

NIOSH Procedures for Providing Public Access to Records or Documents of the Advisory Board on Radiation and Worker Health (the Board)

Background

As discussed by the General Services Administration (GSA) memorandum dated March 14, 2000 (Addendum 1), Section 10(b) of the Federal Advisory Committee Act (FACA) provides that, subject to section 552 of title 5, U.S.C. (the Freedom of Information Act or FOIA), documents made available to or prepared for or by an advisory committee shall be made available for public inspection at a single location in the offices of the Advisory Committee or the agency to which it reports. The memorandum further explains that advisory committee records “may generally be withheld” if there is a reasonable expectation that the records sought fall within one of the exemptions of section 552(b) of FOIA¹; that agencies may not require members of the public to file requests for non-exempt committee records under the request and review process established by FOIA section 552(a)(3); and it recommends that agencies consider procedures for “segregating information and materials [among advisory committee records] that must be released under FACA section 10(b) from those that must be processed under FOIA.” Additional guidance concerning the implementation of FOIA generally, which is also germane under FACA as outlined above, is provided in a memorandum on FOIA dated March 19, 2009 from the Attorney General (Addendum 2). This memorandum elaborates on an earlier Presidential Memorandum requiring that FOIA be administered with “a presumption of openness” in the face of doubt. The Attorney General’s memorandum also recognizes that “the disclosure obligation is not absolute” and references the major exemptions of FOIA. With respect to these exemptions, it notes that FOIA requires that agencies take reasonable steps to segregate and release nonexempt information, consistent with the GSA Memorandum’s recommendation quoted above.

Section 10(b) of FACA mandates the public provision of a wide spectrum of Board records when they are not covered by FOIA exemptions. After careful consideration,

¹ Relevant FOIA exemptions are specified as follows:

“(b) This section does not apply to matters that are--

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; ...”

NIOSH has determined that the following procedures are consistent with the mandates and provisions of FACA and FOIA and the guidelines of GSA and the Attorney General referenced above. In doing so, NIOSH also specifically accounts for the unusual situation of the Board among FACA committees; whereas FACA committees are customarily supplied documents that they are asked by the Agency to directly consider to provide specific advice to the agency, the Board has extensive, self-governed access to agency records, with the exception of certain pre-decisional policy and procedural documents generated by the agency. Otherwise, the Board has access to all NIOSH documents obtained or generated by NIOSH related to the Energy Employees Occupational Illness Compensation Act (EEOICPA) activities, including non-classified records on nuclear weapons facilities, materials and processes; extensive records of claimants and petitioners; and scientific, technical, and procedural documents and data resources. The scope of this information accessible by the Board comprises millions of pages of information and data, much of it including personally identifiable information.

As noted above, FACA specifies a wide spectrum of document types that either must or could be defined as Board documents, subject to the exemptions of FOIA. These include: “records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by” the Board (5 U.S.C. § 10(b)). Therefore, NIOSH must establish a practical working definition of Board documents, consistent with FACA, to make publicly available the informational basis upon which the Board deliberates and provides its advice to the Secretary of HHS, as well as the records of such deliberation and advice. This practical definition will enable NIOSH to respond to public requests for nonexempt Board documents without involving the formal FOIA request process. Should NIOSH determine that a requested record does not fall within section 10(b) of FACA or is covered under section 552(b) of FOIA, it will instruct the requester to file a formal FOIA request.

Accordingly, NIOSH has developed the procedures outlined below to maintain the public’s right to access records under FOIA and FACA while also allowing the Board and the CDC contractor supporting the Board to obtain and consider documents and data managed by the Office of Compensation Analysis and Support (OCAS) that are needed to carry out their duties under EEOICPA. Such information includes documents and data obtained by OCAS, the CDC contractor supporting the Board, and OCAS contractors under EEOICPA. The Designated Federal Official (DFO) of the Board will cooperate with the Director of OCAS and the CDC contractor supporting the Board to oversee implementation of these procedures. Responses to questions regarding the procedures and their implementation shall be coordinated by the DFO.

PROCEDURES

1.0 Documents Prepared for or by the Board

1.1 Definition. “Documents Prepared for or by the Board” are documents created by the Board as part of its duties under EEOICPA or for the Board that are used as

part of the Board's work and its decision making process. These documents may include the following:

(a) reports and working papers prepared by the Board, a subcommittee of the Board, or a working group of the Board, including such reports and working papers as are issued to the Board by the CDC contractor supporting the Board or by OCAS specifically in response to a request by the Board or a subcommittee or workgroup thereof;

(b) transcripts of meetings of the Board or a subcommittee or workgroup thereof;

(c) letters written and transmitted by a consensus decision of the Board

Note: Documents under this section 1.1 do not include drafts of reports or working papers prepared by OCAS or by the CDC contractor supporting the Board until such documents are transmitted to the Board for its consideration. Any documents (or select content thereof) determined to be Board documents under this section may still be withheld from the public if they fall within one of the exemptions set forth in section 552(b) of FOIA or if they include content covered by the Privacy Act.

1.2 Procedure.

(a) All Board transcripts shall be posted on the OCAS Web Page upon clearance from a Privacy Act Review. Hard copy transcripts or excerpts thereof shall be made available, upon request, in the NIOSH OCAS reading room.

(b) All final reports prepared by the Board and received by the Board from the CDC contractor supporting the Board or from OCAS that do not fall within one of the exemptions set forth in section 552(b) of FOIA, shall be posted on the OCAS Web Page upon clearance from a Privacy Act Review and any review that may be required under provisions of the Department of Energy (DOE) Security Plan covering NIOSH and Board EEOICPA activities. These Board reports to be posted on the OCAS Web Page include:

- Final reports prepared by Board members that are approved by the Board for submission to the Secretary, HHS;
- Any final report submitted by OCAS for consideration by the Board;
- The most current version of site profile reviews, SEC petition reviews, dose reconstruction review summary reports, and procedure reviews submitted to the Board by the CDC contractor supporting the Board.

(c) Board working papers prepared and issued by the CDC contractor supporting the Board or OCAS for a subcommittee or working group meeting that do not fall within one of the exemptions set forth in section 552(b) of FOIA shall be transmitted by e-mail or made available by other means to related SEC Petitioners and, upon request, to other parties, upon clearance from a Privacy Act and DOE

Board working papers may include resolution matrices and technical papers on specific SEC petitions, site profiles, or dose reconstruction procedures. Board working papers do not include e-mail dialogue between individual Board Members, OCAS staff, and/or staff of the CDC contractor supporting the Board when such represent the views of the individuals involved rather than the final official views of the respective organization.

(d) All final Board technical papers discussed under 1.2(c) of these procedures shall be posted on the OCAS Web page upon clearance from a Privacy Act review and DOE Security review, when such DOE review is necessary.

(e) Draft reports prepared by Board members or Board Working Groups or Subcommittees and submitted for consideration by the Board shall be provided to members of the public upon request, after a Privacy Act review (provided that the request does not fall within one of the exemptions set forth in section 552(b) of FOIA).

(f) Members of the public requesting a Board document, as defined under section 1.1 of these procedures, shall make such a request in writing to the Board DFO. Provided that the request does not fall within one of the exemptions set forth in section 552(b) of FOIA, the individual shall not be required to file a FOIA request.

(g) A review of a document covered under section 1.1 of these procedures may determine that some or all of its content is subject to one or more FOIA exemptions or to requirements of the Privacy Act. Determinations regarding FOIA exemptions shall be made by a CDC FOIA Officer. Content protected by the Privacy Act or FOIA exemptions shall not be released to the requestor.

2.0 Records Obtained by the Board

- 2.1 Definition. “Records obtained by the Board” include NIOSH records (documents and data) that the Board has obtained and reviewed from the NIOSH System of Records associated with EEOICPA and has considered during a meeting of the Board or of its subcommittees or working groups. Such records have been “considered” when their content has been substantively discussed by the Board during a Board meeting to conduct work covered by the Board’s Charter. “Records obtained by the Board” also include records that the Board or a subcommittee or working group thereof has accepted directly from a source other

than NIOSH, such as documents and data submitted to the Board by private sector organizations, governmental agencies other than NIOSH, and members of the public. Such records from sources other than NIOSH are considered Board records once they have been shared with Board members at a Board meeting, subcommittee meeting, or working group meeting or have been provided to the Board through correspondence.

2.2 Procedure.

(a) Records obtained by the Board, as defined under 2.1 of these procedures, shall be provided to members of the public upon request, provided that the record does not fall within one of the exemptions set forth in section 552(b) of FOIA, after a Privacy Act review and, when necessary, after clearance by a DOE security review under the DOE Security Plan covering NIOSH and Board EEOICPA activities. Records in media that cannot be readily transmitted electronically or in print to the requestor (e.g., videos) will be made available for viewing in the NIOSH OCAS Reading Room.

(b) As noted in 2.2(a), a review of the document or data may determine that some or all of its content is subject to one or more FOIA exemptions or to the requirements of the Privacy Act. Determinations regarding FOIA exemptions shall be made by a CDC FOIA Officer. Such content shall not be released to the requestor.

(c) Members of the public requesting a Board document, as defined under section 2.1 of these procedures, shall make such a request in writing to the Board DFO. Provided that the request does not fall within one of the exemptions set forth in section 552(b) of FOIA, the individual shall not be required to file a FOIA request.

3.0 **Records Accessible to the Board**

3.1 Definition. “Records accessible to the Board” include all NIOSH records contained in the NIOSH System of Records associated with EEOICPA that are accessible to the Board but that have not been obtained and reviewed by the Board and considered by the Board during a meeting of the Board, as defined under section 2.1 of these procedures.

3.2 Procedure.

(a) NIOSH records accessible to the Board, as defined under section 3.1 of these procedures, are not considered Board documents. Such records may be provided to members of the public through a FOIA request and, when necessary, upon clearance by a DOE security review under the DOE Security Plan covering NIOSH and Board EEOICPA activities.

(b) A FOIA and Privacy Act review of the document or data may determine that some or all of its content is subject to one or more FOIA exemptions or to the requirements of the Privacy Act. Such content shall not be released to the requestor.

(c) Members of the public requesting a NIOSH record, as defined under 3.1 of these procedures, must submit a FOIA request to the CDC/ATSDR FOIA Office. CDC shall require a FOIA request before providing such records and such records shall be processed under the CDC FOIA policies and procedures.