



NATIONAL TRANSPORTATION SAFETY BOARD

49 CFR Part 801

Docket No.: NTSB-GC-2017-0004

RIN: 3147-AA18

Public Availability of Information

AGENCY: National Transportation Safety Board (NTSB).

ACTION: Interim final rule.

SUMMARY: The NTSB is issuing an interim final rule that revises 49 CFR part 801, “Public Availability of Information,” to implement the substantive and procedural changes to the Freedom of Information Act (FOIA), identified in the Open Government Act of 2007, December 31, 2007, the Open FOIA Act of 2009, October 28, 2009, and the FOIA Improvement Act of 2016, June 30, 2016. These revisions to the NTSB FOIA regulation are being issued as an interim final rule to ensure that an updated regulation is in place as soon as practicable to implement the Acts referenced above.

DATES: This interim final rule is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. The NTSB will accept written comments on this interim final rule on or before **[INSERT 60 DAYS FROM THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: A copy of this interim final rule, published in the **Federal Register** (FR), is available for inspection and copying in the NTSB’s public reading room, located at 490 L’Enfant Plaza, SW, Washington, D.C. 20594-003. Alternatively, a copy is available on

the government-wide website on regulations at <http://www.regulations.gov> (Docket ID Number NTSB-GC-2017-0004).

You may send comments identified by Docket ID Number NTSB-GC-2017-0004 using any of the following methods:

1. Federal eRulemaking Portal: Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.
2. Mail: Send comments to NTSB Office of General Counsel, 490 L'Enfant Plaza East, SW, Washington, D.C. 20594-003.
3. Facsimile: Fax comments to 202-314-6090.
4. Hand Delivery: Bring comments to 490 L'Enfant Plaza East, SW, 6th Floor, Washington, D.C., between 9 a.m. and 5 p.m., Monday through Friday, except Legal public holidays.

Privacy: We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Kathleen Silbaugh, General Counsel, (202) 314-6016.

SUPPLEMENTARY INFORMATION:

I. Background

The FOIA provides that any person has a right, enforceable in federal court, to obtain access to federal agency records, except to the extent that any portions of such records are protected from public disclosure by one of nine exemptions or by one of three special law enforcement record exclusions. The FOIA also sets forth the process for obtaining federal agency records and requires agencies to promulgate regulations addressing the requirements for making initial requests and appeals, the fees an agency

may charge, and the standards and procedures for regular and expedited processing of requests.

Since the NTSB last revised 49 C.F.R. part 801 on April 16, 2007, 72 FR 18914, the FOIA was amended three times: in the Open Government Act of 2007, Pub. L. 110–175, 121 Stat 2524, December 31, 2007 (hereinafter “2007 Act”), the Open FOIA Act of 2009, Pub. L. 111-83, 123 Stat 2142, October 28, 2009 (hereinafter “2009 Act”), and the FOIA Improvement Act of 2016, Pub. L. 114-185, 130 Stat 538, June 30, 2016 (hereinafter “2016 Act”). The 2016 Act specifically requires all agencies to review and update their FOIA regulations in accordance with its provisions. The NTSB is revising part 801 to (1) implement the 2007, 2009, and 2016 statutory amendments, and (2) update and clarify the regulation pursuant to the NTSB’s plan to review and revise all of its regulations. NTSB Plan for Retrospective Analysis of Existing Rules, 77 FR 37865 (June 25, 2012); Retrospective Analysis of Existing Rules; Notification, 78 FR 1193, 1194 (January 8, 2013).

The NTSB is issuing this regulation as an interim final rule to ensure that the agency implements the 2016 Act as soon as practicable. In the revised regulation, the NTSB has adopted, where appropriate, the template for agency FOIA regulations released by the Office of Information Policy at the Department of Justice.

II. Guidelines for Adoption of Interim Rules

The NTSB has concluded that good cause exists, under the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(B) and (d)(3), to waive the APA’s notice-and-comment and delayed-effective-date requirements and to issue this regulation as an interim final rule. The amendments to part 801 primarily address how the NTSB will implement the 2007, 2009, and 2016 Acts, and make clarifying and general updates to the existing regulation but do not

fundamentally alter or change the regulation's nature or scope. Further, in light of the significant need for immediate guidance regarding the changes made under the 2016 Act, the NTSB has determined that notice-and-comment rulemaking is impracticable and unnecessary. The revisions are noncontroversial, and no opposition or significant adverse comments are expected. Nevertheless, the NTSB is providing the public a 60-day period following publication of the interim final rule to submit comments. The NTSB will consider comments received during the comment period, and will alter the issued final rule if the comments warrant alteration.

III. Summary of Changes to Part 801 Made by This Interim Final Rule

A. Proactive disclosures

The revisions add to § 801.10, "General," a list of proactive disclosures pursuant to 5 U.S.C. §§ 552(a)(2), (a)(5), (e)(3), and (g). Pursuant to the 2016 Act, § 801.10 explains that the proactive disclosures are available on the NTSB's website, and specifies the categories of agency records that must be made available in its electronic reference room and its public reference room at NTSB headquarters. These proactively disclosed records include records that have been disclosed pursuant to a FOIA request and have been requested at least three times.

B. Electronic availability of information

Throughout part 801, pursuant to the 2016 Act, the revisions emphasize information that is available on the NTSB's website. Section 801.10 also explains that the NTSB maintains a public access link for requesters to submit and track FOIA requests electronically.

Pursuant to the 2007 Act, the definition of “record” in § 801.3 specifies that agency records include information maintained in an electronic format and information maintained by contractors.

C. Time limits

Section 801.20 provides definitions and procedures for deciding requests for expedited processing. Sections 801.21 and 801.23 clarify the circumstances in which the NTSB may extend the time to make an initial determination, and the procedures to follow when extending the time. Pursuant to the 2016 Act, section 801.22 extends the time to appeal an initial determination to the NTSB Managing Director from 20 days to 90 days.

D. Requester assistance

Pursuant to the 2007 Act, as amended by the 2016 Act, sections 801.21–.23 and 801.60 permit requesters to seek dispute resolution services from the NTSB FOIA Public Liaison, or the Office of Government Information Services (OGIS) in the National Archives and Records Administration, in connection with initial and final determinations, time extensions, and fee assessments. Sections 801.20 and 801.23 also allow a requester to modify a request to qualify for faster processing.

E. Fees

Pursuant to the 2007 Act, as amended by the 2016 Act, section 801.60 prohibits the NTSB from charging search fees, or for some requesters, duplication fees, if the NTSB fails to comply with the time limits, including extensions, for processing a request. If the NTSB fails to comply with a time limit for processing a request, it may assess search fees only if unusual circumstances exist, the request involves more than 5,000 responsive pages; and the NTSB has attempted in good faith to work with the requester to limit the scope of the request.

Section 801.60 also prohibits the NTSB from requiring advance payment of fees unless the requester has previously failed to pay or the fee is expected to exceed \$250;

F. Exemptions

Pursuant to the 2016 Act, the NTSB will withhold records under a FOIA exemption only if the NTSB reasonably foresees that disclosure would harm an interest protected by the exemption. The NTSB will partially disclose a record if a releasable portion of the record is reasonably segregable from a portion that is being withheld.

Also, pursuant to the 2016 Act, section 801.55, which implements the interagency and intra-agency exchanges exemption under 5 U.S.C. 552(b)(5), provides that the deliberative process privilege does not apply to records created 25 years or more before the FOIA request.

Pursuant to the 2009 Act, section 801.53, which implements the FOIA exemption at 5 U.S.C. 552(b)(3) for records exempt by statute from disclosure, provides that, to exempt information from disclosure under the FOIA, statutes enacted after the 2009 Act must specifically cite to section 552(b).

IV. Regulatory Analysis.

This rule does not require an assessment of its potential costs and benefits under section 6(a)(3) of E.O. 12866, Regulatory Planning and Review, 58 FR 51735 (Sept. 30, 1993), because it is not a “significant regulatory action” under section 3(f) of that Order. Thus, the Office of Management and Budget has not reviewed this rule under E.O. 12866. Likewise, this rule does not require an analysis under the Unfunded Mandates Reform Act, 2 U.S.C. 1501-71, or the National Environmental Policy Act, 42 U.S.C. 4321-47.

In addition, under the Regulatory Flexibility Act, 5 U.S.C. 601–12, the NTSB has considered whether this rule would have a significant economic impact on a substantial number of small entities. The NTSB certifies under 5 U.S.C. 605(b) that this rule would not have a significant economic impact on a substantial number of small entities. Moreover, in accordance with 5 U.S.C. 605(b), the NTSB will submit this certification to the Chief Counsel for Advocacy at the Small Business Administration.

The NTSB does not anticipate this rule will have a substantial, direct effect on state or local governments or will preempt state law; as such, this rule does not have implications for federalism under E.O. 13132, Federalism, 64 FR 43255 (Aug. 4, 1999).

This rule also complies with all applicable standards in sections 3(a) and 3(b)(2) of E.O. 12988, Civil Justice Reform, 61 FR 4729 (Feb. 5, 1996), to minimize litigation, eliminate ambiguity, and reduce burden.

NTSB has evaluated this rule under: E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, 53 FR 8859 (Mar. 15, 1988); E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks, 62 FR 19885 (Apr. 21, 1997); E.O. 13175, Consultation and Coordination with Indian Tribal Governments, 65 FR 67249 (Nov. 6, 2000); E.O. 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, 66 FR 28355 (May 18, 2001); and the National Technology Transfer and Advancement Act, Pub. L. 104-113, 110 Stat. 775, Mar. 7, 1996. The NTSB has concluded that this interim final rule neither violates, nor requires further consideration under those Orders and statutes.

The NTSB invites comments relating to any of the foregoing determinations and notes the most helpful comments reference a specific portion of this interim final rule, explain the reason for any recommended change, and include supporting data.

List of Subjects in 49 CFR Part 801

Archives and records; Freedom of information.

Accordingly, for the reasons stated in the Preamble, the NTSB is revising 49 CFR part 801 to read as follows:

PART 801—PUBLIC AVAILABILITY OF INFORMATION

Subpart A--Applicability and Policy

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Subpart G—Fee Schedule

801.60 Fee schedule.

801.61 Appeals of fee determinations.

Authority: 49 U.S.C. 1113(f); 5 U.S.C. 552; 18 U.S.C. 641, 2071; 31 U.S.C. 3717, 9701; 44 U.S.C. Chapters 21, 29, 31, and 33.

Subpart A—Applicability and Policy

§ 801.1 Applicability.

(a) This part contains the rules that the National Transportation Safety Board (NTSB) follows in processing requests for records under the Freedom of Information Act, as amended (FOIA), 5 U.S.C. 552. These rules should be read together with the FOIA, which provides additional information about public access to records maintained by the NTSB.

(b) This part also provides for document services and the fees for such services, pursuant to 31 U.S.C. 9701.

(c) This part applies only to records existing when the request for the information is made. The NTSB is not required to create records for the sole purpose of responding to a FOIA request.

(d) Subpart F of this part describes records that are exempt from public disclosure.

§ 801.2 Presumption of openness.

(a) In implementing the FOIA, it is the policy of the NTSB to make information available to the public to the greatest extent possible, consistent with the mission of the NTSB. The NTSB will withhold records under the FOIA only when the NTSB reasonably foresees that disclosure would harm an interest protected by a FOIA exemption or is prohibited by law. Whenever the NTSB determines that full disclosure of a requested record is not possible, the NTSB will consider whether partial disclosure is possible and will take reasonable steps to segregate and release nonexempt material. Information the NTSB routinely provides to the public as part of a regular NTSB activity (such as press releases and information disclosed on the NTSB's public website) may be provided to the public without compliance with this part.

(b) The NTSB will release on its website a "public docket" containing documentation that the agency deemed pertinent to the investigation. Requesters may access these public dockets without submitting a FOIA request. The NTSB encourages all requesters to review the public docket materials before submitting a FOIA request.

§ 801.3 Definitions.

The following definitions apply in this part:

Chairman means the Chairman or Acting Chairman of the NTSB.

FOIA Public Liaison means a supervisory official, designated by the Chief FOIA Officer, who is responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in resolving disputes.

Managing Director means the Managing Director of the NTSB.

Non-docket items include records from an accident that are not directly pertinent to the investigation, and are not in the public docket.

Public Docket includes a collection of records from an accident investigation that the agency deemed pertinent to the investigation.

Record, document, or any other term used to reference information includes:

(1) Any writing, drawing, map, recording, tape, film, photo, or other documentary material by which information is preserved. In this part, “document” and “record” have the same meaning;

(2) Any information that would be an agency record subject to the requirements of this section when maintained by the NTSB in any format, including an electronic format; and

(3) Any information described under subparagraphs (1) or (2) that is maintained for the NTSB by an entity under Government contract, for the purposes of records management.

Redact refers to the act of making a portion of text illegible by placing a black mark on top of the text.

Requester means any person, as defined in 5 U.S.C. 551(2), who submits a request pursuant to the FOIA.

Subpart B—Administration

§ 801.10 General.

(a) The NTSB’s Chief FOIA Officer provides high level oversight and support to NTSB’s FOIA programs, and recommends adjustments to agency practices, personnel, and funding as may be necessary to improve FOIA administration. The Chief FOIA Officer is responsible for the initial determination of whether to release records within the 20-working-day time limit, or the extension, specified in the Freedom of Information Act. The Chief FOIA Officer is also responsible for designating one or more FOIA Public Liaisons.

(b) The NTSB’s Chief, Records Management Division:

(1) Is responsible for the custody and control of all NTSB records required to be preserved under the Federal Records Act, 44 U.S.C. Chapters 21, 29, 31, and 33.

(2) Maintains a public reference room and an electronic reading room in accordance with 5 U.S.C. 552(a)(2). The NTSB’s public reference room is located at 490 L’Enfant Plaza, SW., Washington, DC. The NTSB’s electronic reading room is located on the NTSB’s FOIA website, found at <http://www.nts.gov/>.

(3) Maintains a public access link on the NTSB’s FOIA website for requesters to electronically submit a FOIA request and track the status of the request.

(c) The NTSB maintains in its electronic reading room and makes available for public inspection in its public reference room:

- (1) Records that have been provided pursuant to a FOIA request, and
 - (i) Have been requested at least three times or
 - (ii) Are likely to be the subject of repeat requests.
 - (2) A general index of the records in paragraph (c)(1) of this section;
 - (3) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of appeals under parts 821 and 825 of this chapter.
 - (4) Statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;
 - (5) Administrative staff manuals and instructions to staff that affect a member of the public;
 - (6)
 - (i) The annual report submitted to the Attorney General and the Office of Government Information Services in the National Archives and Records Administration (OGIS), under 5 U.S.C. 552(e)(1); and
 - (ii) The raw statistical data used in the annual report in an aggregate, searchable, and downloadable format, provided without charge, license, or registration requirement;
 - (7) A guide for requesting records or information from the NTSB that includes an index of the agency's major information systems, major information and record locator systems, concise descriptions of FOIA exemptions, and general categories of NTSB records to which the exemptions apply; and
 - (8) A record of the votes of each Member in NTSB proceedings.
- (d) FOIA requests for records or information not publicly available on the NTSB website may be submitted electronically by email or through the public access link, or in

writing to: National Transportation Safety Board, Attention: FOIA Requester Service Center, CIO-40, 490 L'Enfant Plaza, SW., Washington, DC 20594-003. All requests must reasonably identify the record requested and contain the name, address, email address, and telephone number of the person making the request. A requester must inform the NTSB of changes to the requester's contact information. Requests mailed to the NTSB must prominently display the letters "FOIA" to distinguish the FOIA request from other types of document requests. For requests regarding an investigation of a particular accident, requesters should include the date and location of the accident, as well as the NTSB investigation number.

(e) In response to broad requests for records regarding a particular investigation, the FOIA Office will notify the requester that a public docket has been or will be opened for the investigation, and attempt to clarify whether the information in the docket satisfies the request.

(f) The NTSB will not release records originally generated by other agencies or entities. Instead, the NTSB will refer such requests for other agencies' records to the appropriate agency, which will make a release determination upon receiving and processing the referred request.

(g) Where a requester seeks a record on behalf of another person, and the record contains that person's personal information protected by 5 U.S.C. 552(b)(6) and § 801.56, the personal information will not be provided to the requester unless the requester submits a notarized statement of consent from the person whose personal information is contained in the record.

(h) In general, the NTSB will deny requests for records concerning a pending investigation, pursuant to appropriate exemptions under the FOIA. The FOIA Office will notify the requester of this denial in accordance with § 801.21(b), and provide the requester additional information regarding how the requester may receive information on the investigation once the investigation is complete.

§ 801.11 Segregability of records.

The initial decision of the FOIA Officer will include a determination of segregability. If it is reasonable to do so, the exempt portions of a record will be segregated and, where necessary, redacted, and the nonexempt portions will be sent to the requester.

§ 801.12 Protection of records.

No person may, without permission, remove from the place where it is made available any record made available for inspection or copying under § 801.10(c). Removing, concealing, altering, mutilating, obliterating, or destroying, in whole or in part, such a record is deemed a criminal offense pursuant to 18 U.S.C. 641, 2071(a).

Subpart C—Time Limits

§ 801.20 Processing of requests.

(a) *Multi-track processing.* The FOIA Office processes FOIA requests in one of three tracks:

(1) Track 1: Requests that meet the criteria for expedited processing, or requests that seek records that have been produced in response to a prior request.

(2) Track 2: Requests that do not involve voluminous records or lengthy consultations with other entities.

(3) Track 3: Requests that involve voluminous records and for which lengthy or numerous consultations are required, or those requests which may involve sensitive records.

(b) *Expedited processing.* (1) A requester may submit a statement demonstrating with reasonable particularity that the requester has a compelling need for expedited processing in Track 1. The requester must certify that the statement is true and correct to the best of the requester's knowledge. Within 10 calendar days after receipt of the statement, the FOIA Office will inform the requester whether the request qualifies for expedited processing, and if not, provide the requester with the information in § 801.21(b).

(2) In this section, "compelling need" means:

(i) That a failure to expedite the request could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

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

(3) The requester may appeal the FOIA Office's decision regarding expedited processing to the Managing Director within 90 calendar days. The Managing Director will decide the appeal on an expedited basis, and no later than 20 days (excluding

Saturdays, Sundays, and legal public holidays) after receipt of the appeal. The final determination will notify the requester of the statutory right to seek judicial review of the determination pursuant to 5 U.S.C. 552(a)(6)(E)(iii), and will inform the requester of the dispute resolution services offered by OGIS.

§ 801.21 Initial determination.

(a) The NTSB FOIA Officer will make an initial determination as to whether to comply with the request within 20 days (excluding Saturdays, Sundays, and legal public holidays) after the request is received.

(b) Upon the FOIA Office's receipt of a FOIA request, the time limit is tolled while the FOIA Office seeks reasonable information from the requester:

(1) About the scope of the request, such as whether docket items and other publicly available information on the NTSB website satisfy the request; and

(2) Necessary to resolve fee assessment issues.

(c) If unusual circumstances exist, this time limit may be extended up to 10 additional days (excluding Saturdays, Sundays, and legal public holidays) in accordance with § 801.23. The requester will be notified immediately of an extension in accordance with § 801.23. If a determination is made to release the requested record(s), such record(s) will be made available promptly.

(d) If the FOIA Officer determines not to release the record(s), the FOIA Office will notify the requester of:

(1) The reason for the determination;

(2) The right to appeal the determination to the Managing Director within 90 calendar days;

(3) The name and title or positions of each person responsible for the denial of the request;

(4) The right to seek dispute resolution services from the NTSB's FOIA Public Liaison or OGIS.

§ 801.22 Final determination.

Requesters seeking an appeal of the FOIA Officer's initial determination must send a written appeal to the NTSB's Managing Director within 90 calendar days. The NTSB's Managing Director will determine whether to grant or deny any appeal within 20 days (excluding Saturdays, Sundays, and legal public holidays) after receipt of such appeal, except that this time limit may be extended by as many as 10 additional days (excluding Saturdays, Sundays, and legal public holidays), in accordance with § 801.23. The final determination will notify the requester of the statutory right to seek judicial review of the determination pursuant to 5 U.S.C. 552(a)(4)(B), and will inform the requester of the dispute resolution services offered by OGIS.

§ 801.23 Extension.

(a) In unusual circumstances as specified in this section, the time limits prescribed in either § 801.21 or § 801.22 may be extended by no more than 10 days (excluding Saturdays, Sunday, and legal public holidays) by providing written notice to the requester setting forth the reasons for the extension and the date on which a determination is expected to be dispatched.

(b) If the request cannot be processed within the extended time limit specified in paragraph (a) of this section, the requester will be:

(1) Notified in writing;

(2) Given an opportunity to limit the scope of the request so that it may be processed within that time limit, or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request; and

(3) Advised of the requester's right to seek assistance from the NTSB's FOIA Public Liaison and seek dispute resolution services from OGIS.

(c) As used in this paragraph (c), "unusual circumstances," as they relate to any delay that is reasonably necessary to the proper processing of the particular request, means:

(1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(2) The need to search for, collect, and appropriately examine and process a voluminous amount of separate and distinct records which are the subject of a single request; or

(3) The need to consult with another agency that has a substantial interest in the disposition of the request or with two or more components of the agency having substantial subject-matter interest therein.

Subpart D—Accident Investigation Records

§ 801.30 Records from accident investigations.

Upon completion of an accident investigation, the NTSB will compile a public docket containing investigators' factual reports, and documents and exhibits that the agency deemed pertinent to the investigation. The Chief, Records Management Division,

will then make the docket available on the NTSB website and available for public inspection and copying in the NTSB's public reference room.

§ 801.31 Public hearings regarding investigations.

Within approximately four (4) weeks after a public investigative hearing conducted in accordance with part 845, subpart A, of this chapter, the Chief, Records Management Division, will make the hearing transcript available in the electronic reading room and the public reference room. On or before the date of the hearing, the Chief, Records Management Division, will make the exhibits introduced at the hearing available on the NTSB website and available for public inspection and copying in the NTSB's public reference room.

§ 801.32 Accident reports.

(a) The NTSB will report the facts, conditions, circumstances, and its determination of the probable causes of U.S. civil transportation accidents, in accordance with 49 U.S.C. 1131(e).

(b) These reports will be made available on the NTSB website and available for public inspection and copying in the NTSB's public reference room.

Subpart E—Other Agency Documents

§ 801.40 NTSB rules.

The NTSB's rules are published in the Code of Federal Regulations, Title 49, Chapter VIII.

§ 801.41 Reports to Congress.

The NTSB submits its annual report to Congress, in accordance with 49 U.S.C. 1117. The report will be available on the NTSB's website, found at <http://www.nts.gov>. Interested parties may purchase the report from the U.S. Government Publishing Office or review it in the NTSB's public reference room. All other reports or comments to Congress will be available in the NTSB's electronic reading room and in its public reference room for inspection or by ordering a copy after issuance.

Subpart F—Exemption from Public Disclosure

§ 801.50 Exemptions from disclosure.

Title 5 U.S.C. 552(a) and (b) exempt certain records from public disclosure. Examples of records given in this subpart included within a particular statutory exemption are not necessarily illustrative of all types of records covered by the applicable exemption.

§ 801.51 National defense and foreign policy secrets.

Pursuant to 5 U.S.C. 552(b)(1), national defense and foreign policy secrets established by Executive Order, as well as properly classified documents, are exempt from public disclosure. Requests to the NTSB for such records will be transferred to the source agency as appropriate, where such classified records are identified. (See, e.g., Executive Order 12,958, as amended on March 25, 2003.)

§ 801.52 Internal personnel rules and practices of the NTSB.

Pursuant to 5 U.S.C. 552(b)(2), the following records are exempt from disclosure under FOIA:

(a) Records relating solely to internal personnel rules and practices, including memoranda pertaining to personnel matters such as staffing policies, and procedures for the hiring, training, promotion, demotion, or discharge of employees, and management plans, records, or proposals relating to labor-management relations.

(b) Records regarding:

(1) Internal matters of a relatively trivial nature that have no significant public interest, and

(2) Predominantly internal matters, the release of which would risk circumvention of a statute or agency regulation.

§ 801.53 Records exempt by statute from disclosure.

Pursuant to 5 U.S.C. 552(b)(3), the NTSB will not disclose records specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b)), provided that such statute:

(a)(1) Requires that the matters be withheld from the public in such manner as to leave no discretion on the issue, or

(2) Establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(b) If enacted after the date of enactment of the Open FOIA Act of 2009, Public Law 111-83, Title V, section 564, 123 Stat. 2142, Oct. 28, 2009, specifically cites to 5 U.S.C. 552(b)(3).

§ 801.54 Trade secrets and commercial or financial information.

Pursuant to 5 U.S.C. 552(b)(4), trade secrets and items containing commercial or financial information that are obtained from a person and are privileged or confidential are exempt from public disclosure.

§ 801.55 Interagency and intra-agency exchanges.

(a) Pursuant to 5 U.S.C. 552(b)(5), any record prepared by an NTSB employee for internal Government use is exempt from public disclosure to the extent that it contains--

(1) Opinions made in the course of developing official action by the NTSB but not actually made a part of that official action, or

(2) Information concerning any pending NTSB proceeding, or similar matter, including any claim or other dispute to be resolved before a court of law, administrative board, hearing officer, or contracting officer.

(b) The purpose of this section is to protect the full and frank exchange of ideas, views, and opinions necessary for the effective functioning of the NTSB. These resources must be fully and readily available to those officials upon whom the responsibility rests to take official NTSB action. Its purpose is also to protect against the premature disclosure of material that is in the developmental stage, if premature disclosure would be detrimental to the authorized and appropriate purposes for which the material is being used, or if, because of its tentative nature, the material is likely to be revised or modified before it is officially presented to the public.

(c) Examples of materials covered by this section include, but are not limited to, staff papers containing advice, opinions, or suggestions preliminary to a decision or action; preliminary notes; advance information on such things as proposed plans to

procure, lease, or otherwise hire and dispose of materials, real estate, or facilities; documents exchanged in preparation for anticipated legal proceedings; material intended for public release at a specified future time, if premature disclosure would be detrimental to orderly processes of the NTSB; records of inspections, investigations, and surveys pertaining to internal management of the NTSB; and matters that would not be routinely disclosed in litigation but which are likely to be the subject of litigation.

(d) The deliberative process privilege does not apply to records created 25 years or more before the date on which the records were requested.

§ 801.56 Unwarranted invasion of personal privacy.

Pursuant to 5 U.S.C. 552(b)(6), any personal, medical, or similar file is exempt from public disclosure if its disclosure would harm the individual concerned or would be a clearly unwarranted invasion of the person's personal privacy.

§ 801.57 Records compiled for law enforcement purposes.

Pursuant to 5 U.S.C. 552(b)(7), any records compiled for law or regulatory enforcement are exempt from public disclosure to the extent that disclosure would interfere with enforcement, would be an unwarranted invasion of privacy, would disclose the identity of a confidential source, would disclose investigative procedures and practices, or would endanger the life or security of law enforcement personnel.

§ 801.58 Records for regulation of financial institutions.

Pursuant to 5 U.S.C. 552(b)(8), records compiled for agencies regulating or supervising financial institutions are exempt from public disclosure.

§ 801.59 Geological records.

Pursuant to 5 U.S.C. 552(b)(9), records concerning geological wells are exempt from public disclosure.

Subpart G—Fee Schedule

§ 801.60 Fee schedule.

(a) *Authority.* Pursuant to 5 U.S.C. 552(a)(4)(i) and the Office of Management and Budget's Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 FR 10012, Mar. 27, 1987, the NTSB may charge certain fees for processing requests under the FOIA in accordance with paragraph (c) of this section, except where fees are limited under paragraph (d) of this section, or where a waiver or reduction of fees is granted under paragraph (e) of this section. The NTSB does not require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the NTSB determines that the fee will exceed \$250.00. A requester must pay fees in accordance with the instructions provided on the invoice the FOIA Office sends to the requester.

(b) *Definitions.* For purposes of this section:

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. This includes the furtherance of commercial interests through litigation. When it appears that the requester will use the requested records for a commercial purpose, either because of the nature of the request or because the NTSB has reasonable cause to

doubt a requester's stated use, the NTSB will provide the requester with a reasonable opportunity to submit further clarification.

Direct costs mean those expenses that an agency incurs in searching for, reviewing, and duplicating records in response to a FOIA request. This includes the salaries of NTSB employees performing the work, as listed below, but does not include overhead expenses such as the costs of office space.

Duplication means the copying of a record, or of the information contained in a record, in response to a FOIA request. Copies can take the form of paper, audiovisual materials, or electronic records, among others.

Educational institution means any school, or institution of vocational education that operates a program of scholarly research. In order for a requester to demonstrate that their request falls within the category of an "educational institution," the requester must show that the request is authorized by the qualifying institution and that the requester does not seek the records for commercial use, but only to further scholarly research.

Representative of the news media or news media requester means any person actively gathering news for an entity that is organized and operated to publish or broadcast news 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 (for example, a journalist may submit a copy of a publication contract for which the journalist needs NTSB records).

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. Review also includes processing the record(s) for disclosure, which includes redacting and otherwise

preparing releasable records for disclosure. Review does not include time spent resolving legal or policy issues regarding the application of exemptions nor will the NTSB charge for review during the administrative appeal stage, if applicable. The NTSB may recover review costs even if the NTSB ultimately does not release the record(s).

Search means the process of looking for and retrieving records or information within the scope of a request. Search includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve electronic records. The NTSB will make an effort to conduct such searches in the least expensive manner.

(c) *Fees*. In responding to FOIA requests, the NTSB will charge the following fees, subject to the limitations in paragraph (d) of this section, unless a waiver or reduction of fees has been granted under paragraph (e) of this section:

(1) *Search*. (i) The NTSB will charge search fees except for a request from an educational institution, a noncommercial scientific institution, or a news media representative. The NTSB may charge for time spent searching even if the NTSB does not locate any responsive record or if the NTSB withholds the record(s) located because such record(s) are exempt from disclosure.

(ii) In searching for and retrieving records, the NTSB will charge \$4.00 for each quarter of an hour spent by administrative personnel, \$7.00 for each quarter of an hour spent by professional personnel, and \$10.25 for each quarter of an hour spent by management personnel.

(2) *Duplication.* (i) The NTSB will charge duplication fees. The NTSB will honor a requester's preference for receiving a record in a particular format when the FOIA Office can readily reproduce it in the format requested.

(ii) The NTSB will charge \$0.10 per page for the duplication of a standard-size paper record. For other forms of duplication, the NTSB will charge the direct costs of the duplication.

(iii) Where the NTSB certifies records upon request, the NTSB will charge the direct cost of certification.

(3) *Review.* For a commercial use request, the NTSB will charge fees for the initial review of a record to determine whether the record falls within the scope of a request and whether the record is exempt from disclosure. The NTSB will not charge for subsequent review of the request and responsive record. For example, in general, the NTSB will not charge additional fees for review at the administrative appeal level when the NTSB has already applied an exemption. The NTSB will charge review fees at the same rate as those charged for a search under paragraph (c)(1)(ii).

(d) *Limitations on charging fees.* (1) The NTSB will not charge fees if it fails to comply with the time limits in §§ 801.21 or 801.22, including an extension of time pursuant to § 801.23(a), except:

(i) If the NTSB determines there are unusual circumstances, as defined by 5 U.S.C. 552(a)(6)(B)(iii) and § 801.23(c), and more than 5,000 pages are responsive to the request, the FOIA Office may charge fees if timely written notice of the unusual circumstances has been provided to the requester and the FOIA Office has discussed with

the requestor (or made not less than three good-faith attempts to do so) how the requestor could limit the scope of the request.

(ii) If a court determines there are exceptional circumstances, as defined by 5 U.S.C. 552(a)(6)(C), a failure to comply with the time limits will be excused for the length of time provided by the court order.

(2) The NTSB will not charge a fee for notices, decisions, orders, etc. provided to persons acting as parties in the investigation under the procedures set forth in part 831 of this chapter, or where required by law to be served on a party to any proceeding or matter before the NTSB. Likewise, the NTSB will not charge fees for requests made by family members of accident victims, when the NTSB has investigated the accident that is the subject of the FOIA request.

(3) The NTSB will not charge a search fee or review fee for a quarter-hour period unless more than half of that period is required for search or review.

(4) Except for requesters seeking records for commercial use, the NTSB will provide the following items without charge:

- (i) The first 100 pages of duplication (or the cost equivalent) of a record; and
- (ii) The first two hours of search (or the cost equivalent) for a record.

(5) Whenever the total fee calculated under paragraph (c) of this section is \$14.00 or less for any request, the NTSB will not charge a fee.

(6) The NTSB will not charge fees for ordinary packaging and mailing costs.

(7) When the FOIA Office determines or estimates that fees to be charged under this section will amount to more than \$25.00, the Office will notify the requestor of the actual or estimated amount of the fees, including a breakdown of the fees for the search,

review or duplication, unless the requester has indicated a willingness to pay fees as high as those anticipated. If the FOIA Office is able to estimate only a portion of the expected fee, the FOIA Office will advise the requester that the estimated fee may be only a portion of the total fee. Where the FOIA Office notifies a requester that the actual or estimated fees will exceed \$25.00, the NTSB will not expend additional agency resources on the request until the requester agrees in writing to pay the anticipated total fee. The NTSB does not accept payments in installments.

(8) In circumstances involving a total fee that will exceed \$250.00, or if the requester has previously failed to pay fees in a timely fashion, the NTSB may require the requester to make an advance payment or deposit of a specific amount before beginning to process the request. If the requester does not pay the advance payment within 30 calendar dates after the date of the FOIA Office's fee determination, the request will be closed.

(9) The NTSB may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided at 31 U.S.C. 3717 and will accrue from the date of the billing until the NTSB receives payment. The NTSB will follow the provisions of the Debt Collection Act of 1982, Public Law 97-365, 96 Stat. 1749, as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(10) Where the NTSB reasonably believes that a requester or group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees, the NTSB may aggregate those requests and charge accordingly.

(11) The NTSB will make the FOIA Public Liaison available to assist the requester in reformulating a request to meet the requester's needs at a lower cost.

(e) *Requirements for waiver or reduction of fees.* (1) For fee purposes, the NTSB will determine, whenever reasonably possible, the use to which a requester will put the requested records. The NTSB will furnish records responsive to a request without charge, or at a reduced charge, where the NTSB determines, based on all available information, that the requester has shown that:

(i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations of activities of the government; and

(ii) Disclosure of the requested information is not primarily in the commercial interest or for the commercial use of the requester.

(2) In determining whether disclosure of the requested information is in the public interest, the NTSB will consider the following factors:

(i) Whether the subject of the requested records concerns identifiable operations or activities of the Federal Government, with a connection that is direct and clear, and not remote or attenuated. In this regard, the NTSB will consider whether a requester's use of the documents would enhance transportation safety or contribute to the NTSB's programs.

(ii) Whether the portions of a record subject to disclosure are meaningfully informative about government operations or activities. The disclosure of information already in the public domain, in either a duplicative or substantially identical form, would

not be as likely to contribute to such understanding where nothing new would be added to the public's understanding.

(iii) Whether disclosure of the requested information would contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. The NTSB will consider a requester's expertise in the subject area and ability to effectively convey information to the public.

(iv) Whether the disclosure is likely to enhance the public's understanding of government operations or activities.

(3) The NTSB's decision to designate the FOIA request as commercial will be made on a case-by-case basis based on the NTSB's review of the requester's intended use of the information. The NTSB will provide the requester with a reasonable opportunity to submit further clarification. In determining whether the request is primarily in the commercial interest of the requester, the NTSB will consider the following factors:

(i) The existence and magnitude of any commercial interest the requester may have, or of any person on whose behalf the requester may be acting. The NTSB will provide requesters with an opportunity in the administrative process to submit explanatory information regarding this consideration.

(ii) Whether the commercial interest is greater in magnitude than any public interest in disclosure.

(4) Additionally, the NTSB may, at its discretion, waive search, duplication, and review fees for qualifying foreign countries, international organizations, nonprofit public

safety entities, state and federal transportation agencies, and colleges and universities, after approval by the Chief, Records Management Division.

(5) Where only some of the records to be released satisfy the requirements for a waiver of fees, the NTSB will grant a waiver for those particular records.

(6) Requests for the waiver or reduction of fees should address the factors listed in paragraphs (e)(2) and (3) of this section, insofar as they apply to each request. The NTSB will exercise its discretion to consider the cost-effectiveness of its use of administrative resources in determining whether to grant waivers or reductions of fees.

(f) *Services available free of charge.* (1) The following documents are available without commercial reproduction cost until limited supplies are exhausted:

(i) Press releases;

(ii) NTSB regulations (Chapter VIII of Title 49, Code of Federal Regulations);

(iii) Indexes to initial decisions, Board orders, opinion and orders, and staff manuals and instructions;

(iv) Safety recommendations; and

(v) NTSB Annual Reports.

(2) The NTSB public website, <http://www.nts.gov>, also includes an e-mail subscription service for press releases, safety recommendations, and other announcements.

§ 801.61 Appeals of fee determinations.

Requesters seeking an appeal of the FOIA Office's fee or fee waiver determination must send a written appeal to the Managing Director within 90 calendar days. The Managing Director will determine whether to grant or deny any appeal made

pursuant to § 801.21 within 20 days (excluding Saturdays, Sundays, and legal public holidays) after receipt of such appeal, except that this time limit may be extended for as many as 10 additional days (excluding Saturdays, Sundays, and legal public holidays), in accordance with § 801.23.

Robert L. Sumwalt III,

Chairman

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