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**CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD****40 CFR Part 1601****Freedom of Information Act Program****AGENCY:** Chemical Safety and Hazard Investigation Board**ACTION:** Final rule.

**SUMMARY:** The Chemical Safety and Hazard Investigation Board adopts regulations establishing policies and procedures for requesting and disclosing records under the Freedom of Information Act (FOIA). The FOIA requires Federal agencies to create regulations establishing procedures for its implementation. These regulations will ensure the proper handling of agency records and requests for those records under the FOIA.

**DATES:** This rule is effective December 26, 2000.

**FOR FURTHER INFORMATION CONTACT:** Ray Porfiri, 202-261-7629.

**SUPPLEMENTARY INFORMATION:** In the *Federal Register* of October 4, 2000 (65 FR 59155), the Chemical Safety and Hazard Investigation Board published a proposed rule setting forth its proposed procedures for disclosure of records under the Freedom of Information Act (FOIA). The proposed rule provided for a 30-day comment period. No comments were received in response to the proposed rule and invitation for comments. This final rule is unchanged from the proposed rule.

These regulations implement the FOIA, 5 U.S.C. 552, as amended by the Electronic Freedom of Information Act Amendments of 1996, Public Law 104-231, 110 Stat. 3048. The Board adopts the following set of regulations to discharge its responsibilities under the FOIA. The FOIA establishes: basic procedures for public access to agency records and guidelines for waiver or reduction of fees the agency would otherwise assess for the response to the records request; categories of records that are exempt for various reasons from public disclosure; and basic requirements for Federal agencies regarding their processing of and response to requests for agency records.

**Regulatory Flexibility Act**

The Board, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation and by adopting it certifies that this

regulation will not have a significant economic impact on a substantial number of small entities. Under the FOIA, agencies may recover only the direct costs of searching for, reviewing, and duplicating the records processed for requesters. Thus, fees assessed by the Board will be nominal. Further, the "small entities" that make FOIA requests, as compared with individual requesters and other requesters, are relatively few in number.

**Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, we did not deem any action necessary under the provisions of the Unfunded Mandates Reform Act of 1995, Public Law 104-4, 109 Stat. 48.

**List of Subjects in 40 CFR Part 1601**

Administrative practice and procedure, Archives and records, Freedom of information.

**Chapter VI—Chemical Safety and Hazard Investigation Board**

For the reasons set forth in the preamble, the Chemical Safety and Hazard Investigation Board establishes 40 CFR Chapter VI—Chemical Safety and Hazard Investigation Board, consisting of parts 1600 through 1699, reserves parts 1600 and 1602 through 1699, and adds part 1601 to read as follows:

**PART 1600 [RESERVED]****PART 1601—PROCEDURES FOR DISCLOSURE OF RECORDS UNDER THE FREEDOM OF INFORMATION ACT****PART 1602-1699 [RESERVED]****Subpart A—Purpose, Scope, and Applicability**

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**Authority:** 5 U.S.C. 552, 553; 42 U.S.C. 7412 *et seq.*

**PART 1600 [RESERVED]****PART 1601—PROCEDURES FOR DISCLOSURE OF RECORDS UNDER THE FREEDOM OF INFORMATION ACT****PART 1602-1699 [RESERVED]****Subpart A—Purpose, Scope, and Applicability****§ 1601.1 Purpose and scope.**

This part contains the regulations of the United States Chemical Safety and Hazard Investigation Board ("CSB" or "Board" or "agency") implementing the Freedom of Information Act ("FOIA"). These regulations provide procedures by which members of the public may obtain access to records compiled, created, and maintained by the CSB, along with procedures it must follow in response to such requests for records.

**§ 1601.2 Applicability.**

(a) *General.* The FOIA and the regulations in this part apply to all CSB documents and information. However, if another law sets specific procedures for disclosure, the CSB will process a request in accordance with the procedures that apply to those specific documents. If a request is received for disclosure of a document to the public which is not required to be released under those provisions, the CSB will consider the request under the FOIA and the regulations in this part.

(b) *Records available through routine distribution procedures.* When 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, the CSB will first refer the requester to those sources. Nevertheless, if the requester is not satisfied with the alternative sources, the CSB will process the request under the FOIA.

**§ 1601.3 Definitions.**

*Appeals Officer* means the person designated by the Chairperson to process appeals of denials of requests for CSB records under the FOIA.

*Business submitter* means any person or entity which provides confidential business information, directly or indirectly, to the CSB and who has a proprietary interest in the information.

*Chairperson* means the Chairperson of the CSB (including, in the absence of a Chairperson, the Board Member supervising personnel matters) or his or her designee.

*Commercial-use requester* means requesters seeking information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, the CSB shall determine, whenever reasonably possible, the use to which a requester will put the documents requested. Where the CSB 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 CSB shall seek additional clarification before assigning the request to a specific category.

*Confidential business information* means records provided to the government by a submitter that arguably contain material exempt from disclosure under Exemption 4 of the FOIA, because disclosure could reasonably be expected to cause substantial competitive harm.

*Direct costs* means those expenditures by the CSB actually incurred in searching for and duplicating records to respond to a FOIA request. Direct costs include the salary of the employee or employees performing the work (the basic rate of pay for the employee plus a percentage of that rate to cover benefits) and the cost of operating duplicating machinery. Direct costs do not include overhead expenses, such as the cost of space and heating or lighting of the facility in which the records are stored.

*Duplication* refers to the process of making a copy of a document necessary to fulfill a FOIA request. Such copies can take the form of, among other things, paper copy, microform, audio-visual materials, or machine-readable documentation. The copies provided shall be in a form that is reasonably usable by requesters.

*Educational institution* refers to a preschool, a public or private elementary or high school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, and an institution of vocational education, which operates a program of scholarly research.

*FOIA Officer* means the person designated to process requests for CSB documents under the FOIA.

*Non-commercial scientific institution* refers to an institution that is not operated on a commercial basis as that term is used above in defining *commercial-use requester*, and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.

*Record* includes any writing, drawing, map, recording, tape, film, photo, or other documentary material by which information is preserved.

*Representative of the news media* refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term *news* means information that is about current events or that would be of current interest to the public. 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 components shall also look to the past publication record of a requester in making this determination.

*Requester* means any person, including an individual, Indian tribe, partnership, corporation, association, or public or private organization other than a Federal agency, that requests access to records in the possession of the CSB.

*Review* refers to the process of examining a record, in response to a FOIA request, to determine whether any portion of that record may be withheld under one or more of the FOIA exemptions. It also includes the processing of any record for disclosure; for example, redacting information that is exempt from disclosure under the FOIA. Review does not include time spent resolving general legal or policy issues regarding the use of FOIA exemptions.

*Search* refers to the time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within a document. The CSB shall ensure that searches are conducted in the most efficient and least expensive manner reasonably possible.

*Submitter* means any person or entity who provides information directly or indirectly to the CSB. The term includes, but is not limited to, corporations, Indian tribal governments, state governments, and foreign governments.

*Working day* means a Federal workday that does not include

Saturdays, Sundays, or Federal holidays.

## Subpart B—Administration

### § 1601.10 Protection of records.

(a) Except as authorized by this part or as otherwise necessary in performing official duties, no employee shall in any manner disclose or permit disclosure of any document or information in the possession of the CSB that is confidential or otherwise of a nonpublic nature, including that regarding the CSB, the Environmental Protection Agency or the Occupational Safety and Health Administration.

(b) No person may, without permission, remove from the place where it is made available any record made available to him for inspection or copying. Stealing, altering, mutilating, obliterating, or destroying, in whole or in part, such a record shall be deemed a crime.

### § 1601.11 Preservation of records pertaining to requests under this part.

The CSB will preserve all correspondence pertaining to the requests that it receives under this part, as well as copies of all requested records, until disposition or destruction is authorized by Title 44 of the United States Code or the National Archives and Records Administration's General Records Schedule 14. Records will not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

### § 1601.12 Public reading room.

(a) The CSB maintains a public reading room that contains the records that the FOIA requires to be made regularly available for public inspection and copying as well as a current subject-matter index of its reading room records.

(b) Because of the lack of requests to date for material required to be indexed, the CSB has determined that it is unnecessary and impracticable to publish quarterly, or more frequently, and distribute (by sale or otherwise) copies of each index and supplements thereto, as provided in 5 U.S.C. 552(a)(2). However, the CSB will provide a copy of such indexes to a member of the public upon request, at a cost not to exceed the direct cost of duplication and mailing, if sending records by other than ordinary mail.

(c) The CSB maintains a public reading room at its headquarters: 2175 K Street, NW, Suite 400, Washington, DC 20037-1809.

(d) *Copying*. The cost of copying information available in the offices of the CSB shall be imposed on a requester

in accordance with the provisions of §§ 1601.30 through 1601.33.

(e) The CSB also makes reading room records available electronically through the agency's World Wide Web site (which can be found at <http://www.csb.gov>). This includes the index of its reading room records, indicating which records are available electronically.

### Subpart C—Procedures for Requesting and Disclosing Records

#### § 1601.20 Requests for records.

(a) *Addressing requests.* Requests for records in the possession of the CSB shall be made in writing. The envelope and the request both should be clearly marked *FOIA Request* and addressed to: FOIA Officer, United States Chemical Safety and Hazard Investigation Board, 2175 K Street, NW, Suite 400, Washington, DC 20037-1809. A request improperly addressed will be deemed not to have been received for the purposes of § 1601.24(a) until it is received, or would have been received with the exercise of due diligence, by the FOIA Officer. Records requested in conformance with this section and which are not withholdable records may be obtained in person or by mail as specified in the request. Records to be obtained in person will be available for inspection or copying during business hours on a regular business day in the office of the CSB.

(b) *Description of records.* Each request must reasonably describe the desired records in sufficient detail to enable CSB personnel to locate the records with a reasonable amount of effort. A request for a specific category of records will be regarded as fulfilling this requirement if it enables responsive records to be identified by a technique or process that is not unreasonably burdensome or disruptive of CSB operations.

(1) Whenever possible, a request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record.

(2) If the FOIA Officer determines that a request does not reasonably describe the records sought, he or she will either advise the requester what additional information is needed to locate the record or otherwise state why the request is insufficient. The FOIA Officer will also extend to the requester an opportunity to confer with CSB personnel with the objective of reformulating the request in a manner which will meet the requirements of this section.

(c) *Agreement to pay fees.* A FOIA request shall be considered an agreement by the requester to pay all applicable fees charged under §§ 1601.30 through 1601.33 up to \$25, unless the requester seeks a waiver of fees. The CSB ordinarily will confirm this agreement in an acknowledgement letter. When making a request, you may specify a willingness to pay a greater or lesser amount.

(d) *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 expected 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.

#### § 1601.21 Responses to requests.

(a) *Response to initial request.* The FOIA Officer is authorized to grant or deny any request for a record and to determine appropriate fees.

(b) *Referral to another agency.* When a requester seeks records that originated in another Federal government agency, the CSB will refer the request to the other agency for response. If the CSB refers the request to another agency, it will notify the requester of the referral. A request for any records classified by some other agency will be referred to that agency for response.

(c) *Creating records.* If a person seeks information from the CSB in a format that does not currently exist, the CSB will 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.

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

#### § 1601.22 Form and content of responses.

(a) *Form of notice granting a request.* After the FOIA Officer has granted a request in whole or in part, the requester will be notified in writing. The notice shall describe the manner in which the record will be disclosed, whether by providing a copy of the record with the response or 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 may not unreasonably disrupt the operation of the CSB. The response letter will also inform the requester of any fees to be

charged in accordance with the provisions of §§ 1601.30 through 1601.33.

(b) *Form of notice denying a request.* When the FOIA Officer denies a request in whole or in part, he or she will so notify the requester in writing. The response will be signed by the FOIA Officer and will include:

- (1) The name and title or position of the person making the denial;
- (2) A brief statement of the reason or reasons for the denial, including the FOIA exemption or exemptions which the FOIA Officer has relied upon in denying the request; and
- (3) A statement that the denial may be appealed under § 1601.23 and a description of the requirements of that section.

#### § 1601.23 Appeals of denials.

(a) *Right of appeal.* If a request has been denied in whole or in part, the requester may appeal the denial to: FOIA Appeals Officer, United States Chemical Safety and Hazard Investigation Board, 2175 K Street, NW, Suite 400, Washington, DC 20037-1809.

(b) *Letter of appeal.* The appeal must be in writing and must be sent within 30 days of receipt of the denial letter. An appeal should 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. Both the envelope and the letter of appeal must be clearly marked *FOIA Appeal*. An appeal improperly addressed shall be deemed not to have been received for purposes of the 20-day time period set forth in § 1601.24(e) until it is received, or would have been received with the exercise of due diligence, by the Appeals Officer.

(c) *Action on appeal.* The disposition of an appeal will be in writing and will constitute the final action of the CSB on a request. A decision affirming in whole or in part the denial of a request will include a brief statement of the reason or reasons for affirmance, including each FOIA exemption relied on. If the denial of a request is reversed in whole or in part on appeal, the request will be processed promptly in accordance with the decision on appeal.

(d) *Judicial review.* If the denial of the request for records is upheld in whole or in part, or if a determination on the appeal has not been mailed at the end of the 20-day period or the last extension thereof, the requester is deemed to have exhausted his or her administrative remedies, giving rise to a right of judicial review under 5 U.S.C. 552(a)(4).

**§ 1601.24 Timing of responses to requests.**

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

(b) *Multitrack processing.* (1) The CSB may use two processing tracks by distinguishing between simple and more complex requests based on the amount of work and/or time needed to process the request, including according to limits based on the number of pages involved. If the agency does so, it shall advise requesters assigned to its slower track of the eligibility limits for its faster track.

(2) The agency may provide requesters in its slower track with an opportunity to limit the scope of their requests in order to qualify for faster processing within the specified limits of the agency's faster track. If it does so, the agency will contact the requester either by telephone or by letter, whichever is most efficient in each case.

(c) *Unusual circumstances.* (1) Where the time limits for processing a request cannot be met because of unusual circumstances and the CSB determines to extend the time limits on that basis, the agency shall as soon as practicable notify the requester in writing of the unusual circumstances and of the date by which processing of the request can be expected to be completed. Where the extension is for more than ten working days, the CSB shall provide the requester with an opportunity either to modify the request so that it may be processed within the time limits or to arrange an alternative time period for processing the request or a modified request.

(2) Where the CSB reasonably believes that multiple requests submitted by a requester, or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances, and the requests involve clearly related matters, they may be aggregated. Multiple requests involving unrelated matters will not be aggregated.

(d) *Expedited processing.* (1) Requests and appeals will be taken out of order and given expedited treatment whenever it is determined that they involve:

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

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

(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 which affect public confidence.

(2) A request for expedited processing may be made at the time of the initial request for records or at any later time.

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

(4) Within ten calendar days of its receipt of a request for expedited processing, the CSB shall decide whether to grant it and shall notify the requester of the decision. If a request for expedited treatment is granted, the request shall be given priority and shall be processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision shall be acted on expeditiously.

(e) *Appeals.* A written determination on an appeal submitted in accordance with § 1601.23 will be issued within 20 working days after receipt of the appeal. This time limit may be extended in unusual circumstances up to a total of 10 working days after written notice to the requester setting forth the reasons for the extension and the date on which a determination is expected to be made. As used in this paragraph, unusual circumstances means that there is a need to:

(1) Search for and collect the requested records from facilities that are separate from the office processing the request;

(2) Search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) Consult with another agency having a substantial interest in the determination of the request, or consult

with various offices within the CSB that have a substantial interest in the records requested.

(f) When a determination cannot be mailed within the applicable time limit, the appeal will nevertheless be processed. In such case, upon the expiration of the time limit, the requester will be informed of the reason for the delay, of the date on which a determination may be expected to be mailed, and of that person's right to seek judicial review. The requester may be asked to forego judicial review until determination of the appeal.

**§ 1601.25 Disclosure of requested records.**

(a) The FOIA Officer shall make requested records available to the public to the greatest extent possible in keeping with the FOIA, except that the following records are exempt from the disclosure requirements:

(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;

(2) Records related solely to the internal personnel rules and practices of the CSB;

(3) Records specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b)) provided that such statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue or that the statute establishes particular criteria for withholding information or refers to particular types of matters to be withheld;

(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;

(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.

(b) If a requested record contains exempted material along with nonexempted material, all reasonably segregable nonexempt material shall be disclosed.

(c) Even if an exemption described in paragraph (a) of this section may be reasonably applicable to a requested record, or portion thereof, the CSB may elect under the circumstances of any particular request not to apply the exemption to such requested record, or portion thereof, subject to the provisions in § 1601.26 for confidential business information. The fact that the exemption is not applied by the CSB to any requested record, or portion thereof, has no precedential significance as to the application or non-application of the exemption to any other requested record, or portion thereof, no matter when the request is received.

#### **§ 1601.26 Special procedures for confidential business information.**

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

(b) *Designation of business information.* Business submitters should use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, those portions of their submissions which they deem to be protected under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4). Any such

designation will expire 10 years after the records were submitted to the government, unless the submitter requests, and provides reasonable justification for, a designation period of longer duration.

(c) *Predisclosure notification.* (1) Except as is provided for in paragraph (h) of this section, the FOIA Officer shall, to the extent permitted by law, provide a submitter with prompt written notice of a FOIA request or administrative appeal encompassing its confidential business information whenever required under paragraph (d) of this section. Such notice shall either describe the exact nature of the business information requested or provide copies of the records or portions thereof containing the business information.

(2) Whenever the FOIA Officer provides a business submitter with the notice set forth in this paragraph, the FOIA Officer shall notify the requester that the request includes information that may arguably be exempt from disclosure under Exemption 4 of the FOIA and that the person or entity who submitted the information to the CSB has been given the opportunity to comment on the proposed disclosure of information.

(d) *When notice is required.* The CSB shall provide a business submitter with notice of a request whenever:

(1) The business submitter has in good faith designated the information as business information deemed protected from disclosure under 5 U.S.C. 552(b)(4); or

(2) The CSB has reason to believe that the request seeks business information the disclosure of which may result in substantial commercial or financial injury to the business submitter.

(e) *Opportunity to object to disclosure.* Through the notice described in paragraph (c) of this section, the CSB shall, to the extent permitted by law, afford a business submitter at least 10 working days within which it can provide the CSB with a detailed written statement of any objection to disclosure. Such statement shall demonstrate why the information is contended to be a trade secret or commercial or financial information that is privileged or confidential and why disclosure would cause competitive harm. 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.

(f) *Notice of intent to disclose.* (1) The FOIA Officer shall consider carefully a

business submitter's objections and specific grounds for nondisclosure prior to determining whether to disclose confidential commercial business information. Whenever the FOIA Officer decides to disclose such information over the objection of a business submitter, the FOIA Officer shall forward to the business submitter a written notice at least 10 working days before the date of disclosure containing:

(i) A statement of the reasons for which the business submitter's disclosure objections were not sustained,

(ii) A description of the confidential commercial information to be disclosed, and

(iii) A specified disclosure date.

(2) Such notice of intent to disclose likewise shall be forwarded to the requester at least 10 working days prior to the specified disclosure date.

(g) *Notice of FOIA lawsuit.* Whenever a requester brings suit seeking to compel disclosure of confidential business information, the FOIA Officer shall promptly notify the business submitter of such action.

(h) *Exceptions to predisclosure notification.* The requirements of this section shall not apply if:

(1) The FOIA Officer determines that the information should not be disclosed;

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

(3) Disclosure of the information is required by law (other than 5 U.S.C. 552); or

(4) The designation made by the submitter in accordance with paragraph (b) of this section appears obviously frivolous; except that, in such a case, the FOIA Officer will provide the submitter with written notice of any final decision to disclose confidential business information within a reasonable number of days prior to a specified disclosure date.

#### **Subpart D—Fees**

##### **§ 1601.30 Fees to be charged—general.**

(a) *Policy.* Generally, the fees charged for requests for records pursuant to 5 U.S.C. 552 shall cover the full allowable direct costs of searching for, reproducing, and reviewing records that are responsive to a request for information. Fees shall be assessed according to the schedule contained in paragraph (b) of this section and the category of requesters described in § 1601.31 for services rendered by the CSB staff in responding to, and processing requests for, records under this part. Fees assessed will be paid by check or money order payable to the United States Treasury.

(b) *Types of charges.* The types of charges that may be assessed in connection with the production of records in response to a FOIA request are as follows:

(1) *Searches.*

(i) *Manual searches for records.* For each quarter hour spent in searching for and/or reviewing a requested record, the fees will be: \$4.00 for clerical personnel; \$8.00 for professional personnel; and \$11.00 for managerial personnel.

(ii) *Computer searches for records.* Requesters will be charged at the actual direct costs of conducting a search using existing programming. These direct costs will include the cost of operating the central processing unit for that portion of operating time that is directly attributable to searching for records and the operator/programmer salary, *i.e.*, basic pay plus 16 percent, apportionable to the search. A charge shall also be made for any substantial amounts of special supplies or materials used to contain, present, or make available the output of computers, based upon the prevailing levels of costs to the CSB for the type and amount of such supplies or materials that are used. Nothing in this paragraph shall be construed to entitle any person or entity, as of right, to any services in connection with computerized records, other than services to which such person or entity may be entitled under the provisions of this section or § 1601.32. The CSB will not alter or develop programming to conduct a search.

(iii) *Unproductive searches.* The CSB will charge search fees even if no records are found which are responsive to the request or if the records found are exempt from disclosure.

(2) *Duplication.* Records will be reproduced at a rate of \$0.25 per page. For copies prepared by computer, such as tapes or printouts, the requester shall be charged the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction, the actual direct costs of reproducing the record(s) shall be charged.

(3) *Review.* Only commercial-use requesters may be charged for time spent reviewing records to determine whether they are exempt from mandatory disclosure. Charges may be assessed only for initial review, *i.e.*, the review undertaken the first time the CSB analyzes the applicability of a specific exemption to a particular record or portion of a record. Records or portions of records withheld in full under an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not

previously considered. The costs for such a subsequent review are properly assessable.

(4) *Other services and materials.*

Where the CSB elects, as a matter of administrative discretion, to comply with a request for a special service or materials, such as certifying that records are true copies or sending records by special methods, the actual direct costs of providing the service or materials will be charged.

**§ 1601.31 Fees to be charged—categories of requesters.**

(a) *Fees for various requester categories.* Paragraphs (b) through (e) of this section state, for each category of requester, the types of fees generally charged by the CSB. However, for each of these categories, the fees may be limited, waived or reduced in accordance with the provisions set forth in § 1601.32(c). If the CSB has reasonable cause to doubt the purpose specified in the request for which a requester will use the records sought, or where the purpose is not clear from the request itself, the CSB will seek clarification before assigning the request a specific category.

(b) *Commercial use requester.* The CSB shall charge fees for records requested by persons or entities making a commercial use request in an amount that equals the full direct costs for searching for, reviewing for release, and reproducing the records sought. Commercial use requesters are not entitled to 2 hours of free search time nor 100 free pages of reproduction of records. In accordance with § 1601.30, commercial use requesters may be charged the costs of searching for and reviewing records even if there is ultimately no disclosure of records.

(c) *Educational and noncommercial scientific institutions.* The CSB shall charge fees for records requested by, or on behalf of, educational institutions and noncommercial scientific institutions in an amount which equals the cost of reproducing the records responsive to the request, excluding the cost of reproducing the first 100 pages. No search fee shall be charged with respect to requests by educational and noncommercial scientific institutions. For a request to be included in this category, requesters must show that the request being made is authorized by and under the auspices of a qualifying institution, and that the records are not sought for commercial use but are sought in furtherance of scholarly research (if the request is from an educational institution) or scientific research (if the request is from a noncommercial scientific institution).

(d) *News media.* The CSB shall charge fees for records requested by representatives of the news media in an amount which equals the cost of reproducing the records responsive to the request, excluding the costs of reproducing the first 100 pages. No search fee shall be charged with respect to requests by representatives of the news media. For a request to be included in this category, the requester must qualify as a representative of the news media and the request must not be made for a commercial use. A request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for commercial use.

(e) *All other requesters.* The CSB shall charge fees for records requested by persons or entities that are not classified in any of the categories listed in paragraphs (b), (c), or (d) of this section in an amount that equals the full reasonable direct cost of searching for and reproducing records that are responsive to the request, excluding the first 2 hours of search time and the cost of reproducing the first 100 pages of records. In accordance with § 1601.30, requesters in this category may be charged the cost of searching for records even if there is ultimately no disclosure of records, excluding the first 2 hours of search time.

(f) For purposes of the exceptions contained in this section on assessment of fees, the word *pages* refers to paper copies of 8½ × 11 inches or 11 × 14 inches. Thus, requesters are not entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or a computer disk containing the equivalent of 100 pages of computer printout meets the terms of the exception.

(g) For purposes of paragraph (e) of this section, the term *search time* has as its basis, manual search. To apply this term to searches made by computer, the CSB will determine the hourly cost of operating the central processing unit and the operator's hourly salary plus 16 percent. When the cost of the search (including the operator time and the cost of operating the computer to process a request) equals the equivalent dollar amount of 2 hours of the salary plus 16 percent of the person performing the search, *i.e.*, the operator, the CSB will begin assessing charges for the computer.

**§ 1601.32 Limitations on charging fees.**

(a) *In general.* Except for requesters seeking records for a commercial use as described in § 1601.31(b), the CSB will provide, without charge, the first 100

pages of duplication and the first 2 hours of search time, or their cost equivalent.

(b) *No fee charged.* The CSB will not charge fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself. The elements to be considered in determining the cost of collecting a fee are the administrative costs of receiving and recording a requester's remittance and of processing the fee.

(c) *Waiver or reduction of fees.* The CSB may grant a waiver or reduction of fees if the CSB determines that the 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 Federal government, and the disclosure of the information is not primarily in the commercial interest of the requester. Requests for a waiver or reduction of fees will be considered on a case-by-case basis.

The following factors will be considered by the CSB in determining whether a waiver or reduction of fees is in the public interest:

(i) *The subject of the request.* Whether the subject of the requested records concerns the operations or activities of the government. The subject matter of the requested records, in the context of the request, must specifically concern identifiable operations or activities of the Federal government with a connection that is direct and clear, not remote or attenuated. Furthermore, the records must be sought for their informative value with respect to those government operations or activities; a request for access to records for their intrinsic informational content alone will not satisfy this threshold consideration.

(ii) *The informative value of the information to be disclosed.* Whether the disclosure is likely to contribute to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative on specific government operations or activities in order to hold potential for contributing to increased public understanding of those operations and activities. The disclosure of information that is already in the public domain, in either a duplicative or substantially identical form, would not be likely to contribute to such understanding, as nothing new would be added to the public record.

(iii) *The contribution to an understanding of the subject by the general public.* Whether disclosure of the requested information will contribute to the public understanding.

The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. A requester's identity and qualifications, e.g., expertise in the subject area and ability and intention to convey information to the general public, will be considered.

(iv) *The significance of the contribution in public understanding.* Whether the disclosure is likely to significantly enhance the public understanding of government operations or activities. The public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent. The FOIA Officer shall not make a separate value judgment as to whether information, even though it in fact would contribute significantly to public understanding of the operations or activities of the government, is "important" enough to be made public.

(2) In order to determine whether the second fee waiver requirement is met, i.e., that disclosure of the requested information is not primarily in the commercial interest of the requester, the CSB shall consider the following two factors in sequence:

(i) *The existence and magnitude of a commercial interest.* Whether the requester, or any person on whose behalf the requester may be acting, has a commercial interest that would be furthered by the requested disclosure. In assessing the magnitude of identified commercial interests, consideration will be given to the effect that the information disclosed would have on those commercial interests, as well as to the extent to which FOIA disclosures serve those interests overall. Requesters shall be given a reasonable opportunity in the administrative process to provide information bearing upon this consideration.

(ii) *The primary interest in disclosure.* 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. A fee waiver or reduction is warranted only where, once the public interest standard set out in paragraph (c)(1) of this section is satisfied, that public interest can fairly be regarded as greater in magnitude than that of the requester's commercial interest in disclosure. The CSB will ordinarily presume that, where a news media requester has satisfied the

public interest standard, the public interest will be serviced primarily by disclosure to that requester. Disclosure to requesters who compile and market Federal government information for direct economic gain will not be presumed to primarily serve the public interest.

(3) Where only a portion of the requested record satisfies the requirements for a waiver or reduction of fees under this paragraph, a waiver or reduction shall be granted only as to that portion.

(4) A request for a waiver or reduction of fees must accompany the request for disclosure of records and should include:

(i) A clear statement of the requester's interest in the records;

(ii) The proposed use of the records and whether the requester will derive income or other benefit from such use;

(iii) A statement of how the public will benefit from release of the requested records; and

(iv) If specialized use of the documents is contemplated, a statement of the requester's qualifications that are relevant to the specialized use.

(5) A requester may appeal the denial of a request for a waiver or reduction of fees in accordance with the provisions of § 1601.23.

#### **§ 1601.33 Miscellaneous fee provisions.**

(a) *Notice of anticipated fees in excess of \$25.* Where the CSB determines or estimates that the fees chargeable will amount to more than \$25, the CSB shall promptly notify the requester of the actual or estimated amount of fees or such portion thereof that can be readily estimated, unless the requester has indicated his or her willingness to pay fees as high as those anticipated. Where a requester has been notified that the actual or estimated fees may exceed \$25, the request will be deemed not to have been received until the requester has agreed to pay the anticipated total fee. A notice to the requester pursuant to this paragraph will include the opportunity to confer with CSB personnel in order to reformulate the request to meet the requester's needs at a lower cost.

(b) *Aggregating requests.* A requester may not file multiple requests at the same time, each seeking portions of a record or records, solely in order to avoid the payment of fees. When the CSB 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 CSB may aggregate such requests and charge accordingly. One



element to be considered in determining whether a belief would be reasonable is the time period over which the requests have occurred. The CSB will presume that multiple requests of this type made within a 30-day period have been made in order to evade fees. Where requests are separated by a longer period, the CSB shall aggregate them only where there exists a solid basis for determining that such aggregation is warranted, *e.g.*, where the requests involve clearly related matters. Multiple requests regarding unrelated matters will not be aggregated.

(c) *Advance payment of fees.* (1) The CSB does not require an advance payment before work is commenced or continued, unless:

(i) The CSB estimates or determines that the fees are likely to exceed \$250. If it appears that the fees will exceed \$250, the CSB will notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees. In the case of requesters with no history of payment, the CSB may require an advance payment of fees in an amount up to the full estimated charge that will be incurred; or

(ii) The requester has previously failed to pay a fee in a timely fashion, *i.e.*, within 30 days of the date of a billing. In such cases, the CSB may require the requester to pay the full amount owed plus any applicable interest, as provided in paragraph (d) of this section, or demonstrate that the fee owed has been paid, prior to processing any further record request. Under these circumstances, the CSB may require the requester to make an advance payment of the full amount of the fees anticipated before processing a new request or finishing processing of a pending request from that requester.

(2) A request for an advance deposit shall ordinarily include an offer to the requester to confer with identified CSB personnel to attempt to reformulate the request in a manner which will meet the needs of the requester at a lower cost.

(3) When the CSB requests an advance payment of fees, the administrative time limits described in 5 U.S.C. 552(a)(6) begin only after the CSB has received the advance payment.

(d) *Interest.* The CSB may assess interest charges on an unpaid bill starting on the 31st day following the day on which the bill was sent. Once a fee payment has been received by the CSB, even if not processed, the accrual of interest shall be stayed. Interest charges shall be assessed at the rate prescribed in 31 U.S.C. 3717 and shall accrue from the date of the billing.

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

Dated: November 16, 2000.

**Christopher W. Warner,**  
*General Counsel.*

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the Secretary

### Office of Inspector General

#### 45 CFR Part 61

**RIN 0906-AA46**

#### Health Care Fraud and Abuse Data Collection Program: Reporting of Final Adverse Actions; Correction

**AGENCY:** Office of Inspector General (OIG), HHS.

**ACTION:** Final rule; correction amendment.

**SUMMARY:** This document contains a correction to the final regulations which were published in the **Federal Register** on October 26, 1999 (64 FR 57740). These regulations established a national health care fraud and abuse data collection program for the reporting and disclosing of certain adverse actions taken against health care providers, suppliers and practitioners, and for maintaining a data base of final adverse actions taken against health care providers, suppliers and practitioners. An inadvertent error appeared in the text of the regulations concerning the definition of the term "health plan." As a result, we are making a correction to 45 CFR 61.3, Definitions, to assure the technical correctness of these regulations.

**EFFECTIVE DATE:** November 24, 2000.

**FOR FURTHER INFORMATION CONTACT:** Joel Schaer, OIG Regulations Officer, (202) 619-0089.

**SUPPLEMENTARY INFORMATION:** The HHS Office of Inspector General (OIG) issued final regulations on October 26, 1999 (64 FR 57740) that established a national health care fraud and abuse data collection program—the Healthcare Integrity and Protection Data Bank (HIPDB)—for the reporting and disclosing of certain final adverse actions taken against health care providers, suppliers and practitioners, and for maintaining a data base of final adverse actions taken against health care

providers, suppliers and practitioners. The final rule established a new 45 CFR part 61 to implement the requirements for reporting of specific data elements to, and procedures for obtaining information from, the HIPDB. In that final rule, an inadvertent error appeared in § 61.3—the definitions section of the regulations—and is now being corrected.

Section 61.3 expanded on previous regulatory definitions and provided additional examples of the scope of various terms set forth in the statute. In the preamble of the final rule, we reiterated that the statutory intent of the definition for the term "health plan" was not meant to be exclusive or exhaustive, and interpreted congressional use of the word "includes" in the statutory definition of this term as an indication that additional entities may be recognized as "health plans" if they meet the basic definition of providing health benefits. The preamble of the final rule stated that the statutory language indicated that Congress intended that guarantors of payment for health care items and services—including "self insured employers" who are often the subjects of health care fraud—have access to HIPDB information. As a result, in order to make the term more inclusive, we indicated our intention of modifying the fourth element defining this term to include, but not be limited to, a plan, program, agreement or other mechanism established, maintained or made available by a self insured employer or group of self insured employers. This clarifying language, however, was not properly reflected in the regulatory text that appeared in the October 26, 1999 final regulations.

To be consistent with the intent of the final rule's preamble, we are correcting the inadvertent error that appeared in § 61.3 that failed to accurately reflect the definition of the term "health plan."

#### List of Subjects in 45 CFR Part 61

Billing and transportation services, Durable medical equipment suppliers and manufacturers, Health care insurers, Health maintenance organizations, Health professions, Home health care agencies, Hospitals, Penalties, Pharmaceutical suppliers and manufacturers, Privacy, Reporting and recordkeeping requirements, Skilled nursing facilities.

Accordingly, 45 CFR part 61 is corrected by making the following correcting amendment.