



April 16, 2012

Mr. Hugo Teufel
Acting General Counsel
Special Inspector General for Afghanistan Reconstruction
2530 Crystal Drive
Arlington, VA 22202-3940
via email to hugo.teufel.civ@mail.mil

Re: RIN 3460-AA00
Freedom of Information Act and Privacy Act Procedures, 77 FR 15555

Dear Mr. Teufel:

OMB Watch welcomes the opportunity to comment on the Special Inspector General for Afghanistan Reconstruction's (SIGAR) 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, and we appreciate SIGAR's steps to draft FOIA regulations. As a new agency, SIGAR has an opportunity to learn from the FOIA implementation lessons of other agencies and start off with the full benefit of modern technology and forward looking policies.

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

- Strengthen the regulations to expand online disclosures; and
- Notify requesters of alternatives to litigation.

Strengthen the regulations to expand online disclosures

OMB Watch is concerned that the proposed regulations do not seem to fully embrace the use of online disclosure for public information under FOIA. Expanding online disclosure is an important method to efficiently maximize SIGAR's transparency.

FOIA requires agencies to post online information that has been released in response to a FOIA request and is “likely to become the subject of subsequent requests.”¹ In addition, the Presidential Memorandum of Jan. 21, 2009² and the Attorney General’s 2009 FOIA policy guidance³ direct agencies to post information online in advance of receiving a FOIA request. However, SIGAR’s regulations do not explain how the agency will fulfill these responsibilities.

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.

We recommend that SIGAR adopt a policy to (a) proactively disclose information to the greatest extent possible and (b) post online responses to all FOIA requests, excluding those made jointly under the Privacy Act. Specifically:

- (a) *Proactive disclosure*: The FOIA regulations proposed by the Department of Justice on March 21, 2011 affirm the department’s responsibility for “determining which of its records are required to be made publicly available, as well as identifying additional records of interest to the public that are appropriate for public disclosure, and for posting such records.”⁴ SIGAR should adopt a similar policy.

In addition, SIGAR should adopt a policy to “establish categories of records that can be disclosed regularly,” as recommended by the Office of Government Information Services (OGIS).⁵ SIGAR should consult with stakeholders to identify such categories of records.

- (b) *Documents released in response to FOIA requests*: The Office of the Secretary of Defense and Joint Staff regularly posts released FOIA documents on its website.⁶ SIGAR should also adopt this policy, which was recommended in a 2008 report by OMB Watch and the open government community.⁷

In addition to a clear policy on posting released records online, SIGAR should consider putting in place technology to facilitate posting of records as well as improve request processing and customer service. The Environmental Protection Agency is currently

¹ 5 U.S.C. 552(a)(2)(D).

² Barack Obama, Freedom of Information Act, The White House, Jan. 21, 2009, *available at* http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/

³ 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>

⁴ Justice Department, Freedom of Information Act Regulations, March 21, 2011, 76 FR 15236.

⁵ <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf>

⁶ Office of the Secretary of Defense and Joint Staff, FOIA Requester Service Center, Most Recently Posted Reading Room Documents, *available at* <http://www.dod.gov/pubs/foi/recent.html>

⁷ Moving Toward a 21st Century Right-to-Know Agenda, November 2008, *available at* <http://www.ombwatch.org/files/21strtkreccs.pdf>

leading the development of a multi-agency software platform that will serve as a central portal for requests for all participating agencies, including automatic publication of released documents.⁸ OMB Watch believes the portal project has great promise and encourages SIGAR to explore becoming a participant in the effort as soon as is feasible.

Notify requesters of alternatives to litigation

SIGAR's regulations provide that agency FOIA determinations notify requesters of "the procedure for filing an appeal" and that appellate decisions describe "the provisions for judicial review."⁹ In both cases, SIGAR should notify requesters of the services offered by the Office of Government Information Services (OGIS), including mediation as an alternative to litigation.

Congress created OGIS within the National Archives and Records Administration and directed it to offer mediation services.¹⁰ Such services can facilitate communication between requesters and agencies and may reduce litigation under FOIA.

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

Conclusion

OMB Watch appreciates the opportunity to comment on SIGAR'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

⁸ See p. 4-5, U.S. Environmental Protection Agency, Open Government Plan 2.0, April 2012, *available at* http://epa.gov/open/EPAOpenGovernmentPlan_20.pdf

⁹ 5 CFR 9301.6(c)(1)(i), (ii); 5 CFR 9301.6 (d)(2).

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