

## The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

### PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

#### § 39.13 [Amended]

2. Section 39.13 is amended by adding a new airworthiness directive (AD) to read as follows:

**Industrie Aeronautiche E Meccaniche Rinaldo Piaggio S.P.A.:** Docket No. 97-CE-141-AD.

**Applicability:** Model P-180 airplanes (serial numbers 1001, 1002, 1004, and 1006 through 1033), certificated in any category.

**Note 1:** This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (c) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

**Compliance:** Required within the next 150 hours time-in-service (TIS) after the effective date of this AD, unless already accomplished.

To prevent low pitch stop switch support displacement, which if not corrected, could result in an improper cockpit indication that the propeller is in the Beta range and cause loss of control of the airplane, accomplish the following:

(a) Modify the low pitch stop switch support in accordance with I.A.M. Rinaldo Piaggio Service Bulletin No. SB-80-0080; Original Issue: July 3, 1997.

(b) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

(c) An alternative method of compliance or adjustment of the compliance time that provides an equivalent level of safety may be approved by the Manager, Small Airplane Directorate, 1201 Walnut, suite 900, Kansas City, Missouri 64106. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Small Airplane Directorate.

**Note 2:** Information concerning the existence of approved alternative methods of

compliance with this AD, if any, may be obtained from the Small Airplane Directorate.

(d) Questions or technical information related to Piaggio Service Bulletin No. SB-80-0080, dated July 3, 1997, should be directed to I.A.M. Rinaldo Piaggio S.p.A., Via Cibrario, 4 16154 Geona, Italy. This service information may be examined at the FAA, Central Region, Office of the Regional Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

**Note 3:** The subject of this AD is addressed in Italian AD 97-217, dated July 28, 1997.

Issued in Kansas City, Missouri, on February 23, 1998.

**Marvin R. Nuss,**

*Acting Manager, Small Airplane Directorate, Aircraft Certification Service.*

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## OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

### 15 CFR Part 2004

#### Proposed Revisions to the Agency's Freedom of Information Act Regulations

**AGENCY:** The Office of the United States Trade Representative.

**ACTION:** Proposed rule.

**SUMMARY:** This document sets forth proposed revisions of the Office of the United States Trade Representative's ("USTR") regulations under the Freedom of Information Act (FOIA). The proposed revisions reflect the principles established by President Clinton and Attorney General Reno in their FOIA Policy Memoranda of October 4, 1993. The proposed regulations also reflect updated cost figures to be used in calculating and charging fees. Additionally, the proposed regulations contain new provisions implementing the Electronic Freedom of Information Act Amendments of 1996.

**DATES:** Submit comments on or before April 1, 1998.

**ADDRESSES:** Address all comments concerning this proposed rule to Elizabeth Hyman, Office of the General Counsel, Office of the United States Trade Representative, 600 17th Street, N.W., Washington, D.C. 20508.

**FOR FURTHER INFORMATION CONTACT:** Ms. Elizabeth Hyman at (202) 395-3432.

**SUPPLEMENTARY INFORMATION:** This document sets forth proposed revisions of the Office of the United States Trade Representative's regulations under the Freedom of Information Act.

New provisions implementing the Electronic Freedom of Information Act

Amendments of 1996 are found at § 2004.3(c)(4) (electronic reading room), § 2004.6 (timing of response), § 2004.5(b) and § 2004.13(c) (deletion marking), § 2004.5(c)(2) (volume estimation), § 2004.3(b)(2) and § 2004.8(b)(3) (format of disclosure), and § 2004.8(b)(8) (electronic searches). For specific sections and subsections implementing the regulations implementing the Electronic Freedom of Information Act Amendments of 1996, the following effective dates apply:

Section 2004.3(c)(4)—electronic reading room—November 1, 1997

Section 2004.6(d), (e), and (f)—processing requests under unusual circumstances, multi-track systems, and with expedited treatment—October 2, 1997; and

Section 2004.5(c)(2)—Volume estimation—October 2, 1997.

### Regulatory Flexibility Act

The United States Trade Representative, in accordance with the Regulatory Flexibility Act (5 U.S.C. 606(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant impact on a substantial number of small entities. This is because costs assessed by USTR will be nominal. Under the Freedom of Information Act, agencies may recover only the direct costs for searching for, reviewing, and duplicating the records processed for requesters. Further, the "small entities" that make FOIA requests, as compared with individual requesters and other requesters, are relatively few in number.

### Executive Order 12866

This regulation has been drafted and reviewed in accordance with Executive Order 12866, Sec. 1(b), Principles of Regulation. The Office of Management and Budget has determined that this rule is a "significant regulatory action" under Executive Order 12866, Sec. 3(f), Regulatory Planning and Review, and accordingly this rule has been reviewed by that office.

### Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

### Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by Sec. 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

### Paperwork Reduction Act

This part does not impose any reporting or record keeping requirements under the Paperwork Reduction Act of 1995.

### List of Subjects in 15 CFR Part 2004

Freedom of information.

For the reasons stated in the preamble, the Office of the United States Trade Representative proposes to amend 15 CFR Ch. XX by revising Part 2004 to read as follows:

## PART 2004—FREEDOM OF INFORMATION POLICIES AND PROCEDURES

### Subpart A—Procedures Regarding FOIA Requests to USTR

Sec.

- 2004.1 General.
- 2004.2 Public reading room.
- 2004.3 Material available to public.
- 2004.4 Requirements for making requests.
- 2004.5 Responses to requests.
- 2004.6 Time limits and expedited processing.
- 2004.7 Administrative appeals.
- 2004.8 Fees—definitions.
- 2004.9 Fee designations.
- 2004.10 Miscellaneous fee provisions.

### Subpart B—Rules governing disclosure

- 2004.11 Notification regarding requests for confidential business information.
- 2004.12 Classified information.
- 2004.13 Records which may be exempt from disclosure.
- 2004.14 Annual report to Congress.

**Authority:** 5 U.S.C. 552, 31 U.S.C. 3717, 44 U.S.C. chapter 35.

### Subpart A—Procedures Regarding FOIA Requests to USTR

#### § 2004.1 General.

The Office of the United States Trade Representative (USTR) was established in the Executive Office of the President pursuant to the Trade Act of 1974, Public Law 93-618, as amended. That law describes the principal statutory functions of the Office and its organization. The agency's office is

located at 600 17th Street, N.W., Washington, D.C. 20508. This information is furnished for the guidance of the public and in compliance with the requirements of section 552 of title 5 U.S.C., as amended. Information routinely provided to the public as part of a regular agency activity (for example, press releases issued by the Office of Public Affairs) may be provided to the public without following this subpart. As a matter of policy, USTR makes discretionary disclosures of records or information exempt under the FOIA whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption, but this policy does not create any right enforceable in court.

#### § 2004.2 Public reading room.

USTR maintains a public reading room at 600 17th Street, N.W., Washington, D.C. The reading room contains records that the FOIA requires to be made regularly available for public inspection and copying.

#### § 2004.3 Material available to the public.

(a) *In general.* Nonexempt records released under the authority of this part are considered to be in the public domain. (See § 2004.13 to determine what exemptions may be applied under FOIA.) Such records may also be made available in the USTR reading room in paper form, as well as electronically to facilitate public access (described in paragraph (c) of this section). Discretionary releases to FOIA requesters constitute a waiver of the FOIA exemptions that otherwise apply. Disclosure to a properly constituted advisory committee, to Congress, to foreign governments or multilateral organizations, or other Federal agencies does not waive the exemption.

(b) *Creating a record.* (1) A record must exist and be in the possession of USTR at the time of the request to be considered subject to this part and the FOIA. There is no obligation to create, compile, or obtain from outside the agency a record to satisfy a FOIA request.

(2) In regard to electronic data, the issue of whether records are actually created or merely extracted from an existing database is not always readily apparent. Consequently, when responding to FOIA requests for electronic data where creation of a record, programming, or particular format become an issue, USTR shall apply a standard of "reasonable efforts." In other words, if the capability exists to respond to the request and the effort would not significantly interfere with

the operation of the agency's information systems, then the request should be processed. However, the request need not be processed where the capability to respond does not exist without a significant expenditure of resources, thus interfering with operations. A significant expenditure of resources in both time and manpower that would cause a significant interference with the operation of USTR's automated information system would exceed reasonable efforts.

(c) *Information available in the public reading room.* (1) *Index of available information.* USTR will maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter which is issued, adopted, or promulgated after July 4, 1967, and which is retained as a record and is required to be made available or published. Copies of the index are available upon request for a fee of the direct cost of duplication.

(2) *Availability of released records.* USTR will make available for public inspection and copying copies of records which have been released and which the agency determines, because of their subject matter, have become or are likely to become the subject of subsequent requests for substantially the same records.

(3) *Index of released materials.* USTR will maintain and make available for public inspection and copying a general index of records which have been released and which USTR determines because of their subject matter have become or are likely to become the subject of subsequent requests for substantially the same records. The index will be available by computer telecommunications by December 31, 1999.

(4) *Electronic availability.* Records described in this paragraph (c)(4) which are created by USTR on or after November 1, 1996, will be made available by November 1, 1997, including by computer telecommunications, or if those have not been established, by other electronic means. Specifically the records are:

(i) Administrative staff manuals and instructions, or portions thereof, that establish USTR policy or interpretations of policy that affect a member of the public. This provision does not apply to instructions for employees on tactics and techniques to be used in performing their duties, or to instructions relating to the internal management of USTR.

(ii) Those requested records that have been released in part or in whole, which because of the nature of the subject matter, have become or are likely to

become the subject of subsequent requests for substantially the same records.

#### § 2004.4 Requirements for making requests.

(a) All identifiable records of the Office of the United States Trade Representative (USTR) shall be made available to the public upon compliance with the procedures established in this part, except to the extent that a determination is made to withhold a record subject to exemption under 5 U.S.C. 552(b) and (c).

(b) All requests for records must be in writing and shall be addressed to Freedom of Information Officer, Office of the United States Trade Representative, 600 17th Street, N.W., Washington, D.C. 20508.

(c) *Description of records sought.* The requester must describe the records that he/she seeks in enough detail to enable USTR personnel to locate them with a reasonable amount of effort. Whenever possible, the request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record. In addition, if the requester desires records pertaining to a specific trade negotiation or dispute, he/she should provide the specific name of the proceeding or negotiation, and the nature of that case or matter. As a general rule, the greater the specificity about the records or type or records wanted, the more likely USTR will be able to locate those records in response to your request. If USTR determines that a request does not reasonably describe records, it shall notify the requester either of the additional information needed or explain why the request is otherwise insufficient. USTR also shall give the requester an opportunity to discuss the request so that it may be modified to meet the requirements of this section.

(d) *Agreement to pay fees.* If the requester makes a FOIA request, it shall be considered an agreement by the requester to pay all applicable fees charged under § 2004.9, unless he/she seeks a waiver of fees. USTR ordinarily will confirm this agreement in an acknowledgment letter. When making a request, the requester may state a willingness to pay a specific maximum amount without further consultation.

#### § 2004.5 Responses to requests.

(a) *Acknowledgments of requests.* On receipt of a request, USTR ordinarily shall send an acknowledgment letter to the requester which shall confirm, or ask for confirmation, of the requester's agreement or willingness to pay fees

under § 2004.9, and provide an assigned request number for further reference.

(b) *Consultations and referrals.* (1) *Determining the Origin of the Record.* When USTR receives a request for a record in its possession, it shall determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA and, if so, whether it should be disclosed as a matter of administrative discretion. If USTR determines that it is best able to respond to the request, then it shall do so. If USTR determines that it is not best able to process the record then it shall either respond to the request regarding that record after having consulted with the agency best able to determine whether to disclose it, and with any other agency that has a substantial interest in it; or USTR shall refer the responsibility for responding to the request to another agency that originated the record (but only if that agency is subject to the FOIA). Ordinarily the agency that originated a record will be presumed to be best able to determine whether to disclose it.

(2) *Notice of referral.* Whenever USTR refers all or any part of the responsibility for responding to a request to another agency, it ordinarily shall notify the requester of the referral, the agency to which the request has been referred, and the part of the request that has been referred.

(3) *Timing of responses to consultations and referrals.* All consultations and referrals will be handled according to the date the FOIA request by the first agency.

(b) *Grants of requests.* Once USTR makes a determination to grant a request in whole or in part, it shall notify the requester in writing. USTR shall inform the requester in the notice of any fee charged under § 2004.9 and shall disclose records to the requester promptly on payment of any applicable fee. Records disclosed in part shall be marked or annotated to show both the amount and the location of the information deleted wherever practicable.

(c) *Adverse determinations of the request.* If USTR makes an adverse determination denying the request in any respect, it shall notify the requester of that determination in writing. Adverse determinations, or denials of requests, consist of: a determination to withhold any requested document in part or in whole; a determination that a requested document does not exist or cannot be located; a determination that what has been requested is not a record subject to the Act; a determination on any disputed fee matter, including a

denial of a request for a fee waiver; and a denial of a request for expedited treatment. The denial letter shall include:

(1) A brief statement of the reason(s) for the denial, including any FOIA exemption applied by USTR in denying the request;

(2) An estimate of the volume of records or information withheld, in number of pages or in some other reasonable form of estimation. This estimate does not need to be provided if the volume is otherwise indicated through deletions on records disclosed in part, or if providing an estimate would harm an interest protected by an applicable exemption; and

(3) A statement that the denial may be appealed under § 2004.6 and a description of the requirements of that section.

#### § 2004.6 Time limits and expedited processing.

(a) *In general.* USTR ordinarily shall respond to requests according to their order of receipt. USTR will not search for documents responsive to a request that were created after the date of receipt by USTR of the request.

(b) *Initial response and appeal.* Effective October 2, 1997, an initial response shall be made within 20 working days (i.e. exempting Saturdays, Sundays, and legal public holidays) after the receipt of a request for a record under this part by the Freedom of Information Officer or his designee. An appeal under § 2004.7 shall be decided within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such an appeal by the Appeals Committee.

(c) *Commencement of time limits.* The time limits for initial decision and for an appeal decision begins on the date the request or appeal is actually received by USTR. If requests or appeals are not properly marked "Freedom of Information Request" or "Freedom of Information Act Appeal," or the request or appeal is inadvertently delayed in reaching the respective Freedom of Information Officer or the Appeals Committee, they will not be deemed received by USTR until actually received by the Freedom of Information Officer or Appeals Committee. In such events, the person making the request or appeal will be furnished a notice of the effective date of receipt.

(d) *Unusual circumstances.* (1) In unusual circumstances as specified in paragraph (d)(2) of this section, the Freedom of Information Officer or his designee may extend the time limits in paragraph (b) of this section by written notice to the person requiring a record

under this part. This notice shall set forth the reasons for such extension. No such notice shall specify a date which would result in an extension of either the initial determination period, or the appeal period, or both, for more than 10 working days. An opportunity will be provided to limit the scope of the request so that it may be processed within the time limit or to arrange an alternative time frame for processing the request or a modified request.

(2) As used in this section, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request:

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

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

(iii) The need for consultations, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request, or among two or more components of the agency having substantial subject matter interest therein.

(3) Unusual circumstances do not include a delay that results from a predictable agency workload of requests, unless USTR demonstrates reasonable progress in reducing its backlog of pending requests. Refusal to reasonably modify a scope of a request or arrange an alternate time frame may affect a requestor's ability to obtain judicial review.

(e) *Multitrack processing.* USTR will ordinarily respond to requests according to order of receipt. When USTR has a significant number of pending requests that prevent a response determination from being made within 20 working days, the requests shall be processed in a multitrack processing system. USTR may use two or more processing tracks by distinguishing between simple and more complex requests based on the date of receipt, the amount of time and work involved in processing the requests, and whether the request qualifies for expedited processing as described in paragraph (f) of this section. USTR may provide requesters in its slower track(s) with an opportunity to limit the scope of their requests in order to qualify for faster processing within the specified limits of USTR's faster track(s). USTR will contact the requester either by telephone or by letter, whichever is

more efficient in each case. This multitrack processing system does not obviate the responsibility of USTR to exercise due diligence in processing requests in the most expeditious manner possible.

(f) *Expedited processing.* (1) Requests and appeals will be taken out of order and put into a separate queue for expedited treatment whenever it is determined they involve:

(i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information to the public; or

(iii) The loss of substantial due process rights.

(2) A request for expedited processing may be made at the time of the initial request for records or at any later time. A requester who seeks expedited processing must submit a statement, certified to be true and correct to the best of that person's knowledge and belief, explaining in detail the basis for requesting expedited processing. For example, a requester within the category described in paragraph (f)(1)(ii) of this section, if not a full-time member of the news media, must establish that he or she is a person whose main professional activity or occupation is information dissemination, though it need not be his or her sole occupation. A requester within the category described in paragraph (f)(1)(ii) of this section must also establish a particular urgency to inform the public about the government activity generally. The formality of certification may be waived as a matter of administrative discretion.

#### § 2004.7 Administrative appeals.

(a) *Appeals of adverse determinations.* (1) The requester may appeal an adverse determination denying the request or referral in § 2004.5(b). The appeal must be in writing and it must be received by USTR within 60 days of the date of the letter from USTR denying the request. The appeal letter may include as much or as little related information as the requester wishes, so long as it clearly identifies the determination that is being appealed. For the quickest possible handling, the appeal letter and envelope should be marked "Freedom of Information Act Appeal," and the letter of appeal should include the assigned request number referenced in § 2004.5(a).

(2) The Office of the United States Trade Representative has established an appeals process. An Assistant United States Trade Representative (AUSTR) shall review all appeals. In the event that the designated official participated in the adverse determination under review, or is otherwise unable to render judgement, he or she may choose one of two other senior officials of the agency (of the rank of Deputy Assistant United States Trade Representative or higher) also designated to carry out the function of appellate review. The senior officials serving as appellate officials may not simultaneously serve on the classification committee discussed in § 2004.12.

(b) Final determinations on appeals normally shall be made within 20 working days after receipt. When USTR has a significant number of appeals preventing a response determination within 20 working days, the appeals shall be processed based on the multi track system discussed in § 2004.6.

(c) If the appeal is granted, the person making the appeal shall be immediately notified and copies of the releasable documents shall be made available promptly thereafter upon receipt of appropriate fees as set forth in § 2004.9. If the appeal is denied in whole or part, the person making the request shall be immediately notified of the decision and of the provision of judicial review of USTR's denial of the request.

(d) In the event a determination is not issued within the appropriate time limit, and the person making the request chooses to initiate a court action against USTR, the administrative appeal process may continue.

#### § 2004.8 Fees—definitions.

(a) *In general.* USTR will charge fees that recoup the full allowable direct costs it incurs. Moreover, it shall use the most efficient and least costly methods to comply with requests for documents made under the FOIA.

(b) *Definitions.* For purposes of this section:

(1) *Commercial use request* means a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, which can include furthering those interests through litigation. USTR shall determine, whenever reasonably possible, the use to which a requester will put the requested records. When it appears that the requester will put the records to a commercial use, either because of the nature of the request itself or because USTR has reasonable cause to doubt a requester's stated use, USTR shall provide the requester a

reasonable opportunity to submit further clarification.

(2) *Direct costs* means those expenses that an agency actually incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records to respond to a FOIA request. Direct costs include, for example, the salary of the employees performing the work (the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits) and the cost of operating duplication machinery.

(3) *Duplication* means the making of a copy of a record, or the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, microform, audiovisual materials, or electronic records (for example magnetic tape or disk), among others. USTR shall honor a requester's specified preference of form or format of disclosure if the record is readily reproducible with reasonable efforts in the requested form or format by the office responding to the request.

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

(5) *Noncommercial scientific institution* means an institution that is not operated on a "commercial" basis, as that term is defined in paragraph (b)(1) of this section, and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scientific research.

(6) *Representative of the news media, or news media requester*, means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and

publishers of periodicals (but only in instances where they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. For "freelance" journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization. A publication contract would be the clearest proof, but USTR shall also look to the past publication record of a requester in making this determination. To be in this category, a requester must not be seeking the requested records for commercial use. However, a request for records supporting the news-dissemination function of the requester shall not be considered to be for a commercial use.

(7) *Review* means the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. It also includes processing any record for disclosure—for example, doing all that is necessary to redact and prepare it for disclosure. Review costs are recoverable even if a record ultimately is not disclosed. Review time includes time spent considering any formal objection to disclosure made by a business submitter under § 2004.11, but does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) *Search* means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. USTR shall ensure that searches are done in the most efficient and least expensive manner reasonably possible. For example, USTR shall not search line-by-line where duplicating a document would be quicker and less expensive.

#### § 2004.9 Fee designations.

(a) *Fees*. USTR will charge fees as set forth in this paragraph (a) unless a fee is under paragraph (b) of this section or would be reduced under § 2004.10(e).

(1) *Manual searches for records*. For each quarter hour spent by clerical personnel in searching for and retrieving a requested record, the fee will be \$3.50. Where such retrieval cannot be performed entirely by clerical personnel—for example, where the identification of records within the scope of a request requires the use of professional personnel—the fee will be \$8.75 per quarter hour. Where the time

of managerial personnel is required, the fee will be \$10.25 per quarter hour.

(2) *Computer searches for records*. USTR will charge at the actual direct cost of providing the service. This will include the cost of operating the central processing unit (CPU) for that portion of operating time that is directly attributable to searching for records responsive to a FOIA request and operator/programmer salary apportionable to the search.

(3) *Review of records*. Only requesters who are seeking documents for commercial use may be charged for time spent reviewing records to determine whether they are exempt from mandatory disclosure. Charges may be assessed only for the initial review, i.e., the review undertaken the first time USTR analyzes the applicability of a specific exemption to a particular record or portion of a record. 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 for such a subsequent review are assessable.

(4) *Duplication of records*. For paper copies, records will be duplicated at a rate of \$.15 per page. For copies prepared by computer, such as diskettes, tapes, or printouts, USTR shall charge the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction or duplication, USTR will charge the actual direct costs of producing the document(s).

(5) *Other charges*. USTR will recover the full costs of providing services such as those enumerated in this paragraph (a)(5) when it elects to provide them.

(i) Certifying that records are true copies;

(ii) Sending records by special methods such as express mail.

(6) *Remittances*. Remittances shall be in the form either of a personal check or bank draft drawn on a bank in the United States, or a postal money order. Remittances shall be made payable to the order of the Treasury of the United States and mailed or delivered to the Freedom of Information Officer, Office of the United States Trade Representative, 600 17th Street, N.W., Washington, D.C. 20508.

(7) A receipt for fees paid will be given upon request. A refund of fees paid for services actually rendered will not be made.

(b) *Limitations on charging fees* (1) No search fee will be charged for requests by educational institutions, noncommercial scientific institutions, or representatives of the news media.

(2) No search fee or review will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(3) Except for requesters seeking records for a commercial use, USTR will provide without charge: the first 100 pages of duplication (or the cost equivalent); and the first two hours search (or the cost equivalent).

(4) Whenever a total fee calculated under paragraph (c) of this section is \$14.00 or less for any request, no fee will be charged.

(5) The provisions of paragraphs (b)(3) and (4) of this section work together. This means that for requesters other than those seeking records for a commercial use, no fee will be charged unless the cost of search in excess of two hours plus the cost of duplication in excess of 100 pages totals more than \$14.00.

(c) *Notice of anticipated fees in excess of \$25.00.* When USTR determines or estimates that the fees to be charged under this section will amount to more than \$25.00, the USTR shall notify the requester of the actual or estimated amount of fees, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily, the USTR shall advise the requester that the estimated fee may be only a portion of the total fee. In cases in which a requester has been notified that actual or estimated fees may exceed \$25.00, the request shall not be considered received and further work shall not be done on it until the requester agrees to pay the anticipated total fee. Any such agreement should be memorialized in writing. A notice under this paragraph will offer the requester an opportunity to discuss the matter with USTR in order to reformulate the request to meet the requester's needs at a lower cost.

#### **§ 2004.10 Miscellaneous fee provisions.**

(a) *Charging interest.* USTR may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the date of billing until payment is received by the USTR. USTR will follow the provisions of the Debt Collection Act of 1982, Public Law 97-265 (October 25, 1982), and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(b) *Aggregating requests.* Multiple requests involving related matters may be aggregated for two purposes. When USTR reasonably believes that a

requester or, on rare occasions, a group of requesters acting in concert, is:

(1) Attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, USTR may aggregate any such requests and charge accordingly. One element to be considered in determining whether a belief would be reasonable is the time period over which the requests have occurred.

(2) When USTR reasonably believes that such a request constitutes a single request, which would otherwise satisfy the unusual circumstances set forth in § 2004.6(d), and the request involves clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(c) *Charges for a search without disclosure.* USTR may assess charges for time spent searching, even if it fails to locate the records or if records located are determined to be exempt from disclosure. If USTR estimates that search charges are likely to exceed \$25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer the requester the opportunity to confer with agency personnel with the object of reformulating the request to meet his or her needs at a lower cost.

(d) *Advance payments.* USTR may not require a requester to make an advance payment, i.e., payment before work is commenced or continued on a request, unless:

(1) USTR estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250. Then, USTR will notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment; or

(2) 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). Then, USTR may require the requester to pay the full amount owed plus any applicable interest as provided in paragraph (a) of this section or demonstrate that he or she has, in fact, paid the fee, and to make an advance payment of the full amount of the estimated fee before the agency begins to process a new request or a pending request from the requester.

(3) When USTR acts under paragraph (d)(1) or (2) of this section, the administrative time limits prescribed in the FOIA, 5 U.S.C. 552(a)(6) (i.e., 10

working days from receipt of initial requests and 20 working days from receipt of appeals from initial denial, plus permissible extensions of these time limits) will begin only after USTR has received fee payments described in this paragraph (d).

(e) *Waiver or reduction of charges.*

Fees otherwise chargeable in connection with a request for disclosure of a record shall be waived or reduced where it is determined that disclosure is in the interest of USTR or in the public interest because it is:

(1) Likely to contribute significantly to public understanding of the operations or activities of the Government and

(2) Is not primarily in the commercial interest of the requester.

#### **Subpart B—Rules Governing Disclosure**

##### **§ 2004.11 Notification regarding requests for confidential business information.**

(a) *In general.* Business information obtained by USTR from a submitter will be disclosed under the FOIA only consistent with the procedures established in this section.

(b) *Definitions.* For the purposes of this section:

(1) *Business information* means commercial or financial information obtained by USTR from a submitter that may be protected from disclosure under exemption 4 of the FOIA (see § 2004.13).

(2) *Submitter* means any person or entity from whom USTR obtains business information, directly or indirectly. The term includes but is not limited to corporations; state, local and tribal governments; and foreign governments.

(c) *Designation of business information.* A submitter of business information will use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that is considered to be protected from disclosure under exemption 4.

(d) *Notice to submitters.* USTR shall provide a submitter with prompt written notice of a FOIA request or administrative appeal that seeks its business information whenever required under paragraph (e) of this section, except as provided in paragraph (h) of this section, in order to give the submitter an opportunity to object to disclosure of any specified portion of that information under paragraph (f) of this section. The notice shall either describe the business information requested or include copies of the requested records or record portions containing the information.

(e) *Where notice is required.* Notice shall be given to the submitter wherever:

(1) The information has been designated in good faith by the submitter as information considered protected from disclosure under exemption 4; or

(2) USTR has reason to believe that the information may be protected from disclosure under exemption 4.

(f) *Opportunity to object to disclosure.* USTR will allow a submitter a reasonable period of time to respond to the notice described in paragraph (d) of this section. If a submitter has any objection to disclosure, it is required to submit a detailed written statement. The statement must specify all grounds for withholding any portion of the information under any exemption of the FOIA and, in the case of exemption 4, it must show why the information is a trade secret or commercial or financial information that is privileged or confidential. In the event that a submitter fails to respond to the notice within the time specified in it, the submitter will be considered to have no objection to disclosure of the information. In most cases this will result in a disclosure of information. Information provided by a submitter regarding the application of the exemption may itself be subject to disclosure under the FOIA.

(g) *Notice of intent to disclose.* USTR shall consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose business information. Whenever USTR decides to disclose business information over the objection of a submitter, USTR shall give the submitter written notice, which shall include:

(1) A statement of reason(s) why each of the submitter's disclosure objections was not sustained;

(2) A description of the business information to be disclosed; and

(3) A specified disclosure date, which shall be a reasonable time subsequent to the notice.

(h) *Exceptions to notice requirements.* The notice requirements of paragraphs (d) and (g) of this section shall not apply if:

(1) USTR determined the information should not be disclosed;

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

(3) Disclosure of the information is required by statute (other than FOIA) or by a regulation issued in accordance with Executive Order 12600 (which pertains to agency rules, opinions, orders and proceedings); or

(4) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous—except that, in such a case, USTR shall, within a reasonable time prior to a specific disclosure date, give the submitter written notice of any final decision to disclose the information.

(i) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of business information, USTR shall promptly notify the submitter.

(j) *Corresponding notice to requesters.* Whenever USTR provides a submitter with notice and an opportunity to object to disclosure under paragraph (d) of this section, USTR shall also notify the requester(s). Whenever USTR notifies a submitter of its intent to disclose requested information under paragraph (g), the USTR shall also notify the requester(s). Whenever a submitter files a lawsuit seeking to prevent the disclosure of business information, the USTR shall notify the requester(s).

#### § 2004.12 Classified information.

(a) A Classification Review Committee has been established within USTR to make determinations on the applicability of the exemption for classified documents. The Committee is composed of one Assistant U.S. Trade Representative representing a regional or bilateral office, the AUSTR for Trade Policy Coordination and a lawyer from the General Counsel's office.

(b) The applicability of the exemption for classified information, Exemption 1 of the FOIA, requires a determination that the record in question is specifically authorized under the criteria established by Executive Order 12958 to be kept classified and is in fact properly classified pursuant to that order. This determination shall be made whenever possible before the initial denial under § 2004.5. It must in any case be made prior to the decision of an appeal under § 2004.7. No denial should be based on the existence of a classification marking on the record, and there shall be a substantive review of the validity of the classification to the maximum extent feasible within the time limits for a denial under § 2004.6.

(c) Whenever a request is made for information that is classified, or may be appropriate for classification, by another agency under Executive Order 12958, or any other executive order concerning the classification of records, USTR shall refer the responsibility for responding to the request for such information to the agency that classified the information, or has the primary interest in it, as appropriate. Whenever a record contains information that has been

derivatively classified by another agency, USTR shall refer the responsibility for responding to the request regarding that information to the agency that classified the underlying information. The person requesting the record will be advised of the date and the addressee of the referral.

(d) At the request of another agency, the Classification Review Committee will make recommendations on the release of material concerning "national defense or foreign policy" originally classified by another agency but which is of significant subject-matter interest to USTR.

#### § 2004.13 Records which may be exempt from disclosure.

(a) The following categories of records maintained by USTR may be exempted from disclosure:

(1) Records specifically authorized under criteria established by an executive order to be kept confidential in the interest of national defense or foreign policy and are in fact properly classified pursuant to such executive order.

(2) Records related solely to the internal personnel rules and practices of the agency.

(3) Records specifically exempted from disclosure by statute, including but not limited to information relating to trade negotiations exempted under 19 U.S.C. 2155(g)(1)(A) and B and 2155(g)(2).

(4) Records of trade secrets and commercial or financial information obtained from a person and which are privileged or confidential.

(5) Records which are inter-agency or intra-agency memorandums, letters, telegrams, or airmgrams (or other forms of communication) which would not be available by law to a party other than an agency in litigation with the agency.

(6) Records such as personnel and medical files and similar files the public disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(7) Such other records that fall within exceptions noted in 5 U.S.C. 552(b)(7), (8), and (9).

(b) Any reasonably segregable nonexempt portion of a record shall be provided to any person requesting such records after deletion of the portions which are exempt under paragraph (a) of this section. Normally a portion of a record shall be considered reasonably segregable when segregation can produce an intelligible record which is not distorted out of context and does not contradict the record being withheld.

(c) The amount of information deleted shall be indicated on the released



portion of the record, unless including that indication would harm an interest protected by the exemption in paragraph (a) of this section under which the deletion is made. If technically feasible, the amount of the information deleted shall be indicated at the place in the record where such deletion is made.

#### **§ 2004.14 Annual report to Congress.**

(a) USTR shall compile FOIA statistics on a fiscal year basis beginning on October 1, 1997, and will submit this report to the Attorney General of the United States. The report will include:

- (1) Number of requests received;
- (2) Number of requests processed;
- (3) The number of requests for records pending before USTR as of September 30 of the preceding year, and the median number of days that such requests had been pending before USTR as of that date;

- (4) The number of appeals made by persons under the Act, the results of such appeals, and the reason for the action by USTR upon each appeal that results in a denial of information;

- (5) A complete list of all statutes that USTR relies upon to authorize it to withhold information under the Act, a description of whether a court has upheld the decision of USTR to withhold information under each such statute, and a concise description of the scope of any information withheld;

- (6) The total amount of fees collected by USTR for processing requests; and

- (7) The number of full-time staff of USTR devoted to processing requests for records, and the total amount expended in terms of time and dollars by that staff in processing requests.

(b) USTR shall make the above report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by USTR, by other electronic means.

**Susan Esserman,**

*General Counsel.*

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## **OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

### **29 CFR Part 2200**

#### **Rules of Procedure**

**AGENCY:** Occupational Safety and Health Review Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Occupational Safety and Health Review Commission proposes to

supplement its existing rule establishing a Settlement Judge procedure, with a new procedure to be known as the Settlement Part which is intended to facilitate the settlement process in large and complex cases. This procedure would be instituted as a pilot program for a one-year trial period.

**DATES:** Comments must be received by April 16, 1998.

**ADDRESSES:** All comments concerning these proposed rules should be addressed to Earl R. Ohman, Jr., General Counsel, One Lafayette Center, 1120 20th St., NW., 9th Floor, Washington, DC 20036-3419.

**FOR FURTHER INFORMATION CONTACT:** Earl R. Ohman, Jr., General Counsel, 202-606-5410.

**SUPPLEMENTARY INFORMATION:** The Occupational Safety and Health Review Commission proposes to supplement its existing rule establishing a Settlement Judge procedure, 29 CFR § 2200.101, with a new procedure to be known as the Settlement Part which is intended to facilitate the settlement process in large and complex cases. This procedure would be instituted as a pilot program for a one year trial period. However, as the Commission currently is without a quorum, it will wait for a second Commission member before acting to put the pilot program into effect. Before commencing the pilot program, the Commission also intends to give several judges specialized training in settlement negotiation techniques and procedures. After the trial period, the Commission would evaluate the results and determine whether it should continue the Settlement Part procedure and, if so, what modifications should be made. The Settlement Part process is intended to provide a more structured and formal setting in which the possibility of settlement would be enhanced by requiring the parties at a preliminary stage in the proceedings to meet and confer with a judge who has full authority both to guide and assist the parties to a complete or partial resolution of the case and to assure the parties the confidentiality which is a necessary component of any successful settlement procedure. Unlike the existing Settlement Judge procedure, which requires the consent of the parties, proceedings under the Settlement Part will be compulsory in certain cases. For purposes of the pilot program, the Settlement Part procedure will be mandated for cases where the amount of the proposed penalties is at least \$200,000 and in other cases where the Chief Administrative Law Judge deems the Settlement Part procedure to be appropriate. A settlement process

which may be prescribed for the parties without a requirement for their prior consent has ample precedent. For example, the Courts of Appeals for the Third Circuit and the Eleventh Circuit have, respectively, an "Appellate Mediation Program" and an "Appellate Conference Program" under which the selection of cases for settlement negotiations is controlled by the court. An independent unit of the court in the Ninth Circuit staffed by mediators conducts settlement conferences as directed by the court (9th Cir. R. 33-1). In the Fourth (4th Cir. R. 33) Sixth (6th Cir. R. 18), and Tenth (10th Cir. R. 33.1) Circuits, the court determines whether a pre-argument settlement conference should be conducted. In the Eighth Circuit, such conferences are mandatory in most civil appeals (8th Cir. R. 33A). The Federal Energy Regulatory Commission or its Chief Administrative Law Judge may mandatorily assign a settlement judge even absent the consent of or a motion by any of the parties. 18 CFR § 385.603. The provisions of the Settlement Part are set forth here as a separate and distinct rule for purposes of clarity in the notice and comment process. The Commission will consider combining these provisions with those of the existing settlement rule so as to create a single rule governing settlement practice.

#### **Development of the Proposed Rules**

The Commission's experience has shown that, generally speaking, parties have not been able to agree to use the existing consensual Settlement Judge procedure except in relatively simple cases which do not raise novel or complex issues of law or fact. While the Commission appreciates that the parties in such cases may have found the Settlement Judge system to be helpful in resolving their dispute, the Commission is concerned about the increasing volume of cases which for complexity or other reasons demand a great deal of trial time and impose an appreciable burden on Commission resources. The proposed Settlement Part is designed to make available to the parties a mechanism for addressing the potential for settlement, either in full or in part, of issues arising under these cases.

Since this procedure is to be a pilot program, the number of cases processed under the Settlement Part must be controlled so as to provide a sample large enough for an accurate and thorough evaluation of the program but not so large as to overtax the number of judges that can be made available to serve in the Settlement Part. Based on the Commission's analysis of its existing and anticipated docket, the Commission