confidential and protected by section 21(f) of the Federal Trade Commission Act, 15 U.S.C. 57b–2(f), and §4.10(d) of this part; or

(2) That is designated by the submitter as confidential, and protected by section 21(c) of the Federal Trade Commission Act, 15 U.S.C. 57b–2(c), and §4.10(e) of this part; or

(3) That is confidential commercial or financial information protected by section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and §4.10(a)(2) of this part, may be disclosed in Commission administrative or court proceedings subject to Commission or court protective or *in camera* orders as appropriate. See §§1.18(b) and 3.45.

Prior to disclosure of such material in a proceeding, the submitter will be afforded an opportunity to seek an appropriate protective or *in camera* order. All other material obtained by the Commission may be disclosed in Commission administrative or court proceedings at the discretion of the Commission except where prohibited by law.

(15 U.S.C. 41 *et seq.*)

[38 FR 1731, Jan. 18, 1973, as amended at 40 FR 7629, Feb. 21, 1975; 40 FR 23278, May 29, 1975; 42 FR 13540, Mar. 11, 1977; 46 FR 26291, May 12, 1981; 49 FR 30166, July 27, 1984; 54 FR 7399, Feb. 21, 1989; 57 FR 10807, Mar. 31, 1992; 60 FR 37749, July 21, 1995; 63 FR 38473, July 17, 1998; 65 FR 67259, Nov. 9, 2000; 66 FR 17633, Apr. 3, 2001]

§4.11 Disclosure requests.

(a) *Freedom of Information Act requests*—(1) *Initial requests*—(i) *Form and contents; time of receipt.* (A) A request under the provisions of the Freedom of Information Act, 5 U.S.C. 552, as amended, for access to Commission records shall be in writing and addressed as follows: Freedom of Information Act Request, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

(B) Failure to mark the envelope and the request in accordance with paragraph (a)(1)(i)(A) of this section, or the filing of a request for expedited treatment under paragraph (a)(1)(i)(E) of this section, will result in the request (or requests, if expedited treatment has been requested) being treated as received on the date that the processing unit in the Office of General Counsel actually receives the request(s).

(C) *Costs; agreement to pay costs.* Requesters will be charged search and duplication costs prescribed by Rule 4.8 for requests under this section. All requests shall include a statement of the information needed to determine fees, as provided by §4.8(c), and an agreement to pay fees (or a statement that the requester will not pay fees if a fee waiver is denied), as provided by §4.8(d). Requests may also include an application for a fee waiver, as provided by §4.8(e). An advance payment may be required in appropriate cases as provided by §4.8(h).

(D) *Failure to agree to pay fees.* If a request does not include an agreement to pay fees, and if the requester is notified of the estimated costs pursuant to Rule 4.8(d)(3), the request will be deemed not to have been received until the requester agrees to pay such fees. If a requester declines to pay fees and is not granted a fee waiver, the request will be denied.

(E) *Expedited treatment.* Requests may include an application for expedited treatment. Where such an application is not included with an initial request for access to records under paragraph (a)(1) of this section, the application may be included in any appeal of that request filed under paragraph (a)(2) of this section. Such application, which shall be certified by the requester to be true and correct to the best of such person's knowledge and belief, shall describe the compelling need for expedited treatment, including an explanation as to why a failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual, or, with respect to a request made by a person primarily engaged in disseminating information, an explanation of the urgency to inform the public concerning actual or alleged Federal Government activity. The deciding official (as designated by the General Counsel) will, within 10 calendar days of receipt of a request for expedited treatment, notify the requester, in writing, of the decision to either grant or deny the request

for expedited treatment, and, if the request is denied, advise the requester that this determination may be appealed to the General Counsel.

(F) *Records for sale at another government agency*. If requested materials are available for sale at another government agency, the requester will not be provided with copies of the materials but will be advised to obtain them from the selling agency.

(ii) *Identifiability*. (A) A request for access to Commission records must reasonably describe the records requested to enable Commission personnel to identify and locate them with a reasonable amount of effort. A request should be as specific as possible, and include, where known, information regarding dates, titles, file designations, location, and any other information which may assist the Commission in identifying and locating the records requested.

(B) A denial of a request may state that the description required by paragraph (a)(1)(ii)(A) of this section is insufficient to allow identification and location of the records.

(iii) *Time limit for initial determination*. (A) The deciding official (as designated by the General Counsel) will, within 20 working days of the receipt of a request, either grant or deny, in whole or in part, such request, unless the request has been granted expedited treatment in accordance with this section, in which case the request will be processed as soon as practicable.

(B) Except in exceptional circumstances as provided in paragraph (a)(1)(iii)(C) of this section, the deciding official (as designated by the General Counsel) may extend the time limit by not more than 10 working days if such extension is:

(*1*) Necessary for locating records or transferring them from physically separate facilities; or

(*2*) Necessary to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are sought in a single or series of closely related requests; or

(*3*) Necessary for consultation with another agency having a substantial interest in the determination, or for consultation among two or more components of the Commission having substantial subject matter interest therein.

(C) If the deciding official (as designated by the General Counsel) extends the time limit for initial determination pursuant to paragraph (a)(1)(iii)(B) of this section, the requester will be notified in accordance with 5 U.S.C. 552(a)(6)(B). In exceptional circumstances, when the request cannot be processed within the extended time limit, the requester will be so notified and provided an opportunity to limit the scope of the request so that it may be processed within such time limit, or to arrange an alternative time frame for processing the request or a modified request. ''Exceptional'' circumstances will not include delays resulting from a predictable workload of requests under this section. Unwillingness to make reasonable modifications in the scope of the request or to agree to an alternative time frame may be considered as factors in determining whether exceptional circumstances exist and whether the agency has exercised due diligence in responding to the request.

(D) If the deciding official (as designated by the General Counsel) reasonably believes that requests made by a requester, or a group of requesters acting in concert, actually constitute a single request that would otherwise involve unusual circumstances, as specified in paragraph (a)(1)(iii)(B) of this section, and the requests involve clearly related matters, those multiple requests may be aggregated.

(E) If a request is not granted within the time limits set forth in paragraphs (a)(1)(iii) (A) and (B) of this section, the request shall be deemed to be denied and the requesting party may appeal such denial to the General Counsel in accordance with paragraph (a)(2) of this section.

(iv) *Initial determination*. (A) The deciding official (as designated by the General Counsel) will make reasonable efforts to search, using either manual or electronic means, for the requested records in electronic form or format, except when such efforts would significantly interfere with the operation of the Commission's automated information systems. Access will be granted to requested records, or any portions

thereof, that must be made available under the Freedom of Information Act. Access will be denied to records that are exempt under the Freedom of Information Act, 5 U.S.C. 552(b), unless the deciding official (as designated by the General Counsel) determines that such records fall within a category the Commission or the General Counsel has previously authorized to be made available to the public as a matter of policy. Denials will set forth the reasons therefor and advise the requester that this determination may be appealed to the General Counsel if the requester believes either that the records are not exempt, or that the General Counsel should exercise discretion to release such records notwithstanding their exempt status. The deciding official (as designated by the General Counsel) will also provide a reasonable, good-faith estimate of the volume of any materials to which access is denied, unless providing such an estimate would harm an interest protected by an exemption in 5 U.S.C. 552(b) that was cited as a basis for withholding materials.

(B) The deciding official (as designated by the General Counsel) is deemed to be the sole official responsible for all denials of initial requests, except denials of access to materials contained in active investigatory files, in which case the Director or Deputy Director of the Bureau or the Director of the Regional Office responsible for the investigation will be the responsible official.

(C) Records to which access has been granted will be made available to the requester in any form or format specified by the requester, if the records are readily reproducible in that form or format, or can be converted to that form or format with a reasonable amount of effort, and they will remain available for inspection and copying for a period not to exceed 30 days from date of notification to the requester unless the requester asks for and receives the consent of the deciding official (as designated by the General Counsel) to a longer period. Records assembled pursuant to a request will remain available only during this period and thereafter will be refiled. Appropriate fees may be imposed for any new or renewed request for the same records.

(D) If a requested record cannot be located from the information supplied, or is known to have been destroyed or otherwise disposed of, the requester shall be so notified.

(2) *Appeals to the General Counsel from initial denials*—(i) *Form and contents; time of receipt.* (A)(*1*) If an initial request for expedited treatment is denied, the requester, at any time before the initial determination of the underlying request for records by the deciding official (as designated by the General Counsel) (or, if the request for expedited treatment was filed with any appeal filed under paragraph (a)(2)(i)(A)(*2*) of this section, at any time before the General Counsel's determination on such an appeal), may appeal the denial of expedited treatment to the General Counsel.

(*2*) If an initial request for records is denied in its entirety, the requester may, within 30 days of the date of the determination, appeal such denial to the General Counsel. If an initial request is denied in part, the time for appeal will not expire until 30 days after the date of the letter notifying the requester that all records to which access has been granted have been made available.

(*3*) The appeal shall be in writing and should include a copy of the initial request and a copy of the response to that initial request, if any. The appeal shall be addressed as follows: Freedom of Information Act Appeal, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

(B) Failure to mark the envelope and the appeal in accordance with paragraph (a)(2)(i)(A) of this section will result in the appeal (and any request for expedited treatment filed with that appeal) being treated as received on the actual date of receipt by the Office of General Counsel.

(C) Each appeal to the General Counsel which requests him to exercise his discretion to release exempt records shall set forth the interest of the requester in the subject matter and the purpose for which the records will be used if the request is granted.

(ii) *Time limit for appeal.* (A)(*1*) Regarding appeals from initial denials of a request for expedited treatment, the General Counsel will either grant or deny the appeal expeditiously;

(*2*) Regarding appeals from initial denials of a request for records, the General Counsel will, within 20 working days of the receipt of such an appeal, either grant or deny it, in whole or in part, unless expedited treatment has been granted in accordance with this section, in which case the appeal will be processed as soon as practicable.

(B) The General Counsel may, by written notice to the requester in accordance with 5 U.S.C. 552(a)(6)(B), extend the time limit for deciding an appeal by not more than 10 working days pursuant to paragraph (a)(1)(iii)(B) of this section, provided that the amount of any extension utilized during the initial consideration of the request under that paragraph will be subtracted from the amount of additional time otherwise available. Where exceptional circumstances do not permit the processing of the appeal within the extended time limit, the notice and procedures set forth in paragraph (a)(1)(iii)(C) of this section shall apply.

(iii) *Determination of appeal.* (A) The General Counsel has the authority to grant or deny all appeals and to release as an exercise of discretion records exempt from mandatory disclosure under 5 U.S.C. 552(b). In unusual or difficult cases, the General Counsel may, in his or her sole discretion, refer an appeal to the Commission for determination. A denial of an appeal in whole or in part will set forth the basis for the denial; will include a reasonable, good-faith estimate of the volume of any materials to which access is denied, unless providing such an estimate would harm an interest protected by an exemption in 5 U.S.C. 552(b) that was cited as a basis for withholding materials; and will advise the requester that judicial review of the decision is available by civil suit in the district in which the requester resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia.

(B) The General Counsel shall be deemed solely responsible for all denials of appeals, except where an appeal is denied by the Commission. In such instances, the Commission shall be deemed solely responsible for the denial.

(b) *Requests from congressional committees and subcommittees.* Requests from congressional committees and subcommittees for nonpublic material shall be referred to the General Counsel for presentation to the Commission, subject to the provisions in 5 U.S.C. 552(c) and FTC Act 21(b) that neither the Freedom of Information Act, 5 U.S.C. 552, nor the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.*, is authority to withhold information from Congress. Upon receipt of a request from a congressional committee or subcommittee, notice will be given to the submitter of any material marked confidential, or any material within the scope of § 4.10(a)(9), that is responsive to the request that the request has been received. No other notice need be provided prior to granting the request. The Commission will inform the committee or subcommittee that the submitter considers such information confidential.

(c) *Requests from Federal and State law enforcement agencies.* Requests from law enforcement agencies of the Federal and State governments for nonpublic records shall be addressed to a liaison officer, where the Commission has appointed such an officer, or if there is none, to the General Counsel. With respect to requests under this paragraph, the General Counsel, the General Counsel's designee, or the appropriate liaison officer is delegated the authority to dispose of them. Alternatively, the General Counsel may refer such requests to the Commission for determination, except that requests must be referred to the Commission for determination where the Bureau having the material sought and the General Counsel do not agree on the disposition. Prior to granting access under this section to any material submitted to the Commission, the General Counsel, the General Counsel's designee, or the liaison officer will obtain from the requester a certification that such information will be maintained in confidence and will be used only for official law enforcement purposes. The certificate will also describe the nature

of the law enforcement activity and the anticipated relevance of the information to that activity. A copy of the certificate will be forwarded to the submitter of the information at the time the request is granted unless the agency requests that the submitter not be notified. Requests for material pursuant to compulsory process, or for voluntary testimony, in cases or matters in which the Commission is not a party will be treated in accordance with paragraph (e) of this section.

(d) *Requests from Federal and State agencies for purposes other than law enforcement.* Requests from Federal and State agencies for access to nonpublic records for purposes not related to law enforcement should be addressed to the General Counsel. The General Counsel or the General Counsel's designee is delegated the authority to dispose of requests under this paragraph. Disclosure of nonpublic information will be made consistent with sections 6(f) and 21 of the FTC Act. Requests under this section shall be subject to the fee and fee waiver provisions of §4.8. Requests for material pursuant to compulsory process, or for voluntary testimony, in cases or matters in which the Commission is not a party will be treated in accordance with paragraph (e) of this section.

(e) *Requests for testimony, pursuant to compulsory process or otherwise, and requests for material pursuant to compulsory process, in cases or matters to which the Commission is not a party.* (1) The procedures specified in this section will apply to compulsory process and requests for voluntary testimony directed to Commission employees, except special government employees, that relate in any way to the employees' official duties. These procedures will also apply to compulsory process and requests for voluntary testimony directed to former Commission employees or to current or former special government employees of the Commission that seek nonpublic materials or information acquired during Commission employment. The provisions of paragraph (e)(3) of this section will also apply when requests described above are directed to the Commission. For purposes of this section, the term *testimony* includes any written or oral statement by a witness, such as depositions, affidavits, declarations, and statements at a hearing or trial; the term *nonpublic* includes any material or information which, under §4.10, is not required to be made public; the term *employees,* except where otherwise specified, includes *special government employees* and other Commission employees; and the term *special government employees* includes consultants and other employees as defined by section 202 of title 18 of the United States Code.

(2) Any employee or former employee who is served with compulsory process shall promptly advise the General Counsel of its service, the nature of the material or information sought, and all relevant facts and circumstances. This notification requirement also applies to any employee or former employee whose testimony is sought on a voluntary basis under the conditions set forth in paragraph (e)(1) of this section.

(3) A party who causes compulsory process to be issued to, or who requests testimony by, the Commission or any employee or former employee of the Commission shall furnish a statement to the General Counsel, unless, with respect to a request by a Federal or State agency, the General Counsel determines, as a matter of discretion, to waive this requirement. The statement shall set forth the party's interest in the case or matter, the relevance of the desired testimony or material, and a discussion of whether it is reasonably available from other sources. If testimony is desired, the statement shall also contain a general summary of the testimony and a discussion of whether Commission records could be produced and used in its place. Any authorization for testimony will be limited to the scope of the demand as summarized in such statement.

(4) Absent authorization from the General Counsel, the employee or former employee shall respectfully decline to produce requested material or to disclose requested information. The refusal should be based on this paragraph and on *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951).

(5) The General Counsel will consider and act upon compulsory process and requests for voluntary testimony under

this section with due regard for statutory restrictions, the Commission's rules and the public interest, taking into account such factors as the need to conserve the time of employees for conducting official business; the need to avoid spending the time and money of the United States for private purposes; the need to maintain impartiality between private litigants in cases where a substantial government interest is not involved; and the established legal standards for determining whether justification exists for the disclosure of confidential information and material.

(6) Invitations to testify before Congressional committees or subcommittees or to testify before other government bodies on the possible effects of legislative and regulatory proposals are not subject to paragraphs (e)(1) through (5) of this section.

(f) Requests by current or former employees to use nonpublic memoranda as writing samples shall be addressed to the General Counsel. The General Counsel or the General Counsel's designee is delegated the authority to dispose of such requests consistent with applicable nondisclosure provisions, including sections 6(f) and 21 of the FTC Act.

(g) Employees are encouraged to engage in teaching, lecturing, and writing that is not prohibited by law, Executive order, or regulation. However, an employee shall not use information obtained as a result of his Government employment, except to the extent that such information has been made available to the general public or will be made available on request, or when the General Counsel or the General Counsel's designee gives written authorization for the use of nonpublic information on the basis that the use is in the public interest.

(h) The General Counsel (or General Counsel's designee) may authorize a Commission member, other Commission official, or Commission staff to disclose an item or category of information from Commission records not currently available to the public for routine inspection and copying under Rule 4.9(b) where the General Counsel (or General Counsel's designee) determines that such disclosure would facilitate the conduct of official agency business and would not otherwise be prohibited by applicable law, order, or regulation. Requests for such determinations shall be set forth in writing and, in the case of staff requests, shall be forwarded to the General Counsel (or General Counsel's designee) through the relevant Bureau. In unusual or difficult cases, the General Counsel may refer the request to the Commission for determination.

(i) The Director of the Bureau of Competition is authorized, without power of redelegation, to respond to access requests for records and other materials pursuant to an agreement under the International Antitrust Enforcement Assistance Act, 15 U.S.C. 6201 *et seq*. Before responding to such a request, the Bureau Director shall transmit the proposed response to the Secretary and the Secretary shall notify the Commission of the proposed response. If no Commissioner objects within three days following the Commission's receipt of such notification, the Secretary shall inform the Bureau Director that he or she may proceed.

(15 U.S.C. 41 *et seq*.)

[40 FR 7629, Feb. 21, 1975, as amended at 42 FR 13820, Mar. 14, 1977; 43 FR 5802, Feb. 10, 1978; 46 FR 26292, May 12, 1981; 48 FR 4280, Jan. 31, 1983; 49 FR 20279, May 14, 1984; 49 FR 21048, May 18, 1984; 50 FR 53306, Dec. 31, 1985; 55 FR 29839, July 23, 1990; 57 FR 10807, Mar. 31, 1992; 58 FR 15764, Mar. 24, 1993; 60 FR 37750, July 21, 1995; 63 FR 32978, June 17, 1998; 63 FR 45647, Aug. 26, 1998; 64 FR 3013, Jan. 20, 1999; 64 FR 32180, June 16, 1999; 64 FR 35256, June 30, 1999; 65 FR 67259, Nov. 9, 2000; 66 FR 64144, Dec. 12, 2001]

§ 4.12 Disposition of documents submitted to the Commission.

(a) *Material submitted to the Commission*. (1) Any person who has submitted material to the Commission may obtain, on request, the return of material submitted to the Commission which has not been received into evidence:

(i) After the close of the proceeding in connection with which the material was submitted; or

(ii) When no proceeding in which the material may be used has been commenced within a reasonable time after completion of the examination and analysis of all such material and other