



This document is scheduled to be published in the Federal Register on 01/04/2017 and available online at <https://federalregister.gov/d/2016-31508>, and on FDsys.gov

Billing Code 4410-BE

DEPARTMENT OF JUSTICE

28 CFR Part 16

Docket No. OAG 155

RIN 1105-AB51; A.G. Order No. 3803-2016

Revision of Department of Justice Freedom of Information Act Regulations

AGENCY: Department of Justice.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule amends the Department of Justice's regulations under the Freedom of Information Act (FOIA) to incorporate certain changes made to the FOIA by the FOIA Improvement Act of 2016. In addition, this rule amends certain provisions in the fee section to reflect developments in the case law and to streamline the description of the factors to be considered when making fee waiver determinations.

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

Comment Date: Public comments must be submitted by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments submitted by mail will be accepted as timely if they are postmarked on or before that date. Electronic comments may be submitted via www.regulations.gov prior to midnight Eastern Time at the end of that day.

ADDRESSES: You may submit written comments, identified by RIN 1105-AB51 or Docket No. OAG 155, by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Lindsay Roberts, Attorney-Advisor, Office of Information Policy, 1425 New York Avenue, N.W., Room 11050, Washington, DC 20530.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. For additional details on submitting comments, see the “Public Participation” heading of the SUPPLEMENTARY INFORMATION section of this document

FOR FURTHER INFORMATION CONTACT: Lindsay Roberts, Attorney-Advisor, Office of Information Policy, (202) 514-3642.

SUPPLEMENTARY INFORMATION:

This rule amends the Department’s regulations under the Freedom of Information Act to incorporate certain changes made to the FOIA, 5 U.S.C. 552, by the FOIA Improvement Act of 2016, Public Law 114-185, 130 Stat. 538 (June 30, 2016). The FOIA Improvement Act of 2016 provides that agencies must allow a minimum of 90 days for requesters to file an administrative appeal. The Act also requires that agencies notify requesters of the availability of dispute resolution services at various times throughout the FOIA process. Finally, the Act codifies the Department of Justice’s “foreseeable harm” standard. This rule updates the Department’s regulations in 28 CFR part 16, subpart A, to reflect those statutory changes.

In addition, as explained below, this rule amends provisions in § 16.10 (Fees) to incorporate the new statutory restrictions on charging fees in certain circumstances, to reflect developments in the case law, and to streamline the description of the factors to be considered when making fee waiver determinations.

Section 16.1 (General provisions) is revised to delete the reference to the Department's policy regarding discretionary release of information whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption, because that foreseeable harm standard is now part of the FOIA statute itself as a result of the FOIA Improvement Act of 2016.

Section 16.2 (Proactive disclosure of Department records) is revised to more clearly reflect the FOIA Improvement Act of 2016's requirement that records the FOIA requires agencies to make available for public inspection must be in an electronic format, rather than simply made available for public inspection and copying.

Section 16.4 (Responsibility for responding to requests) is revised to remove the reference to discretionary release of information when another component or agency is better able to make the determination because the foreseeable harm standard is now part of the FOIA statute itself as a result of the FOIA Improvement Act of 2016.

Section 16.5 (Timing of responses to requests) is revised to include a requirement that components notify requesters of the availability of assistance from the Office of Government Information Services (OGIS) at the National Archives and Records Administration when the component gives notice to requesters that the request involves unusual circumstances. This notification is required by the FOIA Improvement Act of 2016.

Section 16.6 (Responses to requests) is revised to include requirements that components notify requesters of the availability of assistance from a FOIA Public Liaison and OGIS when providing requesters with responses to their requests. These notifications are required by the FOIA Improvement Act of 2016.

Section 16.8 (Administrative appeals) is revised to extend the time to file an administrative appeal to 90 days, in conformity with the 90-day minimum time period

established by the FOIA Improvement Act of 2016. This section is also revised to include a new paragraph regarding engaging in dispute resolution services provided by OGIS.

Paragraph (b) of § 16.10 (Fees) is revised to conform to recent decisions of the D.C. Circuit Court of Appeals addressing two FOIA fee categories: “representative of the news media” and “educational institution.” *See Cause of Action v. FTC*, 799 F.3d 1108 (D.C. Cir. 2015); *Sack v. DOD*, 823 F.3d 687 (D.C. Cir. 2016). The Department’s existing FOIA regulations state that a representative of the news media is “any person or entity that is organized and operated to publish or broadcast news to the public that actively gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” In *Cause of Action*, 799 F.3d at 1125, the court held that a representative of the news media need not work for an entity that is “organized and operated” to publish or broadcast news. Therefore, the definition of “representative of the news media” is revised to remove the “organized and operated” requirement. The definition of “educational institution” is revised to reflect the holding in *Sack*, 823 F.3d at 688, that students who make FOIA requests in furtherance of their coursework or other school-sponsored activities may qualify under this requester category.

Paragraph (d)(2) of § 16.10, which addresses restrictions on charging fees when the FOIA’s time limits are not met, is revised to reflect changes made to those restrictions by the FOIA Improvement Act of 2016. Specifically, these changes reflect that agencies may not charge search fees (or duplication fees for representatives of the news media and educational/non-commercial scientific institution requesters) when the agency fails to comply with the FOIA’s time limits. The restriction on charging fees is excused and the agency may

charge fees as usual when it satisfies one of three exceptions detailed at 5 U.S.C.

552(a)(4)(A)(viii)(II).

Lastly, this rule revises paragraph (k) of § 16.10, which addresses the requirements for a waiver or reduction of fees, to specify that requesters may seek a waiver of fees and to streamline and simplify the description of the factors to be considered by components when making fee waiver determinations. These updates do not substantively change the analysis, but instead present the factors in a way that is clearer to both components and requesters. Rather than six factors, the amended section provides for three overall factors. Specifically, a requester should be granted a fee waiver if the requested information 1) sheds light on the activities and operations of the government; 2) is likely to contribute significantly to public understanding of those operations and activities; and 3) is not primarily in the commercial interest of the requester. This streamlined description facilitates easier understanding and application of the statutory standard.

Public Participation

The Department is issuing an interim rule to make these revisions in the Department's FOIA regulations, because these changes merely bring the regulations into alignment with the provisions contained in the FOIA Improvement Act of 2016 and with current case law and clarify the procedure the Department uses for making fee waiver determinations. This approach allows these regulatory changes to take effect sooner than would otherwise be possible with the publication of a Notice of Proposed Rulemaking in advance. Nevertheless, the Department welcomes public comments from any interested person on any aspect of the changes made by this interim final rule. Please refer to the ADDRESSES section above. The Department will carefully consider all public comments in the drafting of the final rule.

Please note that all comments received are considered part of the public record and are made available for public inspection online at <http://www.regulations.gov>. The information made available includes personal identifying information (such as name and address) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name and address) as part of your comment, but do not want it to be posted online, you must include the phrase “PERSONAL IDENTIFYING INFORMATION” in the first paragraph of your comment. You also must locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify what information you want redacted. If you want to submit confidential business information as part of your comment, but do not want it to be posted online, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You also must prominently identify any confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on <http://www.regulations.gov>.

Personal identifying information and confidential business information identified and located as set forth above will be placed in the agency’s public docket file, but not posted online. If you wish to inspect the agency’s public docket file in person, please see the FOR FURTHER INFORMATION CONTACT paragraph above to schedule an appointment.

Regulatory Certifications

Administrative Procedure Act

The Department’s implementation of this rule as an interim final rule, with provision for post-promulgation public comment, is based on section 553(b) of the Administrative Procedure

Act. 5 U.S.C. 553(b). Under section 553(b), an agency may issue a rule without notice of proposed rulemaking and the pre-promulgation opportunity for public comment, with regard to “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” The Department has determined that many of the revisions being made are interpretive rules issued by the Department, as they merely advise the public of the Department’s construction of the new statute and clarify the application of the substantive law. Moreover, the Department has determined that the remaining revisions are rules of agency procedure or practice, as they do not change the substantive standards the agency applies in implementing the FOIA. The Department has also concluded that there is good cause to find that a pre-publication public comment period is unnecessary. These revisions to the existing regulations in 28 CFR part 16 merely implement the statutory changes, align the Department’s regulations with controlling judicial decisions, and clarify agency procedures.

Regulatory Flexibility Act

This rule amends the Department of Justice’s regulations under the FOIA to incorporate certain changes made by the FOIA Improvement Act of 2016, and to reflect developments in the case law and to streamline the description of the factors to be considered when making fee waiver determinations. Because the Department is not required to publish a notice of proposed rulemaking for this rule, a Regulatory Flexibility analysis is not required. 5 U.S.C. 603(a).

Executive Orders 12866 and 13563— Regulatory Review

This regulation has been drafted and reviewed in accordance with Executive Order 12866, “Regulatory Planning and Review,” section 1(b), Principles of Regulation, and in accordance with Executive Order 13563 “Improving Regulation and Regulatory Review,” section 1(b), General Principles of Regulation. The Department of Justice has determined that this rule is not a

“significant regulatory action” under Executive Order 12866, section 3(f), Regulatory Planning and Review, and accordingly this rule has not been reviewed by the Office of Management and Budget. Further, both Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Department has assessed the costs and benefits of this regulation and believes that the regulatory approach selected maximizes net benefits.

Executive Order 13132—Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, the Attorney General has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988—Civil Justice Reform

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. *See* 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

List of Subjects in 28 CFR Part 16

Administrative practice and procedure, Freedom of information, Privacy.

Accordingly, for the reasons stated in the preamble, 28 CFR Chapter 1, part 16 is amended as follows:

PART 16 – DISCLOSURE OR PRODUCTION OF MATERIAL OR INFORMATION

1. Revise the authority citation for part 16 to read as follows:

Authority: 5 U.S.C. 301, 552, 552a, 553; 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717.

§ 16.1 [Amended]

2. In § 16.1, remove the last sentence of paragraph (a).

3. In § 16.2, revise the first sentence, to read as follows:

§ 16.2 Proactive disclosure of Department records.

Records that are required by the FOIA to be made available for public inspection in an electronic format may be accessed through the Department's Web site at

http://justice.gov/oip/04_2.html. * * *

4. In § 16.4, revise the first sentence of paragraph (d) introductory text, to read as follows:

§ 16.4 Responsibility for responding to requests.

* * * * *

(d) * * * When reviewing records located by a component in response to a request, the component shall determine whether another component or another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA. * * *

* * * * *

5. In §16.5, add a sentence at the end of paragraph (c), to read as follows:

§ 16.5 Timing of responses to requests.

* * * * *

(c) * * * The component must also alert requesters to the availability of the Office of Government Information Services to provide dispute resolution services.

* * * * *

6. In § 16.6, add a sentence at the end of paragraph (c), and add paragraph (e)(5), to read as follows:

§ 16.6 Responses to requests.

* * * * *

(c) * * *. The component must inform the requester of the availability of the FOIA Public Liaison to offer assistance.

* * * * *

(e) * * *

(5) A statement notifying the requester of the assistance available from the component's FOIA Public Liaison and the dispute resolution services offered by the Office of Government Information Services.

* * * * *

7. In § 16.8:

- a. Remove the term “60 calendar days” in paragraph (a) and add in its place “90 calendar days”;
- b. Redesignate paragraph (d) as paragraph (e); and
- c. Add a new paragraph (d), to read as follows:

§ 16.8 Administrative appeals.

* * * * *

(d) Engaging in dispute resolution services provided by OGIS. Mediation is a voluntary process. If a component agrees to participate in the mediation services provided by the Office of Government Information Services, it will actively engage as a partner to the process in an attempt to resolve the dispute.

* * * * *

6. In § 16.10:

- a. Revise paragraph (b)(4) and Example 3 to paragraph (b)(4);
- b. Revise the first sentence of paragraph (b)(6); and
- c. Revise paragraph (d)(2) and paragraph (k), to read as follows:

§ 16.10 Fees.

* * * * *

(b) * * *

* * * * *

(4) Educational institution is any school that operates a program of scholarly research.

A requester in this fee category must show that the request is made in connection with the requester’s role at the educational institution. Components may seek assurance from the requester that the request is in furtherance of scholarly research and will advise requesters of their placement in this category.

* * * * *

Example 3. A student who makes a request in furtherance of the student’s coursework or other school-sponsored activities and provides a copy of a course syllabus or other reasonable documentation to indicate the research purpose for the request, would qualify as part of this fee category.

* * * * *

(6) Representative of the news media is any person or entity that actively gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. * * *

* * * * *

(d) * * *

(2) If a component fails to comply with the FOIA’s time limits in which to respond to a request, it may not charge search fees, or, in the instances of requests from requesters described in paragraph (d)(1) of this section, may not charge duplication fees, except as described in paragraphs (d)(2)(i) through (iii) of this section.

(i) If a component has determined that unusual circumstances as defined by the FOIA apply and the agency provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit shall be excused for an additional 10 days.

(ii) If a component has determined that unusual circumstances as defined by the FOIA apply, and more than 5,000 pages are necessary to respond to the request, the component may charge search fees, or, in the case of requesters described in paragraph (d)(1) of this section, may charge duplication fees if the following steps are taken. The component must have provided timely written notice of unusual circumstances to the requester in accordance with the FOIA and the component must have discussed with the requester via written mail, e-mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii). If this exception is satisfied, the component may charge all applicable fees incurred in the processing of the request.

(iii) If a court has determined that exceptional circumstances exist as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

* * * * *

(k) Requirements for waiver or reduction of fees. (1) Requesters may seek a waiver of fees by submitting a written application demonstrating how disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(2) A component must furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. In deciding whether this standard is satisfied the component must consider the factors described in paragraphs (k)(2)(i) through (iii) of this section:

(i) Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(ii) Disclosure of the requested information would be likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(A) Disclosure of the requested records must be meaningfully informative about government operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding.

(B) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's ability and intention to effectively convey information to the public must be considered. Components will presume that a representative of the news media will satisfy this consideration.

(iii) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, components will consider the following criteria:

(A) Components must identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or profit interest. Requesters must be given an opportunity to provide explanatory information regarding this consideration.

(B) If there is an identified commercial interest, the component must determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of paragraphs (k)(2)(i) and (ii) of this section are satisfied and any commercial interest is not the primary interest furthered by the request. Components ordinarily will presume that when a news media requester has satisfied the requirements of paragraphs (k)(2)(i) and (ii) of this section, the request is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(3) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver shall be granted for those records.

(4) Requests for a waiver or reduction of fees should be made when the request is first submitted to the component and should address the criteria referenced above. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks

for a waiver of those fees and that waiver is denied, the requester shall be required to pay any costs incurred up to the date the fee waiver request was received.

Dated: December 21, 2016.

Loretta E. Lynch
Attorney General

[FR Doc. 2016-31508 Filed: 1/3/2017 8:45 am; Publication Date: 1/4/2017]