



FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

Docket No. FFIEC-2016-0004

12 CFR Part 1101

Description of Office, Procedures, and Public Information

AGENCY: Federal Financial Institutions Examination Council (FFIEC)

ACTION: Interim final rule.

SUMMARY: The Federal Financial Institutions Examination Council (FFIEC or Council), on behalf of its members, is amending its regulations to incorporate changes to the Freedom of Information Act (FOIA). This interim final rule reflects the required changes necessitated by the FOIA Improvement Act of 2016 (Act) consisting of extending the deadline for administrative appeals, including information on dispute resolution services, and amends parts of the fee determination. This interim final rule also corrects a duplicate entry that occurred in the 2010 update of the regulations. The Council has reviewed the proposed regulations and adopted them in this interim final rule.

DATE: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Judith Dupre, Executive Secretary, Federal Financial Institutions Examination Council, via telephone: (703) 516-5590, or via e-mail: JDupre@FDIC.gov.

SUPPLEMENTARY INFORMATION: The members of the FFIEC are the Board of Governors of the Federal Reserve System (FRB), the Consumer Financial Protection Bureau (CFPB), the Federal Deposit Insurance Corporation (FDIC), the National Credit

Union Administration (NCUA), the Office of the Comptroller of the Currency (OCC), and the State Liaison Committee (SLC) (Agencies).

The Council is publishing an interim final rule revising its regulations implementing the FOIA as necessitated by the passage of the FOIA Improvement Act of 2016 Pub. L. 114-185, 130 Stat. 538. This interim file rule serves to achieve the mandated changes required by December 31, 2016. The Council expects to conduct a review and further updating of its regulations in the next year based on recent guidance issued by the United States Department of Justice's Office of Information Policy on agency FOIA regulations.

I. Background

The Council modifies its existing regulations to reflect a number of substantive and procedural amendments to the FOIA contained in the FOIA Improvement Act of 2016, Pub. L. 114-185, 130 Stat. 538.

II. Section-by-Section Analysis

In 12 CFR 1101.4(a), the Council revises the paragraph by providing public inspection in electronic format along with an index of records referred to in this section.

In 12 CFR 1101.4(b)(1), the Council adds language to the paragraph on exempt from disclosure to reference 5 U.S.C. 552(b) and where disclosure is prohibited by law except as provided in subparagraph (2) of this paragraph (b).

In 12 CFR 1101.4(b)(1)(v), the Council adds language to explain that the Council will not withhold records based on the deliberative process privilege if the records were created 25 years or more before the date of the records request.

In 12 CFR 1101.4(b)(2), the Council adds language that the Council will only withhold records requested under this paragraph (b) if disclosure has a foreseeable harm to the interests protected by an exemption listed in 5 U.S.C. 552(b), and that the Council will consider partial disclosures were possible by segregating and releasing the nonexempt portion of the record.

In 12 CFR 1101.4(b)(3)(v)(A) the Council adds language for defining when the Council can extend the time for response by 10 days in unusual circumstances as defined in 5 U.S.C. 552(a)(6)(B) and provide notice in writing to the requestor including the reasons for the delay and the expected date for determination. In addition the Council adds language explaining when the requestor would be provided the opportunity to modify the scope of their request and offering both the FFIEC FOIA Public Liaison and the Office of Government Information Services contact information for dispute resolution.

The Council adds a new 12 CFR 1101.4(b)(3)(v)(B)(3) with language that the requestor has the right to seek assistance from the FFIEC FOIA Public Liaison.

The Council reassigns the text from the previous 12 CFR 1101.4(b)(3)(v)(B)(3) to the new 12 CFR 1101.4(b)(3)(v)(B)(4) and details the procedures in the event that an adverse determination is made.

In 12 CFR 1101.4(b)(3)(v)(B)(4)(iv) the Council replaces the words “the denial” with the words “any adverse determination” and replaces the reference of “10 working days” with the new requirement of “90 days.”

The Council adds 12 CFR 1101.4(b)(3)(v)(B)(4) (v) to offer the requester the right to seek dispute resolution services from both the FFIEC FOIA Public Liaison and the Office of Government Information Services.

In 12 CFR 1101.4(b)(3)(vi) the Council replaces the phrase “If a request is denied in whole or in part, the requester may appeal” with the phrase “A requestor may appeal any adverse determination.” The Council also and replaces the reference of “10 working days” with the new requirement of “90 days” and replaces the word “denial” with the word “adverse.” The Council adds the option to file an appeal by e-mail.

In 12 CFR 1101.4(b)(4)(i) the Council adds the words “in an electronic format” for defining how the Council will provide access to the requester for inspection when records requests are granted in whole or in part.

In 12 CFR 1101.4(b)(5)(ii) the Council revises the language to include that charging of fees for search and/or duplication is subject to the restrictions of paragraph (b)(5)(ii)(G) of this section.

In 12 CFR 1101.4(b)(5)(ii)(E) the Council replaces the words “Council personnel” with “the Council’s FOIA Public Liaison.”

In 12 CFR 1101.4(b)(5)(ii)(G) the Council adds sections (1), (2)(i), (2)(ii), (2)(iii), and (2)(iv) to update and define the procedures for restrictions on assessing fees if the Council fails to comply with time limits specified, if the Council determines that unusual circumstances apply, and where a court determines that exceptional circumstances exist.

The Council deletes the duplicate entry for section 12 CFR 1101.4(b)(5)(iii) “Categories of requestors.”

In 12 CFR 1101.4(b)(5)(iii)(A) the Council replaces the words “which recover the” with the words “sufficient to recover the” and makes a typographical correction to replace “the” with “and.”

The Council deletes the duplicate entry for section 12 CFR 1101.4(b)(5)(iv) which was inadvertently left in the 2010 regulation update along with its replacement section.

Therefore the second appearance of 12 CFR 1101.4(b)(5)(iv) is fully deleted.

The Council adds 12 CFR 1101.4(b)(5)(v) which was inadvertently removed from the 2010 regulation update in error. Therefore the full text from the previous regulation is reinstated as follows: “*Fees for unsuccessful search and review.* The Council may assess fees for time spent searching and reviewing, even if it fails to locate the records or if records located are determined to be exempt from disclosure.”

III. Regulatory Analysis and Procedure

A. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601, et seq.) (RFA), the Council certifies that the interim final rule will not have a significant economic impact on a substantial number of small entities. The interim final rule addresses only the procedures to be followed to request records of the Council. Small entities, like any other individual or entity, may request information from the Council pursuant to the FOIA that has not been generally made available to the public. Under the FOIA, agencies may recover only the direct costs of searching for, reviewing, and duplicating the records processed for certain categories of requesters. The Council’s fee structure is in accordance with Department of Justice and Office of Management and

Budget (OMB) guidelines, and is based upon the category of requester. Thus, fees assessed by the Council are nominal and will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.

B. Paperwork Reduction Act

The Council has determined that the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., does not apply because these rules do not contain any information collection requirements that require the approval of the OMB.

C. The Treasury and General Government Appropriations Act, 1999— Assessment of Federal Regulations and Policies on Families

The Council has determined that the interim final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681).

D. Small Business Regulatory Enforcement Fairness Act

OMB has determined that the rule is not a “major rule” within the meaning of the relevant sections of the Small Business Regulatory Enforcement Act of 1996 (SBREFA) (5 U.S.C. 801 et seq.). As required by SBREFA, the Council will file the appropriate reports with Congress and the General Accounting Office so that the rule may be reviewed.

E. Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Pub. L. 106–102, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The Council has sought to present the interim final rule in a simple, comprehensible, and straightforward manner.

Lists of Subjects in 12 CFR Part 1101

Freedom of information, FOIA exemptions, Schedule of fees, Waivers or reductions of fees.

For the reasons set forth in the preamble, the Council amends 12 CFR part 1101 as follows:

PART 1101-- DESCRIPTION OF OFFICE, PROCEDURES, PUBLIC INFORMATION

1. The authority citation for part 1101 continues to read as follows:

Authority: 5 U.S.C. 552; 12 U.S.C. 3307.

2. Amend § 1101.4 as follows:

a. By revising paragraph (a);

b. By revising paragraphs (b)(1) introductory text and (b)(1)(v);

c. By revising paragraph (b)(2);

d. By revising paragraphs (b)(3)(v)(A) and (b)(3)(v)(B)(3);

e. By adding paragraph (b)(3)(v)(B)(4);

f. By redesignating paragraphs (b)(3)(v)(B)(3)(i) through (iv) as paragraphs (b)(3)(v)(B)(4)(i) through (iv);

- g. By revising newly redesignated paragraph (b)(3)(v)(B)(4)(iv), and by adding paragraph (b)(3)(v)(B)(4)(v);
- h. By revising paragraph (b)(3)(vi);
- i. By revising paragraph (b)(4)(i);
- j. By revising paragraphs (b)(5)(ii) introductory text and (b)(5)(ii)(E) and (G);
- k. By removing the first paragraph (b)(5)(iii) subject heading and first paragraph (b)(5)(iii)(A);
- l. By revising paragraph (b)(5)(iii)(A);
- m. By removing the second paragraph (b)(5)(iv);
- n. By adding paragraph (b)(5)(v);

The revisions and additions read as follows:

§ 1101.4 Disclosure of information, policies, and records.

(a) *Statements of policy published in the Federal Register or available for public inspection in an electronic format; indices.* (1) Under 5 U.S.C. 552(a)(1), the Council publishes general rules, policies and interpretations in the FEDERAL REGISTER.

(2) Under 5 U.S.C. 552(a)(2), policies and interpretations adopted by the Council, including instructions to Council staff affecting members of the public are available for public inspection in an electronic format at the office of the Executive Secretary of the Council, 3501 Fairfax Drive, Room B-7081a, Arlington, VA, 22226-3550, during regular business hours. Policies and

interpretations of the Council may be withheld from disclosure under the principles stated in paragraph (b)(1) of this section.

(3) Copies of all records, regardless of form or format, are available for public inspection in an electronic format if they –

(i) Have been released to any person under paragraph (b) of this section; and

(ii)(A) Because of the nature of their subject matter, the Council determines that they have become or are likely to become the subject of subsequent requests for substantially the same records; or

(B) They have been requested three or more times.

(4) An index of the records referred to in paragraphs (a)(1) through (3) of this section is available for public inspection in an electronic format..

(b) * * *

(1) *General rule and exemptions.* Under 5 U.S.C. 552(a)(3), all other records of the Council are available to the public upon request, except to the extent exempted from disclosure as provided in 5 U.S.C. 552(b) and described of this paragraph (b)(1), or if disclosure is prohibited by law. Unless specifically authorized by the Council, or as set forth in paragraph (b)(2) of

this section, the following records, and portions thereof, are not available to the public:

* * * * *

- (v) An intra-agency or interagency memorandum or letter that would not be routinely available by law to a private party in litigation, including, but not limited to, memoranda, reports, and other documents prepared by the personnel of the Council or its constituent agencies, and records of deliberations of the Council and discussions of meetings of the Council, any Council Committee, or Council staff, that are not subject to 5 U.S.C. 552b (the Government in the Sunshine Act). In applying this exemption, the Council will not withhold records based on the deliberative process privilege if the records were created 25 years or more before the date on which the records were requested.

* * * * *

- (2) *Discretionary release of exempt information.* Notwithstanding the applicability of an exemption, the Council will only withhold records requested under this paragraph (b) if the Council reasonably foresees that disclosure would harm an interest protected by an exemption listed in 5

U.S.C. 552(b) and described in paragraph (b)(1) of this section. In addition, whenever the Council determines that full disclosure of a requested record is not possible, the Council will consider whether partial disclosure is possible and will take reasonable steps necessary to segregate and release the nonexempt portion of a record. The Council or the Council's designee may elect, under the circumstances of a particular request, to disclose all or a portion of any requested record where permitted by law. Such disclosure has no precedential significance.

(3) * * *

(v) * * *

(A) Except where the Executive Secretary has determined to expedite the processing of a request, the Executive Secretary will respond by mail or electronic mail to all properly submitted initial requests within 20 working days of receipt. The time for response may be extended up to 10 additional working days in unusual circumstances, as defined in 5 U.S.C. 552(a)(6)(B), where the Council has provided written notice to the requester setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. In addition, where the extension of the 20-day time limit exceeds

10 working days, as described by the FOIA, the requester shall be provided with an opportunity to modify the scope of the FOIA request so that it can be processed within that time frame or provided an opportunity to arrange an alternative time frame for processing the request or a modified request. To aid the requester, the Council's FOIA Public Liaison is available to assist the requester for this purpose and in the resolution of any disputes between the requester and the Council. The Council's FOIA Public Liaison's contact information is available at <http://www.ffiec.gov/foia.htm>. The requester may also seek dispute resolution services from the Office of Government Information Services.

(B) * * *

(3) The right of the requester to seek assistance from the Council's FOIA Public Liaison; and

(4) When an adverse determination is made (including a determination that the requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; the requested record is not

readily reproducible in the form or format sought by the requester; a fee waiver request or other fee categorization matter is denied; and a request for expedited processing is denied), the Executive Secretary will advise the requester in writing of that determination and will further advise the requester:

* * * * *

(iv) The right of the requester to appeal any adverse determination to the Chairman of the Council within 90 days following the date of issuance of the notification, as specified in paragraph (b)(3)(vi) of this section; and

(v) The right of the requester to seek dispute resolution services from the Council's FOIA Public Liaison or the Office of Government Information Services.

(vi)(A) *Appeals of responses to initial requests.* A requester may appeal any adverse determination in writing, within 90 days of the date of issuance of the adverse determination. Appeals shall be submitted to the Chairman of the Council:

- (1) By sending a letter to: FFIEC, Attn: Executive Secretary, 3501 Fairfax Drive, Room B-7081a, Arlington, VA, 22226-3550. Both the mailing envelope and the request should be marked “Freedom of Information Act Appeal,” “FOIA Appeal,” or the like; or
- (2) By facsimile clearly marked “Freedom of Information Act Appeal,” “FOIA Appeal,” or the like to the Executive Secretary at (703) 562-6446; or
- (3) By e-mail with the subject line marked “Freedom of Information Act Appeal,” “FOIA Appeal,” or the like to FOIA@ffiec.gov.
- (B) Appeals should refer to the date and tracking number of the original request and the date of the Council's initial ruling. Appeals should include an explanation of the basis for the appeal.

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- (4) *Procedure for access to records if request is granted.* (i) When a request for access to records is granted, in whole or in part, a copy of the records to be disclosed will be promptly delivered to the requester or made available for inspection in an electronic format, whichever was requested. Inspection of records, or duplication and delivery of copies of records will be arranged so as not to interfere with their use by the Council and other users of the records.

* * * * *

(5) * * *

- (ii) *Fees to be charged.* The Council will charge fees that recoup the full allowable direct costs it incurs, except that the charging of search and/or duplication fees is subject to the restrictions of paragraph (b)(5)(ii)(G) of this section. The Council may contract with the private sector to locate, reproduce, and/or disseminate records. Provided, however, that the Council has ensured that the ultimate cost to the requester is no greater than it would be if the Council performed these tasks. Fees are subject to change as costs change. In no case will the Council contract out responsibilities which the FOIA provides that it alone may discharge, such as determining the applicability of an exemption, or determining whether to waive or reduce fees.

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- (E) *Fees to exceed \$25.* If the Council estimates that duplication and/or search fees are likely to exceed \$25, it will notify the requester of the estimated amount of fees, unless the requester has indicated in advance his/her willingness to pay fees as high as those anticipated. In the case of such notification by the Council, the requester will

then have the opportunity to confer with the Council's FOIA Public Liaison with the object of reformulating the request to meet his/her needs at a lower cost.

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(G) Restriction on assessing fees. (1) The Council will not charge fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself.

(2)(i) If the Council fails to comply with the time limits specified in the FOIA in which to respond to a request, the Council will not charge search fees, or, in the case of a requester described in paragraph (b)(5)(iii)(B) of this section, will not charge duplication fees, except as described in paragraphs (b)(5)(ii)(G)(2)(ii) through (iv) of this section.

(ii) If the Council has determined that unusual circumstances apply (as the term is defined in the FOIA) and the Council provided a timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit shall be excused for an additional 10 working days.

- (iii) If the Council has determined that unusual circumstances apply (as the term is defined in the FOIA) and more than 5,000 pages are necessary to respond to the request, the Council may charge search fees, or, in the case of requesters described in paragraph (b)(5)(iii)(B) of this section, may charge duplication fees, if the following steps are taken: The Council provided timely written notice of unusual circumstances to the requester in accordance with the FOIA; and The Council discussed with the requester via written mail, e-mail message, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii). If this exception is satisfied, the Council may charge all applicable fees incurred in the processing of the request.
- (iv) If a court has determined that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

* * * * *

(iii) *Categories of requesters—(A) Commercial use requesters.* The Council will assess fees for commercial use requesters sufficient to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial use requesters are not entitled to two hours of free search time nor 100 free pages of reproduction of documents.

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(v) *Fees for unsuccessful search and review.* The Council may assess fees for time spent searching and reviewing, even if it fails to locate the records or if records located are determined to be exempt from disclosure.

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Federal Financial Institutions Examination Council.

Judith E. Dupre,

FFIEC Executive Secretary.

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