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Deputy Assistant Secretary for Information
Resources Management.

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FEDERAL MARITIME COMMISSION

46 CFR Part 503

[Docket No. 98-11]

Availability of Records to the Public— Electronic Freedom of Information Act

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission revises its regulations on public access to Commission records, materials, and information in order to clarify existing rules, provide information concerning the electronic availability of information and records, and to incorporate the requirements of the Electronic Freedom of Information Act Amendments of 1996.

DATES: This rule is effective November 4, 1998.

FOR FURTHER INFORMATION CONTACT:

Joseph C. Polking, Secretary, Federal Maritime Commission, 800 North Capitol St., NW, Room 1046, Washington, DC 20573-0001, (202) 523-5725, E-mail: secretary@fmc.gov

SUPPLEMENTARY INFORMATION: On July 22, 1998, the Federal Maritime Commission published a proposed rule to revise its regulations on public access to Commission records, materials, and information. 63 FR 39263-39267, July 22, 1998. The proposed rule clarified existing regulations, provided information concerning the electronic availability of information and records, and incorporated the requirements of the Electronic Freedom of Information Act Amendments of 1996 ("EFOIA"), Pub. L. 104-231, 110 Stat. 3408. Interested parties were given the opportunity to submit comments on the proposed rule. The Commission received one comment jointly from two nonprofit groups claiming to have experience as requesters of Freedom of Information Act (FOIA) material and as counsel or assistant to requesters.

The comment addressed proposed section 503.24(b)(5)(iv), which reflects provisions in EFOIA requiring that previously requested records created on or after November 1, 1996, that are subject to subsequent, multiple FOIA requests be made available in agency electronic reading rooms. 5 U.S.C. 552(a)(2)(D). The proposed rule

provided that "[r]ecords created by the Commission since November 1, 1996," and subject to subsequent requests would be available through the Electronic Reading Room. The comment takes exception to the language "by the Commission," and argues that EFOIA requires that repeatedly requested, previously released records be made electronically available whether or not they were created by an agency.

The Department of Justice (DOJ) issued government-wide guidance advising agencies that the requirement of electronic reading room availability was applicable only to agency created records. *FOIA Update*, Winter 1997, at 4-5. Moreover, DOJ dismissed an identical comment when issuing its own implementing rules. 63 FR 29591, 29592, June 1, 1998. DOJ explained that by limiting the electronic reading room contents to "records created on or after November 1, 1996," EFOIA recognizes the practical limitations on electronic reading rooms. Presumably, according to DOJ, agencies will have their own materials dating from November 1, 1996 in an electronic form and can readily make those available through electronic communications. However, those records not created by the agency, but instead obtained by the agency, are not as likely to be readily available in electronic form. Thus, DOJ explained, only those records created by the agency are required to be available via the electronic reading room. *Id.* See *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144 (recognizing that agencies "either create or obtain" records subject to FOIA), cited in *FOIA Update*, Winter 1997, at 4-5. The Commission shares DOJ's view, and disagrees with the commenter's interpretation of this provision of EFOIA.

Moreover, at this time the Commission does not have sufficient computer equipment to transform paper documents submitted by the public into an electronic form that could then be made available through the electronic reading room on the Commission web page. However, the Commission is cognizant of the need to enhance public access to information through electronic means. The Commission has found that making documents and information accessible via the electronic reading room is of a benefit to both the public and the agency. Both economy and efficiency are served by providing this type of access. Accordingly, the Commission plans to eventually upgrade its computer resources to allow for "scanning" of documents into a form appropriate for the web page.

Thus, while not mandated by law, the Commission hopes eventually to make materials in this category available via the electronic reading room, to the extent it is reasonable and practical to do so.

This rule is not a significant regulatory action as defined by Executive Order 12866, Regulatory Planning and Review, and therefore, is not subject to review by the Office of Information and Regulatory Affairs, in the Office of Management and Budget.

This rule concerns internal administrative procedures for making information available to the public, and, accordingly, the Chairman certifies that this rule will not have a significant economic impact on a substantial number of small entities.

The rule contains no additional information collection or record keeping requirements. Therefore, the requirements of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* do not apply.

List of Subjects in 46 CFR part 503

Classified information, Freedom of Information, Privacy, Sunshine Act. For the reasons set out in the preamble, the Commission amends 46 CFR part 503 as follows:

PART 503—PUBLIC INFORMATION

1. The authority citation for part 503 is revised to read as follows:

Authority: 5 U.S.C. 552, 552a, 552b, 553; 31 U.S.C. 9701; E.O. 12958 of April 20, 1995 (60 FR 19825), sections 5.2(a) and (b).

2. Revise subpart C to read as follows:

Subpart C—Records, Information and Materials Generally Available to the Public Without Resort to Freedom of Information Act Procedures

Sec.

503.21 Mandatory public records.

503.22 Records available at the Office of the Secretary.

503.23 Records available upon written request.

503.24 Information available via the internet.

Subpart C—Records, Information and Materials Generally Available to the Public Without Resort to Freedom of Information Act Procedures

§ 503.21 Mandatory public records.

(a) The Commission, as required by the Freedom of Information Act, 5 U.S.C. 552, shall make the following materials available for public inspection and copying:

(1) Final opinions (including concurring and dissenting opinions) and all orders made in the adjudication of cases.

(2) Those statements of policy and interpretations which have been adopted by the Commission.

(3) Administrative staff manuals and instructions to staff that affect any member of the public.

(4) Copies of all records, regardless of form or format, which have been released to any person pursuant to a Freedom of Information Act request, and which the Secretary determines have become or are likely to become the subject of subsequent requests for substantially the same records, and a general index of such records.

(b) To prevent unwarranted invasion of personal privacy, the Secretary may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in paragraph (a)(4) of this section. In each case, the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on that portion of the record which is made available or published, unless including that indication would harm an interest protected by an exemption in § 503.33 under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made.

(c) The Commission maintains and makes 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, and which is required by paragraph (a) of this section to be made available or published.

(1) The index shall be available at the Office of the Secretary, Federal Maritime Commission, Washington, DC 20573. Publication of such indices has been determined by the Commission to be unnecessary and impracticable. The indices shall, nonetheless, be provided to any member of the public at a cost not in excess of the direct cost of duplication of any such index upon request therefor.

(2) No final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects any member of the public will be relied upon, used, or cited as precedent by the Commission against any private party unless:

(i) It has been indexed and either made available or published as provided by this subpart; or

(ii) That private party shall have actual and timely notice of the terms thereof.

(d) Duplication of records may be subject to fees as prescribed in subpart E of this part.

§ 503.22 Records available at the Office of the Secretary

(a) The following records will be made available for inspection and copying at the Office of the Secretary, Federal Maritime Commission, 800 North Capitol St., NW, Washington, DC 20573, without the requirement of a written request. Access to requested records may be delayed if they have been sent to archives.

(1) Proposed and final rules and regulations of the Commission including general substantive rules, statements of policy and interpretations, and rules of practice and procedure.

(2) Reports of decisions (including concurring and dissenting opinions), orders and notices in all formal proceedings.

(3) Official docket files in all formal proceedings including, but not limited to, orders, notices, pertinent correspondence, transcripts, exhibits, and briefs, except for materials which are the subject of a protective order. Copies of transcripts may only be available from the reporting company contracted by the Commission. Contact the Office of the Secretary for the name and address of this company.

(4) News releases.

(5) Approved summary minutes of Commission actions showing final votes, except for minutes of closed Commission meetings which are not available until the Commission publicly announces the results of such deliberations.

(6) Annual reports of the Commission.

(b) Certain fees may be assessed for duplication of records made available by this section as prescribed in subpart E of this part and in Part 514 of this chapter.

§ 503.23 Records available upon written request.

(a) The following Commission records are generally available for inspection and copying, without resort to Freedom of Information Act procedures, upon request in writing addressed to the Office of the Secretary, Federal Maritime Commission, Washington, DC 20573:

(1) Agreements filed and in effect pursuant to sections 5 and 6 of the Shipping Act of 1984.

(2) Agreements filed under section 5 of the Shipping Act of 1984 which have been noticed in the **Federal Register**.

(3) Tariffs filed under the provisions of the Shipping Act of 1984, and terminal tariffs filed pursuant to part 514 of this chapter, under the procedures set forth in §§ 514.21(d) or 514.8(k)(2).

(4) List of certifications of financial responsibility pertaining to Pub. L. 89-777.

(5) List of licensed ocean freight forwarders.

(b) Certain fees may be assessed for duplication of records made available by this section as prescribed in subpart E of this part and in part 514 of this chapter.

§ 503.24 Information available via the internet.

(a) The Commission maintains an internet web site. The Commission home page may be found at <http://www.fmc.gov>.

(b) The following general information, records, and resources are accessible through the home page:

(1) General descriptions of the functions, bureaus, and offices of the Commission, phone numbers and e-mail addresses for Commission officials, as well as locations of Area Representatives;

(2) Information about filing complaints;

(3) Commonly used forms;

(4) A public information handbook describing the types of information available from the Commission and how to access such information;

(5) A Freedom of Information Act Electronic Reading Room which contains:

(i) Copies of final decisions in adjudicatory proceedings issued since November 1, 1996;

(ii) Recently issued final rules and pending proposed rules;

(iii) Access to statements of policy and interpretations as published in 46 CFR 571; and

(iv) Records created by the Commission since November 1, 1996, and made available under § 503.21, paragraph (a)(4).

(6) Commission regulations as codified in Title 46 of the Code of Federal Regulations;

(7) News releases issued by the Commission;

(8) Statements and remarks from the Chairman and Commissioners;

(9) A connection to the Government Information Locator Service maintained by the Government Printing Office, which identifies Commission databases; and

(10) Privacy Act information.

(c) Comments or questions regarding the home page should be addressed via e-mail to webmaster@fmc.gov.

3. Revise subpart D to read as follows:

Subpart D—Requests for records under the Freedom of Information Act

Sec.

503.31 Records available upon written request under the Freedom of Information Act.

503.32 Procedures for responding to requests made under the Freedom of Information Act.

503.33 Exceptions to availability of records.

503.34 Annual report of public information request activity.

Subpart D—Requests for Records Under the Freedom of Information**§ 503.31 Records available upon written request under the Freedom of Information Act.**

(a) A member of the public may request permission to inspect, copy or be provided with any Commission records not described in subpart C of this part. Such a request must:

(1) Reasonably describe the record or records sought;

(2) Be submitted in writing to the Secretary, Federal Maritime Commission, Washington, DC 20573; and

(3) Be clearly marked on the exterior with the letters "FOIA".

(b) The Secretary shall evaluate each request in conjunction with the official having responsibility for the subject matter area and the General Counsel, and the Secretary shall determine whether or not to grant the request in accordance with the provisions of this subpart.

(c) In making any record available to a person under this subpart, the Secretary shall provide the record in any form or format requested by the person if the record is readily reproducible by the Secretary in that form or format.

(d) Certain fees may be assessed for processing of requests under this subpart as prescribed in subpart E of this part.

§ 503.32 Procedures for responding to requests made under the Freedom of Information Act.

(a) *Determination to grant or deny request.* Upon request by any member of the public for documents, made in accordance with the rules of this part, the Commission's Secretary or his or her delegate in his or her absence, shall determine whether or not such request shall be granted.

(1) Such determination shall be made by the Secretary within twenty (20) days (excluding Saturdays, Sundays and legal public holidays) after receipt of such request, except as provided in paragraph (c) of this section.

(2) Upon granting a request the Secretary shall promptly make records

available to the requestor. Upon denial of such a request the Secretary shall promptly notify the requestor of the determination, explain the reason for denial, give an estimate of the volume of matter denied, set forth the names and titles or positions of each person responsible for the denial of the request, and notify the party of its right to appeal that determination to the Chairman.

(3)(i) Any party whose request for documents or other information pursuant to this part has been denied in whole or in part by the Secretary may appeal such determination. Any such appeal must:

(A) Be addressed to: Chairman, Federal Maritime Commission,

Washington, D.C. 20573-0001; and

(B) Be filed not later than ten (10) working days following receipt of notification of denial or receipt of a part of the records requested.

(ii) The Chairman or the Chairman's specific delegate in his or her absence, shall make a determination with respect to that appeal within twenty (20) days (excepting Saturdays, Sundays and legal public holidays) after receipt of such appeal, except as provided in paragraph (b) of this section.

(iii) If, on appeal, the denial is upheld, either in whole or in part, the Chairman shall so notify the party submitting the appeal and shall notify such person of the provisions of 5 U.S.C. 552(a)(4) regarding judicial review of such determination upholding the denial. Notification shall also include the statement that the determination is that of the Chairman of the Federal Maritime Commission and the name of the Chairman.

(b) *Extension of time limits.* (1) In unusual circumstances, as defined in paragraph (b)(2) of this section, the time limits prescribed with respect to initial actions in response to a FOIA request or actions on appeal may be extended by written notice from the Secretary of the Commission to the person making such request, setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten (10) working days, except as provided in paragraph (b)(3) of this section.

(2) As used in this paragraph, 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 field facilities or other establishments that are separate from the office processing the request;

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

(iii) The need for consultation, 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) If the time limit is extended as prescribed under this section, and the request cannot be processed within the extended time limit, the Secretary shall notify the requestor, and either provide the requestor with an opportunity to limit the scope of the request so that it may be processed within the time limit, or provide the requestor an opportunity to arrange with the Secretary an alternative time frame for processing the request or a modified request.

(c) *Aggregation of requests.* Certain requests by the same requestor, or by a group of requestors acting in concert, may be aggregated:

(1) Upon the Secretary's reasonable belief that such requests actually constitute a single request, which if not aggregated would satisfy the unusual circumstances specified in paragraph (b)(2) of this section; and

(2) If the requests involve clearly related matters.

(d) *Multitrack processing of requests.* The Secretary may provide for multitrack processing of requests based on the amount of time or work involved in processing requests.

(e) *Expedited processing of requests.*

(1) The Secretary will provide for expedited processing of requests for records when:

(i) The person requesting the records can demonstrate a compelling need; or

(ii) In other cases, in the Secretary's discretion.

(2) The term *compelling need* means:

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

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

(3) A demonstration of compelling need by a person making a request for expedited processing must be made in the form of a statement describing the circumstances and certified by such person to be true and correct to the best of such person's knowledge and belief.

(4) The Secretary shall determine whether to provide expedited processing, and provide notice of the determination to the person making the request, within ten (10) working days after the date of the request.

(5) Appeal of the determination not to provide expedited processing should be sought in accordance with the provisions of paragraph (a)(3)(i) of section 503.32, and will be considered expeditiously.

(6) Any request granted expedited processing shall be processed as soon as practicable.

§ 503.33 Exceptions to availability of records.

(a) Except as provided in paragraph (b) of this section, the following records may be withheld from disclosure:

(1) Records specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and which are in fact properly classified pursuant to such Executive order. Records to which this provision applies shall be deemed by the Commission to have been properly classified. This exception may apply to records in the custody of the Commission which have been transmitted to the Commission by another agency which has designated the record as nonpublic under an Executive order.

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

(3) Records specifically exempted from disclosure by statute, provided that such statute:

(i) Requires that the matter be withheld from the public in such a manner as to leave no discretion on the issue, or

(ii) Establishes particular criteria for withholding or refers to particular types of matters to be withheld.

(4) Trade secrets and commercial financial information obtained from a person and privileged or confidential.

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

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

(7) Records or information compiled for law enforcement purposes, but only

to the extent that the production of such law enforcement records or information:

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual.

(b) Nothing in this section authorizes withholding of information or limiting the availability of records to the public except as specifically stated in this part, nor shall this part be authority to withhold information from Congress.

(c) Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this part. 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 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.

(d) Whenever a request is made which involves access to records described in paragraph (a)(7)(i) of this section and the investigation or proceeding involves a possible violation of criminal law, and there is reason to believe that the subject of the investigation or proceeding is not aware of its pendency, and disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the

Commission may, during only such time as that circumstance continues, treat the records as not subject to the requirements of 5 U.S.C. 552 and this subpart.

§ 503.34 Annual report of public information request activity.

(a) On or before February 1 of each year, the Commission shall submit to the Attorney General of the United States, as required by the Attorney General, a report which shall cover the preceding fiscal year and which shall include:

(1) The number of determinations made not to comply with requests for records made to the Commission under this Subpart and the reasons for each such determination;

(2)(i) The number of appeals made by persons under § 503.32, the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) A complete list of all statutes relied upon to authorize withholding of information under § 503.33(a)(3), a description of whether a court has upheld the Commission's decision to withhold information under each such statute, and a concise description of the scope of any information withheld;

(3) The number of requests for records pending before the Commission as of September 30 of the preceding year, and the median number of days that such requests had been pending as of that date;

(4) The number of requests for records received by the Commission and the number of requests which the Commission processed;

(5) The median number of days taken to process different types of requests;

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

(7) The number of full-time staff devoted to processing requests for records under this section, and total amount expended for processing such requests.

(b) Each such report shall be made available to the public at the Office of the Secretary, Federal Maritime Commission, Washington, D.C. 20573 and on the Commission's web site (www.fmc.gov).

By the Commission.

Joseph C. Polking,

Secretary.

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