

**Merit Systems
Protection Board**

**Tuesday
July 24, 1979**

Part VII

**Merit Systems
Protection Board**

**Freedom of Information Act; Privacy Act;
and Government in the Sunshine Act;
Final Rulemaking**

MERIT SYSTEMS PROTECTION BOARD

5 CFR Parts 1204, 1205, 1206

[Docket No. 79-2—Notice 2]

Final Rulemaking; Freedom of Information Act; Privacy Act; Government in the Sunshine Act

AGENCY: Merit Systems Protection Board.

ACTION: Final rulemaking.

SUMMARY: These regulations establish procedures for the Merit Systems Protection Board pursuant to the requirements of the Freedom of Information Act; the Privacy Act; and the Government in the Sunshine Act.

EFFECTIVE DATE: July 24, 1979.

FOR FURTHER INFORMATION CONTACT: Alan Greenwald or Deborah House (202-653-7101).

SUPPLEMENTARY INFORMATION: This publication constitutes the final regulations of the Merit Systems Protection Board implementing the Freedom of Information Act (5 U.S.C. 552); the Privacy Act (5 U.S.C. 552a); and the Government in the Sunshine Act (5 U.S.C. 552b).

These regulations were published on March 23, 1979 (44 FR 17964-17967) for interim effect and with a request for comments. Several comments were submitted, most of which suggested changes of a technical nature which have been adopted. Additionally some minor language changes have been made by the Board. The three substantive changes, all contained in the regulations issued under the Privacy Act, are discussed below.

Section 1205.4 Application of the Freedom of Information Act, has been added to the regulations. This section is intended to put individuals on notice that, as required by law, records otherwise subject to the protections from disclosure under the Privacy Act may be subject to disclosure under the Freedom of Information Act.

Given its role as adjudicator of employee appeals, the great majority of records maintained by the Board fall within the category of personnel files. Disclosure of these files is not required under the Freedom of Information Act pursuant to 5 U.S.C. 552(b)(6) if to do so would "constitute a clearly unwarranted invasion of personal privacy." However, under relevant court interpretations it should be recognized that this exemption is not automatically

applicable, but a determination must be made on a case by case basis. Accordingly, such records may be released where the facts and circumstances dictate that such release is appropriate.

Section 1205.15 Medical Records, has been deleted. This section provided that, where necessary, medical records pertaining to an individual might be released only to a physician designated by the individual. This provision was very similar to one adopted by the Civil Service Commission and codified at 5 CFR 297.108(c)(1) pursuant to 5 U.S.C. 552a(f)(3). Reflecting the growing public opinion that individuals should have access to all files pertaining to themselves, the Board has deleted this provision.

A new § 1205.15, Denial of Access, has been added to the rules. The purpose of this section is to put the public on notice that certain files otherwise subject to the access provisions of the Privacy Act may be exempt from disclosure by the Board. Specifically, the records exempted are investigatory files compiled for law enforcement purposes. This exemption is based on the anticipation of the Board that from time to time it will maintain such records in conjunction with an action brought by the Special Counsel. In determining whether these records will be withheld, the Board will analyze whether they are exempt under exemption (b)(7) of the Freedom of Information Act. Application of this exemption requires not only that the records be of an investigatory nature compiled for law enforcement purposes, but also that certain types of harm be demonstrated in order to justify withholding. Thus, denial of disclosure will not be made merely on the basis of the characterization of these records.

One comment suggested that the provisions as now written be substantially expanded. However, the Board's position is that these regulations, which are used by the public, should contain only that information necessary to advise the public of rights under these statutes in a clear and understandable form. Issuance of provisions pursuant to each subsection of these three Acts was determined not to be desirable for that reason. This is not meant, however, to limit application of the statutory provisions in any manner. Those provisions will be applied whenever appropriate.

Issued on July 2, 1979, by order of the Board.

Ruth T. Prokop,
Chair, Merit Systems Protection Board.

5 CFR is amended by adding Parts 1204-1206 to read as follows:

PART 1204—FREEDOM OF INFORMATION ACT

Subpart A—Purpose and Policy

Sec.

- 1204.1 Purpose.
1204.2 Policy.

Subpart B—Procedures for Obtaining Records

- 1204.11 Submission of request.
1204.12 Time limitations and determinations.
1204.13 Fees.
1204.14 Denials.

Subpart C—Appeals

- 1204.21 Submission.
1204.22 Determinations on appeal.

Authority: 5 U.S.C. 552

Subpart A—Purpose and Policy

§ 1204.1 Purpose.

The purpose of this part is to set forth the procedures pursuant to the Freedom of Information Act ("the Act") through which the public may obtain records controlled by the Board.

§ 1204.2 Policy.

(a) It is the policy of the Board to release records when:

- (1) The request submitted reasonably describes such records; and
- (2) The request is made in accordance with the rules of this part.

(b) Records shall be disclosed to a requestor unless:

- (1) They are exempt from disclosure under subsection (b) of the Act; and
- (2) Their disclosure would not be in the public interest.

Subpart B—Procedures for Obtaining Records

§ 1204.11 Submission of request.

(a) *Place.* Requests for copies of records shall be made to the appropriate field office of the Board or the Office of the Secretary of the Merit Systems Protection Board, Washington, D.C. If the requestor has reason to believe the records in question are located in a field office, it is appropriate to submit the request to that office. Requests to the field shall be addressed to the Chief Appeals Officer at the appropriate field office listed in appendix II of 5 CFR Part 1201. Requests shall be made during normal business hours, or submitted by mail. Requests shall be in writing.

(b) *Form.* Each request shall reasonably describe the record including any name, subject matter and number or date where possible so that the Board can identify and locate the record. Requests submitted by mail shall be clearly marked as a "FREEDOM OF INFORMATION ACT REQUEST" on both the envelope and letter.

(c) *Payment.* Requests shall be accompanied by the fee or an offer to pay the fee according to § 1204.13 of this part.

§ 1204.12 Time limitations and determinations.

(a) *Board determinations.* The Board shall make a determination on the request within 10 working days except under "unusual circumstances."

(1) "Unusual circumstances" means:

- (i) The need to obtain the records from other offices;
- (ii) The need to obtain and examine a large number of records; or
- (iii) The need to consult with another agency having substantial interest in the records requested.

(b) *Time extensions.* Where "unusual circumstances" exist, the Board may extend the time period for making a determination on the request for no more than 10 additional working days and shall notify the requestor of the extension.

(c) *Improper request.* If a request or an appeal is not properly labeled or is submitted to the wrong office, the time for processing the request shall run from the time it is received by the proper official.

(d) *Determining official.* Determinations on requests will be made by the Secretary of the Board or the Chief Appeals Officer.

§ 1204.13 Fees.

(a) Requests for records are subject to the following costs for search and duplication:

(1) If the record(s) is in excess of 50 pages, \$0.10 will be charged for each page. Records under 50 pages will be provided without charge.

(2) Manual records search.

(i) First hour of any single request: No fee.

(ii) Each additional hour or fraction thereof: \$5.00.

(iii) Fees for search and duplication of automated records shall be provided upon request.

(b) At their discretion, the Secretary or Chief Appeals Officer may refuse to furnish records prior to receipt of the required fee.

(c) At their discretion, the Secretary or Chief Appeals Officer shall furnish

records without charge or at a reduced charge where the release primarily benefits the general public.

§ 1204.14 Denials.

Denials of a request for a record, in whole or in part, shall be in writing and shall state the reasons for the denial and notify the requestor of the right to appeal the denial.

Subpart C—Appeals

§ 1204.21 Submission.

(a) *Place.* Appeals shall be addressed to the Chair, Merit Systems Protection Board, Washington, D.C. 20419.

(b) *Form.* Appeals shall be clearly marked as "Freedom of Information Act Appeal" on both the envelope and letter. Appeals must be in writing and shall include:

- (1) A copy of the original request;
- (2) A copy of the written denial; and
- (3) A statement of the reasons why the original denial should be overruled.

§ 1204.22 Determinations on appeal.

(a) Determinations by the Board on the appeal shall be made within 20 working days after receipt.

(b) Determinations on the appeal shall be in writing; shall state the reasons therefor if denied; and shall notify the requestor of the right to judicial review of any denial.

PART 1205—PRIVACY ACT

Subpart A—Scope

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1205.1	Purpose.
1205.2	Policy.
1205.3	Definitions.
1205.4	Disclosure of Privacy Act Records.

Subpart B—Procedures for Obtaining Records

1205.11	Submission of request.
1205.12	Time limitations and determinations.
1205.13	Identification.
1205.14	Grant of access.
1205.15	Denial of access.
1205.16	Fees.

Subpart C—Amendment of Records

1205.21	Request for amendment.
1205.22	Action on request.
1205.23	Time limitations.

Subpart D—Appeals

1205.31	Submission of appeal.
1205.32	Determinations on appeal.

Authority: 5 U.S.C. 552a.

Subpart A—Scope

§ 1205.1 Purpose.

The purpose of this part is to set forth the procedures pursuant to the Privacy Act ("the Act") by which an individual

may make an inquiry regarding a record, gain access to such record, or amend the record.

§ 1205.2 Policy.

It is the policy of the Board to facilitate the full exercise of rights conferred by the Act upon individuals and to insure the privacy of records maintained regarding such individuals. Such records shall contain only that information which is relevant and necessary to the functions of the Board and shall be treated in a manner which is fully in accordance with the provisions of the Act.

§ 1205.3 Definitions.

The definitions of 5 U.S.C. 522a apply to this part and are incorporated herein by reference. As used in this part:

"Inquiry" means a request by an individual regarding whether the Board has a record which pertains to that individual.

"Request for access" means a request by an individual to inspect or copy a record.

"Request for amendment" means a request by an individual to change the substance of a particular record by addition, deletion or other correction.

"Requestor" means the individual requesting access or amendment to a record. The individual may be either the person to whom the record requested pertains; a legal guardian acting on behalf of an individual; or a representative designated by that individual.

§ 1205.4 Disclosure of Privacy Act Records.

Records subject to the Privacy Act may be released to persons other than the person to whom the record pertains if such disclosure is permitted under 5 U.S.C. 552a(b) (1-11). This includes release as required by the Freedom of Information Act.

Subpart B—Procedures for Obtaining Records

§ 1205.11 Submission of request.

(a) *Place.* Inquiries or requests for access to records shall be made to the appropriate field office of the Board or the Office of the Secretary of the Merit Systems Protection Board, Washington, D.C. 20419. If the requestor has reason to believe the records in question are located in a field office then it is appropriate to submit the request to that office. Requests to the field shall be addressed to the Chief Appeals Officer at the appropriate field office listed in Appendix II of 5 CFR Part 1201.

(b) *Form.* Each submission shall contain the following information:

(1) Name, address and telephone number of the individual to whom the record pertains;

(2) Name, address and telephone number of the individual making the request if the requestor is someone other than the person to whom the record pertains such as an attorney or legal guardian, and evidence of the relationship such as: an authenticated copy of the birth certificate of the minor child, or the court document appointing the individual legal guardian; or an agreement for representation signed by the individual to whom the record pertains;

(3) Such additional information as may assist the Board in responding to the request (for example, the name of the agency which is taking the action, the subject matter of the case, etc.);

(4) Date of inquiry;

(5) Requestor's signature; and

(6) Indication both on the envelope and the letter that the inquiry is a "PRIVACY ACT REQUEST."

(c) Each submission shall comply with the identification requirements set forth in § 1205.13.

§ 1205.12 Time limitations and determinations.

(a) *Board determinations:* The Board shall make a determination on the request within 10 working days except under "unusual circumstances" as described below:

(1) The need to obtain the records from other offices;

(2) The need to obtain and examine a large number of records;

(3) The need to consult with another agency having substantial interest in the records requested; or

(4) Other extenuating circumstances which reasonably prohibit the Board from processing the request within the 10-day period.

(b) *Time extensions.* Where "unusual circumstances" exist, the Board may extend the time period for making a determination on the request for no more than 10 additional working days and shall notify the requestor of the extension.

(c) *Improper request.* If a request or an appeal is not properly labeled or is submitted to the wrong office, the time for processing the request shall run from the time it is received by the proper official.

(d) *Determining official.* Determinations on requests will be made by the Secretary of the Board or the Chief Appeals Officer.

§ 1205.13 Identification.

(a) *In person.* Each individual making a request in person shall be required to present satisfactory proof of identity. In order of preference the following items shall be acceptable.

(1) A document bearing the requestor's photograph; or

(2) A document bearing the individual's signature.

(3) In the event subparagraph (1) or (2) of this paragraph are not available, the requestor will be required to sign a statement asserting his/her identity and acknowledging the requestor's understanding that misrepresentation of identity in order to obtain a record is a misdemeanor and subject to a possible fine of \$5,000 under 5 U.S.C. 552a(i)(3).

(b) *By mail.* The identification of a requestor making a request by mail must be certified by a notary public or equivalent official or contain other information sufficient to identify the requestor.

(c) *Parents of minors, legal guardians and representatives.* Parents of minors, legal guardians and representatives must submit identification pursuant to paragraphs (a) or (b) of this section. Additionally, they must present an authenticated copy of the minor's birth certificate, court order of guardianship, or agreement of representation where appropriate.

§ 1205.14 Grant of access.

(a) The alternative methods of access may be granted for inspection of records:

(1) Personal inspection during normal business hours;

(2) Transfer of records to a suitable Federal facility in closer proximity to the requestor;

(3) Provision of copies by mail.

(b) An individual seeking personal access to records may be accompanied by another individual of his/her choice. However, the requestor shall be required to sign a written statement authorizing the discussion and presentation of his/her record in the accompanying individual's presence.

§ 1205.15 Denial of access.

(a) *Basis.* In accordance with 5 U.S.C. 552a(k)(2) the Board may deny access to records which are of an investigatory nature and are compiled for law enforcement purposes. Such requests will be denied only where access to such records would otherwise be unavailable under exemption (b)(7) of the Freedom of Information Act.

(b) *Form.* All denials of access under this section will be made in writing and

will notify the requestor of the right to judicial review.

§ 1205.16 Fees.

(a) No fees shall be charged by the Board for any other purpose than making copies of records.

(b) It is the policy of the Board to provide one copy of a record upon request free of charge. However, where the requested record exceeds 50 pages, the Board shall charge \$0.10 for each copy.

(c) It is the policy of the Board to provide one copy of the amended pages of any record free of charge as evidence of the amendment.

Subpart C—Amendment of Records

§ 1205.21 Request for amendment.

A request for amendment of a record shall be made to the Chief Appeals Officer at a field office or the Secretary of the Merit Systems Protection Board, Washington, D.C. 20419, depending on which office is maintaining the record. The request shall be in writing and shall be designated on the outside of the envelope and the letter as a "Privacy Act Request" and shall include the following information:

(a) Identification of the record to be amended;

(b) A description of the amendment requested (e.g., addition, deletion, placement of amendment, etc.);

(c) A statement of the basis for the amendment and supporting documentation, if any.

§ 1205.22 Action on request.

(a) *Amendment granted.* Where the amendment requested is granted the requestor shall be notified and supplied a copy of the amendment.

(b) *Amendment denied.* Where the amendment requested is denied in whole or in part the requestor shall be notified in writing and provided the following information:

(1) The basis for the denial; and

(2) The procedures for appealing the denial.

§ 1205.23 Time limitations.

The appropriate official shall acknowledge a request for amendment within 10 days after receipt and shall make a determination on the request.

Subpart D—Appeals

§ 1205.31 Submission of appeal.

(a) *Place.* Appeals shall be addressed to the Chair, Merit Systems Protection Board, Washington, D.C. 20419.

(b) *Form.* Appeals shall be in writing, shall be clearly marked "PRIVACY ACT

APPEAL" on both the envelope and letter; and shall include:

- (1) A copy of the original request for amendment;
- (2) A copy of the denial; and
- (3) A statement of the reasons why the original denial should be overruled.

§ 205.32 Determinations on appeal.

(a) A written determination on the appeal shall be made within 30 working days unless the Chair determines that there is good cause for extension. Where an appeal is improperly labeled or is submitted to an inappropriate official, the time limitation for processing the request shall run from the time it is received by the Chair.

(b) If the amendment is granted on appeal, the Chair shall direct that the amendment be made and shall supply the requestor with a copy of the amended record.

(c) If the amendment is denied, the Chair shall notify the requestor of the denial and inform him/her of:

- (1) The basis for the denial;
- (2) The right to file a concise statement with the Board stating the reasons for his/her disagreement with the denial which shall become a part of the record; and
- (3) The right to judicial review of the decision under 5 U.S.C. 552a(g)(1)(A).

PART 1206—OPEN MEETINGS

Subpart A—Purpose and Policy

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1206.2	Policy.
1206.3	Definitions.

Subpart B—Procedures

1206.4	Notice of meeting.
1206.5	Change in meeting plans after notice.
1206.6	Determination to close meeting.
1206.7	Record of meetings.
1206.8	Provision of information to the public.

Subpart C—Conduct of Meetings

1206.11	Meeting place.
1206.12	Role of observers.
	Authority: 5 U.S.C. 552b.

Subpart A—Purpose and Policy

§ 1206.1 Purpose.

The purpose of this part is to set forth the procedures pursuant to the Government in the Sunshine Act (5 U.S.C. 552b) ("the Act") by which the Board will conduct open meetings.

§ 1206.2 Policy.

It is the policy of the Board to provide the public with the fullest practicable information regarding the decision-making processes of the Board. Board

meetings involving deliberations which determine or result in the joint conduct or disposition of official Board business are presumptively open to the public. It is the intent of these regulations to open such meetings to public observation while protecting individuals' rights and the Board's ability to carry out its responsibilities. Board meetings will be closed in whole or in part only in accordance with the exemptions provided under 5 U.S.C. 552b(c) and where to do so is in the public interest.

§ 1206.3 Definitions.

In this part:

"Meeting" means the deliberations of at least two Board Members where such deliberations determine or result in the joint conduct of official Board business.

"Member" means one of the Members of the Merit Systems Protection Board.

Subpart B—Procedures

§ 1206.4 Notice of meeting.

(a) Notices of Board meetings shall be published in the Federal Register at least one week prior to the meeting. Such notice shall include the following information:

- (1) Time;
 - (2) Place;
 - (3) Subject of meeting and agenda;
 - (4) Whether the meeting is to be opened or closed; and
- (5) The name and telephone number of a Board official responsible for receiving inquiries regarding the meeting.

(b) The Board may, by majority vote, provide less than one week's notice but such notice shall be provided at the earliest practicable time.

§ 1206.5 Change in meeting plans after notice.

(a) Following notice of a meeting, the time or place of a meeting may be changed only if the change is announced publicly at the earliest practicable time.

(b) Following notice of a meeting, the subject matter of a meeting or the determination to open or close a meeting may be changed only if both of the following conditions are met:

- (1) There must be a majority, recorded vote of the Board members that Board business requires the change and that no earlier announcement of such changes was possible; and
- (2) There must be a notice of the change in the Federal Register and of the individual Board Members' votes at the earliest practicable time.

§ 1206.6 Determination to close meeting.

(a) *Basis.* The Board, by majority vote, may determine to close a meeting in accordance with the provisions of 5

U.S.C. 552b(c)(1-10) and where it is in the public interest.

(b) *General Counsel Certification.* Where the Board has determined that a meeting shall be closed in whole or in part, the General Counsel shall certify the propriety of doing so and state the basis therefor.

(c) *Vote.* Where the Board has voted to close a meeting, within one day of such vote the Board shall make publicly available a record reflecting the vote of each Member on the question. In addition, within one day of any vote which closed a portion or portions of a meeting to the public, the Board shall make publicly available a full written explanation of its decision to close the meeting together with a list naming all persons expected to attend and identifying their affiliation, unless such disclosure would reveal the information that the meeting itself was closed to protect.

§ 1206.7 Record of meetings.

(a) *Closed Meeting.* Where the Board has determined that a meeting shall be closed in whole or in part the following record shall be maintained:

- (1) A transcript of recording of the proceeding;
- (2) A copy of the General Counsel's certification;
- (3) A statement from the presiding official setting forth the time and place of the meeting and the persons present; and

(4) A recordation of all votes and all documents considered (which may be part of the transcript).

(b) *Open Meetings.* Transcripts or other recordations shall be made of all open meetings of the Board and shall be made available upon request at actual cost.

§ 1206.8 Provision of information to the public.

Information available to the public under this part shall be made available at the Office of the Secretary, Merit Systems Protection Board, Washington, D.C. 20419. Individuals or organizations having a special interest in activities of the Board may submit a request to the Office of the Secretary to be placed on a mailing list for receipt of information available under this part.

Subpart C—Conduct of Meetings

§ 1206.11 Meeting place.

Meetings shall be held in meeting rooms designated in the public announcement. Whenever the number of observers is greater than can be accommodated in the meeting room

designated, alternative facilities shall be made available to the extent possible.

§ 1206.12 Role of observers.

The public may attend open meetings for the sole purpose of observation. Observers may not participate in meetings unless expressly invited to do so. Observers may not create distractions which interfere with the conduct and disposition of Board business and may be asked to leave if they do so. For the portions of meetings which are partially closed, observers shall leave the meeting room upon request.

[FR Doc. 79-214 ? Filed 7-23-79; 8:45 am]

BILLING CODE 6325-20-M

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Tuesday, July 24, 1979

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AGENCY PUBLICATION ON ASSIGNED DAYS OF THE WEEK

The following agencies have agreed to publish all documents on two assigned days of the week (Monday/Thursday or Tuesday/Friday).

This is a voluntary program. (See OFR NOTICE FR 32914, August 6, 1976.)

Monday	Tuesday	Wednesday	Thursday	Friday
DOT/SECRETARY*	USDA/ASCS		DOT/SECRETARY*	USDA/ASCS
DOT/COAST GUARD	USDA/APHIS		DOT/COAST GUARD	USDA/APHIS
DOT/FAA	USDA/FNS		DOT/FAA	USDA/FNS
DOT/FHWA	USDA/FSQS		DOT/FHWA	USDA/FSQS
DOT/FRA	USDA/REA		DOT/FRA	USDA/REA
DOT/NHTSA	MSPB/OPM		DOT/NHTSA	MSPB/OPM
DOT/RSPA	LABOR		DOT/RSPA	LABOR
DOT/SLS	HEW/FDA		DOT/SLS	HEW/FDA
DOT/UMTA			DOT/UMTA	
CSA			CSA	

Documents normally scheduled for publication on a day that will be a Federal holiday will be published the next work day following the holiday.

Comments on this program are still invited. Comments should be submitted to the Day-of-the-Week Program Coordinator, Office of the Federal Register, National Archives and Records Service, General Services Administration, Washington, D.C. 20408

***NOTE: As of July 2, 1979, all agencies in the Department of Transportation, will publish on the Monday/Thursday schedule.**

REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance. Since this list is intended as a reminder, it does not include effective dates that occur within 14 days of publication.

Rules Going Into Effect Today

Note: There were no items eligible for inclusion in the list of Rules Going Into Effect Today.

List of Public Laws

Last Listing July 20, 1979

This is a continuing list of public bills from the current session of Congress which have become Federal laws. The text of laws is not published in the Federal Register but may be ordered in individual pamphlet form (referred to as "slip laws") from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 (telephone 202-375-3030).

S. 1007 / Pub. L. 96-35 "Special International Security Assistance Act of 1979". (July 20, 1979; 93 Stat. 89) Price \$.75.

S. 927 / Pub. L. 96-36 To authorize the Smithsonian Institution to plan for the development of the area south of the original Smithsonian Institution Building adjacent to Independence Avenue at Tenth Street, Southwest, in the city of Washington. (July 20, 1979; 93 Stat. 94) Price \$.75.









