



November 4, 2013

Regulations Comments Desk, Strategy Division (SP)
Suite 4100
National and Archives Records Administration
8601 Adelphi Road
College Park, MD 20740-6001
via Regulations.gov

Re: NARA Records Subject to FOIA (78 F.R. 47245)
RIN 3095-AB73

Dear Mr. Ferriero,

The Center for Effective Government welcomes the opportunity to comment on the National and Archives Records Administration's (NARA) 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. We are concerned that NARA's proposed regulations fail to implement statutory requirements or to adopt best practices in several regards. Therefore, we encourage NARA 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 adopting the foreseeable harm standard for withholding, providing requesters with an estimated time of completion, and notifying requesters about dispute resolution services available from the Office of Government Information Services. We applaud NARA 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. Expand online disclosures
 - a. Establish categories of records that can be disclosed regularly
 - b. Proactively identify and disclose additional records of interest to the public
 - c. Post records released in response to FOIA requests



- d. Publish logs of FOIA requests received by the agency
2. Communicate with requesters by e-mail where appropriate
3. Improve the acknowledgment of requests
 - a. Acknowledge requests as soon as practicable
 - b. Promptly reroute requests to the appropriate agency FOIA office and notify requesters
4. Improve communication with requesters
 - a. Explain NARA's multitrack processing system
 - b. Seek clarification as necessary
 - c. Contact the requester before denying requests as unreasonable
 - d. Use plain language in all communications with requesters
5. Apply the presumption of openness
 - a. Release records on a rolling basis
 - b. Prevent the destruction of requested records
6. Streamline confidential business information claims
 - a. Require submitters to proactively designate claimed confidential business information
 - b. Streamline notice of requests to submitters
 - c. Require substantiation for claims of confidential business information
7. Clarify fees and fee waivers
 - a. Comply with statutory requirements for fee waivers and reductions
 - b. Reduce duplication fees
 - c. Adopt a reasonable threshold for minimum fee charges
 - d. Provide discretion to waive fees in additional circumstances
 - e. Comply with the statutory prohibition against fees for requests exceeding time limits
8. Improve administrative appeals
 - a. Provide adequate time limits for requesters to submit appeals
 - b. Streamline the process for submitting appeals
9. Improve the clarity and accuracy of the recommendations

1. Expand online disclosures

We encourage NARA 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 NARA's transparency.¹ Posting information online maximizes the impact of the agencies' FOIA efforts by

¹ Department of Justice, "Proactive Disclosures," *DOJ Guide to the Freedom of Information Act 2009 Edition*. 2009, p.11, available at http://www.justice.gov/oip/foia_guide09/proactive-disclosures.pdf ("Proactive disclosures are an

allowing the public to access and use the information disclosed.² For instance, millions more Americans visit government websites to seek information than file FOIA requests.³

FOIA contains minimum obligations for agencies to disclose information proactively, in advance of any request.⁴ But agencies can, and should, go far beyond the statutory minimum.⁵ Whenever possible, agencies should make information available to the public without requiring requesters to navigate FOIA's administrative process.

Additionally, online disclosure can save agency resources by reducing duplicative requests. For example, after the Agriculture Marketing Service posted online a searchable database of more than 50,000 animal care inspection reports, the number of incoming FOIA requests fell by nearly 35 percent.⁶

President Obama's FOIA memorandum,⁷ Attorney General Holder's FOIA guidelines,⁸ and the Open Government Directive⁹ have also emphasized the importance of posting information online. Therefore, NARA should proactively disclose information to the greatest extent possible and include provisions within its regulations outlining its responsibilities in this area. Although

efficient means to make record publicly available that otherwise might be sought through less efficient FOIA requests").

² U.S. Department of Justice Office of Information Policy, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines," April 17, 2009, available at <http://www.justice.gov/oip/foiapost/2009foiapost8.htm> ("[A]gencies must recognize that proactively disclosing information about the operations and activities of their agency is an integral part of achieving transparency").

³ See Center for Effective Government, "Fixes Early in FOIA Process Offer Greatest Potential for Impact," May 7, 2013, available at <http://www.foreffectivegov.org/fixes-early-foia-process-offer-greatest-potential-impact>.

⁴ See 5 U.S.C. § 552(a)(1), (2); U.S. Department of Justice Office of Information Policy, "Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements," June 27, 2008, available at <http://www.justice.gov/oip/foiapost/2008foiapost21.htm> ("[T]he Reading Room provision of the FOIA imposes an affirmative disclosure requirement").

⁵ Department of Justice, "Proactive Disclosures," *DOJ Guide to the Freedom of Information Act 2009 Edition*, 2009, p.10, available at http://www.justice.gov/oip/foia_guide09/proactive-disclosures.pdf ("Agencies should also exercise their discretion to make a broader range of records available beyond the minimum required by the statute.").

⁶ Office of Government Information Services, "FOIA Requirements, Best Practices, and OGIS Recommendations," available at <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf>.

⁷ Barack Obama, Presidential Memorandum, "Freedom of Information Act," The White House, Jan. 21, 2009, available at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct ("[A]gencies should take affirmative steps to make information public").

⁸ 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> ("[A]gencies should readily and systematically post information online in advance of any public request"); also see Office of Government Information Services, "FOIA Requirements, Agency Best Practices, and OGIS Best Practices," March 19, 2009, p.2, available at <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf> (noting the Holder memo's requirements for proactive disclosure online).

⁹ Peter R. Orszag, "Open Government Directive," Office of Management and Budget, Memorandum 10-06, Dec. 8, 2009, available at http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf ("[A]gencies should proactively use modern technology to disseminate useful information, rather than waiting for specific requests under FOIA.").

NARA makes general statements about affirmative disclosure in § 1250.2 of the proposed regulations, NARA should commit to specific procedural requirements to advance the proactive, online disclosure of information.

a. Establish categories of records that can be disclosed regularly

NARA should adopt a policy to “establish categories of records that can be disclosed regularly,” as recommended by the Office of Government Information Services (OGIS).¹⁰ Establishing such categories of records would ensure that NARA routinely makes key information available to the public without the need to file a FOIA request. The Equal Employment Opportunity Commission, for example, has adopted such a policy.¹¹

Recommendation: Revise the proposed regulations at § 1250.12 to add, “NARA will establish categories of records that can be disclosed regularly and will routinely post such records on its website.”

Implementation suggestion: NARA 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.¹²

b. Proactively identify and disclose additional records of interest to the public

NARA should adopt a policy to proactively identify particular records likely to be of interest to the public and to post such records online.¹³ NARA has a public service obligation to promptly disclose matters that would be of public interest, without waiting for a FOIA request.¹⁴ The Department of the Interior, for example, has adopted such a policy in its FOIA regulations.¹⁵

¹⁰ 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>.

¹¹ Equal Employment Opportunity Commission, “Availability of Records,” rule, June 19, 2013, 78 F.R. 36649 (“EEOC has established and will continue to establish categories of records and information of interest to the public that it will disclose regularly online.”).

¹² 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>.

¹³ Department of Justice. “OIP Guidance and Suggested Practices for Improving Transparency.” Sept. 1, 2010, p.3, available at <http://www.justice.gov/oip/docs/best-practices-guidance-sept-2010.pdf> (“All agencies should ensure that they, including all their components, are identifying documents for proactive disclosure and have an on-going process of posting documents of interest to the public”).

¹⁴ Barack Obama, Presidential Memorandum, “Freedom of Information Act,” The White House, Jan. 21, 2009, *available at* http://www.whitehouse.gov/the_press_office/FreedomofInformationAct (“[Agencies] should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government.”).

¹⁵ 43 C.F.R. § 2.67(a) (“Each bureau must ... [i]dentify additional records of interest to the public that are appropriate for public disclosure ... [and] [p]ost those records in FOIA libraries.”).

Recommendation: Revise the proposed regulations at § 1250.12 to add, “NARA will proactively identify and disclose additional records of interest to the public.”

c. Post records released in response to FOIA requests

NARA should adopt a policy to post online all records released in response to FOIA requests.¹⁶

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 agencies to post online any information that has been released in response to a FOIA request and is “likely to become the subject of subsequent requests.”¹⁷ Some agencies, such as the Department of the Air Force,¹⁸ have adopted the best practice of posting *all* released records. Doing so makes more information available to the public and 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 § 1250.12(b)(4) to state, “Copies of records previously released under FOIA.”

Implementation suggestions:

- To protect privacy, NARA could exclude first-person requests for personal information, such as those made jointly under the Privacy Act.¹⁹
- NARA 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.²⁰

¹⁶ Office of Government Information Services. “FOIA Requirements, Agency Best Practices, and OGIS Best Practices,” March 19, 2009, p.2, *available at* <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf> (“Post online significant documents that have been released under FOIA without waiting for a second FOIA request. If feasible post previously released documents, of whatever age, in searchable form on agency FOIA web page.”)

¹⁷ Electronic Freedom of Information Act Amendments of 1996, P.L. 104-231, at Sec. 4; 5 U.S.C. § 552(a)(2)(D).

¹⁸ Air Force Manual, “Freedom of Information Act Program,” sec. C2.1.2.4.3.1, Oct. 21, 2010, *available at* <http://www.foia.af.mil/shared/media/document/AFD-070702-060.pdf> (“The FOIA RSC will consider any requested record that has been previously partially or fully released as a frequently requested record ... and make it publicly available electronically ... FOIA managers will ensure that there is no personally identifiable information (PII) posted to the e-Reading Room even if it is fully released, i.e., first or third party request”).

¹⁹ 5 U.S.C. § 552a. *Cf.* 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)”).

²⁰ 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>.

d. Publish logs of FOIA requests received by the agency

NARA should adopt a policy to post logs of FOIA requests received by the agency.

FOIA logs are a useful tool for members of the public to monitor what sort of requests agencies are receiving.²¹ Additionally, FOIA logs can provide information about agency performance at FOIA implementation, in greater detail than is available in annual agency reports. The Department of Housing and Urban Development, for instance, has proposed regulations to adopt such a policy.²²

Recommendation: Revise the proposed regulations at § 1250.12 to add, “NARA will regularly post logs describing the requests it has received and processed.”

Implementation suggestion: FOIA logs 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. Communicate with requesters by e-mail where appropriate

NARA should adopt a policy that it will communicate with requesters by e-mail where appropriate.

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.²³ E-mail communication can also reduce printing and mailing costs for agencies. The Office of the U.S. Trade Representative, for instance, reports that it generally communicates with requesters via e-mail.²⁴

²¹ 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.”).

²² Department of Housing and Urban Development, “Revision of Freedom of Information Act Regulation,” proposed rule, May 31, 2013, 78 F.R. 32601 (stating that HUD posts on its FOIA website “FOIA request logs”).

²³ 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.”).

²⁴ Office of the U.S. Trade Representative, “Chief Freedom of Information Act Officer Annual Report,” March 11, 2013, *available at* <http://www.ustr.gov/sites/default/files/USTR%20CHIEF%20FOIA%20OFFICER%20Report%202012.pdf> (“USTR is likewise working toward mostly electronic communications with requesters and generally transmits FOIA responses via email”).

Recommendation: Revise the proposed regulations at § 1250.26 to add, “NARA will generally communicate with the requester by e-mail, unless he or she specifies otherwise.”

3. Improve the acknowledgment of requests

By promptly and effectively acknowledging that it has received a request, an agency sets a constructive tone for interactions with the requester. Because it can often take several weeks for agencies to provide a full response to a request, providing an initial acknowledgement letter can be helpful to let requesters know that their request has been received and is being processed.

a. Acknowledge requests as soon as practicable

NARA should adopt a policy to acknowledge all requests as soon as practicable. Promptly acknowledging requests assures requesters that their request has been properly received. In addition, acknowledgement letters can provide requesters with important information, such as the tracking number for their request and contact information for questions on processing. The Environmental Protection Agency, for instance, includes such a policy in its regulations.²⁵

Recommendation: Revise the proposed regulations at the first sentence of § 1250.26 to state, “NARA will acknowledge all FOIA requests *as soon as possible*.”

Implementation suggestion: NARA should provide an automated acknowledgment when possible (e.g., for requests received through the agency website or by e-mail).

b. Promptly reroute requests to the appropriate agency FOIA office and notify requesters

NARA should adopt a policy to reroute requests to the appropriate FOIA office within 10 days, as required by law, and to notify requesters when doing so.

The OPEN Government Act of 2007 required agencies to begin processing a FOIA request within 10 days of its receipt by any agency-designated FOIA office.²⁶ Promptly rerouting requests assists requesters and avoids undue delays. Notifying the requester of the rerouting can

²⁵ 40 C.F.R. § 2.104(b) (“On receipt of a request, the FOI Office ordinarily will send a written acknowledgment advising you of the date it was received and of the processing number assigned to the request for future reference”).

²⁶ P. L. 110-175, at Sec. 6; 5 U.S.C. § 552(a)(6)(A) (“The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section.”).

further inform requesters and avoid confusion.²⁷ The Federal Labor Relations Authority, for example, has adopted such a policy in its regulations.²⁸

Recommendation: Revise the proposed regulations at the final sentence of § 1250.22(f) to state, “Your request will be considered received when it reaches the proper office’s FOIA staff, *but in any event not later than ten days after the request is first received.*”

Revise the proposed regulations at § 1250.26 to add, “Within 10 days of receiving a request, NARA will reroute requests received by any NARA FOIA office to the appropriate NARA FOIA office for the records requested. NARA will notify the requester of the office to which it rerouted the request and provide contact information for that office. If NARA reroutes a request, the time period for processing the request begins when the appropriate FOIA office receives the request, or 10 days after any NARA FOIA office first received the request, whichever is earlier.”

4. Improve communication with requesters

Clear and open communication between requesters and agency staff is vital to an effective, user-friendly FOIA process. Agencies should strive to provide the best service to requesters by maintaining open lines of communication and providing requesters with relevant updates throughout the process.²⁹

Providing requesters with information to make informed decisions, as well as status updates, can generally improve the requester's experience, reduce unnecessary delays, and avoid disputes.

a. Explain NARA’s multitrack processing system

FOIA allows agencies to establish multitrack processing systems based on the time or work required to process a request.³⁰ To provide for multitrack processing, the law requires agencies to “promulgate regulations, pursuant to notice and receipt of public comment.”³¹

²⁷ Department of Justice Office of Information Policy, “OIP Guidance: New Requirement to Route Misdirected FOIA Requests,” *FOIA Post*, November 18, 2008, available at <http://www.justice.gov/oip/foiapost/2008foiapost31.htm> (“In those instances where a receiving FOIA office has routed a misdirected request to another FOIA office within the agency for processing, the receiving FOIA office is encouraged to notify the requester of the routing.”).

²⁸ 5 C.F.R. § 2411.8(a).

²⁹ Barack Obama, Executive Order 13571, “Streamlining Service Delivery and Improving Customer Service,” The White House, April 27, 2011 (“The public deserves competent, efficient, and responsive service from the Federal Government.”).

³⁰ 5 U.S.C. § 552(a)(6)(D).

³¹ 5 U.S.C. § 552(a)(6)(D)(i).

In NARA's 2012 annual FOIA report, NARA reports processing requests on both simple and complex tracks.³² Therefore, it appears that NARA has already implemented multitrack processing. However, NARA's proposed regulations do not provide for multitrack processing. To the contrary, the proposed regulations at § 1250.26(a) state, "NARA places FOIA requests in a queue to be processed on a first-in, first-out basis."

To comply with the statutory provisions for multitrack processing, NARA should revise the proposed regulations to explain its multitrack processing system.

Recommendation: Revise the proposed regulations at § 1250.26 to provide for multitrack processing, explain NARA's multitrack processing system, explain how a request qualifies for the different processing tracks, and provide a person making a request that does not qualify for the fastest processing track an opportunity to limit the scope of the request in order to qualify for faster processing.

b. Seek clarification as necessary

NARA should adopt a policy to contact the requester to seek clarification if NARA is unclear as to the scope of the request.³³

NARA'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.³⁴ In order to make sure that NARA does not unduly limit the records found responsive to FOIA requests, NARA should instruct its employees to carefully read and fairly interpret the terms of the FOIA requests that it receives and contact the requester for clarification if needed. Doing so can avoid disputes. The Nuclear Regulatory Commission, for instance, has issued guidance instructing its FOIA staff to clarify the scope of FOIA requests at the outset of processing.³⁵

³² National Archives and Records Administration, "Fiscal Year 2012 Annual Freedom of Information Act (FOIA) Report," available at <http://archives.gov/foia/reports/2012.pdf>.

³³ Department of Justice. "Guide to the Freedom of Information Act: Procedural Requirements (2013)." 2013, p.25, available at <http://www.justice.gov/oip/foia-guide13/procedural-requirements.pdf> ("Even if the request 'is not a model of clarity,' an agency should carefully consider the nature of each request and give a reasonable interpretation to its terms and overall content.")

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/foiapist/2010foiapist5.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").

³⁵ Nuclear Regulatory Commission FOIA/Privacy Team guidance, available at <http://pbadupws.nrc.gov/docs/ML0932/ML093230619.pdf> ("[M]ake every effort to clarify the scope of the request before forwarding the request to the office FOIA coordinators").

Recommendation: Revise the proposed regulations at § 1250.26 to add, “If NARA has any uncertainty regarding an aspect of the request, NARA will attempt to communicate with the requester to clarify the scope of his or her FOIA request.”

c. Contact the requester before denying requests as unreasonable

NARA should adopt a policy that it will contact the requester to seek clarification before denying a request for not reasonably describing the records sought. Doing so can improve customer service and avoid disputes. The National Labor Relations Board, for example, includes such a policy in its FOIA regulations.³⁶

Recommendation: Revise the proposed regulations at § 1250.26 to add, “Requests must reasonably describe the records sought. If NARA determines that a request does not reasonably describe the records sought, NARA will contact the requester to seek clarification. NARA may toll the time limits for processing in order to make one such request, in which case the time limits resume upon NARA’s receipt of a response from the requester. NARA will provide at least 30 days for the requester to respond to a request for clarification. If the request has not been clarified after 30 days, NARA will deny the request for not reasonably describing the records sought and will provide the requester with the opportunity to appeal under the procedures in Subpart D.”

d. Use plain language in all communications with requesters

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

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.”³⁷

Citizens deserve clear communications from the government. All NARA communications with requesters should be easy to read, understand, and use.

³⁶ 29 C.F.R. § 102.117(c)(1) (“If the Agency determines that a request does not reasonably describe records, it may contact the requester to inform the requester either what additional information is needed or why the request is insufficient. Requesters may be given an opportunity to discuss their request so that requests may be modified to meet the requirements of this section”).

³⁷ 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”).

Recommendation: Revise the proposed regulations at § 1250.30 to add, “NARA will use plain language in all written communications with requesters.”

5. Apply the presumption of openness

Agencies serve the public and should favor disclosure to improve government openness for the benefit of the public. As President Obama has commented, “All agencies should adopt a presumption in favor of disclosure,”³⁸ and withholding should be narrowly limited.³⁹ Furthermore, minimizing withholding, denials, and delays can reduce disputes with requesters and avoid litigation.

a. Release records on a rolling basis

NARA should adopt a policy to make rolling releases of records, also known as “interim releases,” whenever possible, as recommended by OIP guidance⁴⁰ and OGIS best practices.⁴¹ Releasing records as they are processed, rather than waiting to complete processing of the entire request, increases the timeliness of disclosure. The State Department, for instance, implements the practice of rolling releases.⁴²

Recommendation: Revise the proposed regulations at § 1250.30 to add, “If a request involves a voluminous amount of material or searches in multiple locations, NARA will provide the requester with interim responses, releasing the information on a rolling basis.”

b. Prevent the destruction of requested records

³⁸ Barack Obama, Presidential Memorandum, “Freedom of Information Act,” The White House, Jan. 21, 2009, available at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct.

³⁹ *FBI v. Abramson*, 456 U. S. 615, 630 (1982) (providing that FOIA exemptions must be “narrowly construed”).

⁴⁰ 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”).

⁴¹ Office of Government Information Services. FOIA Requirements, Best Practices, and OGIS Recommendations available at <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf>.

⁴² Office of Government Information Services, “Improving the FOIA Process,” *The First Year: Building Bridges Between FOIA Requesters and Federal Agencies*, March 2011, available at <https://ogis.archives.gov/about-ogis/ogis-reports/the-first-year/improving-the-foia-process.htm> (“The State Department makes rolling releases of information to requesters rather than waiting until processing ends”).

NARA should adopt a policy that it will preserve any records requested under FOIA.⁴³ Just as agencies take steps to prevent the spoliation of evidence in legal proceedings, they also should ensure that records requested under FOIA will remain available.

Records management regulations require agencies to prevent the destruction of records subject to a FOIA request.⁴⁴ Additionally, NARA's FOIA regulations should integrate the government-wide schedule for how long agencies must maintain records related to FOIA requests.⁴⁵ The Department of Veterans Affairs, for instance, addresses records retention in its FOIA regulations.⁴⁶

Recommendation: Revise the proposed regulations at § 1250.26 to add, “NARA will maintain copies of records that are the subject of a pending request, appeal, or lawsuit under the FOIA. NARA will also preserve all correspondence pertaining to FOIA requests until disposition is authorized under the National Archives and Records Administration’s General Records Schedule 14.”

c. Indicate the quantity of withheld information

NARA's regulations should reflect FOIA's requirements to indicate the quantity of information withheld under exemptions.⁴⁷

Recommendation: Revise the proposed regulations at § 1250.30(c), after “In addition, if only part of a record must be withheld, NARA will provide access to the rest of the information in the record,” to add: “NARA will indicate the amount of information deleted, and the exemption under which the deletion is made, on the released portion of the record, unless including that indication would harm an interest protected by the exemption under which the deletion is made. If technically feasible, NARA will indicate

⁴³ 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 FOIA regulations information about the preservation of records and records management. OGIS has observed that good records management is essential to the FOIA administrative process.”).

⁴⁴ 36 C.F.R. § 1230.10 (“The heads of Federal agencies must: Prevent the unlawful or accidental removal, defacing, alteration, or destruction of records ... Take adequate measures to inform all employees and contractors of the provisions of the law relating to unauthorized destruction, removal, alteration or defacement of records ... Implement and disseminate policies and procedures to ensure that records are protected against unlawful or accidental removal, defacing, alteration and destruction”); 36 C.F.R. § 1230.3(b) (defining “unlawful or accidental destruction” to include “disposal of a record subject to a FOIA request”).

⁴⁵ National Archives and Records Administration, General Records Schedules, Transmittal No. 22, “General Records Schedule 14: Information Services Records,” April 2010, available at <http://www.archives.gov/records-mgmt/grs/grs14.html>.

⁴⁶ 38 C.F.R. § 1.560.

⁴⁷ 5 U.S.C. § 552(b).

the amount of the information deleted, and the exemption under which the deletion is made, at the place in the record where such deletion is made.”

d. Prevent unwarranted administrative closure of requests

NARA should review the proposed regulations at § 1250.26(a) relating to administrative closure of requests. NARA should ensure the proposed regulations would not result in undue administrative closure of requests. NARA should rigorously attempt to contact requesters, through different methods of communication if possible (e.g., mail and telephone), to confirm that the request should be closed.

6. Streamline confidential business information claims

Many FOIA requesters have raised concerns about overly broad claims of confidential business information restricting access to important information that is properly public. Additionally, the procedures that many agencies have instituted to notify submitters about requests for submitted information are lengthy or open-ended and may contribute to delays in FOIA processing. Agencies should adopt regulations on confidential business information that avoid overly broad claims or delay responses to FOIA requests.

a. Require submitters to proactively designate claimed confidential business information

NARA should strengthen its proposal to require submitters to use good faith effort to designate any information that submitters consider to be exempt from disclosure under FOIA's Exemption 4. Specifically, NARA should require submitters to designate such claims promptly and indicate what it considers a “good faith effort” to designate such claims. The Department of Education, for instance, includes such elements in its FOIA regulations.⁴⁸

Having submitters designate information that could be exempt under Exemption 4 can help ensure that agencies do not inadvertently release exempt information. However, to be effective, submitters must make their designations in a timely fashion and narrowly target designations to information likely to be exempt.

Recommendation: Revise the proposed regulations at § 1250.80 to state, “A submitter of business information *must* use good-faith efforts to designate, by appropriate markings, either at the time of submission or *within 30 days* thereafter, any portions of its submission that it considers to be protected from disclosure under FOIA Exemption 4. These designations *are not binding on NARA* and will expire 10 years after the date of the submission unless the submitter requests, and provides justification for, a longer

⁴⁸ 34 C.F.R. § 5.11(c).

designation period. *A blanket designation on each page of a submission that all information contained on the page is protected from disclosure under Exemption 4 presumptively will not be considered a good faith effort.*”

b. Streamline notice of requests to submitters

To avoid undue delays, NARA should notify submitters about requests for submitted information only when necessary.

Agencies generally notify submitters of information when agencies receive requests for information that the submitters might claim as confidential business information. While this process is logical and reasonable, such notifications take time and should therefore only be pursued if necessary. NARA should establish that it is unnecessary to notify submitters if it determines that:

- The information should not be disclosed;
- The information has already been published;
- Disclosure of the information is required by law; or
- The submitter has made an obviously frivolous claim of confidential business information.

NARA should provide that, in those circumstances, it will proceed without delaying the process with an unnecessary check with the submitter. The White House Office of Science and Technology Policy, for example, adopted such a policy in its FOIA regulations.⁴⁹

Recommendation: Revise the propose regulations to add a new § 1250.83, as follows: “NARA will not notify a submitter under § 1250.82 if it determines that:

- (a) The information must be withheld under FOIA's exemptions;
- (b) The information lawfully has been published or made available to the public;
- (c) Disclosure of the information is required by statute (other than FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600; or
- (d) The designation made by the submitter appears obviously frivolous – except that, in such a case, the agency will, no fewer than five working days prior to a specified disclosure date, give the submitter written notice of any final decision to disclose the information.”

⁴⁹ 32 C.F.R. § 2402.6(h).

c. Require substantiation for claims of confidential business information

NARA should require submitters who wish to object to the disclosure of information to provide detailed substantiation for claiming that the information should be withheld under FOIA's Exemption 4. NARA should require objecting submitters to explain in detail the grounds for withholding the information and why the information is exempt from disclosure.

Under FOIA, agencies are required by law to release any requested information that is not validly covered under the law's specific exemptions. Requiring submitters to provide specific detail about their objections to disclosure can help agencies effectively and promptly determine whether requested information must be withheld or released. The Administrative Conference of the United States, for instance, includes such requirements in its FOIA regulations.⁵⁰

Recommendation: Revise the propose regulations at § 1250.82(d) to add, "A submitter who wishes to object to disclosure must submit a detailed written statement that specifies the grounds for withholding the information under FOIA's exemptions, with specific reference to the submitted information. A submitter who claims that information is exempt under Exemption 4 must show why the information is a trade secret or commercial or financial information that is privileged or confidential."

7. Clarify fees and fee waivers

a. Comply with statutory requirements for fee waivers and reductions

FOIA requires agencies to waive or reduce fees "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" (emphasis added).⁵¹ NARA should revise its proposed regulations to align with that standard.

Recommendation: Revise the proposed regulations at § 1250.56(c) to state, "After reviewing your request and determining that there is a substantial public interest in release, NARA will also determine if it *primarily* furthers your commercial interests. If it does, you are not eligible for a fee waiver."

⁵⁰ 1 C.F.R. § 304.7(f) ("If a submitter has any objection to disclosure, it is required to submit a detailed written statement. The statement must specify all grounds for withholding any portion of the information under any exemption of the FOIA and, in the case of Exemption 4, it must show why the information is a trade secret or commercial or financial information that is privileged or confidential.").

⁵¹ 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.").

b. Reduce duplication fees

NARA should revise the proposed regulations to reduce its per-page charges for photocopies of requested records.

The proposed regulations § 1250.52(c) would establish copy charges of \$0.25 and \$0.30 per page for self-service and NARA-produced photocopies, respectively. These fees are unusually high and could burden requesters. Several other agencies that have recently adopted FOIA regulations have established lower duplication fees: for instance, the White House Office of Science and Technology Policy,⁵² the Consumer Financial Protection Bureau,⁵³ and the Special Inspector General for Afghanistan Reconstruction⁵⁴ adopted charges of \$0.10 per page.

Recommendation: Revise the proposed regulations at § 1250.52(c) to strike “\$0.25 cents per page” and “\$0.30 cents per page” and to insert “\$0.10 per page.”

c. Adopt a reasonable threshold for minimum fee charges

NARA should adopt a policy that it will not charge a fee if the total fee would be less than \$50.⁵⁵

Recouping charges for producing small FOIA requests is uneconomical and may contribute to processing delays. FOIA processing would be streamlined by not charging a fee for processing that costs the agency less than \$50.⁵⁶ The Department of the Interior, for instance, includes a \$50 minimum threshold for fees in its FOIA regulations.⁵⁷

Recommendation: Revise the proposed regulations at § 1250.50(b)(3) to state, “We will not charge you any fee if the total costs for processing your request are **\$50** or less.”

d. Provide discretion to waive fees in additional circumstances

⁵² Office of Science and Technology Policy, “Implementation of the Freedom of Information Act,” rule, 78 F.R. 33209, June 4, 2013.

⁵³ Consumer Financial Protection Bureau, “Disclosure of Records and Information,” rule, 78 F.R. 11483, Feb. 15, 2013.

⁵⁴ Special Inspector General for Afghanistan Reconstruction, “Freedom of Information Act and Privacy Act Procedures,” rule, 77 F.R. 38171, June 27, 2012.

⁵⁵ 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”).

⁵⁶ 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”).

⁵⁷ 43 C.F.R. § 2.49 (a)(1).

NARA should adopt a policy that, in addition to the statutory requirements for awarding fee waivers,⁵⁸ it may use administrative discretion to waive or reduce fees in additional circumstances on a case-by-case basis.⁵⁹ Recalling that President Obama has called for agencies to administer FOIA “in a spirit of cooperation,”⁶⁰ there may be cases where it would be more efficient and accommodating to waive fees than to insist on fees and prompt a dispute. The Consumer Financial Protection Bureau, for example, has adopted such a policy in its regulations.⁶¹

Recommendation: Revise the proposed regulations at § 1250.56 to add, “NARA may also waive or reduce fees in additional circumstances as a matter of administrative discretion.”

e. Comply with the statutory prohibition against fees for requests exceeding time limits

NARA should clearly state that it will not charge fees for requests if it fails to comply with statutory time limits, as required by law.⁶²

Section 6 of the OPEN Government Act of 2007 imposes consequences if agencies fail to meet statutory time limits for processing requests.⁶³ Specifically, Section 6(b) provides that “an agency shall not assess search fees . . . if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined [under the FOIA]) apply to the processing of the request.” Several agencies have integrated this requirement

⁵⁸ 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.”).

⁵⁹ 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.”)

⁶⁰ Barack Obama, Presidential Memorandum, “Freedom of Information Act,” The White House, Jan. 21, 2009, *available at* http://www.whitehouse.gov/the_press_office/FreedomofInformationAct.

⁶¹ 12 C.F.R. § 1070.22(d)(4) (“the CFPB may not charge a requester a fee for processing a FOIA request . . . [i]f the CFPB determines, as a matter of administrative discretion, that waiving or reducing the fees would serve the interest of the United States Government”).

⁶² 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>. (“Assess no fees if the agency fails to comply with any time limit, if no unusual or exceptional circumstances apply to processing the request.”); Department of Justice, “OIP Guidance: New Limitations on Assessing Fees,” *FOIA Post*, November 18, 2008, *available at* <http://www.justice.gov/oip/foiapost/2008foiapost28.htm>.

⁶³ Department of Justice, “Proactive Disclosures,” *DOJ Guide to the Freedom of Information Act 2009 Edition*. 2009, p.11, *available at* http://www.justice.gov/oip/foia_guide09/proactive-disclosures.pdf. (“In those situations where the request does not present unusual or exception circumstances, as described above, an agency is prohibited from assessing search fees. . .if the agency fails to comply with the FOIA’s time limits.”)

into their FOIA regulations, such as the Special Inspector General for Afghanistan Reconstruction.⁶⁴

Recommendation: Revise the proposed regulations at § 1250.54 to add, “NARA will not charge a fee for processing a FOIA request if it exceeds any time limit under 5 U.S.C. § 552(a)(6) in processing that request.”

8. Improve administrative appeals

a. Provide adequate time limits for requesters to submit appeals

The administrative appeal process is an important element of oversight of the FOIA system and a useful opportunity for a FOIA requester to get a “second opinion.” Agencies should ensure that the appeal process is accessible to requesters and that appellate reviews are robust. Maintaining a meaningful and user-friendly appeal process can reduce disputes and may avoid litigation.

NARA should provide a minimum of 60 days from the time of decision for requesters to submit appeals. Shorter 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 provide adequate time for requesters to prepare and submit appeals. The Office of the U.S. Trade Representative, for instance, provides 60 days for the submission of appeals.⁶⁵

Recommendation: Revise the proposed regulations at the final sentence of § 1250.72 to state, “All appeals must be in writing and received by NARA within **60** calendar days of the date of NARA's denial letter.”

b. Streamline the process for submitting appeals

NARA should remove the requirement for requesters to include a copy of the initial request and NARA’s denial when submitting appeals. Because NARA 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.

Recommendation: Revise the proposed regulations at § 1250.72(a)(1) to state, “For appeals submitted via mail, you should mark both your letter and envelope with the

⁶⁴ 5 C.F.R. § 9301.8(f) (“SIGAR shall not charge a fee to any requester if ... (2) SIGAR fails to comply with any time limit under the FOIA for responding to a request for records where no unusual or exceptional circumstances apply”).

⁶⁵ 15 C.F.R. § 2004.6(d)(1).

words ‘FOIA Appeal.’ If possible, include the tracking number for your request or a copy of your initial request and NARA’s denial.”

9. Improve the clarity and accuracy of the recommendations

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.

- The proposed regulations at § 1250.8(d) state, “If you are requesting records that you know to be classified to protect national security interests, you may wish to use the Mandatory Declassification Review process, which is set forth at § 1260.70.” To aid requesters, NARA should add a brief explanation of why a requester might choose the Mandatory Declassification Review process instead of FOIA.
- The proposed regulations at § 1250.10(b) state, “The NPRC processes FOIA requests under authority delegated by the originating agencies, not under the provisions of this part.” To aid requesters, NARA should inform requesters where they can find information about the provisions under which the NPRC processes FOIA requests.
- The proposed regulations at § 1250.10(b) erroneously refer to “§ 1250.208” of NARA’s regulations. However, that section does not exist. NARA should correct the reference.
- Since NARA allows for electronic submission of FOIA requests, the proposed regulations at § 1250.20(c) should be revised to state, “Mark both your letter and envelope, *or the subject line of your email*, with the words ‘FOIA Request.’”
- NARA should revise the proposed regulations at § 1250.22(h) to include a telephone number which people can call to ask for the mailing address for NARA’s FOIA Customer Service Centers.
- NARA should revise the proposed regulations at § 1250.26(b)(1) to state that unusual circumstances include the need to “search for and collect the records from field facilities, *other than the facility to which the requester originally sent the request.*”
- NARA should revise the proposed regulations at § 1250.26(e) to provide the number of the current Executive Order on the implementation of the Presidential Records Act.
- FOIA requires agencies to expedite processing for requests where the requester shows compelling need according to statutory criteria, not according to agency discretion.⁶⁶

⁶⁶ 5 U.S.C. § 552(a)(6)(E).

NARA should revise the proposed regulations at the second sentence of § 1250.28(a) to state, “We *will* grant expedited processing if a requester can show: ...”

- NARA should be direct about which exemptions it asserts to withhold information. For clarity, NARA should revise the proposed regulations at § 1250.30(b) to strike the word “may,” such that NARA denial letters will explain “which FOIA exemptions apply to withhold records.”
- NARA should explain why it proposes to delete § 1250.38 of the regulations, which explain the agency’s statutory responsibility to provide records in the requested format if technically feasible. FOIA requires agencies to “provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”⁶⁷
- Subpart E of the proposed regulations is titled, “Special Situations.” However, all the parts of Subpart E related to confidential commercial information. For clarity, NARA should retitle Subpart E, “Confidential Commercial Information.”

Conclusion

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



Gavin R. Baker
Open Government Policy Analyst

⁶⁷ 5 U.S.C. § 552(a)(3)(B).