



NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Humanities

45 CFR Part 1171

RIN 3136-AA37

Regulations Implementing the FOIA Improvement Act of 2016

AGENCY: National Endowment for the Humanities.

ACTION: Final rule.

SUMMARY: On June 30, 2016, President Obama signed the Freedom of Information Act (“FOIA”) Improvement Act of 2016 (the “FOIA Improvement Act”). Section 3 of the FOIA Improvement Act requires, that not later than 180 days after the date of its enactment, the head of each agency review and revise the agency's regulations to implement the FOIA Improvement Act’s amendments. The FOIA Improvement Act specifically requires that the regulations of each agency include procedures for engaging in dispute resolution through the FOIA Public Liaison and the Office of Government Information Services. After undertaking a review of its FOIA regulations in accordance with Section 3 of the FOIA Improvement Act, NEH is revising its FOIA regulations to incorporate the statutory mandates.

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

FOR FURTHER INFORMATION CONTACT: Adam Kress, Attorney-Advisor, Office of the General Counsel, National Endowment for the Humanities, 400 7th Street SW., Room 4060, Washington, DC 20506, (202) 606-8322, akress@neh.gov.

SUPPLEMENTARY INFORMATION: NEH is amending its FOIA regulations published at 45 CFR part 1171 to incorporate changes required by the FOIA Improvement Act.

Background

Section 10 of the National Foundation on the Arts and the Humanities Act of 1965 (20 U.S.C. 959) authorizes the Chairperson of NEH to prescribe such regulations as he or she deems necessary governing the manner in which the Chairperson's functions shall be carried out.

This rulemaking amends NEH's existing regulations providing Public Access to NEH Records Under the Freedom of Information Act (45 CFR part 1171) by incorporating changes to the FOIA by the FOIA Improvement Act. Among other things, the FOIA Improvement Act requires that agencies (i) make records that have been both released previously and requested three or more times available to the public in electronic format, (ii) establish a minimum of ninety days for requesters to appeal an adverse determination, and (iii) provide, or direct requesters to, dispute resolution services at various times throughout the FOIA process. The FOIA Improvement Act also updates how agencies may charge search, duplication and review fees.

NEH amends 45 CFR Part 1171 as follows:

- By amending 45 CFR 1171.4 to “make available for public inspection in an electronic format” records that have been previously released and either (i) are likely to be subject to subsequent requests for substantially the same records, or (ii) “that have been requested three or more times.”

- By amending 45 CFR 1171.7 & 1171.8 to indicate that the requester may seek assistance from NEH’s Public Liaison and/or the Office of Government Information Services at various times throughout the FOIA process.
- By amending 45 CFR 1171.10 to change the appeals deadline from thirty days to ninety days.
- By amending 45 CFR 1171.11 to provide additional limitations on the fees charged by NEH.

Good Cause for Final Adoption

NEH ordinarily promulgates amendments to the Code of Federal Regulations in accordance with the notice-and-comment rulemaking procedure in Section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553). That provision requires that agencies publish notice of a proposed rule or amended rule in the Federal Register, and that such agencies solicit and consider public comment on the proposed rule or amendment, and publish any final rule at least thirty days prior to its effective date.

Section 553 of the APA, however, allows agencies to dispense with the above notice and comment procedures when the agency has “good cause” for concluding that such procedures are “impracticable, unnecessary, or contrary to the public interest.” Under the APA, an agency may issue a final rule without seeking comment prior to the rulemaking, for good cause.

NEH’s proposed amendments to its FOIA regulations are required by the FOIA Improvement Act, do not reflect or empower agency discretion, and provide additional protection to the public. For these reasons, NEH finds good cause to conclude that it is

not necessary for the public to have notice and an opportunity to comment on the amendments described below.

Regulatory Analysis of the Proposed Amendments

These amendments do not constitute a “significant regulatory action” under Executive Order 12866 (58 FR 51735, Oct. 4, 1993) and therefore are not subject to Office of Management and Budget (OMB) review.

The Regulatory Flexibility Act (5 U.S.C. 601, et seq.) is inapplicable to this rulemaking because it is not one for which a notice of proposed rulemaking is required under 5 U.S.C. 553(b) or any other statute.

For purposes of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4 (2 U.S.C. 1531-1538), these amendments will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, nor will they significantly or uniquely affect small governments.

These amendments are not “major rules” as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801, et seq.). Moreover, they are exempt from the reporting requirements of that Act because they are rules of agency procedure and practice that do not substantially affect the rights or obligations of non-agency parties.

The Paperwork Reduction Act (44 U.S.C. 3501, et seq.), does not apply to these amendments because they do not contain any new information collection requirements that need OMB approval.

List of Subjects in 45 CFR Part 1171

Administrative practice and procedure, Fees, Freedom of Information.

For the reasons discussed in the preamble, NEH amends 45 CFR part 1171 as follows:

PART 1171 – PUBLIC ACCESS TO NEH RECORDS UNDER THE FREEDOM OF INFORMATION ACT

1. The authority citation for part 1171 is revised to read as follows:

Authority: 5 U.S.C. 552; 20 U.S.C. 959; 31 U.S.C. 3717; E.O. 12600.

2. Amend § 1171.4 by revising paragraphs (a) and (b) to read as follows:

§ 1171.4 Public availability of records.

(a) In accordance with 5 U.S.C. 552(a)(2), the NEH will make the following records available for public inspection in an electronic format (unless they are published and copies are offered for sale) without a FOIA request:

- (1) Final opinions, including concurring and dissenting opinions, as well as orders made in the adjudication of cases,

- (2) Statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register,

- (3) Administrative staff manuals and instructions to staff that affect a member of the public,

- (4) Copies of all records, regardless of format, which have been released to any person under 5 U.S.C. 552(a)(3) and which because of their subject matter, the NEH determines have become or are likely to become subject to subsequent requests for substantially the same records, or have been requested three (3) or more times; and

- (5) A general index of the records referred to in paragraph (b) of this section.

(b) The NEH will also maintain and make available for public inspection in an electronic format current indexes as required by 5 U.S.C. 552(a)(2) of the FOIA. However, since the NEH has determined that publication and distribution of these indexes is unnecessary and impracticable, the NEH will provide these indexes upon request at a cost not to exceed the direct cost of the duplication.

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3. Amend § 1171.7 by revising paragraph (d)(1)(ii) to read as follows:

§ 1171.7 Timing of responses to requests.

* * * * *

(d) * * *

(1) * * *

(ii) If the extension will be for more than ten (10) working days, the NEH will provide the requester with an opportunity either to modify the request so that it may be processed within the time limit or to arrange an alternative time period to process the request or a modified request. To aid the requester, NEH shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency, and shall notify the requester of his or her right to seek dispute resolution services from the Office of Government Information Services.

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4. Amend § 1171.8 by revising paragraphs (b) and (c) to read as follows:

§ 1171.8 Responses to requests.

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(b) *Grants of requests.* If the NEH makes a determination to grant a request in whole or in part, it will notify the requester in writing of such determination and the reasons therefore, and the requester's right to seek assistance from NEH's FOIA Public Liaison. The NEH will inform the requester of any applicable fees and will disclose records to the requester promptly on payment of any applicable fees. The NEH will mark or annotate records disclosed in part to show the amount of information deleted pursuant to a FOIA exemption, unless doing so would harm an interest protected by an applicable FOIA exemption. If technically feasible, the NEH will also indicate, on the agency record(s) it provides, the location of the information deleted.

(c) *Denials of requests.* If the NEH makes a determination to deny a request in any respect, the NEH will also notify the requester in writing of:

- (1) The name and title or position of the person responsible for the denial;
- (2) A brief statement of the reason(s) for the denial, including any FOIA exemption applied by the NEH in denying the request;
- (3) An estimate of the volume of records or information withheld, if applicable, although such an estimate is not required if the volume is otherwise indicated through deletion on the records disclosed in part, or if providing such an estimate would harm an interest protected by an applicable exemption;
- (4) The requester's right to seek dispute resolution services from NEH's FOIA Public Liaison or the Office of Government Information Services; and
- (5) A statement that the requester may appeal the denial under § 1171.10 and a description of the requirements to appeal.

5. Amend § 1171.10 by revising paragraph (a) to read as follows:

§ 1171.10 Administrative appeals.

(a) You may appeal a denial of your request for NEH records (except NEH OIG records) and/or FCAH records to The Deputy Chairman, National Endowment for the Humanities, 400 7th Street SW., Room 4053, Washington, DC 20506. You may also send your appeal to the NEH General Counsel by facsimile at 202-606-8600, by e-mail at gencounsel@neh.gov, or through the NEH's electronic FOIA request system, which is available on the NEH website at www.neh.gov. For a denial of your request for OIG records, you may appeal by facsimile at 202-606-8329, by e-mail at oig@neh.gov or by mail to The Inspector General, National Endowment for the Humanities, 400 7th Street SW., Room 2200, Washington, DC 20506. Your appeal must be in writing and received by NEH within ninety (90) days of the date of the letter denying your request in whole or in part. Your appeal letter must clearly identify the NEH decision that you are appealing and contain the tracking number, if assigned. You should clearly mark your appeal letter and envelope "Freedom of Information Act Appeal."

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6. Amend § 1171.11 by revising paragraph (d)(3) to read as follows:

§ 1171.11 Fees.

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(d) * * *

(3) If NEH 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 paragraphs (b)(4) through (6) of this section, may not charge duplication fees, except as described in paragraphs (d)(3)(i) through (iii) of this section.

(i) If NEH has determined that unusual circumstances, as defined by the FOIA, apply and NEH has 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 ten (10) working days.

(ii) If NEH has determined that unusual circumstances, as defined by the FOIA, apply and more than 5,000 pages are necessary to respond to the request, NEH may charge search fees, or, in the case of requesters described in paragraphs (b)(4) through (6) of this section, may charge duplication fees, provided NEH provided timely written notice of unusual circumstances to the requester in accordance with the FOIA and NEH 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).

(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.

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Dated: December 23, 2016

Elizabeth Voyatzis

Deputy General Counsel

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