



LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 203

[Docket No. 2017–1]

Freedom of Information Act Regulations

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: The U.S. Copyright Office is issuing a final rule that amends its regulations governing its practices and procedures under the Freedom of Information Act (FOIA). The final rule closely follows the February 7, 2017 interim rule, implementing the FOIA Improvement Act of 2016. The final rule makes limited modifications to align with public comments and to promote further regulatory clarity and customer service.

DATES: *Effective date:* [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Regan A. Smith, General Counsel and Associate Register of Copyrights, by email at regans@copyright.gov, or by telephone at 202-707-8350; or Catherine Zaller Rowland, Associate Register of Copyrights and Director of Public Information and Education, by email at crowland@copyright.gov, or by telephone at 202-707-0956.

SUPPLEMENTARY INFORMATION:

I. Background

The Freedom of Information Act (FOIA), section 552 of title 5 of the United States Code, provides a statutory right of access to federal agency records. In part, FOIA

establishes procedures by which a member of the public may request records from a federal agency and the parameters by which an agency must operate when responding to a request from the public. FOIA requires agencies to promulgate regulations addressing the logistical requirements of making requests, fees, and expedited processing¹ while providing areas of discretionary authority.

In 2017, the Copyright Office (the “Office”) published an Interim Rule² in response to the FOIA Improvement Act of 2016 (the “Act”),³ which amended FOIA to address a range of procedural issues and required federal agencies subject to FOIA to review and update their regulations. In its interim rule, the Office updated its regulations to conform with the Act, including the Act’s prohibition on charging fees after certain agency failures, specifying a ninety-day period for filing an administrative appeal, and requiring that records be made available in electronic format. The Office also adopted, where appropriate, the template for agency FOIA regulations released by the Office of Information Policy at the Department of Justice (DOJ OIP). The template provided a clear structure for the required regulatory provisions, allowed the Office to formalize its multi-track processing practices, and established clear regulatory language to improve customer service.⁴ In December 2018, the Office also made minor technical changes to its FOIA regulations to reflect the Office’s current organizational structure while updating its licensing regulations relating to section 115 of title 17.⁵

¹ 5 U.S.C. 552 (a)(1), (a)(4)(A)(i), and (a)(6)(E)(i).

² 82 FR 9505 (Feb. 7, 2017).

³ Pub. L. 114-185, 130 Stat. 538 (2016).

⁴ 82 FR at 9506 (Feb. 7, 2017).

⁵ 83 FR 63061 at 63064–65 (Dec. 7, 2018).

The Office received comments from two individuals as well as the National Archives and Records Administration (NARA).⁶ Having reviewed and carefully considered these comments, the Office now issues a final rule that closely follows the proposed rule, with minor amendments as discussed below.

II. Discussion of Comments and Other Considerations

A. NARA Record Schedule Technical Correction

NARA submitted a technical comment related to § 203.10, Preservation of Records, which referenced General Records Schedule (GRS) 14. NARA notes that GRS 14 was replaced with a new records schedule, GRS 4.2.⁷ The final rule incorporates this change.

B. Comments from Individuals

Both individual commenters wrote in support of the Office's interim rule as an effort to provide citizens with access to records and improve agency responsiveness to the public. One commenter also voiced a general concern that access to records should not be dependent upon access to technology.⁸ The Office recognizes that individuals without access to technology can encounter unique obstacles to accessing the Office's information and records but believes that these concerns are adequately addressed by the Office's regulations and practices and that no amendments are required to the rule.

The Office receives a large number of its FOIA requests from individuals without access to technology, often for records that are already made publicly available by the Office in electronic form. When the Office receives such a request, it responds in writing

⁶ The comments can be found on the Copyright Office's website at <https://www.copyright.gov/rulemaking/foia2016/>.

⁷ NARA Comment at 1.

⁸ Jenna Rainey Comment at 1.

by mail and includes copies of the requested documents, even if they are otherwise publicly available on the Office's website at www.copyright.gov. Further, the Office maintains the Public Information Office (PIO), which assists callers and correspondents in accessing information, including by providing printed copies of proactively disclosed records upon request.

C. Other Considerations and Technical Changes

The Office has made three additional technical changes to the final rule based on its ongoing review of the law and additional guidance made publicly available by DOJ OIP. First, the Office has added language to the rule in § 203.7(c), explaining that the Office will alert requesters as to the availability of mediation services offered by NARA's Office of Government Information Services when the Office provides notice of unusual circumstances. The interim rule included language explaining that the Office would alert a requester of the dispute resolution services when issuing a denial notification but inadvertently omitted similar language in the rule with regard to notices of delays due to unusual circumstances. The Office's practices have been to notify requesters of their right to dispute resolution services in both denials and notices of unusual circumstances, and the final rule now reflects the Office's practices.

Second, the final rule clarifies in § 203.11(j) that only Privacy Act⁹ requests are processed under the Office's Privacy Act fee schedule. The Office makes this technical amendment to clear up any possible confusion about the Privacy Act fee schedule by changing the language to focus on the type of request rather than the requester.

Third, the Office has amended § 203.11(k) to adopt the streamlined fee waiver factors published by the DOJ OIP subsequent to the publication of the Office's interim

⁹ 5 U.S.C. 552a.

rule.¹⁰ This updated template language improves regulatory clarity but does not materially change the proposed § 203.11(k).

Accordingly, for the reasons explained above, the Office has determined that these additional amendments comprise non-substantive, procedural changes not “alter[ing] the rights or interests of the parties,” and thus are not subject to further notice and comment requirements of the Administrative Procedure Act.¹¹

List of Subjects in 37 CFR Part 203

Freedom of information.

Final Regulations

For the reasons set forth above, the Copyright Office adopts the interim rule amending 37 CFR part 203 which was published at 82 FR 9505 on February 7, 2017, as amended by 83 FR 63064 on December 7, 2018, as final with the following changes:

PART 203—FREEDOM OF INFORMATION ACT: POLICIES AND PROCEDURES

1. The authority citation for part 203 continues to read as follows:

Authority: 5 U.S.C. 552.

2. Amend §203.7 by revising paragraph (c)(1)(i) introductory text to read as follows:

¹⁰ See *Template for Agency FOIA Regulations*, <https://www.justice.gov/oip/template-agency-foia-regulations> (last updated Feb. 22, 2017).

¹¹ See *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014) (“The critical feature of a procedural rule is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.”) (internal quotation marks omitted); 5 U.S.C. 553(b)(A) (notice and comment not required for “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice”).

§203.7 Timing of responses to requests.

* * * * *

(c) * * *

(1)(i) Whenever the Office cannot meet the statutory time limit for processing a request because of “unusual circumstances,” as defined in paragraph (c)(2) of this section, the Office will notify the requester in writing of the unusual circumstances and the estimated date of determination, and alert requesters to the availability of the Office of Government Information Services (OGIS) to provide dispute resolution services. Where an extension of time greater than 10 days is required, the Office will give the requester the opportunity to:

* * * * *

§203.10 [Amended]

3. Amend §203.10 by removing “General Records Schedule 14” and adding in its place “General Records Schedule 4.2”.

4. Amend §203.11 by revising paragraphs (j) and (k) to read as follows:

§203.11 Fees.

* * * * *

(j) *Other statutes specifically providing for fees.* The provisions of this section do not apply with respect to the charging of fees for which the copyright law requires a fee to be charged. Requests processed under the Privacy Act of 1974, 5 U.S.C. 552a, shall be subject to the fee schedule found in § 204.6 of this chapter. Fees for services by the Office in the administration of the copyright law are contained in § 201.3 of this chapter.

In instances where records responsive to a request are subject to the statutorily-based fee schedule, the Office will inform the requester of the service and appropriate fee.

(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) The Office shall furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that the factors described in paragraphs (k)(2)(i) through (iii) of this section are satisfied:

(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 is 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 will be considered. The Office 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, the Office will consider the following criteria:

(A) The Office shall 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 shall be given an opportunity to provide explanatory information regarding this consideration.

(B) If there is an identified commercial interest, the Office shall 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. The Office ordinarily will presume that when a news media requester has satisfied factors in 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 Office 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: January 28, 2019.

Karyn A. Temple,
*Acting Register of Copyrights and
Director of the U.S. Copyright Office.*

Approved by:

Carla D. Hayden,
Librarian of Congress

[BILLING CODE 1410-30-P]

[FR Doc. 2019-02181 Filed: 2/12/2019 8:45 am; Publication Date: 2/13/2019]