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Title 29 — Labor

Subtitle B — Regulations Relating to Labor

Chapter XX — Occupational Safety and Health Review Commission

Part 2201 Regulations Implementing the Freedom of Information Act

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PART 2201—REGULATIONS IMPLEMENTING THE FREEDOM OF INFORMATION ACT

Authority: 29 U.S.C. 661(g); 5 U.S.C. 552.

Source: 71 FR 56350, Sept. 27, 2006, unless otherwise noted.

§ 2201.1 Purpose and scope.

This part prescribes procedures to obtain information and records of the Occupational Safety and Health Review Commission (OSHRC or Commission) under the Freedom of Information Act (FOIA), 5 U.S.C. 552. It applies only to records or information of the Commission or in the Commission's custody. This part does not affect discovery in adversary proceedings before the Commission. Discovery is governed by the Commission's Rules of Procedure in 29 CFR part 2200, subpart D.

§ 2201.2 Description of agency.

OSHRC adjudicates contested enforcement actions under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651-678. The Commission decides cases after the parties are given an opportunity for a hearing. All hearings are open to the public and are conducted at a place convenient to the parties by an Administrative Law Judge. Any Commissioner may direct that a decision of a Judge be reviewed by the full Commission. The President designates one of the Commissioners as Chairman, who is responsible on behalf of the Commission for the administrative operations of the Commission.

§ 2201.3 Delegation of authority and responsibilities.

- (a) The Chairman delegates to the Chief FOIA Officer the authority to act upon all requests for agency records. The Chief FOIA Officer shall, subject to the authority of the Chairman:
 - (1) Have agency-wide responsibility for efficient and appropriate compliance with this section;
 - (2) Monitor implementation of the FOIA throughout the agency and keep the Chairman and the Attorney General appropriately informed of the agency's performance in implementing this section;
 - (3) Recommend to the Chairman such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve implementation of this section;
 - (4) Review and report to the Attorney General, through the Chairman, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section; and
 - (5) Facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's FOIA Reference Guide, and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply.
- (b) The Chief FOIA Officer shall designate the FOIA Disclosure Officer(s), who shall be responsible for processing FOIA requests.
- (c) The Chief FOIA Officer shall designate the FOIA Public Liaison(s), who shall serve as the official(s) to whom a FOIA requester can raise concerns about the service the FOIA requester has received following an initial response. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.
- (d) OSHRC establishes a FOIA Requester Service Center that shall be staffed by the FOIA Disclosure Officer(s) and FOIA Public Liaison(s). The address of the FOIA Requester Service Center is 1120 20th Street NW., 9th Floor, Washington, DC 20036-3457. The telephone number, fax number and additional contact information for the FOIA Requester Service Center is located on the agency's Web site at: <http://www.oshrc.gov/foia/index.html>. The FOIA Requester Service Center is available to provide information about the status of a request to the requester using the assigned tracking number (as described in § 2201.6(h)), including:
 - (1) The date on which the agency originally received the request; and
 - (2) An estimated date on which the agency will complete action on the request.

[71 FR 56350, Sept. 27, 2006, as amended at 75 FR 41371, July 16, 2010; 81 FR 95037, Dec. 27, 2016]

§ 2201.4 General policy and definitions.

- (a) **Non-exempt records available to public.** Except for records and information exempted from disclosure by 5 U.S.C. 552(b) or published in the FEDERAL REGISTER under 5 U.S.C. 552(a)(1), all records of the Commission or in its custody are available to any person who requests them in accordance with § 2201.5. Records include any information that would be a record subject to the requirements of 5 U.S.C. 552 when maintained by the Commission in any format, including electronic format. In response to FOIA requests, the Commission will search for records manually or by automated means, except when an automated search would significantly interfere with the operation of the Commission's automated information system.
- (b) **Record availability at the OSHRC e-FOIA Reading Room.** The records of Commission activities are publicly available for inspection and copying, and may be accessed electronically on the Commission's Web site at http://www.oshrc.gov/foia/foia_reading_room.html. These records include:
- (1) Final decisions, including concurring and dissenting opinions, remand orders, as well as Administrative Law Judge decisions pending OSHRC review, briefing notices, and other significant orders;
 - (2) OSHRC Rules of Procedure and Guides to those procedures;
 - (3) Agency policy statements and interpretations adopted by OSHRC and not published in the FEDERAL REGISTER, if any;
 - (4) Administrative staff manuals that affect a member of the public, if any;
 - (5) Copies of records that have been released to a person under the FOIA that, because of the subject matter, the Commission determines have become or are likely to become the subject of subsequent requests for substantially the same records, or that have been requested three or more times, as well as records the Commission determines absent a FOIA request could be of significant public interest; and
 - (6) A general index of records referred to under paragraph (b)(5) of this section.
- (c) **Record availability onsite at OSHRC National Office.** Any member of the public may, upon request, access OSHRC's e-FOIA Reading Room via a computer terminal at the OSHRC National Office, located at 1120 20th St. NW., 9th Floor, Washington, DC 20036-3457. Such a request must be made in writing to the FOIA Requester Service Center, and indicate a preferred date and time for the requested access. OSHRC reserves the right to arrange a different date and time with the requester, if necessary.
- (d) **Definitions.** For purposes of this part:
- 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. The FOIA Disclosure Officer 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 the FOIA Disclosure Officer has reasonable cause to doubt a requester's stated use, the FOIA Disclosure Officer shall provide the requester a reasonable opportunity to submit further clarification.

Direct costs means those expenses that the Commission 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 employee 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. Not included in direct costs are overhead expenses such as the costs of space and heating or lighting of the facility in which the records are kept.

Duplication means the making of a copy of a record, or of 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. The FOIA Disclosure Officer 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.

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, 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 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 scholarly research.

Exceptional circumstances does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

Noncommercial scientific institution means an institution that is not operated on a "commercial" basis, as that term is defined in this paragraph, 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.

Record means any information that would be an OSHRC record subject to the requirements of the FOIA when maintained by OSHRC in any format, including an electronic format, and any such OSHRC record that is maintained for OSHRC by an entity under Government contract, for the purposes of records management.

Representative of the news media, or news media requester is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. For purposes of this definition, 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 those instances where they can qualify as disseminators of "news") who make their products available for purchase or subscription by, or free distribution to, the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. 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 OSHRC 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 a 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.

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 it and prepare it for disclosure. Review costs are recoverable even if a record ultimately is not disclosed. Review time does not include time spent resolving general legal or policy issues regarding the application of exemptions.

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. The FOIA Disclosure Officer shall ensure that searches are done in the most efficient and least expensive manner reasonably possible. For example, the FOIA Disclosure Officer shall not search line-by-line where duplicating an entire document would be quicker and less expensive.

Working day means a regular Federal working day. It does not include Saturdays, Sundays, or Federal legal public holidays.

[71 FR 56350, Sept. 27, 2006, as amended at 75 FR 41371, July 16, 2010; 81 FR 95037, Dec. 27, 2016]

§ 2201.5 Procedure for requesting records.

- (a) **General information.** All requests for information must be made in writing to the FOIA Disclosure Officer and may be: Mailed or delivered; faxed; or emailed. Requests may also be made using the Commission's online FOIA request form (which is a downloadable PDF file found at http://www.oshrc.gov/foia/foia_request_form.html) and the completed form can be submitted by mail, fax, or email. Contact information for the FOIA Disclosure Officer is described in § 2201.3(d). For mailed or delivered requests, the words "Freedom of Information Act Request" must be printed on the face of the request's envelope or covering as well as the request itself.
- (b) A requester who is making a request for records about himself or herself must comply with verification of identity requirements as required by 29 CFR 2400.4 in OSHRC's Privacy Act regulations.
- (c) Where a request for records pertains to another individual, 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).
- (d) **Description of records sought.** A request must describe the records sought in sufficient detail to enable the Commission to locate them with a reasonable amount of effort. To the extent possible, the request should include specific information to identify the requested records, such as the docket number(s) or case name(s). Before submitting a request, the requester may contact the FOIA Disclosure Officer, as described in § 2201.3(d), to discuss the records being sought and receive assistance in describing them. If a determination is made after receiving a request that it does not reasonably describe the records sought, the FOIA Disclosure Officer will contact the requester to explain what additional information is needed or why the request is otherwise insufficient. A requester attempting to reformulate or modify such a request is encouraged to discuss the request with the FOIA Disclosure Officer. If a request does not reasonably describe the records sought, the agency's response may be delayed.

- (e) Requests may specify the preferred form or format (including electronic formats) of the response. The FOIA Disclosure Officer 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. When a requester does not specify the preferred form or format of the response, the FOIA Disclosure Officer shall respond in the form or format in which the record is most accessible to the Commission.
- (f) The requester must provide contact information, such as a phone number, email address, and/or mailing address, to facilitate the agency's communication with the requester.
- (g) **Date of receipt.** A request that complies with paragraph (a) of this section is deemed received on the actual date it is received by the Commission. A request that does not comply with paragraph (a) of this section is deemed received when it is actually received by the FOIA Disclosure Officer. For requests that are expected to result in fees exceeding \$250, the request shall not be deemed to have been received until the requester is advised of the anticipated costs and the Commission has received full payment or satisfactory assurance of full payment as provided under § 2201.8(f).

[81 FR 95037, Dec. 27, 2016, as amended at 85 FR 72565, Nov. 13, 2020]

§ 2201.6 Responses to requests.

- (a) **Responses within 20 working days.** The FOIA Disclosure Officer will either grant or deny a request for records within 20 working days after receiving the request. The 20-day period shall not be tolled by the agency except in the following cases. In these cases, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.
 - (1) The agency may toll the 20-day period once while awaiting information that it has reasonably requested from the requester under this section. The agency may make more than one request to the requester for information not related to issues regarding fee assessment, but can only toll the 20-day period once; and
 - (2) The agency may toll the 20-day period as many times as are necessary to clarify any issues regarding fee assessment.
- (b) **Extensions of response time in unusual circumstances.** In unusual circumstances, the Commission may extend the time limit prescribed in paragraph (a) of this section by not more than 10 working days. The FOIA Disclosure Officer shall notify the requester in writing of the extension, the reasons for the extension and the date on which a determination is expected. "Unusual circumstances" exists, but only to the extent reasonably necessary to the proper processing of the particular request, when there is a need to:
 - (1) Search for and collect the requested records from one of OSHRC's regional offices or off-site storage facilities;
 - (2) Search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request; or
 - (3) Consult, with all practicable speed, with another agency having a substantial interest in the determination of the request.
- (c) **Additional extension.** The FOIA Disclosure Officer shall notify the requester in writing when it appears that a request cannot be completed within the allowable time (20 working days plus a 10-working-day extension). In such instances, the requester will be provided an opportunity to limit the scope of the request so that it may be processed in the time limit, or to agree to a reasonable alternative time frame for

processing. The FOIA Disclosure Officer or FOIA Public Liaison shall be available to assist the requester for this purpose and shall notify the requester of the right to seek dispute resolution services from the National Archives and Records Administration's Office of Government Information Services (OGIS).

(d) **Two-track processing.** To ensure the most equitable treatment possible for all requesters, the Commission will process requests on a first-in, first-out basis using a two-track processing system based upon the estimated time it will take to process the request.

- (1) The first track is for requests of simple to moderate complexity that are expected to be completed within 20 working days.
- (2) The second track is for requests involving "unusual circumstances" that are expected to take between 21 to 30 working days to complete and those that, because of their unusual volume or other complexity, are expected to take more than 30 working days to complete.
- (3) A requester should assume, unless otherwise notified by the Commission, that its request is in the first track of processing. The Commission will notify a requester when its request is placed in the second track for processing and that notification will include the estimated time for completion. Should subsequent information substantially change the estimated time to process a request, the requester will be notified in writing. In the case of a request expected to take more than 30 working days for action, a requester may modify the request to allow it to be processed faster or to reduce the cost of processing. Partial responses may be sent to a requester as documents are obtained by the FOIA Disclosure Officer from the supplying offices.

(e) **Expedited processing.**

- (1) The Commission may place a person's request at the front of the queue for the appropriate track for that request upon receipt of a written request that clearly demonstrates a compelling need for expedited processing. Requesters must provide detailed explanations to support their expedited requests. For purposes of determining expedited processing, the term *compelling need* means:
 - (i) That a failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of any individual; or
 - (ii) That a request is made by a person primarily engaged in disseminating information, and that person establishes that there is an urgency to inform the public concerning actual or alleged Federal Government activity.
- (2) A person requesting expedited processing must include a statement certifying the compelling need given to be true and correct to the best of his or her knowledge and belief. The certification requirement may be waived by the Commission as a matter of agency discretion.
- (3) The FOIA Disclosure Officer will make the initial determination whether to grant or deny a request for expedited processing and will notify a requester within 10 calendar days after receiving the request whether processing will be expedited.

(f) **Content of denial.** When the FOIA Disclosure Officer denies a request for records, either in whole or in part, a request for expedited processing, and/or a request for fee waivers (see § 2201.9), the written notice of the denial shall state the reason for denial, give a reasonable estimate of the volume of matter denied (unless doing so would harm an interest protected by the exemption(s) under which the request was denied), set forth the name and title or position of the person responsible for the denial of the request, notify the requester of the right to appeal the determination as specified in § 2201.10, and notify the requester of the assistance available from the FOIA Public Liaison and the dispute resolution services

offered by OGIS. A refusal by the FOIA Disclosure Officer to process the request because the requester has not made advance payment or given a satisfactory assurance of full payment required under § 2201.8(f) may be treated as a denial of the request and appealed under § 2201.10.

- (g) **Deletions.** The FOIA Disclosure Officer shall provide to the requester in writing a justification for deletions within records. The amount of information deleted from records shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption under which the deletion is made. If technically feasible, the place in the record where the deletion is made, and the exemption under which the deletion is made, shall be marked.
- (h) **Tracking numbers.** The FOIA Disclosure Officer shall assign an individualized tracking number to each request received for processing and provide the requester with the tracking number.
- (i) **Determining responsive records.** In determining which records are responsive to a request, OSHRC ordinarily will include only records in its possession as of the date it begins its search for them. If any other date is used, OSHRC shall inform the requester of that date.

[71 FR 56350, Sept. 27, 2006, as amended at 75 FR 41372, July 16, 2010; 81 FR 95038, Dec. 27, 2016; 85 FR 72565, Nov. 13, 2020]

§ 2201.7 Confidential commercial information.

- (a) **Definitions.**
 - (1) **Confidential commercial information** means commercial or financial information obtained by OSHRC 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, but not including another Federal Government entity, that provides confidential commercial information, either directly or indirectly to OSHRC.
- (b) **Designation of confidential commercial information.** A submitter of confidential commercial information must use 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. These designations expire 10 years after the date of the submission unless the submitter requests and provides justification for a longer designation period.
- (c) **When notice to submitters is required.** OSHRC shall promptly provide written notice to the submitter of confidential commercial information whenever records containing such information are requested under the FOIA if OSHRC determines that it may be required to disclose the records, provided the submitter has complied with paragraph (b) of this section or OSHRC 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. The notice must either describe the commercial information requested or include a copy of the requested records or portions of records containing the information.
- (d) **Exceptions to submitter notice requirements.** The notice requirements of this section do not apply if:
 - (1) OSHRC 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 Executive Order 12600 of June 23, 1987; or
- (4) The designation made by the submitter under paragraph (b) of this section appears obviously frivolous. In such case, OSHRC shall 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.
- (e) **Opportunity to object to disclosure.** OSHRC shall specify a reasonable time period within which the submitter must provide a response to the notice referenced above. If a submitter has any objections to disclosure, it should provide 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 confidential. 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. OSHRC 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.
- (f) **Analysis of objections.** OSHRC shall consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.
- (g) **Notice of decision.** OSHRC shall provide the submitter with written notice once a decision is made as to whether or not to disclose information over the submitter's objection. When a decision is made to disclose information over the submitter's objection, this notice shall include a statement of the reasons why each of the submitter's disclosure objections was not sustained, a description of the information to be disclosed or copies of the records as the agency intends to release them, and a specified disclosure date (which must be a reasonable time after the notice).
- (h) **Notice of FOIA lawsuit.** OSHRC shall promptly notify the submitter when a requester files a lawsuit seeking to compel the disclosure of confidential commercial information.
- (i) **Requester notification.** OSHRC shall notify the requester whenever it provides the submitter with notice and an opportunity to object to disclosure; 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.

[81 FR 95038, Dec. 27, 2016]

§ 2201.8 Fees for copying, searching, and review.

- (a) **Fees required unless waived.** The FOIA Disclosure Officer shall charge fees in accordance with the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget and in accordance with paragraph (b) of this section. See appendix A to this part. If the fees for a request are less than the threshold amount as provided in OSHRC's fee schedule, no fees shall be charged. The FOIA Disclosure Officer shall, however, waive the fees in the circumstances stated in § 2201.9.
- (b) **Calculation of fees.** Fees for copying, searching and reviewing will be based on the direct costs of these services, including the average hourly salary (base plus DC locality payment), plus 16 percent for benefits, of the following three categories of employees involved in responding to FOIA requests: Clerical—based on an average of all employees at GS-9 and below; professional—based on an average of all employees at GS-10 through GS-14; and managerial—based on an average of all employees at GS-15 and above. OSHRC

will calculate a schedule of fees based on these direct costs. The schedule of fees under this section appears in appendix A to this part. A copy of the schedule of fees may also be obtained at no charge from the FOIA Disclosure Officer. See § 2201.3(d).

- (1) **Copying fee.** The fee per copy of each page shall be calculated in accordance with the per-page amount established in OSHRC's fee schedule. See appendix A to this part. For other forms of duplication, direct costs of producing the copy, including operator time, shall be calculated and assessed. Copying fees shall not be charged for the first 100 pages of copies unless the copies are requested for a commercial use. No copying fee shall be charged for educational, scientific, or news media requests if the agency fails to comply with any time limit in § 2201.6, provided that no unusual or exceptional circumstances (as those terms are defined in §§ 2201.6(b) and 2201.4(d), respectively) apply to the processing of the request.
- (2) **Search fee.** Search fees shall be calculated in accordance with the amounts established in OSHRC's fee schedule. See appendix A to this part. Commercial requesters shall be charged for all search time, except as described below. Search fees shall be charged even if the responsive documents are not located or if they are located but withheld on the basis of an exemption. However, search fees shall be limited or not charged as follows:
 - (i) **Easily identifiable decisions.** Search fees shall not be charged for searching for decisions that the requester identifies by name and date, or by docket number, or that are otherwise easily identifiable.
 - (ii) **Educational, scientific or news media requests.** No fee shall be charged if the request is not for a commercial use and is by an educational or scientific institution, whose purpose is scholarly or scientific research, or by a representative of the news media.
 - (iii) **Other non-commercial requests.** No fee shall be charged for the first two hours of searching if the request is not for a commercial use and is not by an educational or scientific institution, or a representative of the news media.
 - (iv) **Requests for records about self.** No fee shall be charged to search for records filed in the Commission's systems of records if the requester is the subject of the requested records. See the Privacy Act of 1974, 5 U.S.C. 552a(f)(5) (fees to be charged only for copying).
 - (v) **Failure to comply with time limits.** No search fee shall be charged if the Commission fails to comply with any time limit in § 2201.6, provided that no unusual or exceptional circumstances (as those terms are defined in §§ 2201.6(b) and 2201.4(d), respectively) apply to the processing of the request.
- (3) **Unusual circumstances.**
 - (i) If the Commission has determined that unusual circumstances, as defined in § 2201.6(b), apply and has provided timely written notice to the requester, a failure to comply with the time limit shall be excused for an additional 10 days and the Commission shall assess fees as usual.
 - (ii) If the Commission has determined that unusual circumstances, as defined in § 2201.6(b), apply and more than 5,000 pages are necessary to respond to the request, the Commission may charge search fees, or, in the case of requesters described in § 2201.8(b)(2)(ii), may charge duplication fees, if the Commission provided timely written notice of unusual circumstances to the requester in accordance with § 2201.6(b) and the Commission discussed with the requester via written mail, email, or telephone (or made not less than three good-faith attempts

to do so) how the requester could effectively limit the scope of the request in accordance with the FOIA. If this exception is satisfied, the Commission may charge all applicable fees incurred in the processing of the request even if such processing extends beyond an additional 10 days.

- (4) If a court has determined that exceptional circumstances exist, as defined in § 2201.4(d), a failure to comply with the time limits shall be excused for the length of time provided by the court order.
- (5) **Review fee.** A review fee shall be charged only for commercial requests. Review fees shall be calculated in accordance with the amounts established in OSHRC's schedule of fees. See appendix A to this part. A review fee shall be charged for the initial examination of documents located in response to a request to determine if it may be withheld from disclosure, and for the excision of withholdable portions. However, a review fee shall not be charged for review by the Chairman under § 2201.10 (Appeal of denials).
- (c) **Invoices.** The FOIA Disclosure Officer shall provide the requester with an invoice containing an itemization of assessed fees.
- (d) **Aggregation of requests.** When the FOIA Disclosure Officer reasonably believes that a requester, or a group of requesters acting in concert, is attempting to break a request into a series of requests for the purpose of evading the assessment of fees, the FOIA Disclosure Officer may aggregate any such requests and charge accordingly.
- (e) **Fees likely to exceed \$25.** If the total fee charges are likely to exceed \$25, the FOIA Disclosure Officer shall notify the requester of the estimated amount of the charges, unless the requester has indicated a willingness to pay fees up to the estimated amount. The notification shall offer the requester an opportunity to confer with the FOIA Disclosure Officer to reformulate the request to meet the requester's needs at a lower cost. In cases in which a requester has been notified that actual or estimated fees amount to more than \$25, the time period for responding to the request shall be tolled in accordance with § 2201.6(a)(2) and further work shall not be done on it until the requester agrees to pay the actual or estimated total fee. Any such agreement shall be memorialized in writing.
- (f) **Advance payments.** Advance payment of fees will generally not be required. If, however, charges are likely to exceed \$250, the FOIA Disclosure Officer shall notify the requester of the likely cost and: if the requester has a history of prompt payment of FOIA charges, obtain satisfactory assurance of full payment; or if the requester has no history of payment, require an advance payment of an amount up to the full estimated charge. If the requester has previously failed to pay a fee within 30 days of the date of billing, the FOIA Disclosure Officer shall require the requester to pay the full amount owed plus any interest owed as provided in paragraph (h) 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 charges before the FOIA Disclosure Officer begins to process the new request or a pending request from that requester.
- (g) **Fees for services not required by the Freedom of Information Act.** The Commission has discretion regarding its response to requests for services not required by the FOIA. For example, the FOIA does not require agencies to certify or authenticate responsive documents, nor does it require responsive documents to be sent by express mail. If these services are requested, the FOIA Disclosure Officer shall assess the direct costs of such services.
- (h) **Interest on unpaid bills.** The Commission's Office of the Executive Director shall begin assessing interest charges on unpaid bills starting on the thirty-first day after the date the bill was sent. Interest will accrue from the date of billing until the Commission receives full payment. Interest will be at the rate described in 31 U.S.C. 3717.

- (i) **Debt collection procedures.** If bills are unpaid 60 days after the mailing of a written notice to the requester, the Commission's Office of the Executive Director may resort to the debt collection procedures set out in the Debt Collection Act of 1982 (Pub. L. 97-365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

[71 FR 56350, Sept. 27, 2006, as amended at 75 FR 41372, July 16, 2010. Redesignated and amended at 81 FR 95038, 95039, Dec. 27, 2016; 85 FR 72565, Nov. 13, 2020]

§ 2201.9 Waiver of fees.

- (a) **General.** The FOIA Disclosure Officer shall waive part or all of the fees assessed under § 2201.8(b) if two conditions are satisfied: Disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and disclosure is not primarily in the commercial interest of the requester. Where the FOIA Disclosure Officer has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, the FOIA Disclosure Officer may seek clarification from the requester before assigning the request to a specific category for fee assessment purposes. The FOIA Disclosure Officer shall afford the requester the opportunity to show that the requester comes within these two conditions. The following factors may be considered in determining whether the two conditions are satisfied:
- (1) Whether the subject of the requested records concerns the operations or activities of the government;
 - (2) Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities;
 - (3) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so, whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.
- (b) **Partial waiver of fees.** If the two conditions stated in paragraph (a) of this section are met, the FOIA Disclosure Officer will ordinarily waive all fees. In exceptional cases, however, only a partial waiver may be granted if the request for records would impose an exceptional burden or require an exceptional expenditure of Commission resources, and the request for a waiver minimally satisfies the "public interest" requirement in paragraph (a) of this section.

[71 FR 56350, Sept. 27, 2006. Redesignated and amended at 81 FR 95038, 95039, Dec. 27, 2016]

§ 2201.10 Appeal of denials.

- (a) **Requirements for making an appeal.** A denial of a request for records, either in whole or in part, a request for expedited processing, or a request for fee waivers, may be appealed in writing to the Chairman of the Commission. To be considered timely, the appeal must be postmarked, or in the case of electronic submissions, transmitted, within 90 calendar days of the date of the agency's written notice of denial. The appeal should clearly identify the agency determination that is being appealed and the assigned FOIA tracking number. To facilitate handling, the requester should mark both the appeal and its envelope, or state in the subject line of an electronic transmission, "Freedom of Information Act Appeal."

- (b) **Adjudication of appeals.** The Chairman shall act on the appeal under 5 U.S.C. 552(a)(6)(A)(ii) within 20 working days after the receipt of the appeal. An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation. On receipt of any appeal involving classified information, the Chairman shall take appropriate action to ensure compliance with applicable classification rules.
- (c) **Decisions on appeals.** The Chairman shall provide the decision on an appeal in writing. If the Chairman wholly or partially upholds the denial of the request, the decision shall contain a statement that identifies the reasons for the affirmance, including any FOIA exemptions applied. The decision must include notification that the requester may obtain judicial review of the decision under 5 U.S.C. 552(a)(4)(B)-(G). The decision shall also inform the requester of the dispute resolution services offered by OGIS as a non-exclusive alternative to litigation. If the Chairman's decision is remanded or modified on appeal to the court, the requester will be notified by the agency of that determination in writing. The Commission shall then further process the request in accordance with the appeal determination and shall respond directly to the requester.
- (d) **Engaging in dispute services provided by OGIS.** Dispute resolution is a voluntary process. If the Commission agrees to participate in the dispute resolution services provided by OGIS, it will actively engage as a partner in the process in an attempt to resolve the dispute.
- (e) **When appeal is required.** Before seeking review by a court of the Commission's adverse determination, a requester generally must first submit a timely administrative appeal.

[81 FR 95039, Dec. 27, 2016]

§ 2201.11 Maintenance of statistics.

- (a) The FOIA Disclosure Officer shall maintain records of:
 - (1) The number of determinations made by the agency not to comply with the requests for records made to the agency and the reasons for those determinations;
 - (2) The number of appeals made by persons, the results of those appeals, and the reason for the action upon each appeal that results in a denial of information;
 - (3) A complete list of all statutes that the agency used to authorize the withholding of information under 5 U.S.C. 552(b)(3), which exempts information that is specifically exempted from disclosure by other statutes and the number of occasions on which each statute was relied upon;
 - (4) A description of whether a court has upheld the decision of the agency to withhold information under each of those statutes cited, and a concise description of the scope of any information upheld;
 - (5) The number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that these requests had been pending before the agency as of that date;
 - (6) The number of requests for records received by the agency and the number of requests the agency processed;
 - (7) The median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

- (8) The average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;
- (9) Based on the number of business days that have elapsed since each request was originally received by the agency—
 - (i) The number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;
 - (ii) The number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;
 - (iii) The number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and
 - (iv) The number of requests for records to which the agency has responded with a determination within a period greater than 400 days;
- (10) The average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;
- (11) The median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;
- (12) Data on the 10 active requests with the earliest filing dates pending at the agency, including the amount of time that has elapsed since each request was originally received by the agency;
- (13) Data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;
- (14) The number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;
- (15) The number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;
- (16) The total amount of fees collected by the agency for processing requests;
- (17) The number of full-time staff of the agency devoted to the processing of requests for records under this section; and
- (18) The total amount expended by the agency for processing these requests.

- (b) The FOIA Disclosure Officer shall annually, on or before February 1 of each year, prepare and submit to the Attorney General an annual report covering each of the categories of records to be maintained in accordance with paragraph (a) of this section, for the previous fiscal year. A copy of the report will be available for public inspection and copying at the OSHRC FOIA Reading Room, and a copy will be accessible on OSHRC's Web site at <http://www.oshrc.gov>.

[71 FR 56350, Sept. 27, 2006, as amended at 75 FR 41373, July 16, 2010. Redesignated and amended at 81 FR 95038, 95040, Dec. 27, 2016]

§ 2201.12 Preservation of records.

OSHRC shall preserve all correspondence pertaining to FOIA requests, as well as copies of all requested records, until disposition or destruction is authorized pursuant to title 44 of the United States Code or the applicable General Records Schedule of the National Archives and Records Administration. OSHRC shall not dispose of or destroy records while they are the subject of a pending request, appeal or lawsuit under the FOIA.

[81 FR 95040, Dec. 27, 2016]

Appendix A to Part 2201—Schedule of Fees

Type of fee	Amount of fee
Threshold Amount (Amount below which fees will not be assessed)	\$10
Search and Review Hourly Fees:	
Clerical (GS-9 and below)	23
Professional (GS-10 through GS 14)	46
Managerial (GS-15 and above)	76
Duplication cost per page	0.25
Computer printout copying fee	0.40
Searches of computerized records	Actual cost to the Commission, but shall not exceed \$300 per hour, including machine time and the cost of the operator and clerical personnel.
Certification Fee	\$35 per authenticating affidavit or declaration. (Note: Search and review charges may be assessed in accordance with the rates listed above.)