

Census Bureau, there were 26,960 operators of nonresidential buildings generating less than \$5 million in revenue that were in operation for at least one year at the end of 1992. Also according to the Census Bureau, there were 39,903 operators of apartment dwellings generating less than \$5 million in revenue that were in operation for at least one year at the end of 1992. The Census Bureau provides no separate data regarding operators of dwellings other than apartment buildings, and we are unable at this time to estimate the number of such operators that would qualify as small entities.

Reporting, Recordkeeping, and Other Compliance Requirements

34. The *Second Further Notice* seeks comment on whether small broadband service providers, including small cable operators, should be exempt from the signal leakage reporting requirements in § 76.615(b)(7). Such an exemption would relieve qualifying providers from only the relevant filing requirements, but not from the signal leakage testing requirements.

Significant Alternatives and Steps Taken to Minimize the Significant Economic Impact on a Substantial Number of Small Entities Consistent With the Stated Objectives

This section analyzes the impact on small entities of the regulations proposed or considered in the *Second Further Notice*.

35. The *Second Further Notice* seeks comment on several proposals which could minimize the economic impact on a substantial number of small entities. For instance, in seeking comment on what policies should be adopted with respect to exclusive contracts, the Commission raises the option of a limit on the length of exclusive contracts that would still permit a small MVPD to obtain exclusive contracts for the period of time necessary to recover its investment costs in the MDU building. In addition, the Commission seeks comment on whether small broadband service providers, including small cable operators, should be exempt from the signal leakage reporting requirements in § 76.615(b)(7). The issue of whether competing providers should be required to share home run wiring explores the possibility of another means by which small MVPDs may be able to access MDUs. Commenters are invited to address the economic impact of these proposals on small entities and offer any alternatives.

Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

None.

IV. Procedural Provisions

36. Ex parte Rules—"Permit-but-Disclose" Proceeding. This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under § 1.1206(b) of the rules. 47 CFR 1.1206(b), as revised. Ex parte presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, ex parte or otherwise, are generally prohibited. Persons making oral ex parte presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. See 47 CFR 1.1206(b)(2), as revised. Additional rules pertaining to oral and written presentations are set forth in § 1.1206(b). 47 CFR 1.1206(b).

37. Filing of Comments and Reply Comments. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before December 23, 1997, and reply comments on or before January 22, 1998. 47 CFR 1.415 and 1.419. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments and reply comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, 1919 M Street, NW, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street NW, Washington DC 20554.

V. Ordering Clauses

38. *It is ordered* that, pursuant to sections 1, 4(i), 201–205, 214–215, 220, 303, 623, 624 and 632 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201–205, 214–215, 220, 303, 543, 544 and 552, NOTICE IS HEREBY GIVEN of proposed amendments to the Commission's rules, in accordance with

the proposals, discussions and statements of issues in the *Second Further Notice of Proposed Rulemaking*, and COMMENT IS SOUGHT regarding such proposals, discussions and statements of issues.

39. *It is further ordered* that the Commission SHALL SEND a copy of this *Second Further Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 97–29513 Filed 11–13–97; 8:45 am]

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NATIONAL RAILROAD PASSENGER CORPORATION

49 CFR Part 701

Revision of the Freedom of Information Act Regulations of the National Railroad Passenger Corporation and Implementation of the Electronic Freedom of Information Act Amendments of 1996 (Public Law 104–231)

AGENCY: National Railroad Passenger Corporation.

ACTION: Proposed rule.

SUMMARY: This notice sets forth proposed revisions of the Freedom of Information Act (FOIA) regulations of the National Railroad Passenger Corporation ("Amtrak"). The rules reflect recent developments in the statute and case law, including the Electronic Freedom of Information Act Amendments of 1996 (Public Law 104–231). The proposed revisions provide substantive and procedural changes to conform to the amendments. Amtrak has also taken this opportunity to streamline its rules and include updated cost figures to be used in calculating and charging fees.

DATES: Submit comments on or before December 15, 1997.

ADDRESSES: Address all comments concerning this proposed rule to Medaris Oliveri, Freedom of Information Office, National Railroad Passenger Corporation, 60 Massachusetts Avenue, N.E., Washington, DC 20002.

FOR FURTHER INFORMATION CONTACT: Medaris Oliveri at 202/906–2728.

SUPPLEMENTARY INFORMATION: These revisions incorporate changes to the language and structure of Amtrak's regulations and also add new provisions

to implement the Electronic Freedom of Information Act Amendments of 1996 (Public Law 104-231). New provisions implementing the amendments are found at § 701.2 definitions, § 701.3 policy, § 701.4 (c) and (d) reading room records, § 701.5 requirements for making requests, § 701.6(f) electronic records, § 701.7 timing of responses to requests, § 701.8 (a) and (b) content of responses, § 701.9 business information, § 701.10 appeals, and § 701.11 fees.

Proposed revisions of the fee schedule can be found at § 701.11(e). The duplication charge will remain the same at 25 cents per page, while document search and review charges will increase from \$27 to \$38 per hour. The amount at or below which a requester will not be charged will remain the same.

List of Subjects in 49 CFR Part 701

Freedom of Information.

For the reasons stated in the preamble, Amtrak proposes to revise 49 CFR part 701 as follows:

PART 701—AMTRAK FREEDOM OF INFORMATION ACT PROGRAM

Sec.

- 701.1 General provisions.
- 701.2 Definitions.
- 701.3 Policy.
- 701.4 Amtrak public information.
- 701.5 Requirements for making requests.
- 701.6 Release and processing procedures.
- 701.7 Timing of responses to requests.
- 701.8 Responses to requests.
- 701.9 Business information.
- 701.10 Appeals.
- 701.11 Fees.
- 701.12 Other rights and services.

Authority: 5 U.S.C. 552; 49 U.S.C. 24301(e).

§ 701.1 General provisions.

This part contains the rules that the National Railroad Passenger Corporation ("Amtrak") follows in processing requests for records under the Freedom of Information Act (FOIA), Title 5 of the United States Code, section 552. Information routinely provided to the public (i.e., train timetables, press releases) may be obtained without following Amtrak's FOIA procedures. As a matter of policy, Amtrak may make discretionary disclosures of records or information exempt under the FOIA whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption; however, this policy does not create any right enforceable in court.

§ 701.2 Definitions.

Unless the context requires otherwise in this part, masculine pronouns include the feminine gender and

"includes" means "includes but is not limited to."

(a) *Amtrak or Corporation* means the National Railroad Passenger Corporation.

(b) *Appeal* means a request submitted to the President of Amtrak or designee for review of an adverse initial determination.

(c) *Business days* means working days; Saturdays, Sundays, and legal public holidays are excluded in computing response time for processing FOIA requests.

(d) *Disclose or disclosure* means making records available for examination or copying, or furnishing a copy of nonexempt responsive records.

(e) *Electronic data* means records and information (including E-mail) that are created, stored, and retrievable by electronic means.

(f) *Exempt information* means information that is exempt from disclosure under one or more of the nine exemptions to the FOIA.

(g) *Final determination* means a decision by the President of Amtrak or designee concerning a request for review of an adverse initial determination received in response to a FOIA request.

(h) *Freedom of Information Act or "FOIA"* means the statute as codified in section 552 of Title 5 of the United States Code as amended.

(i) *Freedom of Information Officer* means the Amtrak official designated to fulfill the responsibilities of implementing and administering the Freedom of Information Act as specifically designated under this part.

(j) *Initial determination* means a decision by an Amtrak FOIA Officer in response to a request for information under the FOIA.

(k) *Pages* means paper copies of standard office size or the cost equivalent in other media.

(l) *President* means the Chairman, President and Chief Executive Officer (CEO) of the National Railroad Passenger Corporation (Amtrak) or designee.

(m) *Record* means any writing, drawing, map, recording, tape, film, photograph, or other documentary material by which information is preserved in any format, including electronic format. A record must exist and be in the possession and control of Amtrak at the time of the request to be subject to this part and the FOIA. The following are not included within the definition of the word "record":

(1) Library materials compiled for reference purposes or objects of substantial intrinsic value.

(2) Routing and transmittal sheets, notes, and filing notes which do not also include information, comments, or statements of substance.

(3) Anything that is not a tangible or documentary record such as an individual's memory or oral communication.

(4) Objects or articles, whatever their historical or value as evidence.

(n) *Request* means any request for records made pursuant to 5 U.S.C. 552(a)(3).

(o) *Requester or requesting party* means any person who has submitted a request to Amtrak.

(p) *Responsive records* means documents determined to be within the scope of a FOIA request.

§ 701.3 Policy.

(a) Amtrak will make records of the Corporation available to the public to the greatest practicable extent in keeping with the spirit of the law. Therefore, records of the Corporation are available for public inspection and copying as provided in this part with the exception of those that the Corporation specifically determines should not be disclosed either in the public interest, for the protection of private rights, or for the efficient conduct of public or corporate business, but only to the extent withholding is permitted by law.

(b) A record of the Corporation, or parts thereof, may be withheld from disclosure if it comes under one or more exemptions in 5 U.S.C. 552(b) or is otherwise exempted by law. Disclosure to a properly constituted advisory committee, to Congress, or to federal agencies does not waive the exemption.

(c) In the event one or more exemptions apply to a record, any reasonably segregable portion of the record will be made available to the requesting person after deletion of the exempt portions. The entire record may be withheld if a determination is made that nonexempt material is so inextricably intertwined that disclosure would leave only essentially meaningless words or phrases, or when it can be reasonably assumed that a skillful and knowledgeable person could reconstruct the deleted information.

(d) The procedures in this part apply only to records in existence at the time of a request. The Corporation has no obligation to create a record solely for the purpose of making it available under the FOIA or to provide a record that will be created in the future.

(e) Each officer and employee of the Corporation dealing with FOIA requests is directed to cooperate in making

records available for disclosure under the Act in a prompt manner consistent with this part.

(f) The FOIA time limits will not begin to run until a request has been identified as being made under the Act and deemed received by the Freedom of Information Office.

(g) Generally, when a member of the public complies with the procedures established in this part for obtaining records under the FOIA, the request shall receive prompt attention, and a response shall be made within twenty business days.

§ 701.4 Amtrak public information.

(a) *Public reading room.* Amtrak maintains a public reading room at its headquarters at 60 Massachusetts Avenue, N.E. in Washington, D.C. The public reading room contains records required under the FOIA to be regularly available for public inspection and copying. A current subject-matter index shall be maintained of records in the public reading room that are available for inspection and copying. The index shall be updated at least quarterly with respect to newly included records. A copy of the index shall be provided upon request at a cost not to exceed the direct cost of duplication.

(b) *Electronic reading room.* Amtrak will make available electronically reading room records created by the Corporation on or after November 1, 1996 on its World Wide Web site which can be accessed at <http://www.Amtrak.com>. An index of the Corporation's reading room records will also be made available at the web site. The index will indicate reading room records that are available electronically.

(c) *Frequently requested information.* The FOIA requires that copies of records, regardless of form or format, released pursuant to a FOIA request under 5 U.S.C. 552(a)(3) that have become or are likely to become the subject of subsequent requests for substantially the same records be made publicly available. Such records created by the Corporation after November 1, 1996 will be made available electronically while records created prior to this date will be made available for inspection and copying in Amtrak's public reading room.

(1) Amtrak shall decide on a case-by-case basis whether records fall into the category of "frequently requested FOIA records" based on the following factors:

- (i) Previous experience with similar records;
- (ii) The nature and type of information contained in the records;
- (iii) The identity and number of requesters and whether there is

widespread media or commercial interest in the records.

(2) The provision in this paragraph is intended for situations where public access in a timely manner is important. It is not intended to apply where there may be a limited number of requests over a short period of time from a few requesters. Amtrak may remove the records from this category when it is determined that access is no longer necessary.

(d) *Guide for making requests.* A guide on how to use the FOIA for requesting records from Amtrak shall be made available to the public upon request. Amtrak's major information systems will be described in the guide.

§ 701.5 Requirements for making requests.

(a) *General requirements.* (1) A FOIA request can be made by "any person" as defined in 5 U.S.C. 551(2), which encompasses individuals (including foreign citizens; partnerships; corporations; associations; and local, state, tribal, and foreign governments). A FOIA request may not be made by a federal agency.

(2) A request must be in writing, indicate that it is being made under the FOIA, and provide an adequate description of the records sought. The request should also include applicable information regarding fees as specified in paragraphs (d) and (e) of this section.

(b) *How to submit a request.* (1) A request must clearly state on the envelope and in the letter that it is a Freedom of Information Act or "FOIA" request.

(2) The request must be addressed to the Freedom of Information Office; National Railroad Passenger Corporation; 60 Massachusetts Avenue, N.E.; Washington, D.C. 20002. Requests will also be accepted by facsimile at (202) 906-2169. Amtrak cannot assure that a timely or satisfactory response under this part will be given to written requests addressed to Amtrak offices, officers, or employees other than the Freedom of Information Office. Amtrak employees receiving a communication in the nature of a FOIA request shall forward it to the FOIA Office expeditiously. Amtrak shall advise the requesting party of the date that an improperly addressed request is received by the FOIA Office.

(c) *Content of the request.* (1) *Description of records*—Identification of records sought under the FOIA is the responsibility of the requester. The records sought should be described in sufficient detail so that Amtrak personnel can locate them with a reasonable amount of effort. When possible, the request should include

specific information such as dates, title or name, author, recipient, subject matter of the record, file designation or number, or other pertinent details for each record or category of records sought.

(2) *Reformulation of a request.* Amtrak is not obligated to act on a request until the requester provides sufficient information to locate the record. Amtrak may offer assistance in identifying records and reformulating a request where the description is considered insufficient, the production of voluminous records is required, or a considerable number of work hours would be required that would interfere with the business of the Corporation. The Freedom of Information Office shall notify the requester within ten business days of the type of information that will facilitate the search. The requesting party shall be given an opportunity to supply additional information and may submit a revised request, which will be treated as a new request.

(d) *Payment of fees.* The submission of a FOIA request constitutes an agreement to pay applicable fees accessed up to \$25.00 unless the requesting party specifies a willingness to pay a greater or lesser amount or seeks a fee waiver or reduction in fees.

(1) *Fees in excess of \$25.00.* When Amtrak determines or estimates that applicable fees are likely to exceed \$25.00, the requesting party shall be notified of estimated or actual fees, unless a commitment has been made in advance to pay all fees. If only a portion of the fee can be estimated readily, Amtrak shall advise the requester that the estimated fee may be a portion of the total fee.

(i) In order to protect requesters from large and/or unexpected fees, Amtrak will request a specific commitment when it estimates or determines that fees will exceed \$100.00.

(ii) A request shall not be considered received, and further processing carried out until the requesting party agrees to pay the anticipated total fee. Any such agreement must be memorialized in writing. A notice under this paragraph will offer the requesting party an opportunity to discuss the matter in order to reformulate the request to meet the requester's needs at a lower cost.

(iii) Amtrak will hold in abeyance for forty-five (45) days requests requiring agreement to pay fees and will thereafter deem the request closed. This action will not prevent the requesting party from refiling the FOIA request with a fee commitment at a subsequent date.

(2) *Fees in excess of \$250.* When Amtrak estimates or determines that allowable charges are likely to exceed

\$250, an advance deposit of the entire fee may be required before continuing to process the request.

(e) *Information regarding fee category.* In order to determine the appropriate fee category, a request should indicate whether the information sought is intended for commercial use or whether the requesting party is a member of the staff of an educational or noncommercial scientific institution or a representative of the news media.

(f) *Records concerning other individuals.* If the request is for records concerning another individual, either a written authorization signed by that individual permitting disclosure of those records to the requesting party or proof that the individual is deceased (i.e., a copy of a death certificate or an obituary) will help to expedite processing of the request.

§ 701.6 Release and processing procedures.

(a) *General provisions.* In determining records that are responsive to a request, Amtrak will ordinarily include only records that exist and are in the possession and control of the Corporation as of the date that the search is begun. If any other date is used, the requesting party will be informed of that date.

(b) *Authority to grant or deny requests.* Amtrak's FOIA officer is authorized to grant or deny any request for records.

(c) *Notice of referral.* If Amtrak refers all or any part of the responsibility for responding to a request to another organization, the requesting party will be notified. A referral shall not be considered a denial of access within the meaning of this part. All consultations and referrals of requests will be handled according to the date that the FOIA request was initially received.

(d) *Creating a record.* There is no obligation on the part of Amtrak to create, compile, or obtain a record to satisfy an FOIA request. The FOIA also does not require that a new computer program be developed to extract the records requested. Amtrak may compile or create a new record, however, when doing so would result in a more useful response to the requesting party or would be less burdensome to Amtrak than providing existing records. The cost of creating or compiling such a record may not be charged to the requester unless the fee for creating the record is equal to or less than the fee that would be charged for providing the existing record.

(e) *Incomplete records.* If the records requested are not complete at the time of a request, Amtrak may, at its

discretion, inform the requester that complete nonexempt records will be provided when available without having to submit an additional request.

(f) *Electronic records.* Amtrak is not obligated to process a request for electronic records where creation of a record, programming or a particular format would result in a significant expenditure of resources or interfere with the corporation's operations.

§ 701.7 Timing of responses to requests.

(a) *General.* (1) The time limits of the FOIA will begin only after the requirements for submitting a request as established in § 701.5 have been met, and the request is deemed received by the Freedom of Information Office.

(2) A request for records shall be considered to have been received on the later of the following dates:

(i) The requester has agreed in writing to pay applicable fees in accordance with § 701.5(d), or

(ii) The fees have been waived in accordance with § 701.11(k), or

(iii) Payment in advance has been received from the requester when required in accordance with § 701.11(i).

(3) The time for responding to requests set forth in paragraph (b) of this section may be delayed if:

(i) The request does not sufficiently identify the fee category applicable to the request;

(ii) The request does not state a willingness to pay all fees;

(iii) A request seeking a fee waiver does not address the criteria for fee waivers set forth in § 701.11(k);

(iv) A fee waiver request is denied, and the request does not include an alternative statement indicating that the requesting party is willing to pay all fees.

(b) *Initial determination.* Whenever possible, an initial determination to release or deny a record shall be made within twenty business days after receipt of the request. In "unusual circumstances" as described in paragraph (d) of this section, the time for an initial determination may be extended for ten business days.

(c) *Multitrack processing.* (1) Amtrak may use two or more processing tracks by distinguishing between simple and more complex requests based on the amount of work and/or time needed to process a request or the number of pages involved.

(2) In general, when requests are received, Amtrak's FOIA Office will review and categorize them for tracking purposes. Requests within each track will be processed according to date of receipt.

(3) The FOIA Office may contact a requester when a request does not

appear to qualify for fast track processing to provide an opportunity to limit the scope of the request and qualify for a faster track. Such notification shall be at the discretion of the FOIA Office and will depend largely on whether it is believed that a narrowing of the request could place the request on a faster track.

(d) *Unusual circumstances.* (1) The requesting party shall be notified in writing if the time limits for processing a request cannot be met because of unusual circumstances, and it will be necessary to extend the time limits for processing the request. The notification shall include the date by which the request can be expected to be completed. Where the extension is for more than ten business days, the requesting party will be afforded an opportunity to either modify the request so that it may be processed within the time limits or to arrange an alternative time period for processing the initial request or modified request.

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

(3) Unusual circumstances that may justify delay include:

(i) The need to search for and collect the requested records from other facilities that are separate from Amtrak's headquarters offices.

(ii) The need to search for, collect, and examine a voluminous amount of separate and distinct records sought in a single request.

(iii) The need for consultation, which shall be conducted with all practicable speed, with agencies having a substantial interest in the determination of the request, or among two or more Amtrak components having a substantial subject-matter interest in the request.

(e) *Expedited processing.* (1) Requests and appeals may be taken out of order and given expedited treatment whenever it is determined that they involve a compelling need, which means:

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

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

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

(3) A requester seeking expedited processing must submit a statement, certified to be true and correct to the best of that person's knowledge and belief, explaining in detail the basis for requesting expedited processing. This statement must accompany the request in order to be considered and responded to within the ten calendar days required for decisions on expedited access.

(4) A requester who is not a full-time member of the news media must establish that he is a person whose main professional activity or occupation is information dissemination, though it need not be his sole occupation. A requester must establish a particular urgency to inform the public about the Amtrak activity involved in the request.

(5) Within ten business days of receipt of a request for expedited processing, Amtrak shall determine whether to grant such a request and notify the requester of the decision. If a request for expedited treatment is granted, the request shall be given priority and shall be processed as soon as practicable.

(6) Amtrak shall provide prompt consideration of appeals of decisions denying expedited processing.

§ 701.8 Responses to requests.

(a) *Granting of requests.* When an initial determination is made to grant a request in whole or in part, the requesting party shall be notified in writing and advised of any fees charged under § 701.11(e). The records shall be disclosed to the requesting party promptly upon payment of applicable fees.

(b) *Adverse determination of requests.* (1) *Types of denials.*—The requesting party shall be notified in writing of a determination to deny a request in any respect. Adverse determinations or denials of records consist of:

(i) A determination to withhold any requested record in whole or in part;

(ii) A determination that a requested record does not exist or cannot be located;

(iii) A denial of a request for expedited treatment; and

(iv) A determination on any disputed fee matter including a denial of a request for a fee waiver.

(2) *Deletions.* When practical, records disclosed in part shall be marked or annotated to show both the amount and location of the information deleted.

(3) *Content of denial letter.* The denial letter shall be signed by the Freedom of Information Officer or designee and shall include:

(i) A brief statement of the reason(s) for the adverse determination including

any FOIA exemptions applied in denying the request;

(ii) An estimate of the volume of information withheld (number of pages or some other reasonable form of estimation). An estimate does not need to be provided if the volume is indicated through deletions on records disclosed in part, or if providing an estimate would harm an interest protected by an applicable exemption;

(iii) A statement that an appeal may be filed under § 701.10 and a description of the requirements of that section; and

(iv) The name and title or position of the person responsible for the denial.

§ 701.9 Business information.

(a) *General.* Business information held by Amtrak will be disclosed under the FOIA only under this section.

(b) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Business information* means commercial or financial information held by Amtrak 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 partnerships; corporations; associations; and local, state, tribal, and foreign governments.

(c) *Designation of business information.* A submitter of business information will use good faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4. These designations will expire ten years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(d) *Notice to submitters.* Amtrak shall provide a submitter with prompt written notice of a FOIA request or an appeal that seeks its business information when required under paragraph (e) of this section, except as provided in paragraph (h), in order to give the submitter an opportunity to object to disclosure of any specified portion of the information under paragraph (f). The notice shall either describe the business information requested or include copies of the requested records or portions of records containing the information.

(e) *When notice is required.* Notice shall be given to a submitter when:

(1) The information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(2) Amtrak has reason to believe that the information may be protected from disclosure under Exemption 4.

(f) *Opportunity to object to disclosure.* Amtrak will allow a submitter a reasonable amount of time to respond to the notice described in paragraph (d) of this section.

(1) A detailed written statement must be submitted to Amtrak if the submitter has any objection to disclosure. The statement must specify all grounds for withholding any specified portion of the information sought under the FOIA. In the case of Exemption 4, it must show why the information is a trade secret or commercial or financial information that is privileged or confidential.

(2) In the event that a submitter fails to respond within the time specified in the notice, the submitter will be considered to have no objection to disclosure of the information sought under the FOIA.

(3) Information provided by a submitter in response to the notice may be subject to disclosure under the FOIA.

(g) *Notice of intent to disclose.*

Amtrak shall consider a submitter's objections and specific grounds for disclosure in making a determination whether to disclose the information. In any instance, when a decision is made to disclose information over the objection of a submitter, Amtrak shall give the submitter written notice which shall include:

(1) A statement of the reason(s) why each of the submitter's objections to disclosure was not sustained;

(2) A description of the information to be disclosed; and

(3) A specified disclosure date, which shall be a reasonable time subsequent to the notice.

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

(1) Amtrak determines that the information should not be disclosed;

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

(3) Disclosure of the information is required by law (other than the FOIA);

(4) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous. In such a case, Amtrak shall within a reasonable time prior to a specified disclosure date, give the submitter written notice of the final decision to disclose the information; or

(5) The information requested is not designated by the submitter as exempt from disclosure in accordance with this part, unless Amtrak has substantial reason to believe that disclosure of the

information would result in competitive harm.

(i) *Notice of a FOIA lawsuit.*

Whenever a FOIA requester files a lawsuit seeking to compel disclosure of business information, Amtrak shall promptly notify the submitter.

(j) *Notice to requesters.* (1) When Amtrak provides a submitter with notice and an opportunity to object to disclosure under paragraph (f) of this section, the FOIA Office shall also notify the requester(s).

(2) When Amtrak notifies a submitter of its intent to disclose requested information under paragraph (g) of this section, Amtrak shall also notify the requester(s).

(3) When a submitter files a lawsuit seeking to prevent the disclosure of business information, Amtrak shall notify the requester(s).

§ 701.10 Appeals.

(a) *Appeals of adverse determinations.* (1) The requesting party may appeal:

(i) A decision to withhold any requested record in whole or in part;

(ii) A determination that a requested record does not exist or cannot be located;

(iii) A denial of a request for expedited treatment; or

(iv) Any disputed fee matter or the denial of a request for a fee waiver.

(2) The appeal must be addressed to the Chairman, President and CEO; National Railroad Passenger Corporation; 60 Massachusetts Avenue, N.E.; Washington, D.C. 20002.

(3) The appeal must be in writing and specify the relevant facts and the basis for the appeal. The appeal letter and envelope must be marked prominently "Freedom of Information Act Appeal" to ensure that it is properly routed.

(4) The appeal must be received by the President's Office within thirty (30) days of the date of denial.

(5) An appeal will not be acted upon if the request becomes a matter of FOIA litigation.

(b) *Responses to appeals.* The decision on any appeal shall be made in writing.

(1) A decision upholding an adverse determination in whole or in part shall contain a statement of the reason(s) for such action, including any FOIA exemption(s) applied. The requesting party shall also be advised of the provision for judicial review of the decision contained in 5 U.S.C. 552(a)(4)(B).

(2) If the adverse determination is reversed or modified on appeal in whole or in part, the requesting party shall be notified, and the request will be

reprocessed in accordance with the decision.

(c) *When appeal is required.* The requesting party must appeal any adverse determination prior to seeking judicial review.

§ 701.11 Fees.

(a) *General.* Amtrak shall charge for processing requests under the FOIA in accordance with this section. A fee of \$9.50 per quarter hour shall be charged for search and review. For information concerning other processing fees, refer to paragraph (e) of this section. Amtrak shall collect all applicable fees before releasing copies of requested records to the requesting party. Payment of fees shall be made by check or money order payable to the National Railroad Passenger Corporation.

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

(1) *Search* means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format.

(2) *Review* means the process of examining a record located in response to a request to determine whether one or more of the statutory exemptions of the FOIA apply. Processing any record for disclosure includes doing all that is necessary to redact the record and prepare it for release. Review time includes time spent considering formal objection to disclosure by a commercial submitter under § 701.9, but does not include time spent resolving general legal or policy issues regarding the application of exemptions. Review costs are recoverable even if a record ultimately is not disclosed.

(3) *Reproduction* means the making of a copy of a record or the information contained in it in order to respond to a FOIA request. Copies can take the form of paper, microform, audiovisual materials, or electronic records (i.e., magnetic tape or disk) among others. Amtrak shall honor a requester's specified preference for the form or format of disclosure if the record is readily reproducible with reasonable effort in the requested form or format by the office responding to the request.

(4) *Direct costs* means those expenses actually incurred in searching for and reproducing (and, in the case of commercial use requests, reviewing) records to respond to a FOIA request. Direct costs include such costs as the salary of the employee performing the work (the basic rate of pay for the

employee plus applicable benefits and the cost of operating reproduction equipment). Direct costs do not include overhead expenses such as the costs of space and heating or lighting of the facility.

(c) *Fee categories.* There are four categories of FOIA requesters for fee purposes: "commercial use requesters," "representatives of the news media," "educational and non-commercial scientific institution requesters," and "all other requesters." The categories are defined in paragraphs (c)(1) through (5), and applicable fees, which are the same for two of the categories, will be assessed as specified in paragraph (d) of this section.

(1) *Commercial requesters.* The term "commercial use" request refers to a request from or on behalf of a person who seeks information for a use or purpose that furthers his commercial, trade, or profit interests, including furthering those interests through litigation. Amtrak shall determine, whenever reasonably possible, the use to which a requester will put the records sought by the request. When it appears that the requesting party will put the records to a commercial use, either because of the nature of the request itself or because Amtrak has reasonable cause to doubt the stated intended use, Amtrak shall provide the requesting party with an opportunity to submit further clarification. Where a requester does not explain the use or where explanation is insufficient, Amtrak may draw reasonable inferences from the requester's identity and charge accordingly.

(2) *Representative of the news media or news media requester* refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances where they can qualify as disseminators of news). For "freelance" journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through an organization. A publication contract would be the clearest proof, but Amtrak shall also look to the past publication record of a requester in making this determination. A request for records supporting the news dissemination function of the requester shall not be considered to be for commercial use.

(3) *Educational institution* refers to a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education that operates a program of scholarly research. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for commercial use but to further scholarly research.

(4) *Noncommercial scientific institution* refers to an institution that is not operated on a "commercial" basis, as that term is defined in paragraph (c)(1) of this section, and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. To be in this category, the requesting party must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for commercial use but to further scientific research.

(5) *Other requesters* refers to requesters who do not come under the purview of paragraphs (c) (1) through (4) of this section.

(d) *Assessing fees.* In responding to FOIA requests, Amtrak shall charge the following fees unless a waiver or a reduction in fees has been granted under paragraph (k) of this section:

(1) "*Commercial use*" requesters: The full allowable direct costs for search, review, and duplication of records.

(2) "*Representatives of the news media*" and "*educational and non-commercial scientific institution*" requesters: Duplication charges only, excluding charges for the first 100 pages.

(3) "*All other*" requesters: The direct costs of search and duplication of records. The first 100 pages of duplication and the first two hours of search time shall be provided without charge.

(e) *Schedule of fees.* (1) *Manual searches*—Personnel search time includes time expended in either manual searches for paper records, searches using indices, review of computer search results for relevant records, and personal computer system searches.

(2) *Computer searches.* The direct costs of conducting a computer search will be charged. These direct costs will include the cost of operating a central processing unit for that portion of the operating time that is directly

attributable to searching for responsive records as well as the costs of operator/programmer salary apportionable to the search.

(3) *Duplication fees.* Duplication fees will be charged all requesters subject to limitations specified in paragraph (d) of this section. Amtrak shall charge 25 cents per page for a paper photocopy of a record. For copies produced by computer (such as tapes or printouts), Amtrak will charge the direct costs, including the operator time in producing the copy. For other forms of duplication, Amtrak will charge the direct costs of that duplication.

(4) *Review fees.* Review fees will be assessed for commercial use requests. Such fees will be assessed for review conducted in making an initial determination, or upon appeal when review is conducted to determine whether an exemption not previously considered is applicable.

(5) *Charges for other services.* The actual cost or amount shall be charged for all other types of output, production, and duplication (e.g., photographs, maps, or printed materials). Determinations of actual cost shall include the commercial cost of the media, the personnel time expended in making the item available for release, and an allocated cost for the equipment used in producing the item. The requesting party will be charged actual production costs when a commercial service is required. Items published and available through Amtrak will be made available at the publication price.

(6) *Charges for special services.* Apart from the other provisions of this section, when Amtrak chooses as a matter of discretion to provide a special service such as certifying that records are true copies or sending records by other than ordinary mail, the direct costs of providing such services shall be charged.

(f) *Commitment to pay fees.* When Amtrak determines or estimates that applicable fees will likely exceed \$25.00, the requesting party will be notified of the actual or estimated amount unless a written statement has been received indicating a willingness to pay all fees. To protect requesters from large and/or unexpected fees, Amtrak will request a specific commitment when it is estimated or determined that fees will exceed \$100.00. See § 701.5(d) for additional information.

(g) *Restrictions in accessing fees.* (1) *General*—Fees for search and review will not be charged for a quarter-hour period unless more than half of that period is required.

(2) *Minimum fee.* No fees will be charged if the cost of collecting the fee is equal to or greater than the fee itself. That cost includes the costs to Amtrak for billing, receiving, recording, and processing the fee for deposit, which has been deemed to be \$10.00.

(3) *Computer searches.* With the exception of requesters seeking documents for commercial use, Amtrak shall not charge fees for computer search until the cost of search equals the equivalent dollar amount of two hours of the salary of the operator performing the search.

(h) *Nonproductive searches.* Amtrak may charge for time spent for search and review even if responsive records are not located or if the records located are determined to be entirely exempt from disclosure.

(i) *Advance payments.* (1) When Amtrak estimates or determines that charges are likely to exceed \$250, an advance payment of the entire fee may be required before continuing to process the request.

(2) When there is evidence that the requester may not pay the fees that would be incurred by processing the request, an advance deposit may be required. Amtrak may require the full amount due plus applicable interest and an advance payment of the full amount of anticipated fees before beginning to process a new request or continuing to process a pending request where a requester has previously failed to pay a properly charged FOIA fee within thirty (30) days of the date of billing. The time limits of the FOIA will begin only after Amtrak has received such payment.

(3) Amtrak will hold in abeyance for forty-five (45) days requests where deposits are due.

(4) Monies owed for work already completed (i.e., before copies are sent to a requester) is not considered an advance payment.

(5) Amtrak shall not deem a request as being received in cases in which an advance deposit or payment is due, and further work will not be done until the required payment is received.

(j) *Charging interest.* Amtrak may charge interest on any unpaid bill for processing charges starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate that Amtrak pays for short-term borrowing.

(k) *Waiver or reduction of fees.* (1) *Automatic waiver of fees*—When the costs for a FOIA request total \$10.00 or less, fees shall be waived automatically for all requesters regardless of category.

(2) *Other fee waivers.* Decisions to waive or reduce fees that exceed the automatic waiver threshold shall be

made on a case-by-case basis. Records responsive to a request will be furnished without charge or at below the established charge where Amtrak determines, based on all available information, that disclosure of the requested information is in the public interest because:

(i) It is likely to contribute significantly to public understanding of the operations or activities of Amtrak and

(ii) It is not primarily in the commercial interest of the requesting party.

(3) To determine whether fee waiver requirement in paragraph (k)(2)(i) of this section is met, Amtrak will consider the following factors:

(i) *The subject of the request—whether the subject of the requested records concerns the operations or activities of Amtrak.* The subject of the requested records must concern identifiable operations or activities of Amtrak with a connection that is direct and clear, not remote or attenuated.

(ii) *The informative value of the information to be disclosed—whether the disclosure is likely to contribute to an understanding of Amtrak operations or activities.* The disclosable portions of the requested records must be meaningfully informative about Amtrak's operations or activities in order to be found to be likely to contribute to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a 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) *The contribution to an understanding of the subject by the public likely to result from disclosure—whether disclosure of the requested information will contribute to public understanding.* The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject as opposed to the individual understanding of the requester. A requester's ability and expertise in the subject area as well as the requester's intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media will satisfy this consideration.

(iv) *The significance of the contribution to public understanding—whether the disclosure is likely to contribute significantly to public understanding of Amtrak operations or activities.* The public's understanding of the subject in question, as compared to

the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent.

(4) To determine whether the fee waiver requirement in paragraph (k)(2)(ii) of this section is met, Amtrak will consider the following factors:

(i) *The existence and magnitude of a commercial interest—whether the requesting party has a commercial interest that would be furthered by the requested disclosure.* Amtrak shall consider any commercial interest of the requesting party (with reference to the definition of "commercial use" in paragraph (c)(1) of this section), or any person on whose behalf the requesting party may be acting that would be furthered by the requested disclosure. Requesters shall be given an opportunity to provide explanatory information regarding this consideration.

(ii) *The primary interest in disclosure—whether the magnitude of the identified commercial interest of the requester is sufficiently large in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."* A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than any identified commercial interest in disclosure.

(5) Requests for a fee waiver will be considered on a case-by-case basis, based upon the merits of the information provided. Where it is difficult to determine whether the request is commercial in nature, Amtrak may draw inference from the requester's identity and the circumstances of the request.

(6) Requests for a waiver or reduction of fees must address the factors listed in paragraphs (k)(3) and (4) of this section. In all cases, the burden shall be on the requesting party to present evidence of information in support of a request for a waiver of fees.

(l) *Aggregating requests.* A requester may not file multiple requests at the same time in order to avoid payment of fees. Where Amtrak reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a request into a series of requests for the purpose of avoiding fees, Amtrak may aggregate those requests and charge accordingly. Amtrak may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. Where requests are separated by a longer period, Amtrak may aggregate them only when there exists a solid basis for determining that

aggregation is warranted. Multiple requests involving unrelated matters may not be aggregated.

§ 701.12 Other rights and services.

Nothing in this part shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

Dated: November 6, 1997.

Sarah H. Duggin,

Vice President and General Counsel.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 971023253-7253-01; I.D. 093097E]

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Rocket Launches

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of receipt of a petition for regulations and an application for a small take exemption; request for comment and information.

SUMMARY: NMFS has received a request from the 30th Space Wing, U.S. Air Force for a small take of marine mammals incidental to missile and rocket launches, aircraft flight test operations and helicopter operations at Vandenberg Air Force Base, CA (Vandenberg). As a result of that request, NMFS is considering whether to propose regulations that would authorize the incidental taking of a small number of marine mammals. In order to issue such regulations, NMFS must determine that these takings will have a negligible impact on the affected species and stocks of marine mammals. NMFS invites comment on the application and suggestions on the content of the regulations.

DATES: Comments and information must be postmarked no later than December 15, 1997.

ADDRESSES: Comments should be addressed to Michael Payne, Chief, Marine Mammal Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3226. A copy of the application may be