MEMORANDUM

July 5, 1995

ATTORNEY-CLIENT
PRIVILEGED and CONFIDENTIAL

To: FOIA Compliance File
cc: T. Jeremy Gunn, Esq., Acting General Counsel

From: Laura Denk, Esq.

Subject: Review Board Freedom of Information Act Regulations

This memorandum provides a brief analysis of the Review Board's Notice of Proposed Freedom of Information Act Regulations. The purpose of the memorandum is to outline the steps that the Review Board should take in order to comply with its own regulations.

COMMENT PERIOD

From June 30, 1995, until July 31, 1995, the Review Board is accepting comments on its FOIA regulations published on June 30, 1995, in the Federal Register. During this period, the Review Board should comply with its own regulations. However, requesters are not bound to comply with the regulations until the Review Board promulgates its final rules.

Immediate Action: As the Review Board receives comments on the proposed regulations, it must place the comments in the public reading room where they will be available for inspection every day from 10 a.m. to 4:30 p.m.

DEFINITIONS (§ 1410.10)

In section § 1410.10, the Review Board defines those records that are subject to FOIA requests. The Review Board will not process FOIA requests on the following material: (1) publicly available books, periodicals, films, sound or video recordings, and (2) the assassination records of other agencies. In the event that a requester asks for such materials, the Review Board will write the requester informing him or her of why the Review Board will not be processing the request.

Recommended Action: If we receive a FOIA request for the assassination records of other agencies, we should create a boilerplate letter to send to requesters who submit FOIA requests to the Review Board for the records of other agencies. It might also be prudent to inform FOIA officers at other relevant agencies -- especially CIA, FBI, DOD, Secret Service, and NARA -- that the Review Board will only process FOIA requests on Review Board records.

PUBLIC READING ROOM (§ 1410.15)

In section § 1410.15, the Review Board lists those documents that it will place in its public reading room. The reading room will be open between 10 a.m. and 4:30 p.m. The FOIA, at 5 U.S.C. § 552(a)(2), requires agencies to keep certain types of documents in a reading room. If the statute requires an agency to keep a document in the reading room, public access to the document is exclusively through the reading room. In other words, the Review Board need not duplicate the document and send it through the mail to FOIA requesters. On the contrary, the Review Board may keep additional documents -- not listed in section (a)(2) of the FOIA -- in the reading room, but it must respond to formal FOIA requests for those documents.

Immediate Action: Set up the Review Board's public reading room and include the following documents along with a current index of those documents.

(a) rules and regulations;
(b) policy statements;
(c) public hearing transcripts;
(d) formal actions;
(e) court documents;
(f) reports to Congress; and
(g) administrative staff manuals and instructions to staff.

At some point before the Review Board's FOIA regulations are final, we should tell the staff which documents need to be available in the public reading room, so that as the staff creates those types of documents, they will know to place them in the reading room and in the reading room index.

FOIA REQUESTS FOR REVIEW BOARD RECORDS (§ 1410.25)

NOTE: This section of the Review Board's regulation does not apply to those documents that the FOIA requires the agency to place in the public reading room.

The Review Board's regulations state that FOIA requests should meet the following requirements.[1]

[1]With the exception of oral requests, the Review Board must treat non-conforming requests as FOIA requests. The practical effect of a requester failing to conform with the Review Board's regulatory requirements is that the FOIA Officer might not receive the request as quickly as if the request did meet the requirements. In any case, the 10 day period for response does not begin until the FOIA Officer receives the request.

(a) The request must be in writing.[2]
(b) The request must reasonably describe the documents requested. However, if the request fails to reasonably describe the documents, the FOIA Officer must tell the requester how the request was lacking and give the requester an opportunity to refine the request by consulting with Review Board staff.
(c) The request must be addressed to the FOIA Officer.
(d) The request must be marked "FOIA Request."
(e) The request must be mailed or hand delivered. Requesters may hand deliver requests to the Review Board from 8:30 a.m. until 5:00 p.m. on business days. Again, the 10 day time period does not begin until the FOIA Officer actually receives the requests.
(f) The requester must address the issue of fees in the request by stating his or her willingness to pay the fees, or by requesting a fee waiver or reduction pursuant to § 1410.30.

FOIA REQUESTS FOR OTHER AGENCY or JOINT RECORDS (§ 1410.25(c), 1410.50)
Section 1410.25(c) does not apply to assassination records that originated in other agencies. Rather, this section covers those records that are either (1) Review Board records that contain information from another agency, or (2) Review Board records that the Review Board created in conjunction with another agency.

If the Review Board receives a FOIA request for records covered by § 1410.25(c), it should observe the following procedure:
(1) The FOIA Officer must coordinate with the other agency's FOIA Officer.
(2) The FOIA Officer must inform the requester that the agencies are coordinating. Coordination between agencies is an "unusual circumstance" warranting a 10 day time extension under § 1410.40.
(3) If the agencies decide to withhold any information, the final letter to the requester must list the FOIA Officers who decided to deny the request at both agencies.

Section 1410.50 covers those documents that contain *classified* information received from other agencies. In the event that the Review Board receives a FOIA request for the other agency's classified information, it will refer the request to the other agency and not make any determination as to the releasability of the information.

Recommendation: If the Review Board receives a FOIA request under § 1410.25(c), we should try to create a boilerplate letter to send to the requester and to the FOIA Officers at other agencies. The

[2]The Office of Information and Privacy at the Department of Justice suggests that agencies not comply with oral requests. Even if the Review Board has an ongoing relationship with the requester, it should require that all FOIA requests be in writing.

letter to the requester should reflect that the Review Board is the agency ultimately responsible for responding to the FOIA request.

REVIEW BOARD RECORDS EXEMPT FROM PUBLIC DISCLOSURE (§ 1410.20)

Section 1410.20 simply restates the nine exemptions from the FOIA, 5 U.S.C. § 552(b). Although the Review Board will obviously not invoke certain of these exemptions, they are each briefly summarized below:

(a) national security classified information;
(b) information regarding internal personnel matters;
(c) information specifically exempted from the FOIA by statute;
(d) documents containing trade secrets and commercial or financial information;
(e) personnel, medical and similar files, which, if disclosed, would invade personal privacy;
(f) information compiled for law enforcement purposes;
(g) certain documents created by agencies responsible for regulating and supervising financial institutions; and
(h) geological and geophysical information concerning wells.

FEE WAIVER/REDUCTION (§ 1410.30)

Section § 1410.30 of the Review Board's regulations states (1) the requirements that fee waiver/reduction requests must meet, (2) the standards that agencies must use to grant or deny such requests, and (3) the time limits that agencies must comply with in making a determination pursuant to this section.

Request for Fee Waiver/Reduction

A request for a fee waiver or fee reduction should meet the following requirements:

(a) The fee waiver/reduction request must be in writing.
(b) The fee waiver/reduction request must include information sufficient to:
    (i) describe the purpose for which the requester will use the information;
    (ii) explain the extent to which the requester will extract and analyze the information;
    (iii) explain the nature in which the requester will use the information AND the specific qualification the requester possesses to use the information for the intended use so that it will contribute to public understanding;
    (iv) describe the likely impact of disclosure upon the public's understanding;
    (v) describe the size and nature of the relevant public;
    (vi) describe the intended means of dissemination;
    (vii) indicate whether the requester will charge the public for access;
    (viii) and, describe the commercial or private interest the requester or any other party has in the information.

Fee Waiver/Reduction Determination
The FOIA requires agencies to apply the following standard for fee waiver or reduction:

Is the information sought primarily in the commercial interest of the requester? If not, will the disclosure contribute significantly to public understanding of the operations or activities of the Government?

In making this determination, the FOIA Officer should consider (1) whether the requester has a commercial interest, (2) the extent of that interest, and (3) how that interest would be furthered by the disclosure of the requested information.

Time Limits
The FOIA Officer must make the fee waiver/reduction determination within five days of receiving the request. If the request is denied, the FOIA Officer must immediately inform the requester and tell him or her about the right to appeal under § 1410.45.

FEES (§ 1410.35)
This section sets out the following two categories for calculating fees: (1) fees for Public Reading Room records; (2) fees for non-Public Reading Room records. Within category two, there are three formulas for calculating fees that correspond to three different types of requesters: (a) commercial use requesters; (b) educational or noncommercial scientific institutional requester AND news media requesters; and (c) all other requesters.

The Review Board must charge fees according to the following criteria:
(a) If the FOIA requires a document to be in the public reading room, the Review Board may only charge duplication costs.
(b) If the FOIA does not require a document to be in the public reading room, the Review Board must charge fees according to the category of requester under § 1410.35(b)(1).
    (i) Commercial use requesters must be charged the following fees:
        (A) duplication costs;
        (B) search costs[3];
        (C) and review costs.
    (ii) Educational or noncommercial scientific institutional use requesters and

[3]According to the OMB regulations, the Review Board must compute computer search time at a different rate than manual search time. We need to determine how much it costs us to run computer searches so that we are in compliance with the OMB regulations. (Tracy and I have discussed this issue and we will be consulting with Chet in an effort to set a computer search rate.)

representatives of the news media must be charged the following fees:

(A) duplication costs after the first 100 pages.

(iii) All other requesters must be charged the following fees:

(A) duplication costs after the first 100 pages,

(B) and, search costs after the first two hours.

(c) If the requester has asked for special services, charge the actual cost of providing those services.

If fees will exceed $25, the FOIA Officer must notify the requester before continuing to process the request. The Review Board must give the requester an opportunity to refine the request so that the requester's costs are reduced. If the Review Board anticipates that the fee will exceed $250, it may require advance payment from the requester.

According to OMB regulations, the Review Board should not charge fees unless the fee exceeds the cost of billing and processing the fee. The Department of Justice does not charge requesters unless their fees exceed $8.00. The Review Board will need to determine at what point we will charge requesters.[4]

PROCESSING FOIA REQUESTS (§ 1410.40)

Within 10 business days of receipt of the request, the FOIA Officer must send the requester a letter informing him or her of the Review Board's determinations on the above issues.[5] If the Review Board denies any portion of the request, it must set forth in the letter the requester's right to appeal the initial determination.

APPEALS (§ 1410.45)

The requester has 30 days to appeal a denial of a request for records and/or fee waiver/reduction to the Executive Director.

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[4]Tracy and I have tentatively decided that the Review Board will not charge requesters for FOIA services until their fees are $10.00. Given the extremely low frequency of FOIA requests we have encountered thus far, we determined that the Review Board's cost to bill each requester (including staff labor, postage, and office supplies) would be approximately $10.00. However, this figure may be subject to change if the Review Board begins to receive many more requests.

[5]The Review Board may take an additional 10 days to respond to the initial request if "unusual circumstances" exist. Unusual circumstances are present if: (a) a single request demands a voluminous amount of separate and distinct Review Board records, or (b) the Review Board needs to consult with another agency.

Appeals must meet the following requirements: (a) the appeal must be in writing; (b) the appeal must be directed to the Executive Director; and (c) the appeal must be marked "FOIA Appeal." The Executive Director will have 20 business days from receipt of the appeal letter to decide the appeal. If unusual circumstances exist (as defined above), the Executive Director can take 10 extra days to decide the appeal. If the Executive Director denies the appeal, he must inform the requester of his or her right to judicial review of his determination.

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File: 3.2.1.1

FOIA REQUEST

NAME of REQUESTER: _____

_____

DATE that FOIA OFFICER RECEIVED REQUEST: _____

CHECKLIST

☐ Day One: Check adequacy of request.
Make fee waiver/reduction determination.
E-mail to staff re: documents.

☐ Days Two and Three: Gather documents.
Determine anticipated amount of fees to be charged.

☐ Days Four and Five: Review documents.
If deny fee waiver/reduction request, send letter to requester indicating same. If fees will exceed $25, send letter indicating same.

☐ Days Six and Seven: Draft response.

☐ Days Eight and Nine: Finalize response and mail out.

☐ Day Ten: Double-check whether mailed.

ADEQUACY OF FOIA REQUEST

Y	N	
☐	☐	Is the document available in public reading room?
☐	☐	Written request?
☐	☐	Does request reasonably describe documents? (If no, write requester and tell him/her what was missing. Offer him/her a chance to talk to Review Board staff to fix it.)
☐	☐	Is the request addressed to the "Designated FOIA Officer?"
☐	☐	Is the request marked "FOIA Request?"
☐	☐	Was the request mailed or hand-delivered?
☐	☐	Does the requester address the fee issue? (Willing to pay or reasons why qualifies for waiver or reduction.)

FEE WAIVER/REDUCTION CHECKLIST

Y	N	
☐	☐	Is the fee waiver/reduction request in writing?
		Factors:
☐	☐	Description of purpose for which requester will use information.
☐	☐	Explanation of extent to which requester will extract and analyze the information.
☐	☐	Explanation of nature in which the requester will use the information.
☐	☐	Specific qualifications the requester possesses to use information for the intended use so that it will contribute to public understanding.
☐	☐	Description of the likely impact of disclosure upon the public's understanding.
☐	☐	Description of the size and nature of the relevant public.
☐	☐	Description of intended means of dissemination.
☐	☐	Will requester charge the public for access?
☐	☐	Description of commercial or private interest the requester or any other party has in the information.

FOIA Officer's Determination on Fee Waiver/Reduction and Reasons:
Apply the following test in making the determination:

Y	N	
☐	☐	*Is the information sought primarily in the commercial interest of the requester?* Ask (1) Does the requester have a commercial interest?; (2) What is the extent of the commercial interest?; and (3) How is the commercial interest furthered by the disclosure of the requested information?
☐	☐	*And, if not, will the disclosure contribute significantly to public understanding of the operations or activities of the Government?*

Reasons for Determination:

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