

§ 1601.10

40 CFR Ch. VI (7–1–19 Edition)

criteria for withholding information or refers to particular types of matters to be withheld; and if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to 5 U.S.C. 552(b)(3);

(4) Records containing trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Interagency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the CSB, provided that the deliberative process privilege shall not apply to records created twenty-five (25) years or more before the date on which the records were requested;

(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 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.

(8) Records contained in or related to examination, operating, or condition reports prepared by, or on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) Geological or geophysical information and data, including maps, concerning wells.

(c) *Disclosure of segregable nonexempt material.* The CSB will consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible. If a requested record contains exempted material along with nonexempted material, all reasonably segregable non-exempt material must be disclosed.

(d) *Records available through routine distribution procedures.* If the record requested includes material published and offered for sale, *e.g.*, by the Superintendent of Documents of the Government Printing Office, or by an authorized private distributor, then the CSB will refer the requester to those sources. Nevertheless, if the requester is not satisfied with the alternative sources, then the CSB will process the request under its usual FOIA procedures, noting that the CSB will likely withhold copyrighted records under Exemption 4.

Subpart B—Procedures for Requesting and Disclosing Records

§ 1601.10 Proactive disclosures.

(a) *In general.* Records that the FOIA requires the CSB to make available for public inspection in an electronic format may be accessed through the CSB's Web site (which can be found at <http://www.csb.gov/disclaimers/legal-affairs-foia/>). The CSB is responsible for determining which of its records must be made publicly available, for identifying additional records of interest to the public that are appropriate for public disclosure, and for posting and indexing such records. The CSB must ensure that its Web site of posted records and indices is reviewed and updated on an ongoing basis. The CSB has a FOIA

Contact and FOIA Public Liaison who can assist individuals in locating records particular to the CSB. The most up to date contact information for the CSB's FOIA Contact and the CSB's FOIA Public Liaison is available at <http://www.foia.gov/report-makerequest.html>.

(b) *Definitions.*

(1) *Disclose or disclosure* means making records available for examination or copying, or furnishing a copy of non-exempt responsive records.

(2) *FOIA Contact* means the name, address and phone number at the CSB where a requester can make a FOIA request.

(3) *FOIA Public Liaison* means the official who supervises the FOIA Requester Service Center.

§ 1601.11 Requirements for making requests.

(a) *General information.* (1) To make a request for records, a requester should write directly to the FOIA office of the agency that maintains the records sought. A request will receive the quickest possible response if the request is addressed to the FOIA office of the agency that maintains the records sought. If the CSB is the agency that maintains the records sought, then the contact information for the CSB's FOIA office is listed at <http://www.foia.gov/report-makerequest.html>, and any additional requirements for submitting a request can be found herein. Additionally, requesters who have questions or concerns about making a request, and those who have made a request who have questions or concerns, may discuss their request(s) with the CSB's FOIA Contact or FOIA Public Liaison.

(2) A requester who is making a request for records about himself or herself must comply with the verification of identity requirements described in this section. Requesters must provide either a notarized statement or a statement signed under penalty of perjury stating that the requester is the person they claim to be. This certification is required in order to protect the requester's privacy and to ensure that private information about the requester is not disclosed inappropriately to another individual.

(3) Where a request for records pertains to a third party, a requester may receive greater access by submitting either a notarized authorization signed by that individual or a declaration made in compliance with the requirements set forth in 28 U.S.C. 1746 by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual is deceased (*e.g.*, a copy of a death certificate or an obituary). As an exercise of administrative discretion, the CSB can require a requester to supply additional information, if necessary, in order to verify that a particular individual has consented to disclosure.

(b) *Addressing requests.* (1) All requests for records to the CSB must be made in writing.

(2) *For hard copy requests:* The envelope and the request both should be clearly marked "FOIA Request" and addressed to: Chief FOIA Officer—FOIA Request, Chemical Safety and Hazard Investigation Board, 1750 Pennsylvania Ave. NW., Suite 910, Washington, DC 20006.

(3) *For electronic requests:* The subject line of the request should be marked "FOIA Request" and the request may be submitted by email to foia@csb.gov.

(4) A request that is improperly addressed will be deemed to have been received by the CSB on the date that it is actually received by the CSB, or would have been received with the exercise of due diligence, by the FOIA Officer.

(c) *Description of records sought.* (1) Requesters must describe the records sought in sufficient detail to enable the CSB's personnel to locate them with a reasonable amount of effort.

(2) To the extent possible, requesters should include specific information that may help the CSB identify the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number. In general, requesters should include as much detail as possible about the specific records or the types of records that they are seeking. Before submitting their requests, requesters may contact the CSB's FOIA Contact or FOIA Public Liaison to discuss the

§ 1601.12

records they seek and to receive assistance in describing the records.

(3) If, after receiving a request, the CSB determines that the request does not reasonably describe the records sought, then the CSB must inform the requester what additional information is needed or why the request is otherwise insufficient. Requesters who are attempting to reformulate or modify such a request may discuss their request with the CSB's FOIA Contact or with the CSB's FOIA Public Liaison. If a request does not reasonably describe the records sought, the CSB's response to the request may be delayed.

(d) *Form of records.* Requests may specify the preferred form or format (including electronic formats) for the records that the requester seeks. The CSB must accommodate requests if the record is readily reproducible in that form or format. If a person seeks information from the CSB in a format that does not currently exist, then the CSB must make reasonable efforts to provide the information in the format requested. The CSB will not create a new record of information to satisfy a request.

(e) *Contact information.* Requesters must provide their first and last name along with their contact information, such as their phone number, email address, and/or mailing address, to assist the CSB in communicating with them and providing released records.

(f) *Agreement to pay fees.* The CSB considers a FOIA request an agreement by the requester to pay all applicable fees charged unless the requester seeks a waiver of fees. The CSB ordinarily will confirm this agreement in an acknowledgement letter. The CSB will not charge any fee if the total cost of the response is less than \$25.00. See § 1601.40 [discussing fees in more detail]. If the fee will be greater than \$25.00, then the CSB must contact the requester to discuss how the requester wants to proceed.

(g) *Types of records not available.* The FOIA does not require the CSB to:

(1) Compile or create records solely for the purpose of satisfying a request for records;

(2) Provide records not yet in existence, even if such records may be ex-

40 CFR Ch. VI (7-1-19 Edition)

pected to come into existence at some future time; or

(3) Restore records destroyed or otherwise disposed of, except that the FOIA Officer must notify the requester that the requested records have been destroyed or otherwise disposed of.

§ 1601.12 Responsibility for responding to requests.

(a) *In general.* The agency that first receives a request for a record and maintains that record is the agency responsible for responding to the request. In determining which records are responsive to a request, the CSB ordinarily will include only records in its possession as of the date that it begins its search. If any other date is used, the CSB must inform the requester of that date. A record that is excluded from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), is not considered responsive to a request.

(b) *Authority to grant or deny requests.* The Chief FOIA Officer or a designee is authorized to grant or to deny any initial request for records that are maintained by the CSB and to determine any appropriate fees.

(c) *Consultation, referral, and coordination.* When reviewing records, the CSB must determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA. As to any such record, the CSB must proceed in one of the following ways:

(1) *Consultation.* When records originated with the CSB, but contain within them information of interest to another agency or other Federal Government office, the CSB should consult with that other entity prior to making a release determination.

(2) *Referral.* (i) When the CSB believes that a different agency or component of a different agency is best able to determine whether to disclose the record, the CSB should refer the responsibility for responding to the request regarding that record to that agency or component. Ordinarily, the agency that originated the record is presumed to be the best agency to make the disclosure determination. However, if the CSB and the originating agency jointly agree that the CSB is in the best position to

respond regarding the record, then the record may be handled as a consultation.

(ii) Whenever the CSB refers any part of the responsibility for responding to a request to another agency, it must document the referral, maintain a copy of the record that it refers, and notify the requester of the referral, informing the requester of the name(s) of the agency to which the record was referred, including that agency's FOIA contact information.

(3) *Coordination.* The standard referral procedure is not appropriate where disclosure of the identity of the agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. For example, if a non-law enforcement agency responding to a request for records on a living third party locates within its files records originating with a law enforcement agency, and if the existence of that law enforcement interest in the third party was not publicly known, then to disclose that law enforcement interest could cause an unwarranted invasion of the personal privacy of the third party. Similarly, if an agency locates within its files material originating with an Intelligence Community agency, and the involvement of that agency in the matter is classified and not publicly acknowledged, then to disclose or give attribution to the involvement of that Intelligence Community agency could cause national security harms. In such instances, in order to avoid harm to an interest protected by an applicable exemption, the CSB must coordinate with the originating agency to seek its views on whether the record can be disclosed. The release determination for the record that is the subject of the coordination will then be conveyed to the requester by the CSB.

(d) *Classified information.* Upon receipt of any request involving classified information, the CSB must determine whether the information is currently and properly classified in accordance with applicable classification rules. Whenever a request involves a record containing information that has been classified or may be appropriate

for classification by another agency under any applicable E.O. concerning the classification of records, the CSB must refer the responsibility for responding to the request regarding that information to the agency that classified the information, or to the agency that should consider the information for classification. Whenever the CSB's record contains information that has been derivatively classified (for example, when it contains information classified by another agency), the CSB must refer the responsibility for responding to that portion of the request to the agency that classified the underlying information.

(e) *Timing of responses to consultations and referrals.* All consultations and referrals received by the CSB must be handled according to the date that the first agency received the perfected FOIA request.

(f) *Agreements regarding consultations and referrals.* The CSB may establish agreements with other agencies to eliminate the need for consultations or referrals with respect to particular types of records.

(g) *No responsive record.* If no records are responsive to the request, the FOIA Officer will so notify the requester in writing.

§ 1601.13 Timing of responses to requests.

(a) *In general.* The CSB ordinarily will respond to requests according to their order of receipt.

(b) *Definitions.*

(1) *Working day* means a Federal workday; Saturdays, Sundays, and Federal holidays are excluded in computing the response time for processing FOIA requests.

(2) [Reserved]

(c) *Multitrack processing.* The CSB has a specific track for requests that are granted expedited processing, in accordance with the standards set forth in paragraph (f) of this section. In addition, the CSB uses two standard processing tracks- one for simple requests and a separate track for complex requests. The CSB will assign requests to the simple or complex track based on the estimated amount of work or time needed to process the request. Among the factors the CSB may consider are

the number of records requested, the number of pages involved in processing the request and the need for consultations or referrals. The CSB must advise each requester of the track into which their request falls and, when appropriate, will offer a requester an opportunity to narrow or modify their request so that it can be placed in the simple processing track.

(d) *Unusual circumstances.* Whenever the CSB cannot meet the statutory time limit for processing a request because of “unusual circumstances,” as defined in the FOIA, and the CSB extends the time limit on that basis, the CSB must, before expiration of the twenty (20) day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which the CSB estimates processing of the request will be completed. Where the extension exceeds ten (10) working days, the CSB must, as described by the FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. The CSB must make available its designated FOIA Contact or its FOIA Public Liaison for this purpose. A list of agency FOIA Public Liaisons is available at <http://www.foia.gov/report-makerequest.html>. The CSB must also alert requesters to the availability of the Office of Government Information Services (OGIS) to provide dispute resolution services.

(e) *Aggregating requests.* To satisfy unusual circumstances under the FOIA, the CSB may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester, or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances. The CSB must not aggregate multiple requests that involve unrelated matters.

(f) *Expedited processing.* (1) The CSB must process requests and appeals on an expedited basis whenever it is determined that they involve:

(i) Circumstances in which the lack of expedited processing 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 who is primarily engaged in disseminating information;

(iii) The loss of substantial due process rights; or

(iv) A matter of widespread and exceptional media interest in which there exists possible questions about the government’s integrity that affect public confidence.

(2) A request for expedited processing may be made at any time. Requests based on paragraphs (f)(1)(i) through (iv) of this section must be submitted to the CSB. When making a request for expedited processing of an administrative appeal, the request must be submitted to the CSB’s FOIA Appeals Officer in accordance with § 1601.20.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. For example, under paragraph (f)(1)(ii) of this section, a requester who is not a full-time member of the news media must establish that the requester is a person whose primary professional activity or occupation is information dissemination, though it need not be the requester’s sole occupation. Such a requester also must establish a particular urgency to inform the public about the government activity involved in the request—one that extends beyond the public’s right to know about government activity generally. The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an “urgency to inform” the public on the topic. As a matter of administrative discretion, the CSB may waive the formal certification requirement.

(4) The CSB must notify the requester within ten (10) calendar days of the receipt of a request for expedited processing of its decision whether to grant or deny expedited processing. If expedited processing is granted, then the request must be given priority, placed in the processing track for expedited requests, and must be processed as soon as practicable. If a request for expedited processing is denied, then the

CSB must act on any appeal of that decision expeditiously.

§ 1601.14 Responses to requests.

(a) *In general.* The CSB, to the extent practicable, will communicate electronically with requesters having access to the Internet, such as by email or web portal.

(b) *Acknowledgments of requests.* The CSB must acknowledge the request in writing and assign it an individualized tracking number if it will take longer than ten (10) working days to process. The CSB must include in the acknowledgment a brief description of the records sought to allow requesters to more easily keep track of their requests.

(c) *Estimated dates of completion and interim responses.* Upon request, the CSB must provide an estimated date by which the CSB expects to provide a response to the requester. If a request involves a voluminous amount of material, or searches in multiple locations, the CSB may provide interim responses, releasing the records on a rolling basis.

(d) *Grants of requests.* Once the CSB determines it will grant a request in full or in part, it must notify the requester in writing. The notice must describe the manner in which the record or records will be disclosed, whether by providing a copy of the record or records with the response, or providing them at a later date, or by making a copy of the record available to the requester for inspection at a reasonable time and place. The procedure for such an inspection must not unreasonably disrupt the operation of the CSB. The CSB must also inform the requester of any fees charged under §1601.40 and must disclose the requested records to the requester promptly upon payment of any applicable fees. The CSB must inform the requester of the availability of its FOIA Public Liaison to offer assistance.

(e) *Adverse determinations of requests.* If the CSB makes an adverse determination denying a request in any respect, it must notify the requester of that determination in writing. Adverse determinations, or denials of requests, include decisions that: The requested record is exempt, in whole or in part;

the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Adverse determinations also include denials involving fees or fee waiver matters or denials of requests for expedited processing.

(f) *Content of denial.* The denial must be signed by the Chairperson or the FOIA Officer and must include:

(1) The name and title or position of the person responsible for the denial;

(2) A brief statement of the reasons for the denial, including any FOIA exemption(s) applied by the CSB in denying the request;

(3) An estimate of the volume of any records or information withheld, such as the number of pages or some other reasonable form of estimation, although such an estimate is not required if the volume is otherwise indicated by deletions marked on records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption; and

(4) A statement that the denial may be appealed under §1601.20, and a description of the appeal requirements.

(5) A statement notifying the requester of the assistance available from the CSB's FOIA Public Liaison and the dispute resolution services offered by the OGIS.

(g) *Markings on released documents.* Records disclosed in part must be marked clearly to show the amount of information deleted and the exemption under which the deletion was made unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted must also be indicated on the record, if technically feasible.

(h) *Use of record exclusions.* (1) In the event that the CSB identifies records that may be subject to exclusion from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), the CSB must confer with Department of Justice, Office of Information Policy (OIP), to obtain approval to apply the exclusion.

§ 1601.15

40 CFR Ch. VI (7-1-19 Edition)

(2) When invoking an exclusion, the CSB must maintain an administrative record of the process of invocation and approval of the exclusion by OIP.

§ 1601.15 Special procedures for confidential commercial information.

(a) *In general.* Confidential commercial information provided to the CSB by a submitter must not be disclosed pursuant to a FOIA request except in accordance with this section.

(b) *Definitions.*

(1) *Confidential commercial information* means commercial or financial information obtained by the CSB from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(2) *Submitter* means any person or entity, including a corporation, State, or foreign government, Indian tribal governments but not including another Federal Government entity, that provides confidential commercial information, either directly or indirectly to the Federal Government.

(c) *Designation of confidential commercial information.* A submitter of confidential commercial information must make good faith efforts to designate by appropriate markings, at the time of submission, any portion of its submission that it considers to be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4). These designations expire ten (10) years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(d) *When notice to submitters is required.* (1) The CSB must promptly provide written notice to the submitter of confidential commercial information whenever records containing such information are requested under the FOIA if the CSB determines that it may be required to disclose the records, provided:

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

(ii) The CSB has a reason to believe that the requested information may be protected from disclosure under Exemption 4, but has not yet determined

whether the information is protected from disclosure.

(2) The notice must either describe the commercial information requested or include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, the CSB may post or publish a notice in a place or manner reasonably likely to inform the submitters of the proposed disclosure, instead of sending individual notifications.

(e) *Exceptions to submitter notice requirements.* The notice requirements of this section do not apply if:

(1) The CSB determines that the information is exempt under the FOIA, and therefore will not be disclosed;

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

(3) Disclosure of the information is required by a statute other than the FOIA or by a regulation issued in accordance with the requirements of E.O. 12600 of June 23, 1987; or

(4) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous. In such case, the CSB must give the submitter written notice of any final decision to disclose the information within a reasonable number of days prior to a specified disclosure date.

(f) *Opportunity to object to disclosure.* (1) The CSB must specify a reasonable time period within which the submitter must respond to the notice referenced above.

(2) If a submitter has any objections to disclosure, it should provide the CSB a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is privileged or confidential. Whenever possible, the business submitter's claim of confidentiality should be supported by a statement or certification by an officer or authorized representative of the business submitter. Information provided by a submitter pursuant to this paragraph may

itself be subject to disclosure under the FOIA.

(3) A submitter who fails to respond within the time period specified in the notice will be considered to have no objection to disclosure of the information. The CSB is not required to consider any information received after the date of any disclosure decision. Any information provided by a submitter under this subpart may itself be subject to disclosure under the FOIA.

(g) *Analysis of objections.* The CSB must consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(h) *Notice of intent to disclose.* Whenever the CSB decides to disclose information over the objection of a submitter, the CSB must provide the submitter written notice, which must include:

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

(2) A description of the information to be disclosed or copies of the records as the CSB intends to release them; and

(3) A specified disclosure date, which must be a reasonable time after the notice.

(i) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of confidential commercial information, the CSB must promptly notify the submitter.

(j) *Requester notification.* The CSB must notify the requester whenever it provides the submitter with notice and an opportunity to object to disclosure because the request includes information that may arguably be exempt from disclosure under Exemption 4 of the FOIA; whenever it notifies the submitter of its intent to disclose the requested information; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

Subpart C—Appeals

§ 1601.20 Processing of appeals.

(a) *Right of appeal.* If a request has been denied in whole or in part, the requester may appeal the denial to the CSB's FOIA Appeals Officer.

(b) *Definitions.*

(1) *FOIA Appeal* means an independent review of an adverse determination initial determination made in response to a FOIA request.

(2) *FOIA Appeals Officer* means the person designated by the Chairperson to process and to decide a FOIA appeal.

(c) *Requirements for making an appeal.* (1) A requester may appeal any adverse determinations to the FOIA Appeals Officer. Examples of adverse determinations are provided in § 1601.14(e).

(2) The requester must make the appeal in writing. Requesters can submit appeals by mail or email in accordance with the following requirements herein, which are also listed on the CSB's Web site. To facilitate handling, the requester should mark both the appeal letter and envelope, or subject line of the electronic transmission, "Freedom of Information Act Appeal" or "FOIA Appeal."

(i) For hard copy requests: The envelope and the request both should be addressed to: FOIA Appeals Officer—FOIA Appeal, Chemical Safety and Hazard Investigation Board, 1750 Pennsylvania Ave. NW., Suite 910, Washington, DC 20006.

(ii) For electronic requests: The appeal should be addressed to the FOIA Appeals Officer and may be submitted by email to foiaappeals@csb.gov.

(3) To be considered timely, an appeal must be postmarked, or in the case of electronic submissions, transmitted, within ninety (90) calendar days after the date of the adverse determination that is the subject of the appeal. For purposes of apply the ninety (90) calendar day deadline, the CSB will treat an appeal that is improperly addressed as being received on the date on the date that it is actually received by the CSB, or would have been received with the exercise of due diligence, by the FOIA Appeals Officer.

(4) The appeal should clearly identify the adverse determination that is being appealed and the assigned request number.

(5) An appeal should also include a copy of the initial request, a copy of the letter denying the request in whole or in part, and a statement of the circumstances, reasons, or arguments advanced in support of disclosure of the requested record.