



November 13, 2012

Ms. Cindy Cafaro
Executive Secretariat – FOIA Regulations
Department of the Interior
1849 C Street NW
Washington, DC 20240
via Regulations.gov

Re: RIN 1093-AA15
Freedom of Information Act Regulations (77 FR 56592)

Dear Ms. Cafaro:

OMB Watch welcomes the opportunity to comment on the Department of the Interior's proposed Freedom of Information Act (FOIA) regulations. As a nonprofit organization dedicated to open government, accountability, and citizen participation since 1983, OMB Watch has long worked for improvements to the FOIA process.

Ensuring that agencies have up-to-date FOIA regulations that support transparency is a crucial element for the effective functioning of the FOIA system. We appreciate the Department's steps to update its FOIA regulations.

To contribute to the successful development of an effective and efficient FOIA program at the Department, OMB Watch offers the following recommendations:

1. Strengthen the regulations to expand online disclosures;
2. Notify requesters of alternatives to litigation; and
3. Clarify procedures for confidential business information.

1. Strengthen the regulations to expand online disclosures

OMB Watch encourages the Department to strengthen its proposed regulations to more fully embrace the use of online disclosure for public information under FOIA.

Expanding online disclosure is an important method to efficiently maximize the Department's transparency. Posting information online maximizes the impact of the agency's FOIA efforts by allowing the public to access and use the information disclosed. Additionally, online disclosure can save agency resources by reducing duplicative requests.

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a. Post documents released in response to FOIA requests

The Department's proposed regulations would direct bureaus to post online records required to be made publicly available under FOIA. Under the E-FOIA Act, this includes information that has been released in response to a FOIA request and is "likely to become the subject of subsequent requests."¹

We encourage the Department to go beyond the statutory minimum and instead adopt the best practice to post online *all* responses to FOIA requests. This practice makes more information available to the public and eliminates the need for the agency to evaluate each request to determine whether it is likely to become the subject of subsequent requests. The Air Force and the Office of the Secretary of Defense and Joint Staff have adopted this policy.² To protect privacy, the Department could exclude requests made jointly under the Privacy Act.

We note that the multi-agency portal, FOIAonline, provides participating agencies with features to automatically post records released under FOIA.³ OMB Watch believes that FOIAonline has great promise to increase transparency and encourages the Department to consider becoming a participant.⁴

b. Expand proactive disclosure

We encourage the Department to adopt a policy to proactively disclose information to the greatest extent possible. The Department should follow Attorney General Holder's FOIA guidelines, which directed agencies to "readily and systematically post information online in advance of any public request."⁵

We appreciate the Department's proposed requirements for each bureau to identify additional records of interest to the public and to post such records online.⁶ Whenever possible, the Department should make information of public interest available to the public without requiring requesters to navigate the administrative process of the FOIA.

The Department should also adopt a policy to "establish categories of records that can be disclosed regularly," as recommended by the Office of Government Information Services

¹ 5 U.S.C. 552(a)(2)(D).

² U.S. Government Accountability Office, "Freedom of Information Act: Additional Actions Can Strengthen Agency Efforts to Improve Management," GAO-12-828, July 31, 2012, pp. 24-25.

³ <http://foiaonline.regulations.gov/>

⁴ See OMB Watch, "New Website Will Make Government Information Easier to Obtain," Oct. 1, 2012, available at <http://www.ombwatch.org/new-site-will-make-govt-info-easier-to-obtain>.

⁵ Eric Holder, "The Freedom of Information Act (FOIA)," Office of the Attorney General, March 19, 2009, available at <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

⁶ Proposed § 2.67(a)(2) and (3).

(OGIS).⁷ Establishing categories of records to routinely post online ensures that the Department's proactive disclosure efforts are systematic and not merely *ad hoc*. The Department should consult with stakeholders, including the open government community, to identify categories of records that would be useful to disclose.⁸

2. Notify requesters of alternatives to litigation

The Department's proposed regulations provide that agency FOIA determinations notify requesters of the procedures for filing an administrative appeal and that appellate decisions notify requesters of their right to judicial review.⁹ In both cases, the Department should also notify requesters of the services offered by the Office of Government Information Services (OGIS), including mediation as an alternative to litigation.

In the OPEN Government Act, Congress created OGIS within the National Archives and Records Administration and directed it to offer mediation services for FOIA requesters.¹⁰ These services can facilitate communication between requesters and agencies and may reduce litigation under FOIA.

The Department should also notify requesters about these services in its FOIA regulations and on its FOIA website.

3. Clarify procedures for confidential business information

The Department's proposed regulations include several strong provisions on the procedures for processing requests that seek information that may be confidential business information (CBI) or trade secrets. For instance, we are pleased to see provisions that make it clear that submitters of CBI only have a short time to provide objections to the release of such information. We also appreciate the strong clear language requiring the agency to explain to submitters that the Department and not the submitter will decide if the information will be released. Most of these provisions are notably being brought forward from the Department's existing FOIA regulations. The proposed regulations do organize the provisions better with the use of simple questions that will help the public better follow and understand the provisions.

We would recommend the Department replace and strengthen a provision from the current regulations that has been cut from the proposed rule. The Department's FOIA provisions (both current and proposed) require the agency to include several pieces of information in the

⁷ Office of Government Information Services, "FOIA Requirements, Agency Best Practices, and OGIS Recommendations," available at <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf>.

⁸ The open government community has identified several types of information that agencies should regularly post online; see <http://www.ombwatch.org/files/info/OpennessFloor-aug2012.pdf>.

⁹ Proposed § 2.24; proposed § 2.62.

¹⁰ Sec. 10, OPEN Government Act of 2007, P.L. 110-175.

notification to a submitter of potentially CBI data that has been requested. The current provisions state that, “If the submitter designated the material as confidential commercial or financial information 10 or more years before the request, [the notice will] request the submitter’s views on whether he/she still considers the information to be confidential.”¹¹ This provision requires submitters of older records to include additional information in any objection that explains why the information is still confidential and how its release would still be commercially harmful. We would like to see the provision restored and clarified to explicitly require such reporting from submitters objecting to the release of older records.

Conclusion

OMB Watch appreciates the opportunity to comment on the Department’s proposed FOIA regulations. We hope you take our recommendations into consideration. If you have questions about our comments or want to discuss the issues further, please feel free to contact us.

Sincerely,



Sean Moulton
Director, Federal Information Policy
OMB Watch



Gavin Baker
Federal Information Policy Analyst
OMB Watch

¹¹ § 2.23(b)(7).