

On August 6, 1998, a comment was submitted to the docket requesting that the agency extend the comment period on the proposed rule 60 days. The comment noted that certain information relevant to the rulemaking was not included in the public docket. Because the docket was scheduled to close on August 12, 1998, there was insufficient time to prepare and submit a letter of extension to the docket. However, the agency agrees that an additional period will provide time for interested parties to review the proposed rule and information now placed in the public docket and submit written comments. Therefore, the agency is reopening the comment period for an additional 60 days, until February 8, 1999.

Interested persons may, on or before February 8, 1999 submit to the Dockets Management Branch (address above) written comments on the proposed rule. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The proposed rule and received comments are available for public examination in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: December 1, 1998.

**William K. Hubbard,**

*Associate Commissioner for Policy Coordination.*

[FR Doc. 98-32744 Filed 12-9-98; 8:45 am]

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## OVERSEAS PRIVATE INVESTMENT CORPORATION

### 22 CFR Parts 706 and 713

RIN 3420-AA02

#### Production of Nonpublic Records and Testimony of OPIC Employees in Legal Proceedings

**AGENCY:** Overseas Private Investment Corporation.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** OPIC proposes to establish rules regarding subpoenas seeking nonpublic records or the testimony of OPIC employees in legal proceedings. The proposed rule facilitates access to records in OPIC's custody by centralizing agency decision-making with respect to demands for records or testimony in such legal proceedings. The proposed rule provides procedures, requirements and information on how OPIC will handle these matters and expressly prohibits any disclosure or

testimony except as provided by the proposed rule. The effect of the rule will be, among other benefits, to ensure an efficient use of OPIC resources, promote uniformity in decisions, protect confidential information, maintain agency control over the release of official information, protect the interests of the United States, and provide guidance to parties. The proposed rule will also amend the current rule regarding release of OPIC records which are exempt from disclosure under the Freedom of Information Act, to conform with the procedures provided in this proposed rule.

**DATES:** Submit comments on or before February 8, 1999.

**ADDRESSES:** Direct comments to Mitchel Neurock, Counsel for Administrative Affairs. Mail or hand-deliver comments to: Overseas Private Investment Corporation, 1100 New York Avenue, NW, Washington, DC 20527. Fax comments to (202) 408-0297. E-mail comments to mneur@opic.gov. Please send comments via one method only.

**FOR FURTHER INFORMATION CONTACT:** Mitchel Neurock, Counsel for Administrative Affairs, at (202) 336-8400.

#### SUPPLEMENTARY INFORMATION:

##### Background

OPIC receives subpoenas and requests for OPIC employees to provide evidence in legal proceedings. Typically, subpoenas are for OPIC records which are not available to the public under the Freedom of Information Act (FOIA). Also, OPIC receives subpoenas and requests for OPIC employees to appear as witnesses in legal proceedings in conjunction with requests for nonpublic records or to provide testimony.

In recent years, the number of requests has averaged 3 to 4 per year. Often, these subpoenas and requests relate to litigation involving projects financed and/or insured in whole or in part by OPIC, where one or more parties want to use nonpublic records, such as OPIC financing documents, in the case. In addition, parties to litigation frequently wish to have an OPIC employee, often a finance or insurance officer, testify to establish the authenticity of the records or to explain the information contained in those records. If OPIC provides these records and an OPIC employee appears as a witness, this will cause a significant disruption in the employee's work schedule. In many cases, parties want to use the OPIC employee as an expert witness on matters such as the fundamentals of project finance or other issues involving opinion evidence.

OPIC's experience has been that, in practically all cases, the parties can address these issues by eliciting the testimony of other witnesses, including the testimony of their own independent expert witnesses. They may also use their own records.

OPIC's current regulations fail to inform parties about any matter concerning submission of subpoenas. There is no guidance for parties seeking to submit subpoenas addressing when parties should submit a request for nonpublic documents or testimony, the time period for OPIC's review of such a request, potential fees, or, if a request is granted, any restrictions which OPIC might place upon the disclosure of records or the appearance of an OPIC employee as a witness. There is also no guidance for parties about the factors OPIC will consider in making its determination in response to such requests.

The proposed rule fills in these gaps in OPIC's current regulations. OPIC has tried to write the proposed rule in an easy-to-read, question-and-answer format, to promote straightforward English. The proposed rule, in brief: prohibits disclosure of nonpublic records or testimony by OPIC employees absent compliance with the rule; lets the public know what information to submit and what factors OPIC will consider; and sets out filing fees, deadlines and potential restrictions on disclosure of nonpublic documents and testimony of OPIC employees. The proposed charges for witnesses are the same as those provided by the federal courts, and the fees relating to the production of records are the same as those charged under FOIA.

A few simple definitions clarify that the proposed rule applies to a broad range of cases (not just matters before courts). The proposed rule applies to former as well as to current OPIC employees. Former OPIC employees remain prohibited from testifying about specific matters for which they had responsibility during their OPIC employment, unless permitted to testify as provided in the proposed rule. They would not, however, be barred from appearing on general matters or otherwise employing their expertise (as expert witnesses, for example).

The proposed rule solves some problems which have arisen in the past. It should eliminate or reduce eleventh hour requests for nonpublic documents or testimony of OPIC employees. The procedures and criteria will ensure a more efficient use of OPIC resources, will minimize the possibility of involving OPIC in issues unrelated to its responsibilities, will promote

uniformity in responding to such requests, and subpoenas, and will maintain the necessary impartiality of OPIC in matters between private litigants. The proposed rule will serve OPIC's interest in protecting sensitive, confidential and privileged information and records generated by its work.

The proposed rule is procedural, not substantive. It does not confer a benefit upon anyone. It does not create a right to obtain OPIC records or the testimony of any OPIC employee, past or present, nor does it create any additional right or privilege not already available to OPIC to deny such a request. OPIC makes no waiver of its sovereign immunity by proposing or implementing this rule. Failure to comply with the rule, however, constitutes grounds for OPIC's denial of any request.

OPIC is most interested in receiving comments on the application of the proposed regulation to former as well as to current employees, including its application to proceedings to which OPIC is a party, the exception from coverage for expert testimony by former OPIC employees, and any other factors which commentators believe OPIC should consider in addition to those set out in § 713.7 in reaching a final decision.

#### Legal Authority

More than 60 government agencies and departments have promulgated regulations governing the circumstances and manner in which an employee may respond to demands for testimony or production of documents. These regulations, issued under the authority of 5 U.S.C. 301, the so-called "housekeeping statute," are separate from FOIA regulations. In addition, OPIC has statutory authority to "take such actions as may be necessary or appropriate to carry out the powers" granted it by Congress. 22 U.S.C. 2199(d).

The housekeeping statute expressly states that it does not provide a basis for withholding information or limiting the availability of records, but authorizes a head of an executive agency to issue "regulations for the government of his department, the conduct of its employees, the distribution and performance of its business and the custody, use and preservation of its records, papers, and property." 5 U.S.C. 301. These regulations are known as "Touhy regulations," thanks to a landmark Supreme Court decision, *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

*Touhy* was the first in a long line of cases which have upheld regulations restricting the rights of private litigants to require testimony or production of

documents from employees of federal agencies. In *Touhy*, the Supreme Court held that a Department of Justice (DoJ) official, acting on order of the Attorney General, could not be held in contempt for declining to produce records in response to a subpoena. The Court reasoned that the variety of information contained in the files of any government agency, as well as the possibilities of harm from unrestricted disclosure in court, justify centralized determinations as to whether to obey or challenge a subpoena. The Court stated that it was appropriate for the Attorney General to prescribe regulations for the preservation of DoJ records.

Federal circuit and district courts have consistently held that a person seeking testimony or records from an agency must comply with that agency's *Touhy* regulations prior to seeking judicial enforcement of a subpoena. *Davis v. Braswell Motor Freight Lines, Inc.*, 363 F.2d 600 (5th Cir. 1966); *Colonial Savings and Loan Assoc. v. St. Paul Fire and Marine Ins. Co.*, 89 F.R.D. 481, 484 (D. Kan. 1980); *Marcoux v. Mid-States Livestock*, 66 F.R.D. 573, 575 n.1 (W.D. Mo. 1975).

Generally speaking, courts cannot compel an agency employee who is the subject of a subpoena to testify or produce records in violation of the agency's *Touhy* regulations. *Touhy*, 340 U.S. at 467-70; *United States Steel v. Mattingly*, 663 F.2d 68 (10th Cir. 1980). Courts have also upheld regulations which limit federal employees' testifying about purely factual information. *Southeastern Pa. Transp. Auth. v. General Motors Corp.*, 103 F.R.D. 12 (E.D. Pa. 1984); *Kline v. Martin*, 345 F. Supp. 31 (E.D. Va. 1972). Consequently, a limited or conditional authorization to testify or produce records does not waive an employee's immunity from contempt or compulsion with regard to releasing records or testifying on unauthorized matters. *Swett v. Schenk*, 792 F.2d 1447, 1451-52 (9th Cir. 1986).

There is also precedent suggesting that agencies may also restrict the testimony of former employees. *Fowkes v. Dravo Corporation*, 5 F.R.D. 51 (E.D. Pa. 1945). In *Fowkes*, a former employee and a current employee of the Treasury Department refused to testify or produce documents pursuant to subpoenas, in accordance with instructions from the Deputy Commissioner of Internal Revenue. Because the employees obtained the information while in their official positions, disclosure could not be permitted unless in accordance with a Treasury regulation and a Treasury Department circular. The *Fowkes* court upheld the Treasury Department's

refusal to allow the testimony, at least until the procedures in the Department's circular were followed. The court based its decision on the nature of the information. Thus, it is generally understood that, so long as a former employee acquired the information in an official capacity, persons seeking the former employee's testimony are still required to comply with an agency regulation limiting disclosure or testimony. As noted previously, OPIC's proposed rule will not bar former OPIC employees from serving as expert witnesses; however, former OPIC employees are prohibited from testifying about specific matters for which they had responsibility during their employment, unless permission is granted pursuant to the proposed rule.

With respect to the cost of processing and responding to requests for records and testimony, an agency may prescribe regulations establishing the charge for a service or thing of value provided by the agency, 31 U.S.C. 9701.

The proposed rule is not intended to restrict access to records under the Freedom of Information Act (5 U.S.C. 552), the Privacy Act (5 U.S.C. 552a), or any other authority. At the same time, nothing in this proposed rule would permit disclosure of information by OPIC or its employees except as provided by statute or other applicable law.

#### Regulatory Procedures

##### *Regulatory Flexibility Act*

The Regulatory Flexibility Act requires OPIC to prepare an analysis to describe any significant economic impact any proposed regulation may have on any small business or other small entity. 5 U.S.C. 602, 603. OPIC has determined and certifies that the proposed rule, if adopted, will not have a significant economic impact on any entity. The reasons for this determination are that the copying and witness fees to be charged to persons and entities submitting requests under the regulation are not large, and will not create a financial burden. The proposed rule will not create any significant demand for legal, accounting or consulting expenditures. Accordingly, OPIC has determined that a Regulatory Flexibility Analysis is not required.

##### *Paperwork Reduction Act*

OPIC has determined that this rulemaking is not subject to the Paperwork Reduction Act, because OPIC averages less than 10 requests per year, and expects this level of activity to remain below this threshold. 5 CFR 1320.3(c).

*Executive Order 12612*

OPIC has determined that the proposed rule will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government.

**List of Subjects in 22 CFR Part 713**

Administrative practice and procedure, Confidential business information, Freedom of Information Act, Government employees, Reporting and recordkeeping requirements, Subpoenas.

For the reasons set forth in the preamble, OPIC proposes to amend 22 CFR part 706 and add part 713 as set forth below:

**PART 706—[AMENDED]**

1. The authority citation for part 706 is revised to read as follows:

**Authority:** The Freedom of Information Act, as amended, 5 U.S.C. 552; 5 U.S.C. 301; 22 U.S.C. 2199(d).

2. Amend § 706.22, to redesignate the existing text as paragraph (a). In redesignated paragraph (a), further redesignate paragraphs (a) through (f) as paragraphs (a)(1) through (a)(6). Add paragraph (b) to read as follows:

**§ 706.22 Information and records not generally available to the public.**

\* \* \* \* \*

(b) *Prohibition against disclosure.* Except as provided in part 713 of this chapter, no officer, employee or agent of OPIC shall disclose or permit the disclosure of any exempt records of OPIC or of any information described in paragraph (a) of this section to any person other than those OPIC officers, employees or agents properly entitled to such information for the performance of their official duties.

3. Add Part 713 to read as follows:

**PART 713—PRODUCTION OF NONPUBLIC RECORDS AND TESTIMONY OF OPIC EMPLOYEES IN LEGAL PROCEEDINGS**

Sec.

- 713.1 What does this part prohibit?
- 713.2 When does this part apply?
- 713.3 How do I request nonpublic records or testimony?
- 713.4 What must my written request contain?
- 713.5 When should I make my request?
- 713.6 Where should I send my request?
- 713.7 What will OPIC do with my request?
- 713.8 If my request is granted, what fees apply?

713.9 If my request is granted, what restrictions may apply?

713.10 Definitions.

**Authority:** 5 U.S.C. 301; 5 U.S.C. 552; 5 U.S.C. 552a; 5 U.S.C. 702; 18 U.S.C. 207; 18 U.S.C. 641; 22 U.S.C. 2199(d); 28 U.S.C. 1821.

**§ 713.1 What does this part prohibit?**

This part prohibits the release of nonpublic records or the appearance of an OPIC employee to testify in legal proceedings except as provided in this part. Any person possessing nonpublic records may release them or permit their disclosure only as provided in this part.

(a) *Duty of OPIC employees.* (1) If you are an OPIC employee and you are served with a subpoena requiring you to appear as a witness or to produce records, you must promptly notify the Vice-President/General Counsel in the Department of Legal Affairs. The Vice-President/General Counsel has the authority to instruct OPIC employees to refuse to appear as a witness or to withhold nonpublic records. The Vice-President/General Counsel may let an OPIC employee provide testimony, including expert or opinion testimony, if the Vice-President/General Counsel determines that the need for the testimony clearly outweighs contrary considerations.

(2) If a court or other appropriate authority orders or demands from you expert or opinion testimony or testimony beyond authorized subjects contrary to the Vice-President/General Counsel's instructions, you must immediately notify the Vice-President/General Counsel of the order and then respectfully decline to comply with the order. You must decline to answer questions on the grounds that this part forbids such disclosure. You should produce a copy of this part, request an opportunity to consult with the Vice-President/General Counsel, and explain that providing such testimony without approval may expose you to disciplinary or other adverse action.

(b) *Duty of persons who are not OPIC employees.* (1) If you are not an OPIC employee but have custody of nonpublic records and are served with a subpoena requiring you to appear as a witness or produce records, you must promptly notify OPIC of the subpoena. Also, you must notify the issuing court or authority and the person or entity for whom the subpoena was issued of the content of this part. Provide notice to OPIC by sending a copy of the subpoena to the Vice-President/General Counsel, OPIC, 1100 New York Avenue, NW, Washington, DC 20527. After receiving notice, OPIC may advise the issuing court or authority and the person or

entity for whom the subpoena was issued that this part applies and, in addition, may intervene, attempt to have the subpoena quashed or withdrawn, or register appropriate objections.

(2) After notifying the Vice-President/General Counsel, respond to a subpoena by appearing at the time and place stated in the subpoena. Unless otherwise authorized by the Vice-President/General Counsel, decline to produce any records or give any testimony, basing your refusal on this part. If the issuing court or authority orders the disclosure of records or orders you to testify, decline to produce records or testify and advise the Vice-President/General Counsel.

(c) *Penalties.* Anyone who discloses nonpublic records or gives testimony related to those records, except as expressly authorized by OPIC or as ordered by a federal court after OPIC has had the opportunity to be heard, may face the penalties provided in 18 U.S.C. 641 and other applicable laws. Also, former OPIC employees, in addition to the prohibition contained in this part, are subject to the restrictions and penalties of 18 U.S.C. 207.

**§ 713.2 When does this part apply?**

This part applies if you want to obtain nonpublic records or testimony of an OPIC employee for a legal proceeding. It does not apply to records that OPIC is required to release under the Freedom of Information Act (FOIA), records that OPIC releases to federal or state investigatory agencies, or records that OPIC is required to release pursuant to the Privacy Act, 5 U.S.C. 552a.

**§ 713.3 How do I request nonpublic records or testimony?**

To request nonpublic records or the testimony of an OPIC employee, you must submit a written request to the Vice-President/General Counsel of OPIC. If you serve a subpoena on OPIC or an OPIC employee before submitting a written request and receiving a final determination, OPIC will oppose the subpoena on the grounds that you failed to follow the requirements of this part. You may serve a subpoena as long as it is accompanied by a written request that complies with this part.

**§ 713.4 What must my written request contain?**

Your written request for records or testimony must include:

(a) The caption of the legal procedure, docket number, and name of the court or other authority involved.

(b) A copy of the complaint or equivalent document setting forth the assertions in the case and any other

pleading or document necessary to show relevance.

(c) A list of categories of records sought, a detailed description of how the information sought is relevant to the issues in the legal proceeding, and a specific description of the substance of the testimony or records sought.

(d) A statement as to how the need for the information outweighs the need to maintain the confidentiality of the information and outweighs the burden on OPIC to produce the records or provide testimony.

(e) A statement indicating that the information sought is not available from another source, such as the requestor's own books and records, other persons or entities, or the testimony of someone other than an OPIC employee, such as retained experts.

(f) A description of all prior decisions, orders, or pending motions in the case that bear upon the relevance of the records or testimony you want.

(g) The name, address, and telephone number of counsel to each party in the case.

(h) An estimate of the amount of time you anticipate that you and other parties will need with each OPIC employee for interviews, depositions, and/or testimony.

#### **§ 713.5 When should I make a request?**

Submit your request at least 45 days before the date you need the records or testimony. If you want your request processed in a shorter time, you must explain why you could not submit the request earlier and why you need such expedited processing. If you are requesting the testimony of an OPIC employee, OPIC expects you to anticipate your need for the testimony in sufficient time to obtain it by deposition. The Vice-President/General Counsel may well deny a request for testimony at a legal proceeding unless you explain why you could not have used deposition testimony instead. The Vice-President/General Counsel will determine the location of a deposition, taking into consideration OPIC's interest in minimizing the disruption for an OPIC employee's work schedule and the costs and convenience of other persons attending the deposition.

#### **§ 713.6 Where should I send my request?**

Send your request or subpoena for records or testimony to the attention of the Vice-President/General Counsel, OPIC, 1100 New York Avenue NW, Washington, DC 20527.

#### **§ 713.7 What will OPIC do with my request?**

(a) *Factors OPIC will consider.* OPIC may consider various factors in

reviewing a request for nonpublic records or testimony of OPIC employees, including:

Whether disclosure would assist or hinder OPIC in performing its statutory duties or use OPIC resources unreasonably, including whether responding to the request will interfere with OPIC employees' ability to do their work.

(2) Whether disclosure is necessary to prevent the perpetration of a fraud or other injustice in the matter or if you can get the records or testimony you want from sources other than OPIC.

(3) Whether the request is unduly burdensome.

(4) Whether disclosure would violate a statute, executive order, or regulation, such as the Privacy Act, 5 U.S.C. 552a.

(5) Whether disclosure would reveal confidential, sensitive or privileged information, trade secrets or similar, confidential commercial or financial information, or would otherwise be inappropriate for release and, if so, whether a confidentiality agreement or protective order as provided in § 713.9(a) can adequately limit the disclosure.

(6) Whether the disclosure would interfere with law enforcement proceedings, compromise constitutional rights, or hamper OPIC programs or other OPIC operations.

(7) Whether the disclosure could result in OPIC's appearing to favor one litigant over another.

(8) Any other factors OPIC determines to be relevant to the interests of OPIC.

(b) *Review of your request.* OPIC will process your request in the order it is received. OPIC will try to respond to your request within 45 days, but this may vary, depending on the scope of your request.

(c) *Final determination.* The Vice-President/General Counsel makes the final determination on requests for nonpublic records or OPIC employee testimony. All final determinations are in the sole discretion of the Vice President/General Counsel. The Vice-President/General Counsel will notify you and the court or other authority of the final determination of your request. In considering your request, the Vice-President/General Counsel may contact you to inform you of the requirements of this part, ask that the request or subpoena be modified or withdrawn, or may try to resolve the request or subpoena informally without issuing a final determination. You may seek judicial review of the final determination under the Administrative Procedure Act, 5 U.S.C. 702.

#### **§ 713.8 If my request is granted, what fees apply?**

(a) *Generally.* You must pay any fees associated with complying with your request, including copying fees for records and witness fees for testimony. The Vice-President/General Counsel may condition the production of records or appearance for testimony upon advance payment of a reasonable estimate of the fees.

(b) *Fees for records.* You must pay all fees for searching, reviewing and duplicating records produced in response to your request. The fees will be the same as those charged by OPIC under its Freedom of Information Act regulations, § 706.26 of this chapter.

(c) *Witness fees.* You must pay the fees, expenses, and allowances prescribed by the court's rules for attendance by a witness. If no such fees are prescribed, the local federal district court rule concerning witness fees, for the federal district court closest to where the witness appears, will apply. For testimony by current OPIC employees, you must pay witness fees, allowances, and expenses to the Vice-President/General Counsel by check made payable to the "Overseas Private Investment Corporation" within 30 days from receipt of OPIC's billing statement. For the testimony of a former OPIC employee, you must pay witness fees, allowances, and expenses directly to the former employee, in accordance with 28 U.S.C. 1821 or other applicable statutes.

(d) *Certification of records.* OPIC may authenticate or certify records to facilitate their use as evidence. If you require authenticated records, you must request certified copies at least 45 days before the date they will be needed. Send your request to the Vice-President/General Counsel. OPIC will charge you a certification fee of \$5.00 per document.

(e) *Waiver of fees.* A waiver or reduction of any fees in connection with the testimony, production, or certification or authentication of records may be granted in the discretion of the Vice-President/General Counsel. Waivers will not be granted routinely. If you request a waiver, your request for records or testimony must state the reasons why a waiver should be granted.

#### **§ 713.9 If my request is granted, what restrictions may apply?**

(a) *Records.* The Vice-President/General Counsel may impose conditions or restrictions on the release of nonpublic records, including a requirement that you obtain a protective order or execute a confidentiality agreement with the other parties in the legal proceeding that limits access to

and any further disclosure of the nonpublic records. The terms of a confidentiality agreement or protective order must be acceptable to the Vice-President/General Counsel. In cases where protective orders or confidentiality agreements have already been executed, OPIC may condition the release of nonpublic records on an amendment to the existing protective order or confidentiality agreement.

(b) *Testimony*. The Vice-President/General Counsel may impose conditions or restrictions on the testimony of OPIC employees, including, for example, limiting the areas of testimony or requiring you and the other parties to the legal proceeding to agree that the transcript of the testimony will be kept under seal or will only be used or made available in the particular legal proceeding for which you requested the testimony. The Vice-President/General Counsel may also require you to provide a copy of the transcript of the testimony to OPIC at your expense.

#### § 713.10 Definitions.

For purposes of this part:

*Legal proceedings* means any matter before any federal, state or foreign administrative or judicial authority, including courts, agencies, commissions, boards or other tribunals, involving such proceedings as lawsuits, licensing matters, hearings, trials, discovery, investigations, mediation or arbitration. When OPIC is a party to a legal proceeding, it will be subject to the applicable rules of civil procedure governing production of documents and witnesses; however, this part will still apply to the testimony of former OPIC employees.

*Nonpublic records* means any OPIC records which are exempt from disclosure by statute or under part 706 of this chapter, OPIC's regulations implementing the provisions of the Freedom of Information Act. For example, this means records created in connection with OPIC's receipt, evaluation and action on actual and proposed OPIC finance projects and insurance policies (whether such projects or policies were canceled or not), including all reports, internal memoranda, opinions, interpretations, and correspondence, whether prepared by OPIC employees or by persons under contract, as well as confidential business information submitted by parties seeking to do business with OPIC. Whether OPIC has actually chosen in practice to apply any exemption to specific documents is irrelevant to the question of whether they are "nonpublic" for the purposes of this part.

*OPIC employee* means current and former officials, members of the Board of Directors, officers, directors, employees and agents of the Overseas Private Investment Corporation, including contract employees, consultants and their employees. This definition does not include persons who are no longer employed by OPIC and are retained or hired as expert witnesses or agree to testify about general matters, matters available to the public, or matters with which they had no specific involvement or responsibility during their employment.

*Subpoena* means any order, subpoena for records or other tangible things or for testimony, summons, notice or legal process issued in a legal proceeding.

*Testimony* means any written or oral statements made by an individual in connection with a legal proceeding, including personal appearances in court or at depositions, interviews in person or by telephone, responses to written interrogatories or other written statements such as reports, declarations, affidavits, or certifications or any response involving more than the delivery of records.

Dated: December 4, 1998.

**Michael C. Cushing,**

*Managing Director for Administration.*

[FR Doc. 98-32810 Filed 12-9-98; 8:45 am]

BILLING CODE 3210-01-M

## DEPARTMENT OF JUSTICE

### 28 CFR Part 16

[AAG/A Order No. 157-98]

#### Exemption of Records System Under the Privacy Act

**AGENCY:** Department of Justice.

**ACTION:** Proposed Rule.

**SUMMARY:** The Department of Justice proposes to exempt a Privacy Act system of records from subsection (d) of the Privacy Act, 5 U.S.C. 552a. This system of records is the "Freedom of Information/Privacy Acts (FOI/PA) Records, (JUSTICE/OPR-002)." Records in this system may contain information which relates to official Federal investigations and matters of law enforcement of the Office of Professional Responsibility (OPR). Accordingly, where applicable, the exemptions are necessary to avoid interference with the law enforcement functions of OPR. Specifically, the exemptions are necessary to prevent subjects of investigations from frustrating the investigatory process; preclude the disclosure of investigative

techniques; protect the identities and physical safety of confidential sources and of law enforcement personnel; ensure OPR's ability to obtain information from information sources; protect the privacy of third parties; and safeguard classified information as required by Executive Order 12958.

**DATE:** Submit any comments by January 11, 1998.

**ADDRESS:** Address all comments to Patricia E. Neely, Program Analyst, Information Management and Security Staff, Justice Management Division, Department of Justice, Washington, DC 20530 (Room 850 WCTR Building).

**FOR FURTHER INFORMATION CONTACT:** Patricia E. Neely, (202) 616-0178.

**SUPPLEMENTARY INFORMATION:** In the notice section of today's **Federal Register**, the Department of Justice provides a description of the "Freedom of Information/Privacy Acts (FOI/PA) Records (JUSTICE/OPR-002)."

This Order relates to individuals rather than small business entities. Nevertheless, pursuant to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601-612, it is hereby stated that the order will not have "a significant economic impact on a substantial number of small entities."

#### List of Subjects in Part 16

Administrative Practices and Procedures, Courts, Freedom of Information Act, Privacy Act, and Government in Sunshine Act.

Dated: November 20, 1998.

**Stephen R. Colgate,**

*Assistant Attorney General for Administration.*

Pursuant to the authority vested in the Attorney General by 5 U.S.C. 552a and delegated to me by Attorney General Order No. 793-78, it is proposed to amend 28 CFR part 16 as follows:

#### PART 16—[AMENDED]

1. The authority for part 16 continues to read as follows:

**Authority:** 5 U.S.C. 301, 552, 552a, 552b(g), 553, 18 U.S.C. 4203(a)(1); 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717, 9701.

2. It is proposed to amend 28 CFR 16.80 by adding paragraphs (c) and (d) to read as follows:

#### § 16.80 Exemption of Office of Professional Responsibility (OPR) System—limited access.

\* \* \* \* \*

(c) The following system of records is exempted from 5 U.S.C. 552a(d).

(1) Freedom of Information/Privacy Act (FOI/PA) Records (JUSTICE/OPR-002).