



FEDERAL TRADE COMMISSION

16 CFR Part 4

Freedom of Information Act; Miscellaneous Rules

AGENCY: Federal Trade Commission (FTC).

ACTION: Final rule.

SUMMARY: The Federal Trade Commission is revising its Rules of Practice governing access to agency records to implement provisions of the FOIA Improvement Act of 2016.

DATES: These amendments are effective [**insert date of publication in the FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: G. Richard Gold, Attorney, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580, (202) 326-3355.

SUPPLEMENTARY INFORMATION: On June 30, 2016, President Obama signed into law the FOIA Improvement Act of 2016, Public Law No. 114-185 (the “2016 Amendments”), amending the Freedom of Information Act (FOIA), 5 U.S.C. 552. The new law addresses a range of procedural issues, including requirements that agencies establish a minimum of 90 days for requesters to file an administrative appeal and that they provide dispute resolution services at various times throughout the FOIA process.

The 2016 FOIA Amendments also codify the Department of Justice’s “foreseeable harm” standard, amend FOIA Exemption 5, create a new “FOIA Council,” and add two new elements to agency Annual FOIA Reports. Agencies are directed to include procedures in their FOIA regulations for engaging in dispute resolution through agency FOIA Public Liaisons and the National Archives and Records Administration’s Office of Government Information Services (OGIS). Finally, the new law requires the head of each agency to review and update their agency’s regulations as necessary within 180 days of enactment.

As set out below, this document implements Rule amendments that incorporate the 2016 FOIA Amendments. Pursuant to 5 U.S.C. 553, these changes do not require public comment because they relate solely to agency practice and procedure.

In a separate document published in today’s FEDERAL REGISTER, the Commission seeks public comment pursuant to 5 U.S.C. 552(a)(4)(A)(i) on its proposal to amend its Rules of Practice relating to fees charged for obtaining Commission records.

The Public Record (16 CFR 4.9)

The 2016 FOIA Amendments clarified that “frequently requested” records include any document that has been requested under FOIA three or more times. 5 U.S.C. 552(a)(2)(D). The Commission is amending Rule 4.9(b)(10)(ix) to incorporate this revised statutory definition of “frequently requested” records.

Nonpublic Material (16 CFR 4.10)

The 2016 FOIA Amendments revised FOIA Exemption 5, 5 U.S.C. 552(b)(5), to provide that “the deliberative process privilege shall not apply to records created 25

years or more before the date on which the records were requested.”¹ The Commission is amending Rule 4.10(a)(3) to incorporate this.

Disclosure Requests (16 CFR 4.11)

The Commission is amending Rule 4.11(a)(1)(i)(A) to update the agency’s FOIA website address.

The Commission is updating Rule 4.11(a)(1)(i)(D)(1) to assist requesters in providing sufficient contact information to enable the agency to send a response to a FOIA request. A mailing address is generally required although an email address can be sufficient in some instances as determined by the FOIA Office.

The Commission is amending Rule 4.11(a)(1)(ii)(B)(1) to set out the FOIA’s precise statutory language of what constitutes an “unusual circumstance.” 5 U.S.C. 552(a)(6)(B)(iii).

The 2016 FOIA Amendments require agencies to notify a requester at various stages through the FOIA process of the requester’s right to seek dispute resolution services from agency FOIA Public Liaisons and OGIS.² Thus, the Commission is amending Rule 4.11(a)(1)(ii)(C), 4.11(a)(1)(iii)(A), and 4.11(a)(2) to incorporate this notice into the agency’s regulations.

The 2016 FOIA Amendments also codify the Department of Justice’s guidance relating to a foreseeable harm standard. The Amendments prohibit an agency from

¹ See 5 U.S.C. 552(b)(5) as amended.

² For example, see 5 U.S.C. 552 (a)(6)(A)(i)(for adverse determinations) and 5 U.S.C. 552(a)(6)(B)(ii)(for extending time limits by ten days under unusual circumstances).

withholding information requested under FOIA unless the agency reasonably foresees that disclosure would harm an interest protected by a FOIA exemption or the disclosure is prohibited by law. The Commission is amending Rule 4.11(a)(1)(iii)(A) to incorporate this.

The 2016 FOIA Amendments also codify the requirement that agencies shall consider whether partial disclosure of information is possible whenever there is a determination that a full disclosure of a requested record is not possible and take reasonable steps necessary to segregate and release nonexempt information. The obligation to segregate releaseable portions of responsive records was already part of the Commission's pre-existing regulations, in Rule 4.11(a)(1)(iii)(A). However, the language there has been changed to follow the new language from the 2016 FOIA Amendments.

The Commission is amending Rule 4.11(a)(1)(iii)(A) and 4.11(a)(3)(i)(A)(2) to incorporate the new law's mandate that a FOIA requester has the right to file an administrative appeal within a period of time "that is not less than 90 days after the date of such adverse determination."

The Commission certifies that the Rule amendments set forth in this notice do not require an initial or final regulatory analysis under the Regulatory Flexibility Act because the amendments will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 605(b). Most requests for access to FTC records are filed by individuals who are not "small entities" within the meaning of that Act. *Id.* at 601(6). In any event, the economic impact of the Rule changes on all requesters is

expected to be minimal, if any, and the Act does not require an analysis for rules that are not subject to the notice-and-comment requirements of the Administrative Procedure Act, as discussed below. The Rule amendments also do not contain information collection requirements within the meaning of the Paperwork Reduction Act, 44 U.S.C. 3501-3520. Furthermore, the Rule amendments relate solely to agency practice and procedure, and thus are not subject to the notice and comment requirements of the Administrative Procedure Act. *See* 5 U.S.C. 553(b)(3)(A).

List of Subjects in 16 CFR Part 4

Administrative practice and procedure, Freedom of information.

For the reasons set forth in the preamble, the Federal Trade Commission amends Title 16, Chapter I, Subchapter A of the Code of Federal Regulations as follows:

PART 4—MISCELLANEOUS RULES

1. The authority citation for part 4 continues to read as follows:

Authority: 15 U.S.C. 46.

2. Amend § 4.9 by revising paragraph (b)(10)(ix) to read as follows:

§4.9 The public record.

* * * * *

(b) * * *

(10) * * *

(ix) Records, as determined by the General Counsel or his or her designee, that have been

released in response to a request made under the Freedom of Information Act, 5 U.S.C. 552, and which, because of the nature of the subject matter, have become or are likely to become the subject of subsequent requests for substantially the same records, or that have been requested three or more times, except where some or all of those records would be exempt from disclosure under 5 U.S.C. 552 if requested by another party;

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3. Revise § 4.10(a)(3) to read as follows:

§4.10 Nonpublic material.

(a) * * *

(3) Interagency or intra-agency memoranda or letters that would not routinely be available by law to a private party in litigation with the Commission, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records are requested. This exemption preserves the existing freedom of Commission officials and employees to engage in full and frank communication with each other and with officials and employees of other governmental agencies. This exemption includes records of the deliberations of the Commission except for the record of the final votes of each member of the Commission in every agency proceeding. It includes intraagency and interagency reports, memorandums, letters, correspondence, work papers, and minutes of meetings, as well as staff papers prepared for use within the Commission or between the Commission and other governmental agencies. It also includes information scheduled for public release, but as to which

premature release would be contrary to the public interest;

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4. Amend § 4.11 by revising paragraphs (a)(1)(i)(A), (a)(1)(i)(D)(1), (a)(1)(ii)(B)(1), (a)(1)(ii)(C), (a)(1)(iii)(A), (a)(2), and (a)(3)(i)(A)(2) to read as follows:

§ 4.11 Disclosure requests.

(a) * * * (1) * * * (i) * * * (A) A request under the provisions of the Freedom of Information Act, 5 U.S.C. 552, as amended, for access to Commission records shall be in writing and transmitted by one of the following means: by the form located on the FTC's FOIA Web site, found at www.ftc.gov; by email message to the FOIA email account at foia@ftc.gov; by facsimile transmission to (202) 326-2477; or by mail to the following address: Freedom of Information Act Request, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue NW., Washington, DC 20580.

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(D) * * * (I) A properly filed FOIA request shall reasonably describe the records sought with enough detail to enable the Commission to locate them with a reasonable amount of effort. Whenever possible, the request should include specific information about each record sought such as date, title, name, author, recipient, subject matter of the record, provide information regarding fees pursuant to §4.8(c), and provide sufficient contact information for a response to be sent. Although a mailing address is generally required, an email address can suffice in some instances. The FOIA Office will consider requests to send responses by email.

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(ii) * * *

(B) * * *

(I) Necessary to search for and collect the records from field facilities or other establishments that are separate from the office processing the request; or

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(C) If the deciding official (as designated by the General Counsel) extends the time limit for initial determination pursuant to paragraph (a)(1)(ii)(B) of this section, the requester will be notified in accordance with 5 U.S.C. 552(a)(6)(B). In exceptional circumstances, when the request cannot be processed within the extended time limit, the requester will be so notified and provided an opportunity to limit the scope of the request so that it may be processed within such time limit, or to arrange an alternative time frame for processing the request or a modified request. In exceptional circumstances, when the request cannot be processed within the extended time limit, the Commission will also make available the agency's FOIA Public Liaison to assist in the resolution of any disputes and notify the requester of the right to seek dispute resolution services from the Office of Government Information Services. "Exceptional" circumstances will not include delays resulting from a predictable workload of requests under this section. Unwillingness to make reasonable modifications in the scope of the request or to agree to an alternative time frame may be considered as factors in determining whether exceptional circumstances exist and whether the agency has exercised due diligence in

responding to the request.

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(iii) * * * (A) The deciding official (as designated by the General Counsel) will make reasonable efforts to search, using either manual or electronic means, for documents that exist as of the date of the receipt of a request for the requested records in electronic form or format, except when such efforts would significantly interfere with the operation of the Commission's automated information systems. The deciding official will only withhold information if the agency reasonably foresees that disclosure would harm an interest protected by a FOIA exemption or disclosure is prohibited by law. The deciding official shall consider whether partial disclosure of information is possible whenever there is a determination that a full disclosure of a requested record is not possible and take reasonable steps necessary to segregate and release nonexempt information.

Determination letters to a requester shall include the reasons therefor and the right of such person to seek assistance from the FTC's FOIA Public Liaison. Denials will advise the requester that this determination may be appealed to the General Counsel not more than 90 days after the date of the determination if the requester believes either that the records are not exempt, or that the General Counsel should exercise discretion to release such records notwithstanding their exempt status. The deciding official (as designated by the General Counsel) will also provide a reasonable, good-faith estimate of the volume of any materials to which access is denied, unless providing such an estimate would harm an interest protected by an exemption in 5 U.S.C. 552(b) that was cited as a basis for withholding materials. In the case of an adverse determination, FOIA response letters will

notify requesters that they may seek dispute resolution services from the FTC's FOIA Public Liaison or from the Office of Government Information Services.

* * * * *

(2) *FOIA Requester Service Center*. If a requester has questions or comments about the FOIA process, the requester should call the FOIA Requester Service Center at (202) 326-2430 to either speak directly to a FOIA Case Officer or leave a voice message. A requester should also ask the FOIA Case Officer to speak with the FOIA Public Liaison if there are concerns about the quality of the service received, or seek mediation resolution assistance during the FOIA response process.

(3) * * * (i) * * * (A) * * *

(2) If an initial request for records is denied in its entirety, the requester may, within 90 days after the adverse determination, appeal such denial to the General Counsel. If an initial request is denied in part, the time for appeal will not expire until 90 days after the date of the final letter notifying the requester that all records to which access has been granted have been made available. In unusual circumstances, the General Counsel or his or her designee may extend the time to appeal.

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By direction of the Commission.

Donald S. Clark,
Secretary.

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