

mail, return receipt requested, or similar means. The notice shall either describe the business information requested or include copies of the requested records containing the information. When notification of a large number of submitters is required, notification may be made by posting or publishing the notice in a place reasonably likely to accomplish notification.

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

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

(2) The FOIA Officer has reason to believe that the information may be protected from disclosure under FOIA exemption 4.

(f) *Opportunity to object to disclosure.* The FOIA Officer shall allow a submitter seven working days (i.e., excluding Saturdays, Sundays, and legal public holidays) from the date of receipt of the written notice described in paragraph (d) of this section to provide the FOIA Officer with a detailed statement of any objection to disclosure. The statement must specify all grounds for withholding any portion of the information under any exemption of FOIA and, 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. If a submitter fails to respond to the notice within the time specified, the submitter will be considered to have no objection to disclosure of the information. Information a submitter provides under this paragraph may itself be subject to disclosure under FOIA.

(g) *Notice of intent to disclose.* The FOIA Officer shall consider a submitter's objections and specific grounds under FOIA for nondisclosure in deciding whether to disclose business information. If the FOIA Officer decides to disclose business information over the objection of a submitter, the FOIA Officer shall give the submitter written notice via certified mail, return receipt requested, or similar means, which shall include:

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

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

(3) A statement that the FOIA Officer intends to disclose the information seven working days from the date the submitter receives the notice.

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

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

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

(3) Disclosure of the information is required by statute (other than FOIA) or by a regulation issued in accordance with Executive Order 12600; or

(4) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous, in which case the FOIA Officer shall provide the submitter written notice of any final decision to disclose the information seven working days from the date the submitter receives the notice.

(i) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of business information, the FOIA Officer shall promptly notify the submitter.

(j) *Corresponding notice to requesters.* Whenever a FOIA Officer provides a submitter with notice and an opportunity to object to disclosure under paragraph (d) of this section, the FOIA Officer shall also notify the requester(s). Whenever a submitter files a lawsuit seeking to prevent the disclosure of business information, the FOIA Officer shall notify the requester(s).

#### **§ 102.10 Appeals from initial determinations or untimely delays.**

(a) If a request for records is initially denied in whole or in part, or has not been timely determined, or if a requester receives an adverse initial determination regarding any other matter under this subpart (as described in § 102.7(b)), the requester may file a written appeal, which must be received by the Office of General Counsel within thirty calendar days of the date of the

written denial or, if there has been no determination, may be submitted anytime after the due date, including the last extension under §102.6(c), of the determination.

(b) Appeals shall be decided by a Deputy General Counsel. Appeals should be addressed to the General Counsel, United States Patent and Trademark Office, Washington DC 20231. Both the letter and the appeal envelope should be clearly marked "Freedom of Information Appeal". The appeal must include a copy of the original request and the initial denial, if any, and may include a statement of the reasons why the records requested should be made available and why the initial denial, if any, was in error. No opportunity for personal appearance, oral argument or hearing on appeal is provided.

(c) If an appeal is granted, the person making the appeal shall be immediately notified and copies of the releasable documents shall be made available promptly thereafter upon receipt of appropriate fees determined in accordance with §102.11.

(d) If no determination of an appeal has been sent to the requester within the twenty-working-day period specified in §102.6(b) or the last extension thereof, the requester is deemed to have exhausted his administrative remedies with respect to the request, giving rise to a right of judicial review under 5 U.S.C. 552(a)(6)(C). If the person making a request initiates a civil action against USPTO based on the provision in this paragraph, the administrative appeal process may continue.

(e) A determination on appeal shall be in writing and, when it denies records in whole or in part, the letter to the requester shall include:

(1) A brief explanation of the basis for the denial, including a list of applicable FOIA exemptions and a description of how the exemptions apply;

(2) A statement that the decision is final;

(3) Notification that judicial review of the denial is available in the United States district court for the district in which the requester resides or has its principal place of business, the United States District Court for the Eastern District of Virginia, or the District of Columbia; and

(4) The name and title or position of the official responsible for denying the appeal.

#### § 102.11 Fees.

(a) *In general.* USPTO shall charge for processing requests under FOIA in accordance with paragraph (c) of this section, except when fees are limited under paragraph (d) of this section or when a waiver or reduction of fees is granted under paragraph (k) of this section. USPTO shall collect all applicable fees before sending copies of requested records to a requester. Requesters must pay fees by check or money order made payable to the Treasury of the United States.

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

(1) *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, which can include furthering those interests through litigation. The FOIA Officer shall determine, whenever reasonably possible, the use to which a requester will put the requested records. When it appears that the requester will put the records to a commercial use, either because of the nature of the request itself or because the FOIA Officer has reasonable cause to doubt a requester's stated use, the FOIA Officer shall provide the requester a reasonable opportunity to submit further clarification.

(2) *Direct costs* means those expenses USPTO incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records to respond to a FOIA request. Direct costs include, for example, the labor costs of the employee performing the work (the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits). Not included in direct costs are overhead expenses such as the costs of space and heating or lighting of the facility in which the records are kept.

(3) *Duplication* means the making of a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies may take the form of paper, microform, audiovisual materials, or electronic records (for example, magnetic tape or disk), among others. The FOIA Officer shall honor a