



DEPARTMENT OF EDUCATION

34 CFR Part 5

[Docket ID ED-2008-OM-0011]

RIN 1880-AA84

Availability of Information to the Public; Correction

AGENCY: Office of the Secretary, Department of Education.

ACTION: Final rule; correction.

SUMMARY: On June 14, 2010, the Department of Education (Department) published in the *Federal Register* a final rule amending the Department's Freedom of Information Act (FOIA) regulations. The 2010 final rule implemented amendments made to the FOIA statute and clarified how the Department processes FOIA requests for agency records. We are correcting the administrative exhaustion provisions related to the Appeals of Adverse Determinations section in the FOIA regulations. All other provisions in the FOIA regulations remain the same.

DATES: This correction is effective **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

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SUPPLEMENTARY INFORMATION:

On June 14, 2010, the Department published a final rule amending the Department's FOIA regulations in 34 CFR part 5. Section 5.40(b) (Appeals of Adverse Determinations) erroneously states that a requester's, as opposed to the Department's, failure to comply with the applicable time limits constitutes exhaustion of the requester's administrative remedies for the purposes of initiating judicial action to compel disclosure. This current language is contrary to the Federal statute at 5 U.S.C. 552(a)(6)(C)(i) and case law. *See Citizens for Responsibility and Ethics in Washington v. Federal Election Com'n*, 711 F.3d 180, 184 (D.C. Cir. 2013). Additionally, similar language (without the error) is contained in current § 5.40(c)(1) of the FOIA regulations. Therefore, we are correcting the provision to strike the erroneous language from § 5.40(b). Specifically, we are removing the last sentence of § 5.40(b), which reads: "The requester's failure to comply with time limits set forth in this section constitutes exhaustion of the requester's administrative remedies for the purposes of initiating judicial action to compel disclosure."

All other information in the 2010 final rule remains the same, except for the provisions that were amended on December 12, 2019 (84 FR 67865).

Waiver of Rulemaking

Under the Administrative Procedure Act (APA) (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed regulations. However, the APA provides that an agency is not required to conduct notice-and-comment rulemaking when the agency, for good cause, finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest (5 U.S.C. 553(b) (B)).

Rulemaking is "unnecessary" in those situations in which "the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public." Utility Solid Waste Activities Group v. EPA, 236 F.3d 749, 755 (D.C. Cir. 2001), quoting U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act 31 (1947) and South Carolina v. Block, 558 F. Supp. 1004, 1016 (D.S.C. 1983).

There is good cause to waive rulemaking here, because rulemaking is unnecessary. The actions in this document merely correct an inadvertent inconsistency with the FOIA statute and a similar provision in 34 CFR 5.40(c)(1) and are not an exercise of the Department's discretion. Thus, the Secretary has determined that publication of a proposed rule is unnecessary under 5 U.S.C. 553(b) (B).

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List of Subjects in 34 CFR Part 5

Administrative practice and procedure, Investigations.

Accordingly, part 5 of title 34 of the Code of Federal Regulations is corrected by making the following correcting amendments:

PART 5—AVAILABILITY OF INFORMATION TO THE PUBLIC

1. The authority citation for part 5 continues to read as follows:

Authority: 5 U.S.C. 552, 20 U.S.C. 1221e-3, and 20 U.S.C. 3474.

2. Section 5.40 is amended by revising paragraph (b) to read as follows:

§ 5.40 Appeals of Adverse Determinations.

* * * * *

(b) A requester must submit an appeal within 90 calendar days of the date on the adverse determination letter issued by the Department or, where the requester has received no determination, at any time after the due date for such determination. An appeal must be in writing and must include a detailed statement of all legal and factual bases for the appeal.

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Alexis Barrett,
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