



[4334-63]

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 2

[No. DOI-2016-0006; 17XD4523WS DS10200000 DWSN00000.000000 WBS DP10202]

RIN 1093-AA21

Freedom of Information Act Regulations

AGENCY: Office of the Secretary, Interior

ACTION: Final rule.

SUMMARY: This rule revises the regulations that the Department of the Interior (Department) follows in processing records under the Freedom of Information Act in part to comply with the FOIA Improvement Act of 2016. The revisions clarify and update procedures for requesting information from the Department and procedures that the Department follows in responding to requests from the public.

DATES: This rule is effective on **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Cindy Cafaro, Office of Executive Secretariat and Regulatory Affairs, 202-208-5342.

SUPPLEMENTARY INFORMATION:

I. Why We're Publishing This Rule and What It Does.

A. Introduction

In late 2012, the Department published a final rule updating and replacing the Department's previous Freedom of Information Act (FOIA) regulations. In early 2016, the Department updated that final rule, primarily to authorize the Office of Inspector General to process their own FOIA appeals. On June 30, 2016, the FOIA Improvement Act of 2016, Pub. L. 114-185, 130 Stat. 538 (the Act) was enacted. The Act specifically requires all agencies to review and update their FOIA regulations in accordance with its provisions. In addition, the Department has received feedback from its FOIA practitioners and requesters and identified areas where it would be possible to further update, clarify, and streamline the language of some procedural provisions.

On September 20, 2016, the Department published a proposed rule in the **Federal Register** (81 FR 64401) to implement the Act and address the feedback received. We requested comments on the proposed rule over a 60-day period ending on November 21, 2016, and we considered all comments received in drafting this final rule. Accordingly, the Department is making the following changes to 43 CFR part 2:

- Section 2.4(e) is amended to provide additional guidance on how bureaus handle misdirected requests.
- Section 2.15 is amended to bring attention to the Department's existing FOIA Request Tracking Tool (<https://foia.doi.gov/requeststatus>).
- Section 2.19 is amended to bring further attention to the services provided by the Office of Government Information Services (OGIS), in accordance with the provisions of the Act.
- Section 2.21 is amended to reflect that the OGIS would be defined earlier in the

regulations than it previously had been and to reference bureaus' FOIA Public Liaisons, in addition to the OGIS.

- Section 2.24 is amended to require a foreseeable harm analysis, in accordance with the provisions of the Act, and to require bureaus to provide an explanation to the requester when an estimate of the volume of any records withheld in full or in part is not provided.
- Section 2.37(f) is amended to reflect the provisions of the Act.
- Section 2.39 is amended to remove what will be superfluous language, after the changes to section 2.37(f).
- Section 2.58 is amended to provide more time for requesters to appeal, in accordance with the provisions of the Act.
- Section 2.66(d) is amended to reflect an updated website link.

B. Discussion of Comments

Six commenters responded to the invitation for comments, including two commenters from subcomponents of Federal agencies and four commenters from non-Federal sources. Two of these commenters offered substantive suggestions on specific existing provisions of the rule that are not being amended; these suggestions are outside the scope of this rulemaking and are not addressed below. The commenters generally supported the proposed changes, with the exception of one commenter who stated the Act makes it harder to collect fees in FOIA requests that require submitter notifications (a comment that, because it concerns the Act itself, is not within the scope of this rulemaking). However, one commenter suggested that § 2.21 should require certain bureau responses to requesters inform the requesters of their

right to seek assistance from FOIA Public Liaisons, in accordance with the Act. We agree and have modified our edits to this section accordingly.

C. Technical and Procedural Comments

In the interests of clarity and consistency, the Department made very minor clarifications and added, moved, and deleted phrases in § 2.37(f)(2)(i) and (ii). The Department also updated a website link in § 2.66(d).

II. Compliance with laws and executive orders.

1. Regulatory Planning and Review (Executive Orders 12866 and 13563).

Executive Order (E.O) 12866 provides that the Office of Information and Regulatory Affairs will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rulemaking is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive Order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

2. Regulatory Flexibility Act.

The Department of the Interior certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

3. Small Business Regulatory Enforcement Fairness Act.

This is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

- a. Does not have an annual effect on the economy of \$100 million or more.
- b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.
- c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

4. Unfunded Mandates Reform Act.

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. This rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 et seq.) is not required.

5. Takings (E.O. 12630).

In accordance with Executive Order 12630, this rule does not have significant takings implications. A takings implication assessment is not required.

6. Federalism (E.O. 13132).

In accordance with Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. It would not substantially and directly affect the relationship between the Federal and state governments. A federalism summary impact statement is not required.

7. Civil Justice Reform (E.O. 12988).

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

8. Consultation with Indian Tribes (E.O. 13175).

Under the criteria in Executive Order 13175, we have evaluated this rule and determined that it has no potential effects on federally recognized Indian tribes. This rule does not have tribal implications that impose substantial direct compliance costs on Indian Tribal governments.

9. Paperwork Reduction Act.

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget under the Paperwork Reduction Act is not required.

10. National Environmental Policy Act.

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq. (NEPA), is not required. Pursuant to 43 CFR 46.205(b) and 43 CFR 46.210(i), the Department of the Interior NEPA implementing procedures exclude from preparation of an environmental assessment or impact statement “[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature....” None of the extraordinary circumstances listed in 43 CFR 46.215 exists for this rule.

Accordingly, this rule is categorically excluded from environmental analysis under 43 CFR 46.210(i).

11. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required. This rule will not have a significant effect on the nation's energy supply, distribution, or use.

12. Clarity of this regulation.

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

List of Subjects in 43 CFR Part 2

Freedom of information.

Elizabeth Klein
Principal Deputy Assistant Secretary for Policy, Management and Budget

For the reasons stated in the preamble, the Department of the Interior amends part 2 of title 43 of the Code of Federal Regulations as follows:

PART 2—FREEDOM OF INFORMATION ACT; RECORDS AND TESTIMONY

1. The authority citation for part 2 continues to read as follows:

AUTHORITY: 5 U.S.C. 301, 552, 552a, 553; 31 U.S.C. 3717; 43 U.S.C. 1460, 1461.

Subpart B—How to Make a Request

2. In § 2.4, revise paragraph (e) to read as follows:

§ 2.4 Does where you send your request affect its processing?

* * * * *

(e) If your request is received by a bureau that believes it is not the appropriate bureau to process your request, the bureau that received your request will attempt to contact you (if possible, via telephone or email) to confirm that you deliberately sent your request to that bureau for processing. If you do not confirm this, the bureau will deem your request misdirected and route the misdirected request to the appropriate bureau to respond under the basic time limit outlined in § 2.17.

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Subpart D—Timing of Responses to Requests

3. In § 2.15, add paragraph (g) to read as follows:

§ 2.15 What is multitrack processing and how does it affect your request?

* * * * *

(g) You may track the status of your request, including its estimated processing completion date, at <https://foia.doi.gov/requeststatus/>.

§ 2.19—[Amended]

4. In § 2.19(b)(2), add the words “, and notify you of your right to seek dispute resolution from the Office of Government Information Services (OGIS)” after the words “you and the bureau”.

Subpart E—Responses to Requests

5. Amend § 2.21(a) by removing the second sentence and adding two sentences in its place to read as follows:

§ 2.21 How will the bureau respond to requests?

(a) * * * The bureau’s written response will include a statement about the services offered by its FOIA Public Liaison. The bureau’s written response will also include a statement about the services offered by OGIS, using standard language that can be found at:

[https://www.doi.gov/foia/news/guidance.](https://www.doi.gov/foia/news/guidance)”

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§ 2.24—[Amended]

6. Amend § 2.24 by:

a. In paragraph (b)(3), adding the words “, along with a statement that the bureau reasonably foresees that disclosure would harm an interest protected by the applied exemption(s) or disclosure is prohibited by law” after the words “or in part”; and

b. In paragraph (b)(4), adding the word “including” after the word “unless” and adding the words “and the bureau explains this harm to you” after the words “withhold the records”.

Subpart G—Fees

7. In § 2.37, revise paragraph (f) to read as follows:

§ 2.37 What general principles govern fees?

* * * * *

(f) If the bureau does not comply with any time limit in the FOIA:

(1) Except as provided in paragraph (f)(2) of this section, the bureau cannot assess any search fees (or, if you are in the fee category of a representative of the news media or an educational and noncommercial scientific institution, duplication fees).

(2)(i) If the bureau has determined that unusual circumstances apply (as the term is defined in §2.70) and the bureau provided you a timely written notice to extend the basic time limit in accordance with § 2.19, the noncompliance is excused for an additional 10 workdays.

(ii) If the bureau has determined that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, the noncompliance is excused if the bureau has provided you a timely written notice in accordance with § 2.19 and has discussed with you via written mail, email, or telephone (or made not less than 3 good-faith attempts to do so) how you could effectively limit the scope of the request.

(iii) If a court has determined that exceptional circumstances exist (as that term is defined in §2.70), the noncompliance is excused for the length of time provided by the court order.

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§ 2.39—[Amended]

8. In § 2.39, remove the paragraph (a) designation and remove paragraph (b).

Subpart H—Administrative Appeals

§ 2.58—[Amended]

9. In § 2.58(a) and (b), remove the number “30” and add in its place the number “90”.

Subpart I—General Information

§ 2.66—[Amended]

10. In § 2.66(d), remove the website address

“*http://www.doi.gov/foia/servicecenters.cfm*” and add in its place the website address

“*https://www.doi.gov/foia/servicecenters*”.

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