



OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

29 CFR Part 2201

Regulations Implementing the Freedom of Information Act

AGENCY: Occupational Safety and Health Review Commission.

ACTION: Final rule.

SUMMARY: The Occupational Safety and Health Review Commission (“OSHRC”) revises its regulations implementing the Freedom of Information Act (“FOIA”). These revisions account for statutory amendments included in the FOIA Improvement Act of 2016 (“FOIA Improvement Act”), as well as the addition of procedures pertaining to confidential commercial information and preservation of records, clarifications of existing procedures, and updates to contact information.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Noelle Chadwick, OSHRC’s FOIA Public Liaison, by telephone at (202) 606-5410 or email at NChadwick@oshrc.gov.

SUPPLEMENTARY INFORMATION: OSHRC is publishing a final rule revising its regulations implementing the FOIA. On November 30, 2016, OSHRC published for comment a notice of proposed rulemaking (“NPRM”), at 81 FR 86297, that proposed revisions to OSHRC’s regulations at 29 CFR part 2201, implementing the FOIA, 5 U.S.C. 552. Interested persons were afforded an opportunity to participate in the rulemaking process through the submission of written comments on the NPRM. OSHRC received comments from the National Archives and Records Administration (“NARA”)

suggesting two minor changes: (1) changing the word “mediation” to “dispute resolution” in two places to reflect an anticipated new regulation from NARA’s Office of Government Information Services (“OGIS”) that clarifies for requesters the difference between formal mediation and the broader services OGIS provides; and (2) changing the reference to a General Records Schedule pertaining to the preservation of records, as General Records Schedule 4.2 recently replaced (in part) General Records Schedule 14. OSHRC received no other public comments suggesting changes to the proposed regulations. OSHRC updated the website address containing information for the FOIA Requester Service Center, modified the proposed regulations in light of NARA’s comments, reviewed the proposed regulations and adopts them in this final rule.

I. Background

OSHRC makes several substantive and procedural revisions to its regulations implementing the FOIA that fall within four general categories. First, OSHRC modifies its existing FOIA regulations to reflect the amendments to the FOIA contained in the FOIA Improvement Act of 2016, Public Law 114-185. The FOIA Improvement Act amended various practices under the FOIA, such as requiring notification to requesters of the right to seek dispute resolution at various times throughout the FOIA process from OGIS, a ninety-day minimum time period to file administrative appeals, and limitations on assessing certain fees and exceptions to those limitations.

Second, OSHRC revises its regulations to further clarify and update its procedures relating to the submission and processing of FOIA requests.

Third, OSHRC adds a new section to its regulations establishing procedures to notify submitters of records containing confidential commercial information when those records are requested under the FOIA, in compliance with Executive Order 12,600.

Fourth, OSHRC adds a new section to its regulations explaining the procedure for the preservation of records related to FOIA requests.

Accordingly, OSHRC revises its regulations implementing the FOIA. The specific amendments to each section of 29 CFR part 2201 are discussed hereafter in regulatory sequence.

In 29 CFR 2201.3, OSHRC revises paragraph (a) to direct requestors to OSHRC's FOIA Reference Guide for further information. OSHRC revises paragraph (c) explaining the role of the FOIA Public Liaison. OSHRC also revises paragraph (d) to update the contact information for the FOIA Requester Service Center, including the web address previously identified in the proposed rule.

In 29 CFR 2201.4, OSHRC revises a reference to another section of the regulations included in paragraph (a). OSHRC removes paragraph (b) regarding examination of records in cases appealed to courts as the provision is no longer necessary. OSHRC revises new paragraph (b), previously paragraph (c), to update the list of records available at the OSHRC e-FOIA Reading Room. In response to the codification of the "Rule of 3" in the FOIA Improvement Act, OSHRC also adds to new paragraph (b) that it will make publicly available copies of records that have been released to a person under the FOIA and have been requested three or more times. OSHRC revises new paragraph (c), previously paragraph (d), to clarify the location of

records available onsite at the OSHRC National Office. OSHRC changes paragraph (e) to paragraph (d) due to the removal of paragraph (b) in this section.

In 29 CFR 2201.5, OSHRC revises paragraph (a) to clarify the procedure for how to make a FOIA request regarding the ability to submit a request in multiple ways, including by email and OSHRC's online FOIA request form. OSHRC changes paragraph (b) to describe the procedures for a requester making a request for records about himself or herself. OSHRC adds paragraph (c) to describe the procedure enabling a requester to receive greater access when a request for records pertains to another individual. OSHRC also adds paragraph (d) to explain what elements should be included in the description of records in a FOIA request. OSHRC adds paragraph (e), previously included in part in another paragraph in this section, to explain the procedure for requests regarding the preferred form or format of a response. OSHRC adds paragraph (f) to describe the necessary contact information to be provided by a requestor. OSHRC further adds paragraph (g), previously included in another paragraph of this section, to describe how OSHRC determines the date of receipt of a FOIA request and revises the reference in this paragraph to reflect the changes to paragraph designations in a subsequent section.

In 29 CFR 2201.6, OSHRC revises paragraphs (c) and (f) to include notification to the requestor of the availability of assistance from the FOIA Public Liaison and the right to seek dispute resolution services from OGIS. OSHRC also revises the references in paragraph (f) to reflect the changes to paragraph designations in subsequent sections. OSHRC revises paragraph (h) to reflect changes to the procedure notifying a requester of the tracking number assigned to the FOIA request.

OSHC redesignates 29 CFR 2201.7 to 29 CFR 2201.10 as 29 CFR 2201.8 to 29 CFR 2201.11, respectively, and then adds a new 29 CFR 2201.7. This new section pertains to “confidential commercial information,” and describes this type of information and how it is designated as such by a submitter, the circumstances under which OSHRC must notify the submitter of such information when it is contained in records requested under the FOIA, exceptions to this notice requirement, and the process for the submitter to object to the disclosure of such information.

In redesignated 29 CFR 2201.8, OSHRC revises paragraph (a) to explain that OSHRC shall charge fees in accordance with the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget. OSHRC also revises paragraph (b) to explain the limitations on assessing certain fees and exceptions to those limitations, as well as revises a reference to the Commission. OSHRC revises paragraphs (h) and (i) to reflect the change in name for the Commission’s Office of the Executive Director. OSHRC revises the references in this entire section to reflect the changes to paragraph designations in previous and subsequent sections.

In redesignated 29 CFR 2201.9, OSHRC revises the reference in this section to reflect the changes to paragraph designations in a previous section.

In redesignated 29 CFR 2201.10, OSHRC adds paragraph (a) to revise the time period to file an appeal, as well as identify information to be included with the appeal. OSHRC adds paragraph (b) to clarify the procedure for adjudication of appeals. OSHRC also adds paragraph (c) to explain the content of and procedure for decisions on appeals. OSHRC adds paragraph (d) to explain the process of dispute resolution provided by

OGIS. In response to comments from NARA, OSHRC changes the word “mediation” to “dispute resolution” in paragraphs (c) and (d) of the proposed rule. OSHRC also adds paragraph (e) to describe the requirements for seeking review by a court of an adverse determination by OSHRC.

In redesignated 29 CFR 2201.11, OSHRC revises a reference to OSHRC’s website.

OSHRC adds a new section at 29 CFR 2201.12 on the procedures for preserving records pertaining to FOIA requests. In response to comments from NARA, OSHRC revises a reference in this section of the proposed rule from “the General Records Schedule 14” to “the applicable General Records Schedule.”

II. Statutory and Executive Order Reviews

Executive Orders 12866 and 13132, and the Unfunded Mandates Reform Act of 1995: OSHRC is an independent regulatory agency and, as such, is not subject to the requirements of E.O. 12866, E.O. 13132, or the Unfunded Mandates Reform Act, 2 U.S.C. 1501 *et seq.*

Regulatory Flexibility Act: The Chairman of OSHRC certifies under the Regulatory Flexibility Act, 5 U.S.C. 605(b), that these rules will not have a significant economic impact on a substantial number of small entities. The only revisions that could economically impact a small entity pertain to how OSHRC charges its FOIA fees. OSHRC, however, receives relatively few FOIA requests from “small entities” that result in fees being assessed; when fees are assessed, the amounts are generally minimal; and it is not anticipated that the amendments will have much affect (if any) on the number of

entities responsible for paying FOIA fees or the amounts of those fees. For these reasons, a regulatory flexibility analysis is not required.

Paperwork Reduction Act of 1995: OSHRC has determined that the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, does not apply because these rules do not contain any information collection requirements that require the approval of OMB.

Congressional Review Act: These revisions do not constitute a “rule,” as defined by the Congressional Review Act, 5 U.S.C. 804(3)(C), because they involve changes to agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.

List of Subjects in 29 CFR Part 2201

Freedom of information.

Cynthia L. Attwood,

Chairman.

For the reasons set forth in the preamble, OSHRC amends 29 CFR part 2201 as follows:

PART 2201—REGULATIONS IMPLEMENTING THE FREEDOM OF INFORMATION ACT

1. The authority citation for part 2201 continues to read as follows:

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

§ 2201.3 [Amended]

2. Amend § 2201.3 by:

a. Removing the words “FOIA handbook” and adding, in their place, the words “FOIA Reference Guide” in paragraph (a)(5).

b. Removing the word “supervisory” in paragraph (c).

c. Revising paragraph (d) to read as follows:

§ 2201.3 Delegation of authority and responsibilities.

* * * * *

(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 website 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.

* * * * *

§ 2201.4 [Amended]

3. Amend § 2201.4 by:

a. Removing the citation “§ 2201.5(a)” and adding, in its place, the citation “§ 2201.5” in paragraph (a).

b. Removing paragraph (b).

c. Redesignating paragraphs (c) through (e) as paragraphs (b) through (d), respectively.

d. Revising the introductory text of redesignated paragraph (b), and paragraphs (b)(1), (b)(5), (b)(6), and (c) to read as follows:

§ 2201.4 General policy and definitions.

* * * * *

(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 website 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;

* * * * *

(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.

* * * * *

4. Revise § 2201.5 to read as follows:

§ 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 2400.6 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).

5. Amend § 2201.6 by revising paragraphs (c), (f), and (h) to read as follows:

§ 2201.6 Responses to requests.

* * * * *

(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).

* * * * *

(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.

* * * * *

(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.

* * * * *

§§ 2201.7 through 2201.10 [Redesignated as §§ 2201.8 through 2201.11]

6. Redesignate §§ 2201.7 through 2201.10 as §§ 2201.8 through 2201.11, respectively.

7. Add new § 2201.7 to read as follows:

§ 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.

8. Amend redesignated § 2201.8 by:

a. Redesignating paragraph (b)(3) as paragraph (b)(5).

b. Revising paragraph (a), the introductory text of paragraph (b), and paragraphs (b)(1) and (b)(2)(v);

c. Adding new paragraphs (b)(3) and (b)(4); and

d. Revising redesignated paragraph (b)(5), and paragraphs (h) and (i), to read as follows:

§ 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) * * *

(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).

* * * * *

(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.

§ 2201.9 [Amended]

9. Amend redesignated § 2201.9 by removing the citation “§ 2201.7(b)” in paragraph (a) and adding, in its place, the citation “§ 2201.8(b)”.

10. Revise redesignated § 2201.10 to read as follows:

§ 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.

§ 2201.11 [Amended]

11. Amend redesignated § 2201.11 by removing the words “through OSHRC’s Web site” and adding, in their place, the words “on OSHRC’s website” in paragraph (b).

12. Add § 2201.12 to read as follows:

§ 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.

[FR Doc. 2016-31133 Filed: 12/23/2016 8:45 am; Publication Date: 12/27/2016]