commission's Electronic Reading Room, and describes generally the categories of information available from the website.

B. Transfer of FOIA Procedural Rules to New Part 3004

Currently, the rules describing public information available at the Commission and procedures for obtaining access are contained in 39 CFR §§ 3001.42 and 3001.42a, within the Rules of General Applicability included in Part 3001, which is a

compilation of all the Commission's Rules of Practice and Procedure. For the convenience of persons interested primarily in obtaining access to public information, the Commission proposes rules which incorporate a major structural change. Rules describing the procedures for obtaining access to public information at the Commission, fees associated with some retrieval and copying services, and procedures relating to the submission and disclosure of sensitive business information would be transferred to a new Part 3004, to be entitled "Freedom of Information Rules." Rules describing the Commission's public information resources generally would be retained in § 3001.42, with additional detailed information in Part 3002, the organizational description of the Commission.

In addition, the rules proposed for inclusion in the new Part 3004 would revise and update the provisions transferred from §§ 3001.42 and 42a to conform to current FOIA legal requirements and practices. Proposed §§ 3004.1 and 3004.2 describe the purpose of the rules and the sources of the Commission's public information, including the physical and electronic reading rooms. Proposed § 3004.3 provides both for regular FOIA requests and requests for expedited processing based on a demonstration of compelling need. The time limit specified in proposed § 3004.4 for responding to requests would be changed from 10 days to 20 days, in accordance with the 1996 amendments. The period for filing an appeal of a denial of a request with the Commission, currently 20 days, would be extended to one year under proposed § 3004.4(a)(2).

#### *C. Provisions Relating to Submission of Sensitive Business Information*

Proposed § 3004.8 would adopt procedures for the Commission's treatment of materials containing sensitive business information that are considerably more detailed than those incorporated in current § 3001.42a. Proposed § 3004.8(a) would direct any person who submits information believed to be exempt from disclosure under 5 U.S.C. § 552(b)(4) to designate the exempt information by appropriate markings, and provide a

brief written statement explaining why the information is exempt. Any such designation would expire 10 years after the date of submission, unless the submitter requests and justifies a longer duration.

Should the Commission receive an FOIA request seeking business information that has been properly designated under § 3004.8(a), or that the Commission believes may be exempt from disclosure under § 552(b)(4), under proposed § 3004.8(b) the Commission would notify the submitter that such a request has been made, and provide a copy of the notice to the requester. Under proposed § 3004.8(c), the submitter would have 7 days to submit written objections to the information's disclosure, specifying all grounds for withholding it under the FOIA. The submitter would be considered to have no objection to disclosure if it submits no response by the end of the 7-day period.

If the submitter has objected to disclosure, the Commission would then decide whether to disclose the information. If the Commission decides to disclose, under § 3004.8(d) it would provide the submitter written notice of that decision and a brief explanation for not sustaining its objections. Actual disclosure would not be made until 5 days after the submitter's receipt of the notice. Proposed § 3004.8(e) provides that the Commission may not notify the submitter if it determines not to disclose the information; if the information has been lawfully published or officially made publicly available; or if disclosure is required by a regulation or a statute other than the FOIA.

Finally, proposed § 3004.8(f) would specify that protection of business information made available in formal Commission proceedings, and under the periodic reporting requirements Subpart G of 39 C.F.R. Part 3001, is provided under the terms of § 3001.31a. Thus, the procedures to be adopted in proposed § 3004.8 would not apply to the potential disclosure of commercially sensitive materials in the course of the Commission's performance of its primary jurisdictional responsibilities.

D. Updated Information Responsive to Publication Requirements

Subsection (a)(1) of the Freedom of Information Act [5 U.S.C. § 552(a)(1)] specifies five categories of information that agencies are required to “currently publish in the Federal Register for the guidance of the public[.]” The proposed rules are designed to comply fully with these publication requirements, and also to carry out the intent of the Electronic FOIA Amendments of 1996 to increase the public availability of information through computer telecommunications.

The proposed rules address the Act’s publication requirements by incorporating several amendments to existing rules that would enhance the information provided regarding the Commission’s operations, facilities, and information resources available to the public. Proposed § 3002.3 would be amended to describe the potential sources of public information in the Commission’s Docket Room, physical Reading Room, and Electronic Reading Room on its website, as directed in 5 U.S.C. § 552(a)(1)(A). Proposed § 3002.4 would provide additional detail concerning the information available on the Commission’s website, as well as clarifying the responsibility of the Commission’s Administrative Office to maintain it and the other public information resources of the agency. Proposed § 3002.2 would add a description of the Commission’s statutory functions, including its jurisdictional responsibilities and the means by which the public may participate in Commission proceedings, in response to 5 U.S.C. § 552(a)(1)(B).

It is ordered:

1. Interested persons are invited to submit comments on the proposed revisions in Appendix A no later than July 26, 1999.

2. The Secretary of the Commission shall arrange for publication of this Notice and Order in the FEDERAL REGISTER in a manner consistent with applicable requirements.

By the Commission.

(S E A L)

A handwritten signature in black ink, reading "Margaret P. Crenshaw". The signature is written in a cursive style with a large, stylized initial "M".

Margaret P. Crenshaw  
Secretary

**§ 3001.42 Public information and requests.**

This section prescribes the rules governing: Publication of recommended decisions, advisory opinions, and public reports; and records of the Commission.

(a) *Notice and publication.* Service of intermediate and recommended decisions, advisory opinions and public reports upon parties to the proceedings is provided in §§ 3001.12(a) and 3001.39(d). Descriptions of the Commission's organization, its methods of operation, statements of policy and interpretations, procedural and substantive rules, and amendments thereto will be filed with and published in the FEDERAL REGISTER. Commission recommended decisions, advisory opinions and public reports, Commission orders, and intermediate decisions will be released to the press and made available to the public promptly.

(b) *Public records.* Except as provided in § 3001.31a of this chapter, the public records of the Commission include:

(1) All submittals and filings as follows:

(i) Requests of the Postal Service for recommended decisions or advisory opinions, public reports, complaints (both formal and informal), and other papers seeking Commission action;

(ii) Financial, statistical and other reports to the Commission, and other filings and submittals to the Commission in compliance with the requirements of any statute, Executive order, or Commission rule, regulation, or order;

(iii) All answers, replies, responses, objections, protests, motions, stipulations, exceptions, other pleadings, notices, depositions, certificates, proofs of service, transcripts, and briefs in any matter or proceeding;

(iv) All exhibits, attachments and appendices to, amendments and corrections of, supplements to, or transmittals or withdrawals of, any of the foregoing;

(v) Any Commission correspondence relating to any of the foregoing.

(2) All other parts of the formal record in any matter or proceeding set for formal or statutory hearing and any Commission correspondence related thereto. "Formal record" includes in addition to all the filings and submittals, any notice or Commission order initiating the matter or proceeding, and, if a hearing is held, the following: the

designation of the presiding officer, transcript of hearings, all exhibits received in evidence, offers of proof, motions, stipulations, proofs of service, referrals to the Commission, and determination made by the Commission thereon, certifications to the Commission, and anything else upon which action of the presiding officer or the Commission may be based; it does not include any unaccepted offer of settlement made by a party in the course of a proceeding and not formally submitted to the Commission.

(3) Any proposed testimony or exhibit filed with the Commission but not yet offered or received in evidence.

(4) All presiding officer actions and all presiding officer correspondence and memoranda to or from others except within his/her own office.

(5) All Commission orders, notices, findings, determinations, and other actions in any matter or proceeding and all Commission minutes which have been approved.

(6) All Commission correspondence relating to any furnishing of data or information by the Postal Service.

(7) Commission correspondence with respect to the furnishing of data, information, comments, or recommendations to or by another branch, department, or agency of the Government where furnished to satisfy a specific requirement of a statute or where made public by that branch, department or agency.

(8) Commission correspondence and reports on legislative matters under consideration by the Office of Management and Budget or Congress but only if and after made public or released for publication by that Office or the Commission or Member of Congress involved.

(9) Commission correspondence on the interpretation or applicability of any statute, rule, regulation, recommended decision, advisory opinion, or public report issued or administered by the Commission and letters of opinion on that subject signed by the General Counsel and sent to others than the Commission, a Commissioner, or any of the staff.

(10) Copies of all filings by the Commission, and all orders, judgments, decrees, and mandates directed to the Commission in Court proceedings involving Commission action and all correspondence with the courts or clerks of court.

(11) The Commission's administrative and operating manuals as issued.



(12) All other records of the Commission except for those that are:

(i)(a) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (b) are in fact properly classified pursuant to such Executive order;

(ii) Related solely to the internal personnel rules and practices of the Commission;

(iii) Specifically exempted from disclosure by statute;

(iv) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(v) Interagency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the Commission;

(vi) Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(vii) Investigatory records compiled for law enforcement purposes, to the extent specified in 5 U.S.C. § 552(b)(7).

(13) The following are examples of information which is not part of the public records of the Commission:

(i) Written communications between or among the Commission, members of the Commission, the Secretary, and expressly designated members of the staff while particularly assigned, in accordance with all applicable legal requirements, to aid the Commission in the drafting of any recommended decision, advisory opinion or public report and findings, with or without opinion, or report in any matter or proceeding;

(ii) Unaccepted offers of settlement in any matter or proceeding unless or until made public by act of the offeror.

(c) *Procedure in event of subpoena.* If an officer or employee of the Commission is served with a subpoena duces tecum, material which is not part of the public files and records of the Commission shall be produced only as authorized by the Commission. Service of such a subpoena shall immediately be reported to the Commission with a statement of all relevant facts. The Commission will thereupon enter such order or give such instructions as it deems advisable.

**§ 3001.42a Protection of trade secrets and commercial or financial information.****[Repealed]****PART 3002—ORGANIZATION—Table of Contents****§ 3002.1 Purpose.**

This part is published in compliance with 5 U.S.C. 552(a)(1) and constitutes a general description of the Postal Rate Commission.

**§ 3002.2 Statutory Functions.**

(a) **Areas of jurisdiction.** The Commission has jurisdiction over changes in postal rates and fees under 39 U.S.C. § 3622, and over mail classifications under 39 U.S.C. § 3623. It issues Recommended Decisions to the Governors of the Postal Service on these matters. It also acts on postal patrons' appeals from Postal Service decisions to close or consolidate post offices under 39 U.S.C. § 404(b). Further, the Commission investigates complaints of substantial national scope concerning postal rates, fees, mail classifications or services under 39 U.S.C. § 3662. It also responds to requests of the Postal Service for advisory opinions on changes in the nature of postal services under 39 U.S.C. § 3661. Because of the Commission's expertise, Congress occasionally asks it to undertake special studies on postal issues.

(b) **Public participation.** Interested persons may elect to participate in Commission rate and mail classification proceedings as formal intervenors (§ 3001.20), limited participators (§ 3001.20a), or commenters (§ 3001.20b). Interested parties who believe the Postal Service is charging rates which do not conform with the policies of the Postal Reorganization Act, or who believe that they are not receiving postal service in accordance with the policies of title 39, may lodge a complaint with the Commission under § 3001.82. Persons served by post offices that the Postal Service decides to close or consolidate with other post offices may appeal such determinations under § 3001.111.

**§ 3002.3 The Commission and its offices.**

(a) *The Commissioners.* The Postal Rate Commission is an independent establishment of the executive branch of the U.S. Government created by the Postal Reorganization Act (84 Stat. 719, title 39, U.S.C.). The Commission consists of five

Commissioners appointed by the President and confirmed by the Senate, one of whom is designated as *Chairman* by the President.

(b) *The Chairman and Vice-Chairman.* The Chairman has the administrative responsibility for assigning the business of the Commission to the other Commissioners and to the offices and employees of the Commission. He/She has the administrative duty to preside at the meetings and sessions of the **Commission** and to represent the Commission in matters specified by statute or executive order or as the Commission directs. The Commission shall elect annually a member of the Commission to serve as *Vice-Chairman of the Commission for a term of one year or until a successor is elected*. In case of a vacancy in the Office of the Chairman of the Commission, or in the absence or inability of the Chairman to serve, the Vice-Chairman, unless otherwise directed by the Chairman, shall have the administrative responsibilities and duties of the Chairman during the period of vacancy, absence, or inability.

(c) **The Commission's offices are located at 1333 H Street, N.W., Suite 300, Washington, D.C. 20268. On these premises, the Commission maintains offices for Commissioners and the staff components described in sections 3001.4, 3001.5, 3001.6 and 3001.7; a Docket Room where documents may be filed with the Commission pursuant to section 3001.9 and examined by interested persons; a public Reading Room where the Commission's public records are available for inspection and copying; a Library containing legal and technical reference materials; and a Hearing Room where formal evidentiary proceedings are held on matters before the Commission. The Commission also maintains an Electronic Reading Room accessible through the Internet, on its website at <www.prc.gov>.**

#### **§ 3002.4 Administrative Office.**

(a) The incumbent head of the office is responsible for exercising two executive functions of the Commission and utilizes the title of either "Secretary" or "Chief Administrative Officer", as appropriate.

(b) As Secretary of the Commission, the incumbent head shall have custody of the Commission's seal, the minutes of all action taken by the Commission, its rules and regulations, its administrative and other orders, and records. All orders and other actions of the Commission shall be authenticated or signed by the Secretary or any such other person as may be authorized by the Commission.

(c) As Chief Administrative Officer the incumbent head is also responsible, subject to the policy guidelines of the Commission, for: Development, implementation, and

administration of the Commission's financial management system and accounting activities including those relating to the budget and the payroll; development and administration in conjunction with the Personnel Officer of a personnel program designed to meet the needs of the Commission and its employees; development and administration, subject to the supervision of the Chairman, of a public information program appropriate to the agency mission; provision of facilities and operating and support services essential to the efficient and effective conduct of operations; acquisition, planning and assignment of office space; procurement and supply; serving as the contracting officer for the Commission and controlling the obligation of Commission funds, as authorized by the Commission.

(d) The personnel management functions set out above are the immediate responsibility of the Personnel Officer, whose position is located in the Administrative Office.

(e) The Administrative Office is also responsible for the maintenance of the Commission's public information resources, including the Docket Room, the physical Reading Room, and the Library on the premises of the Commission's offices, as well as the Electronic Reading Room accessible on the Commission's website at <[www.prc.gov](http://www.prc.gov)>. The information available on the Commission's website is, in general, coextensive with that available from the Commission's Docket Room and physical Reading Room, and includes: Commission decisions, rules, orders and notices; testimony, pleadings and reference materials filed in Commission proceedings; and current information concerning Commission activities, employment opportunities, and a calendar of upcoming events.

### **§ 3002.5 Office of Rates, Analysis, and Planning.**

(a) The Office of Rates, Analysis, and Planning is responsible for technical (as opposed to legal) analysis and the formulation of policy recommendations for the Commission.

(b) This office provides the analytic support to the Commission for reviewing the record of rate and classification requests, post office closings and other issues which come before the Commission. The functional areas of expertise within this office are:

(1) The economic analysis of the market for postal services including the alternative sources for such services and the users of the service;

(2) The analysis of the operational characteristics of the postal system and its interface with various segments of the economy; and,

(3) *The analysis of the costs of operating the Postal Service and how such costs are influenced by the operational characteristics.*

(c) These functional activities are combined in the evaluation of the revenue requirements of the Postal Service under possible alternative operating circumstances *for the purpose of developing rate structures. They are also used to evaluate the impact of various proposed changes to the Domestic Mail Classification Schedule and the consequences of these changes upon the mailers and upon the revenue requirements and rate structure of the Postal Service.*

(d) *The office also collects, analyzes and periodically summarizes financial and various other statistical information for use in its ongoing activities and for the development of future methods, techniques and systems of analysis and reporting.*

#### **§ 3002.6 Office of the General Counsel.**

The General Counsel directs and coordinates the functions of the Office of the General Counsel and is directly responsible for the counseling and advisory services set forth in 39 CFR 3000.735-203. In accordance with § 3001.8 of the rules of practice, the General Counsel does not appear as an attorney in hearings in any proceeding before the Commission and takes no part in the preparation of evidence or argument presented in such hearings. The General Counsel represents the Commission in court proceedings and performs legal research on issues coming before the Commission; advises the Commission on the legal aspects of proposed legislation and rulemaking, the legal aspects of proposed action and policies on procurement, contracting, personnel matters, and other internal legal questions.

#### **§ 3002.7 Office of the Consumer Advocate.**

(a) The Office of the Consumer Advocate provides representation for the interests of the general public in Commission proceedings. The office prepares and litigates before the Commission legal and evidentiary presentations in all formal Commission dockets under chapter 36 of title 39, U.S. Code. It also is responsible for maintaining a continuing litigation capability including preparation for consideration of issues likely to reflect the interests of the general public in subsequent proceedings.

(b) The head of this office is responsible for directing both legal and technical personnel to fulfill its functions. The office includes both litigation attorneys and a broad spectrum of technical expertise to analyze and evaluate the diverse economic, cost and market issues before the Commission. During the pendency of a proceeding, personnel serving in the Office of the Consumer Advocate are prohibited from participating or advising as to any intermediate or Commission decision in that proceeding pursuant to the Commission Rules of Practice.

(c) A policy statement regarding the Office of the Consumer Advocate is contained as appendix A to this part.

### **§ 3002.8 Official seal.**

(a) Authority. The Seal described in this section is hereby established as the official seal of the Postal Rate Commission.

(b) Description. (1) On a white disc within a blue border with inner and outer rims gold and inscribed at top POSTAL RATE COMMISSION and in base, between two small five-pointed stars, 1970, all in gold, the shield of the coat of arms in full color blazoned as follows:

Five blue stars on a white stripe running from the upper left to the lower right of the shield, with three white billets on each of the upper and lower sections of the shield, the former blue and the latter red.

(2) The official seal of the Postal Rate Commission is modified when reproduced in black and white and when embossed, as it appears in this section.

[GRAPHIC OMITTED]

(c) Custody and authorization to affix. (1) The seal is the official emblem of the Postal Rate Commission and its use is therefore permitted only as provided in this part.

(2) The seal shall be kept in the custody of the Secretary and is to be used to authenticate records of the Postal Rate Commission and for other official purposes.

(3) Use by any person or organization outside of the Commission may be made only with the Commission's prior written approval. Such request must be made in writing to the Secretary.

## **Part 3004 - Freedom of Information Rules**

### **§ 3004.1 Purpose**

(a) This part is published pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, to describe the procedures by which a person can request copies of Commission records. It also describes how a submitter of trade secrets or confidential business information can identify information that the submitter believes to be exempt from disclosure under 5 U.S.C. § 552(b)(4).

(b) An individual seeking access to a record about himself or herself that is subject to the Privacy Act of 1974 should also consult the Commission's Privacy Act rules in part 3003 for the procedures that apply to requests for records under that Act. Requests for first-party access can be made under both the FOIA and the Privacy Act of 1974.

(c) Information required to be published or made available pursuant to 5 U.S.C. § 552(a)(1) and (a)(2) may be found in part 3002, elsewhere in this chapter, in the *Federal Register*, or on the Commission's website at <[www.prc.gov](http://www.prc.gov)>. The Commission's guide to the FOIA, all required FOIA indexes, and any available annual FOIA reports, are also available at the website in the electronic reading room or elsewhere on the site.

(d) Section 3001.42(b) of this chapter identifies records that the Commission has *determined to be public*.

### **§ 3004.2 Reading Room**

(a) The Commission maintains a public reading room at its offices at 1333 H Street NW, Washington, DC 20268. The reading room is open from 8:00 a.m. until 4:30 p.m. during business days.

(b) The records available for public inspection and copying in the reading room include: final opinions, statements of policy, administrative staff manuals and instructions that affect a member of the public, copies of selected records released under the FOIA, and indexes required to be maintained under the FOIA, and records described in 39 CFR § 3001.42(b) relating to any matter or proceeding before the Commission.

(c) The Commission's Electronic Reading Room is maintained at its website at <www.prc.gov>. Commission decisions, orders, rules of practice, and other directives affecting the public are available from the Electronic Reading Room. To the extent practicable, other documents available in the reading room are also posted and available on the website.

### **§ 3004.3 Requests for Records and for Expedited Processing**

(a) A request for records must be in writing and must reasonably describe the records sought. A request should be addressed or delivered to the Secretary of the Commission at the offices of the Commission at 1333 H Street NW, Washington, DC 20268. A request should be clearly identified as "Freedom of Information Act Request" both in the text of the request and on the envelope. A requester should include a daytime telephone number.

(b) A request for expedited processing may be made in cases in which the requester demonstrates a compelling need as defined in 5 U.S.C. § 552(a)(6)(E)(v). The Commission may otherwise grant requests for expedited processing at its discretion. A request for expedited processing should be clearly identified as "Expedited Freedom of Information Act Request" both in the text of the request and on the envelope.

(c) A demonstration of compelling need by a requester seeking expedited processing must be made by a statement certified by the requester to be true and correct to the best of the requester's knowledge and belief. At its discretion, the Commission may waive the requirement for certification.

(d) A request for expedited processing may be made at the time of an initial request (or appeal) or at a later time.

### **§ 3004.4 Response to Requests**

(a) Within 20 days (excluding Saturdays, Sundays, and legal public holidays) after receipt of a request for a Commission record, the Secretary of the Commission will:

(1) Determine to comply with the request and immediately notify the requester of the determination and of any fees that must be paid; or



(2) Deny the request in writing. The denial letter will explain the reason for the denial, including each exemption used as a basis for withholding of the records sought. The denial letter will include an estimate of the volume of requested matter that was denied. If disclosure of a record has been partially denied, the amount of information deleted will be indicated on the released portion if technically feasible. If revealing the amount or location of a denied record will harm an interest protected by an exemption, then the description of the amount or location of deleted information may be withheld. The denial letter will inform the requestor that he/she may, within one year, appeal the denial to the Commission.

(b) A denial is any form of adverse determination, including: a determination to withhold any requested record in whole or in part; a determination that a requested record does not exist or cannot be located; a determination that a record is not readily reproducible in the form or format sought by the requester; a determination that what has been requested is not a record subject to the FOIA; an adverse decision on any disputed fee matter, including a denial of a requested fee waiver; and a denial of a request for expedited treatment.

(c) Within ten days after the receipt of a request for expedited processing, the Secretary will:

(1) Grant the request for expedited processing and process the request for records as soon as practicable; or

(2) Deny a request for expedited processing in writing. Any request for records that has been denied expedited processing will be processed in the same manner as a request that did not seek expedited processing. The denial letter will inform the requestor that he/she may, within five days, appeal the denial to the Commission.

(d) If warranted by the unusual circumstances specified in 5 U.S.C. § 552(a)(6)(B)(iii), the Secretary may extend the time for a response for up to ten working days. The Secretary will notify the requester of any extension, and the reason for the extension, in writing. The Secretary will also provide the requester with an opportunity to limit the scope of the request or to arrange an alternative time frame for processing the request or a modified request.

### **§ 3004.5 Appeals**

(a) A requester who seeks to appeal any denial must file an appeal in writing with the Commission. The Commission may review any decision of the Secretary on its own

initiative. The Commission will grant or deny the appeal in writing, within 20 days (excluding Saturdays, Sundays and legal public holidays) of the date the appeal is received. If on appeal the denial of the request for records is upheld, the Commission will notify the person making such request of the provisions for judicial review of that determination pursuant to 5 U.S.C. § 552(c). The Commission will expeditiously consider an appeal of a denial of expedited processing.

(b) If warranted by the unusual circumstances specified in 5 U.S.C. § 552(a)(6)(B)(iii), the Commission may extend the time for a response to an appeal for up to ten working days. The Commission will notify the requester of any extension, and the reason for the extension, in writing. The Commission will also provide the requester with an opportunity to limit the scope of the request or to arrange an alternative time frame for processing the request or a modified request.

#### **§ 3004.6 Fees**

(a) Definitions pertaining to fees:

(1) "Direct costs" means expenditures the Commission actually incurs in searching for, duplicating, and, where applicable, reviewing documents to respond to a request. They include (without limitation) the salary of the employee performing work (the basic pay rate of such employee plus 16 percent to cover benefits) and the cost of operating required machinery.

(2) "Search" includes all time spent looking for material responsive to a request, including identification of pages or lines within documents. The term covers both manual and computerized searching.

(3) "Duplication" means making copies of documents necessary to respond to a request. Such copies may be paper, microform, audiovisual, or machine-readable.

(4) "Review" means examining documents located in response to a commercial-use request to determine whether any portion is exempt from mandatory disclosure, and processing or preparing documents for release, but not determination of general legal or policy issues regarding application of exemptions.

(5) "Commercial use request" means a request from or on behalf of one seeking information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or person on whose behalf the request is made. In determining the applicability of this term, the use to which a requester will put the document is

considered first; where reasonable doubt exists as to the use, the Commission may seek clarification before assigning the request to a category.

(6) "Educational institution" means a preschool, a public or private elementary or secondary school, an institution of graduate or undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(7) "Noncommercial scientific institution" means an institution, not operated on a "commercial" basis (as referenced above), which is operated solely for the purpose of conducting scientific research whose results are not intended to promote any particular product or industry.

(8) "Representative of the news media" means any person actively gathering news for an entity organized and operated to publish or broadcast news to the public. "News" means information about current events or that would be of current interest to the public. Freelance journalists will be regarded as working for a news medium if they demonstrate (for example, by a publication contract or a past record of publication) a solid basis for expecting publication through such organization even though not actually employed by it.

(b) Except in the case of commercial-use requesters, the first 100 pages of duplication and the first two hours of search time are provided without charge. A "page" for these purposes is a letter- or legal-size sheet, or the equivalent amount of information in a medium other than paper copy. "Search time" for these purposes refers to manual searching; if the search is performed by computer, the amount not charged for will be the search cost equivalent to two hours' salary of the person performing the search. No requester will be charged a fee when the Commission determines that the cost of collecting the fee would equal or exceed the fee itself. In determining whether cost of collection would equal or exceed the fee, the allowance for two hours' search or 100 pages of duplication will be made before comparing the remaining fee and the cost of collection.

(c) Fees will be charged in accordance with the following provisions:

(1) The level of fee charged depends on the category of requester:

(A) A request appearing to be for commercial use will be charged the full direct costs of searching for, reviewing, and duplicating the records sought.

(B) A request from an educational or noncommercial scientific institution will be charged for the cost of duplication only (excluding charges for the first 100 pages). To be eligible for this category, a requester must show that the request is made under the auspices of a qualifying institution and that the records are not sought for commercial use but are in furtherance of scholarly (in the case of educational institutions) or scientific (in the case of noncommercial scientific institutions) research.

(C) A request from a representative of the news media will be charged the cost of duplication only (excluding charges for the first 100 pages).

(D) A request from any other requester will be charged the full direct cost of searching for and duplicating records responsive to the request, except that the first 100 pages of duplication and the first two hours of search will be furnished without charge.

(E) A request from a record subject for records about himself or herself filed in a Commission Privacy Act system of records will be charged fees as provided under the Commission's Privacy Act regulations in Part 3003 of this chapter.

(2) Fees will be calculated as follows:

(1) Manual search: At the salary rate (basic pay plus 16 percent) of the employee(s) making the search. Search time may be charged for even if the Commission fails to locate records or if records located are exempt from disclosure.

(2) Computer search: At the actual direct cost of providing the search, including computer search time directly attributable to searching for records responsive to the request, runs, and operator salary apportionable to the search.

(3) Review (commercial-use requests): At the salary rate (basic pay plus 16 percent) of the employee(s) conducting the review. Charges are imposed only for the review necessary at the initial administrative level to determine the applicability of any exemption, and not for review at the administrative appeal level of an exemption already applied.

(4) Duplication: At 15 cents per page for paper copy, which the Commission has found to be the reasonable direct cost thereof. For copies of records prepared by computer (such as tapes or printouts), the actual cost of production, including operator time, will be charged.

(5) Additional services: Postage, insurance, and other additional services that may be arranged for by the requester will be charged at actual cost.

(d) Interest at the rate prescribed in 31 U.S.C. § 3717 will be charged on unpaid fee bills, starting on the 31st day after the bill was sent. Receipt of a fee by the Commission, whether processed or not, will stay the accrual of interest.

(e) Advance payment may be required only when the allowable fees are likely to exceed \$250, in which case advance payment in part or in full may be required of requesters with no history of prompt payment, and satisfactory assurance of payment from requesters with such history; or when the requester has previously failed to pay a fee timely (within 30 days of the billing date), in which case the Commission may require full payment of the amount owed, plus applicable interest, or a demonstration that the fee has in fact been paid, together with full advance payment of the estimated fee. When advance payment is required, the administrative time limits prescribed in subsection (a)(6) of the Freedom of Information Act begin only after such payment has been received.

(f) Records will be provided without charge or at a reduced charge if 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.

### **§ 3004.7 Aggregation of Requests**

Should the Secretary or the Commission reasonably believe that a requester or a group of requesters acting in concert, have attempted to evade fees or to seek a procedural advantage over other requesters by breaking down a request into a series of requests, the Commission may aggregate the separate requests and treat them as a single request. Multiple requests involving unrelated subjects will not be aggregated.

### **§ 3004.8 Submission of Business Information**

(a) Any person who submits to the Commission a trade secret or commercial or financial information that the submitter reasonably believes to be exempt from disclosure under 5 U.S.C. § 552(b)(4) must designate the exempt information by appropriate markings at the time of submission or at a reasonable time after submission. The submission should be accompanied by a brief written statement explaining why the information is exempt. Any designation will expire ten years after

the date of the submission unless the submitter requests, and provides justification for, a longer period.

(b) Before disclosing, in response to a FOIA request, any information properly designated under this part, the Commission will provide the submitter with written notice that a request seeks disclosure of the information. The Commission may also provide notice when it has reason to believe that business information possibly exempt from disclosure may fall within the scope of any FOIA request. The requester will be provided a copy of any notice sent to the submitter.

(c) A submitter has seven days to submit written objections to the disclosure specifying all grounds for withholding the information under the FOIA. If the submitter fails to respond to the notice, the submitter will be considered to have no objection to the disclosure of the information.

(d) If, after considering the submitter's objections to disclosure, the Commission decides to disclose the information, it will give the submitter written notice of the decision and a brief explanation of the reasons for not sustaining the submitter's objections. The actual disclosure will not be made before five days after the submitter has received the notice.

(e) A submitter may not receive notice if the Commission determines that the *information should not be disclosed; if the information has been lawfully published or officially made available to the public; or if a statute (other than the FOIA) or a regulation requires disclosure.*

(f) Protection of information made available pursuant to proceedings subject to the rules in 39 CFR part 3001, including information provided pursuant to that subpart requiring the filing of periodic reports, is provided upon request to the Commission as described in rule 3001.31a.