



March 31, 2014

Mark R. Tallarico
Office of the General Counsel
Department of Commerce
1401 Constitution Avenue NW
Room 5099
Washington, DC 20230
via Regulations.gov

Re: Public Information, Freedom of Information Act and Privacy Act Regulations
79 F.R. 11025, RIN 0605-AA33

Dear Mr. Tallarico,

The Center for Effective Government welcomes the opportunity to comment on the Department of Commerce's proposed Freedom of Information Act (FOIA) regulations.

Up-to-date FOIA regulations that support transparency are important to the effective functioning of the FOIA system. The Center for Effective Government's report, *Best Practices for Agency Freedom of Information Act Regulations*,¹ provides a guide for agencies engaged in improving FOIA regulations and practices, based on our study of agency FOIA regulations and feedback from FOIA requesters.

We are concerned that the department's proposed regulations fail to implement statutory requirements or adopt best practices in several regards. Therefore, we encourage the department to revise its proposed regulations to incorporate key transparency improvements.

We note that the proposed regulations already include several best practices for FOIA regulations, such as proactively identifying and disclosing records of interest to the public. We applaud the department for seeking to develop modern regulations that support transparency. Nonetheless, certain aspects of the proposed regulations should be improved.

We offer the following recommendations to strengthen the proposed regulations:

¹ Gavin Baker, *Best Practices for Agency Freedom of Information Act Regulations*, Center for Effective Government, December 2013, available at <http://www.foreffectivegov.org/foia-best-practices-guide>.



1. Expand proactive online disclosures
 - a. Clarify indexes of disclosed records and records required to be posted online
 - b. Establish categories of records to be disclosed regularly
 - c. Post records released in response to FOIA requests
 - d. Publish logs of FOIA requests received by the agency
2. Use the Internet to respond to requests more efficiently
 - a. Provide automated status updates online
 - b. Correspond with requesters by e-mail where appropriate
3. Clearly and proactively communicate with requesters
 - a. Seek clarification as necessary
 - b. Provide adequate time to reasonably describe the records sought
 - c. Provide estimated time to complete the request
 - d. Use plain language in all correspondence with requesters
 - e. Provide contact information when referring requests
4. Apply the presumption of disclosure
 - a. Adopt the foreseeable harm standard for withholding
 - b. Release records on a rolling basis
 - c. Notify requesters of declassification reviews
5. Clarify fee procedures
 - a. Adopt a reasonable threshold for minimum fee charges
 - b. Provide discretion to waive more fees
6. Improve administrative appeals and dispute resolution
 - a. Provide adequate time limits for requesters to submit appeals
 - b. Streamline the process for submitting appeals
 - c. Notify requesters about dispute resolution services from the Office of Government Information Services
7. Improve the clarity and accuracy of the proposed regulations

1. Expand online disclosures

a. Clarify indexes of disclosed records and records required to be posted online

The proposed regulations are ambiguous as to how components will provide their indexes of available records. The Electronic Freedom of Information Act Amendments of 1996 require agencies to publish indexes “by computer telecommunications.”²

² Electronic Freedom of Information Act Amendments of 1996, Pub. L. 104-231, 110 Stat. 3049, codified as amended at 5 U.S.C. § 552(a)(2); *see supra* note 1, at 13.

Recommendation: Revise the proposed regulations at § 4.2(a) to state, “Each component shall maintain and make available *in its FOIA Library* a current subject-matter index of the records made available electronically.”

Additionally, the department proposes to remove from its regulations a description of the records that the FOIA requires to be made available for public inspection and copying, as currently provided in § 4.2(d). We suggest that the department retain a description of these requirements in order to advise requesters that these types of records will be available in the FOIA library without the need to submit a request.

Recommendation: Retain § 4.2(d) of the current regulations.

b. Establish categories of records to be disclosed regularly

The department should adopt a policy to “establish categories of records that can be disclosed regularly.”³

The public should be able to access key government-held information without the need to file a FOIA request. The Office of Government Information Services recommends that agencies establish categories of records – such as all inspection reports or all contracts issued by the agency – and regularly post all such records on the agency website.⁴

Recommendation: Revise the proposed regulations at § 4.2 to add, “Each component is also responsible for establishing categories of records that can be disclosed regularly and routinely posting such records on its website.”

Implementation suggestion: Components should consult with stakeholders, including the open government community, to identify categories of records that would be useful to disclose – in particular, categories of records that shed light on core agency operations.⁵

c. Post records released in response to FOIA requests

The department should adopt a policy to post online records that have been released in response to FOIA requests.⁶

Many members of the public have expressed interest in having regular access to any information released under FOIA. The E-FOIA Act of 1996 mandated that agencies post online any

³ See *supra* note 1, at 10.

⁴ 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>.

⁵ The open government community has identified several types of information that agencies should regularly post online; see <http://www.foreffectivegov.org/files/info/open-gov-min-standards-final.pdf>.

⁶ See *supra* note 1, at 11-12.

information that has been released in response to a FOIA request and is “likely to become the subject of subsequent requests.”⁷ Some agencies have gone beyond that and adopted the best practice of posting, by default, *any* released records. Such an approach increases transparency by making more information available to the public. Additionally, it eliminates the need for agencies to evaluate each request in order to determine whether it is likely to become the subject of subsequent requests.

Recommendation: Revise the proposed regulations at § 4.2 to state, “Each component shall, to the extent feasible, post in its FOIA Library copies of all records, regardless of form or format, which have been released to any person under FOIA, other than records released in response to first-party requests (*i.e.*, requests by persons for access to records about themselves.)”

Implementation suggestion: Components should provide a subscription service, such as by e-mail or RSS, to allow members of the public to receive notifications when new records are posted.⁸

d. Publish logs of FOIA requests received by the agency

The department should adopt a policy to post logs of FOIA requests received by the agency.⁹

FOIA logs are a useful tool for members of the public to monitor what sort of requests agencies are receiving.¹⁰ Additionally, FOIA logs can provide information about agency performance on FOIA implementation, in greater detail than is available in annual agency reports. To increase the transparency of their FOIA operations, several agencies now routinely post their FOIA logs on the agency website.

Recommendation: Revise the proposed regulations at § 4.2 to add, “Each component shall regularly post, in a searchable format on its website, a log listing all FOIA requests received by the agency and their processing status.”

⁷ Electronic Freedom of Information Act Amendments of 1996, Pub. L. 104-231, 110 Stat. 3049, codified as amended at 5 U.S.C. § 552(a)(2)(D); *but see* 5 U.S.C. § 552(a)(2) (“To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes ... copies of records referred to in subparagraph (D)”).

⁸ For instance, the Department of Agriculture’s Food Safety and Inspection Service provides requesters with the option of signing up for e-mail notifications of changes to its log of FOIA requests. *See* U.S. Department of Agriculture Food Safety and Inspection Service, “FSIS Electronic Reading Room,” *available at* <http://www.fsis.usda.gov/wps/portal/footer/policies-and-links/freedom-of-information-act/fsis-electronic-reading-room/fsis-electronic-reading-room>.

⁹ *See supra* note 1, at 12-13.

¹⁰ *See e.g.* Freedom of Information Center at the Missouri School of Journalism, *available at* <http://www.nfoic.org/foi-center> (“One of the best things you can do when starting your FOIA request is finding out what other FOIA requesters are asking the government.”).

Implementation suggestion: Components should include sufficient detail about each request, including the opening and closing date of each request, the requester’s name (and, if applicable, organization), a description of the records requested, and the disposition of the request.

2. Use the Internet to respond to requests more efficiently

a. Provide automated status updates online

The department should adopt a policy that it will provide automated status updates online.¹¹

The OPEN Government Act requires agencies to establish a service allowing requesters to inquire about the status of their requests.¹² Requesters often want to know where their request is in processing – for instance, whether the agency is searching for records, reviewing the documents, or consulting with another agency. Providing automated status updates on the agency website can reduce the time spent in communicating such basic information to requesters and allow FOIA personnel to focus on processing requests.¹³

Recommendation: Revise the proposed regulations at § 4.7(a) to add, “Components shall provide automated updates on the status of FOIA requests through FOIAonline. Requesters may view the status of their request and the estimated date of completion by entering the tracking number provided to them.”

b. Correspond with requesters by e-mail where appropriate

The department should adopt a policy that it will correspond with requesters by e-mail where appropriate.¹⁴

Digital communications are changing the way government connects with citizens. Agencies should take advantage of information technology to deliver fast and effective communications with the public.¹⁵ E-mail correspondence can also result in cost savings for agencies.

¹¹ See *supra* note 1, at 15-16.

¹² OPEN Government Act of 2007, Pub. L. 110-175, 121 Stat. 2527, codified as amended at 5 U.S.C. § 552(a)(7)(B); also see Department of Justice. “OIP Guidance: Assigning Tracking Numbers and Providing Status Information Requests,” *FOIA Post*, November 18, 2008, available at <http://www.justice.gov/oip/foiapost/2008foiapost30.htm>.

¹³ Department of Justice, “OIP Guidance and Suggested Practices for Improving Transparency.” Sept. 1, 2010, p. 2, available at <http://www.justice.gov/oip/docs/best-practices-guidance-sept-2010.pdf> (“The FOIA itself requires agencies to provide requesters with status information about their request. There should be mechanisms in place to accomplish all these customer service functions.”); Office of Government Information Services, “FOIA Requirements, Agency Best Practices, and OGIS Best Practices,” March 19, 2009, p. 5, available at <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf> (“Establish telephone or web service that provides information about the status of a request using the case tracking number to the requester.”).

¹⁴ See *supra* note 1, at 16-17.

Recommendation: Revise the proposed regulations at § 4.7 to add, “Components shall generally correspond with the requester by e-mail or through the FOIAonline Web site, rather than postal mail, unless he or she specifies otherwise.”

3. Clearly and proactively communicate with requesters

a. Seek clarification as necessary

The department should adopt a policy to contact the requester to seek clarification if NARA is unclear as to the scope of the request.¹⁶

An agency’s interpretation of the particular scope of a FOIA request, and its determinations regarding exactly which information falls within it, are vitally important aspects of FOIA administration. Therefore, if the agency is unclear as to any aspect of the request, the best approach is to contact the requester to seek clarification, as recommended by the Office of Information Policy.¹⁷ Doing so can help focus the staff’s work in processing the request and avoid disputes with the requester.

Recommendation: Revise the proposed regulations after the second sentence of § 4.6(c) to add, “Components should also attempt to clarification with the requester by telephone.”

Revise the proposed regulations at the end of § 4.6(c) to add, “Notwithstanding the other provisions of this paragraph, if a component has any uncertainty regarding an aspect of the request, it shall attempt to communicate with the requester to clarify the scope of his or her FOIA request.”

b. Provide adequate time to reasonably describe the records sought

The department should provide adequate time for requesters to respond after having been asked to reasonably describe the records sought.¹⁸

¹⁵ Barack Obama, Executive Order 13571, “Streamlining Service Delivery and Improving Customer Service,” The White House, April 27, 2011 (“[B]est practices include increasingly popular lower-cost, self-service options accessed by the Internet or mobile phone and improved processes that deliver services faster and more responsively, reducing the overall need for customer inquiries and complaints.”).

¹⁶ See *supra* note 1, at 21.

¹⁷ U.S. Department of Justice Office of Information Policy, “OIP Guidance: The Importance of Good Communication with FOIA Requesters,” March 4, 2010, available at <http://www.justice.gov/oip/foiapost/2010foiapost5.htm> (“Good communication with requesters can also be exceedingly helpful in those instances where an agency is uncertain about the scope of what is being requested”).

¹⁸ See *supra* note 1, at 22-23.

Recommendation: Revise the proposed regulations at the ninth sentence § 4.4(c) to state, “When a requester fails to provide sufficient detail *within 30 days* after having been asked to reasonably describe the records sought, the component shall notify the requester in writing that the request has not been properly made, that no further action will be taken, and that the FOIA request is closed. *Such a notice constitutes an adverse determination under § 4.7(c); the component shall follow the procedures for a denial letter under § 4.7(d).*”

c. Provide estimated time to complete the request

The department should adopt a policy to provide requesters with the estimated time to complete the request.¹⁹

In the OPEN Government Act, Congress directed agencies to provide requesters with an estimated date of completion for processing the request.²⁰ Agencies should provide a meaningful estimate to requesters as early as possible after receiving a request.²¹ In addition, requesters should be given the opportunity to reduce the time necessary to complete processing by narrowing the scope of their request.

Recommendation: Revise the proposed regulations at § 4.6(b) to add, “As soon as practicable after receiving a request, a component ordinarily shall provide the requester with the estimated date it will complete processing the request. The component shall notify the requester that he or she may reformulate the request, if he or she so chooses, to revise the scope of the request in order to potentially reduce processing time.”

d. Use plain language in all correspondence with requesters

The department should adopt a policy that all written communication with requesters will be written in plain language.²²

¹⁹ See *supra* note 1, at 23.

²⁰ OPEN Government Act of 2007, Pub. L. 110-175, 121 Stat. 2527, codified as amended at 5 U.S.C. § 552(a)(7)(B) (“Each agency shall ... establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including ... an estimated date on which the agency will complete action on the request.”).

²¹ Office of Government Information Services, “Agency Best Practices: Communications and Customer Service,” available at <https://ogis.archives.gov/about-foia/best-practices/agency-best-practices---communications-and-customer-service.htm> (“Processing delays result in many FOIA disputes, but OGIS has observed that these problems can often be alleviated by communicating clearly and directly with the requester, and providing a time estimate. OGIS highly recommends making these estimates as accurate as possible, even if the Agency is unable to make the 20-day response time required under the law.”).

²² See *supra* note 1, at 24.

The Plain Writing Act of 2010 directs agencies to use “writing that is clear, concise, well-organized, and follows other best practices appropriate to the subject or field and intended audience” in any document that “provides information about any Federal Government benefit or service.”²³ Citizens deserve clear communications from the government. All correspondence with requesters should be easy to read, understand, and use.

Recommendation: Revise the proposed regulations at § 4.7 to add, “Components shall use plain language in all written communications with requesters.”

e. Provide contact information when referring requests

When referring requests, the department should provide requesters with contact information for the agency to which the record was referred.²⁴

Recommendation: Revise the proposed regulations at the end § 4.5(c) to add, “and include that agency’s FOIA contact information.”

4. Apply the presumption of disclosure

a. Adopt the foreseeable harm standard for withholding

The department should adopt the foreseeable harm standard for withholding information under FOIA’s exemptions.²⁵

In the OPEN Government Act, Congress reiterated that FOIA “establishes a strong presumption in favor of disclosure.”²⁶ President Obama’s FOIA memorandum likewise stated that the law “should be administered with a clear presumption: In the face of doubt, openness prevails.”²⁷

Attorney General Holder’s FOIA guidelines specifically explain how agencies should implement FOIA’s presumption of disclosure. The guidelines provide that “the Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is

²³ P. L. 111-274; *also see* Janet Reno, “The Freedom of Information Act,” Office of the Attorney General, Oct. 4, 1993, available at http://www.justice.gov/oip/foia_updates/Vol_XIV_3/page3.htm (announcing a “comprehensive review of all standard FOIA forms and correspondence ... for their correctness, completeness, consistency, and particularly for their use of clear language”).

²⁴ *See supra* note 1, at 24-25.

²⁵ *See supra* note 1, at 27-28.

²⁶ OPEN Government Act of 2007, Pub. L. 110-175, 121 Stat. 2524 (“the Freedom of Information Act establishes a ‘strong presumption in favor of disclosure’ as noted by the United States Supreme Court in *United States Department of State v. Ray* (502 U.S. 164 (1991)), a presumption that applies to all agencies governed by that Act”).

²⁷ Barack Obama, Presidential Memorandum, “Freedom of Information Act,” The White House, Jan. 21, 2009, available at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct.

prohibited by law.”²⁸ Applying this “foreseeable harm standard” helps to ensure that agencies do not withhold information improperly.

The Office of Information Policy has recommended that agencies adopt procedures to affirmatively consider making “discretionary disclosures” where agencies cannot identify harm that would result from the release of information.²⁹ In doing so, agencies can uphold FOIA’s spirit of transparency while protecting privacy rights and national security information.³⁰

Recommendation: Revise the proposed regulations at § 4.7 to add, “Components shall apply a presumption of openness when processing requests and will only withhold requested information if it reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions or if disclosure is prohibited by law. Before withholding information, the component shall conduct a foreseeable harm analysis, which clearly identifies the harm that would occur with disclosure.”

Implementation suggestion: Develop procedures or guidelines on how to conduct a foreseeable harm analysis, which clearly identifies the harm that would occur from disclosure.³¹ For instance, the U.S. Forest Service requires staff to document the harm in order to apply Exemptions 2 or 5.³²

²⁸ 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> (“I strongly encourage agencies to make discretionary disclosures of information ... [T]he Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.”).

²⁹ U.S. Department of Justice Office of Information Policy, “OIP Guidance and Suggested Best Practices for Improving Transparency,” Sept. 1, 2010, available at <http://www.justice.gov/oip/docs/best-practices-guidance-sept-2010.pdf> (“Agencies should institute a system, or add a step in their processing procedures, to affirmatively consider whether more information can be released as a matter of administrative discretion”).

³⁰ Department of Justice, “Guide to Discretionary Disclosure and Waiver,” *DOJ Guide to the Freedom of Information Act 2009 Edition*, 2009, p.686. available at http://www.justice.gov/oip/foia_guide09/proactive-disclosures.pdf (“Accordingly, and inasmuch as the FOIA’s exemptions are discretionary, not mandatory, agencies may make ‘discretionary disclosures’ of exempt information, as a matter of their administrative discretion, where they are not otherwise prohibited from doing so.”); U.S. House of Representatives Committee on Oversight and Government Reform, *A Citizen’s Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records*, 2012, p. 3, available at <http://oversight.house.gov/wp-content/uploads/2012/09/Citizens-Guide-on-Using-FOIA.2012.pdf> (“The application of the Act’s exemptions is generally permissive – not mandatory.”).

³¹ Office of Government Information Services, “FOIA Requirements, Agency Best Practices, and OGIS Recommendations,” p. 1, available at <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf> (“Develop agency-specific guidance on how to conduct a foreseeable harm analysis, which clearly identifies the harm that would occur with disclosure”).

³² *Id.*

b. Release records on a rolling basis

The department should adopt a policy to make rolling releases of records, also known as “interim releases,” whenever possible.³³

Often, FOIA requesters wish to use the requested information as soon as possible, which makes the timeliness of responses critical to effective FOIA processing. Releasing records as they are processed, rather than waiting to complete processing of the entire request, increases the timeliness of disclosure and thereby the usefulness of the disclosed records. Therefore, the Office of Information Policy³⁴ and the Office of Government Information Services³⁵ recommend that agencies conduct rolling releases of records, also known as “interim releases,” whenever possible.

Recommendation: Revise the proposed regulations at § 4.7(b) to add, “If a request involves a voluminous amount of material or searches in multiple locations, a component shall provide the requester with interim responses, releasing the information on a rolling basis.”

c. Notify requesters of declassification reviews

The department should adopt a policy to notify a requester when it has performed a declassification review in processing the request.³⁶

Recommendation: Revise the proposed regulations at § 4.8 to add after the third sentence, “If the component determines that the records should continue to be classified and must be withheld, the component shall explain in its response letter to the requester that the records are properly classified and that this determination is based on a declassification review, with an explanation of how that review confirmed the continuing validity of the national security classification.”

5. Clarify fee procedures

a. Adopt a reasonable threshold for minimum fee charges

³³ See *supra* note 1, at 28-29.

³⁴ U.S. Department of Justice Office of Information Policy, “OIP Guidance: The Importance of Good Communication with FOIA Requesters,” March 4, 2010, *available at* <http://www.justice.gov/oip/foiapost/2010foiapost5.htm> (“When an agency is working on a request that involves a voluminous amount of material or which involves searches in multiple locations, whenever feasible, the agency should provide the requester with interim responses rather than waiting until all records are located and processed”).

³⁵ Office of Government Information Services, “FOIA Requirements, Agency Best Practices, and OGIS Recommendations,” p. 3, *available at* <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf> (“Make rolling releases of information in cases with voluminous records”).

³⁶ See *supra* note 1, at 31.

The department should adopt a policy that it will not charge a fee if the total fee would be less than \$50.³⁷

Recouping charges for producing small FOIA requests is uneconomical and may contribute to processing delays.³⁸ FOIA processing would be streamlined by not charging a fee for processing that costs the agency less than \$50.

Recommendation: Revise the regulations at § 4.11(d)(4) to state, “If a total fee calculated under paragraph (c) of this section is \$50 or less for any request, no fee shall be charged. If such total fee is more than \$50, the full amount of such fee shall be charged.”

b. Provide discretion to waive more fees

The department should adopt a policy that components may waive or reduce fees in additional circumstances.³⁹

In addition to the statutory requirements for awarding fee waivers,⁴⁰ agencies may use administrative discretion to waive or reduce fees in additional circumstances on a case-by-case basis.⁴¹ Recalling that President Obama has called for agencies to administer FOIA “in a spirit of cooperation,”⁴² there may be cases where it would be more efficient and accommodating to waive fees than to insist on fees and prompt a dispute.

Recommendation: Revise the proposed regulations at § 4.11(k) to add a new paragraph (6) that states, “Components may also waive or reduce fees in additional circumstances as a matter of administrative discretion.”

³⁷ See *supra* note 1, at 36.

³⁸ 5 U.S.C. § 552(a)(4)(A)(iv)(I) (“No fee may be charged by any agency under this section if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee”); *also see* Office of Government Information Services, “FOIA Requirements, Agency Best Practices, and OGIS Best Practices,” March 19, 2009, p. 4-5, available at <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf> (“Charge no fee if the costs of the routine fee collection and processing are likely to equal or exceed the fee amount”).

³⁹ See *supra* note 1, at 37.

⁴⁰ 5 U.S.C. § 552(a)(4)(A)(iii) (“Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the 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.”).

⁴¹ Office of Government Information Services, “Agency Best Practices for Agency FOIA Regulations,” available at <https://ogis.archives.gov/about-foia/best-practices/Agency-Best-Practices-for-Agency-FOIA-Regulations.htm> (“Regulations may also provide for an agency to exercise administrative discretion to waive fees in the interest of better serving FOIA and making government more efficient.”)

⁴² Barack Obama, Presidential Memorandum, “Freedom of Information Act,” The White House, Jan. 21, 2009, available at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct.

8. Improve administrative appeals and dispute resolution

a. Provide adequate time limits for requesters to submit appeals

The department should provide at least 60 days for requesters to submit administrative appeals.⁴³

Short appeal deadlines may not provide enough time for a requester to gather all the facts relevant to the request and prepare any arguments they wish to make in the appeal. Providing a minimum of 60 days would allow adequate time for requesters to prepare and submit appeals.

Recommendation: Revise the proposed regulations at § 4.10(a) to strike “30 calendar days” and insert “60 calendar days” in each instance.

b. Streamline the process for submitting appeals

The department should remove the requirement for requesters to include a copy of the original request and initial denial when submitting appeals. Because the department is required by General Records Schedule 14 to maintain copies of those records, it is unnecessary for the requester to submit copies. To the contrary, requiring the requester to include copies may be unduly burdensome on requesters who may not have maintained copies.

Additionally, the department should not require appeals to provide a justification. FOIA provides requesters “the right ... to appeal to the head of the agency any adverse determination,” and does not require such appeal to specify a reason.⁴⁴

Recommendation: Revise the proposed regulations at § 4.10(b)(1) and § 4.10(b)(2) to state, “In all cases, the appeal (written or electronic) must include *the assigned request number or* a copy of the original request and initial denial, if any. All appeals *should* include a statement of the reasons why the records requested should be made available and why the adverse determination was in error.”

c. Notify requesters about dispute resolution services from the Office of Government Information Services

The department should adopt a policy to notify requesters about dispute resolution services from the Office of Government Information Services.⁴⁵

⁴³ See *supra* note 1, at 39-40.

⁴⁴ 5 U.S.C. § 552(a)(6)(A)(i).

⁴⁵ See *supra* note 1, at 41-42.

The OPEN Government Act of 2007 created the Office of Government Information Services and directed it to offer mediation services to resolve disputes between FOIA requesters and agencies.⁴⁶ Making dispute resolution services easily available to requesters can help address questions or issues that might otherwise result in costly litigation.⁴⁷ Agencies should provide information about dispute resolution services in their FOIA regulations and in appeal determination letters.⁴⁸

Recommendation: Revise the proposed regulations at § 4.10 to add a new sub-section (g) that states, “The Office of Government Information Services (OGIS) within the National Archives and Records Administration offers mediation services to resolve disputes between requesters and agencies as a non-exclusive alternative to litigation. Requesters with concerns about the handling of their requests may contact OGIS.” (The regulations should then provide contact information for OGIS.)

“Components shall provide the requester with the name and contact information of the Office of Government Information Services in an appeal determination letter.”

7. Improve the clarity and accuracy of the proposed regulations

It is important for requesters as well as agency staff to fully understand NARA’s FOIA policies. Ensuring that FOIA regulations are easy to read helps avoid misunderstandings.

⁴⁶ OPEN Government Act of 2007, Pub. L. 110-175, 121 Stat. 2529, codified as amended at 5 U.S.C. § 552(h)(3); U.S. Department of Justice Office of Information Policy, “OIP Guidance: Notifying Requesters of the Mediation Services Offered by OGIS,” *FOIA Post*, July 9, 2010, available at <http://www.justice.gov/oip/foiapost/2010foiapost21.htm> (“[A]gencies should include in their final agency responses to requesters a standard paragraph notifying the requester that mediation services are offered by OGIS and giving contact information for that office. This notification to requesters should be provided at the conclusion of the administrative process within the agency, i.e., as part of the agency’s final response on administrative appeal.”); Office of Government Information Services, “Agency Best Practices for Agency FOIA Regulations,” available at <https://ogis.archives.gov/about-foia/best-practices/Agency-Best-Practices-for-Agency-FOIA-Regulations.htm> (“OGIS suggests agencies include in their regulations ... that the agency, in its final appeal determinations, will alert FOIA requesters to OGIS’s services”).

⁴⁷ U.S. Department of Justice Office of Information Policy, “OIP Guidance: Notifying Requesters of the Mediation Services Offered by OGIS,” *FOIA Post*, July 9, 2010, available at <http://www.justice.gov/oip/foiapost/2010foiapost21.htm> (“Resolving FOIA disputes through mediation holds the potential to reduce litigation, thereby saving time and money for agencies and requesters alike, as well as enhancing the operation of the FOIA and public collaboration.”).

⁴⁸ Office of Government Information Services, “Agency Best Practices: Communications and Customer Service,” available at <https://ogis.archives.gov/about-foia/best-practices/agency-best-practices---communications-and-customer-service.htm> (“Include information about OGIS in final appeal letters, advising requesters that the Office can assist in resolving FOIA disputes as an alternative to litigation.”).

Recommendation: In the proposed regulations at § 4.9(c), correct the reference to 5 U.S.C. § 552(b)(4) by striking “of this section” after “FOIA exemption (b)(4).” There is no paragraph (b)(4) in this section of the proposed regulations.

Recommendation: Revise the proposed regulations at § 4.9(h)(1) to state, “The component determines that the information is exempt *and will be withheld* under a FOIA exemption, other than exemption (b)(4).”

Conclusion

The Center for Effective Government appreciates the opportunity to comment on the Commerce 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,

A handwritten signature in black ink that reads "Gavin R. Baker". The signature is written in a cursive, slightly slanted style.

Gavin R. Baker

Open Government Policy Analyst