



This document is scheduled to be published in the Federal Register on 12/30/2016 and available online at <https://federalregister.gov/d/2016-31595>, and on [FDsys.gov](http://FDsys.gov)

[7590-01-P]

## NUCLEAR REGULATORY COMMISSION

10 CFR Parts 2 and 9

[NRC-2016-0171]

RIN 3150-AJ84

### Update to Incorporate FOIA Improvement Act of 2016 Requirements

**AGENCY:** U.S. Nuclear Regulatory Commission.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is amending its regulations to reflect changes to the Freedom of Information Act (FOIA). The FOIA Improvement Act of 2016 requires the NRC to amend its FOIA regulations to update procedures for requesting information from the NRC and procedures that the NRC must follow in responding to FOIA requests.

**DATES:** This final rule is effective on **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*]**.

**ADDRESSES:** Please refer to Docket ID NRC-2016-0171 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- **Federal Rulemaking Web Site:** Go to <http://www.regulations.gov> and search for Docket ID NRC-2016-0171. Address questions about NRC dockets to Carol Gallagher,

telephone: 301-415-3463, e-mail: [Carol.Gallagher@nrc.gov](mailto:Carol.Gallagher@nrc.gov). For technical questions, contact the individual listed in the FOR FURTHER INFORMATION CONTACT section of this document.

- **NRC’s Agencywide Documents Access and Management System (ADAMS):**

You may obtain publicly-available documents online in the ADAMS Public Documents collection at <http://www.nrc.gov/reading-rm/adams.html>. To begin the search, select “ADAMS Public Documents” and then select “[Begin Web-based ADAMS Search.](#)” For problems with ADAMS, please contact the NRC’s Public Document Room (PDR) reference staff at 1-800-397-4209, 301-415-4737, or by e-mail to [pdr.resource@nrc.gov](mailto:pdr.resource@nrc.gov). The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in the SUPPLEMENTARY INFORMATION section

- **NRC’s PDR:** You may examine and purchase copies of public documents at the NRC’s PDR, Room O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

**FOR FURTHER INFORMATION CONTACT:** Stephanie Blaney, telephone: 301-415-6975, e-mail: [Stephanie.Blaney@nrc.gov](mailto:Stephanie.Blaney@nrc.gov); or Nina Argent, telephone: 301-415-5295, e-mail: [Nina.Argent@nrc.gov](mailto:Nina.Argent@nrc.gov). Both are staff of the Office of the Chief Information Officer of the U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

**SUPPLEMENTARY INFORMATION:**

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## **I. Background**

The FOIA was enacted to give the public a right to access records held by the executive branch that, although not classified, were not otherwise available to them. Since its enactment in 1966, the FOIA has been amended on a number of occasions to adapt to the times and changing priorities.

On June 30, 2016, the FOIA Improvement Act of 2016, Pub. L. 114-185, 130 Stat. 538 (the Act) was enacted. The Act specifically requires all agencies to review and update their FOIA regulations in accordance with its provisions. The Act addresses a range of procedural issues, including requiring 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 Act also amends Exemption 5, codifies the foreseeable harm standard, and adds two new elements to agency Annual FOIA Reports.

The NRC has identified the areas where the revisions are necessary in order to comply with the Act and is amending parts 2 and 9 of title 10 of the *Code of Federal Regulations* (10 CFR) accordingly.

## **II. Discussion of Amendments by Section**

The following paragraphs describe the specific changes adopted by this rulemaking.

### **Section 2.390 Public inspections, exemptions, requests for withholding.**

This final rule revises paragraph (a)(5) to be identical to 10 CFR 9.17(a)(5), which this final rule is also revising to include new criteria for FOIA Exemption 5. The Act amended Exemption 5 of the FOIA to provide that the deliberative process privilege does not apply to records that are 25 years or older before the date on which they are requested.

### **Section 9.17 Agency records exempt from public disclosure.**

This final rule revises paragraph (a)(5) to include new criteria for FOIA Exemption 5. The Act amended Exemption 5 of the FOIA to provide that the deliberative process privilege does not apply to records that are 25 years or older before the date on which they are requested. This final rule redesignates paragraph (c) as paragraph (d) without change and adds a new paragraph (c) to incorporate the foreseeable harm standard that the Act codified and to include clarifying language derived from the Act about the FOIA's relationship to laws prohibiting disclosure of information.

### **Section 9.19 Segregation of exempt information and deletion of identifying details.**

This final rule revises paragraph (b)(1) to change the reference § 9.17(a) to § 9.17, to account for the foreseeable harm threshold standard in the revised § 9.17(c) that applies to the exemptions listed in § 9.17(a).

### **Section 9.21 Publicly-available records.**

This final rule revises paragraph (c) introductory text to include available viewing formats. This final rule revises paragraph (c)(5) to include copies of records regardless of format, as well as adding paragraphs (c)(5)(i), (c)(5)(ii), (c)(5)(ii)(A) and (c)(5)(ii)(B). This revision is to codify frequently requested records.

**Section 9.25 Initial disclosure determination.**

This final rule revises paragraph (c) to include requirements to make the NRC's FOIA Public Liaison available to assist in resolving any disputes and to notify the requester of the right to seek dispute resolution services from the Office of Government Information Services (OGIS). This final rule revises paragraph (f) to change the reference to § 9.17(a) to § 9.17, to account for the foreseeable harm threshold standard in the revised § 9.17(c) that applies to the exemptions listed in § 9.17(a).

**Section 9.27 Form and content of responses.**

This final rule (1) revises paragraph (a) to include a new requirement to notify the requester of the right to seek assistance from the NRC's FOIA Public Liaison; (2) revises paragraph (b)(5) to notify the requester they now have 90 calendar days to appeal; (3) adds paragraph (b)(6) to include a new requirement to notify the requester of the right to seek assistance from the NRC's FOIA Public Liaison; and (4) adds paragraph (b)(7) to include a new requirement to notify the requester of the right to seek dispute resolution services from the NRC's FOIA Public Liaison or OGIS.

**Section 9.29 Appeal from initial determination.**

This final rule revises paragraph (a) to change the length of time to appeal from 30 calendar days to 90 calendar days.

### **Section 9.30 Contact for dispute resolution services.**

This final rule adds new section 10 CFR 9.30 to include contact information for obtaining dispute resolution services from OGIS and the NRC's FOIA Public Liaison.

### **Section 9.39 Search and duplication provided without charge.**

This final rule adds new paragraph (f) to include new fee limitations for search and duplication.

### **Section 9.43 Processing requests for a waiver or reduction of fees.**

This final rule revises paragraph (d) to change the length of time to appeal from 30 calendar days to 90 calendar days.

### **Section 9.45 Annual report to the Attorney General of the United States and Director of the Office of Government Information Services**

This final rule (1) revises the section heading to include the Director of OGIS as a recipient of the annual FOIA report; (2) revises paragraph (a) to include the Director of OGIS as a recipient of the annual FOIA report and to replace the incomplete list of required contents of the report found in paragraphs (a)(1)-(8) with a reference to 5 U.S.C. 552(e)(1), which contains the full list of required contents of the report; and (3) revises the link where you can locate the NRC's annual FOIA reports.

## **III. Rulemaking Procedure**

Under the Administrative Procedure Act (5 U.S.C. 553(b)), an agency may waive the normal notice and comment requirements if it finds, for good cause, that they are impracticable, unnecessary, or contrary to the public interest. As authorized by 5 U.S.C. 553(b)(3)(B), the

NRC finds good cause to waive notice and opportunity for comment on the amendments. Notice and opportunity for comment are unnecessary, because the NRC is issuing this final rule for the limited purpose of complying with specific direction in the Act requiring agencies to update their FOIA regulations in accordance with the Act, and the final rule updates the NRC's FOIA regulations only as necessary to bring them into compliance with the Act.

#### **IV. Plain Writing**

The Plain Writing Act of 2010 (Pub. L. 111-274) requires Federal agencies to write documents in a clear, concise, and well-organized manner. The NRC has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, "Plain Language in Government Writing," published June 10, 1998 (63 FR 31883).

#### **IV. National Environmental Policy Act**

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

#### **V. Paperwork Reduction Act**

This final rule does not contain a collection of information as defined in the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1995.

#### **VI. Congressional Review Act**

This final rule is a rule as defined in the Congressional Review Act (5 U.S.C. 801-808). However, the Office of Management and Budget has not found it to be a major rule as defined in the Congressional Review Act.

### **List of Subjects**

#### **10 CFR Part 2**

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Confidential business information, Freedom of information, Environmental protection, Hazardous waste, Nuclear energy, Nuclear materials, Nuclear power plants and reactors, Penalties, Reporting and recordkeeping requirements, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

#### **10 CFR Part 9**

Administrative practice and procedure, Courts, Criminal penalties, Freedom of information, Government employees, Privacy, Reporting and recordkeeping requirements, Sunshine Act.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR parts 2 and 9:

### **PART 2 — AGENCY RULES OF PRACTICE AND PROCEDURE**

1. The authority citation for part 2 continues to read as follows:

**Authority:** Atomic Energy Act of 1954, secs. 29, 53, 62, 63, 81, 102, 103, 104, 105, 161, 181, 182, 183, 184, 186, 189, 191, 234 (42 U.S.C. 2039, 2073, 2092, 2093, 2111, 2132, 2133, 2134, 2135, 2201, 2231, 2232, 2233, 2234, 2236, 2239, 2241, 2282); Energy Reorganization Act of 1974, secs. 201, 206 (42 U.S.C. 5841, 5846); Nuclear Waste Policy Act of 1982, secs. 114(f), 134, 135, 141 (42 U.S.C. 10134(f), 10154, 10155, 10161); Administrative Procedure Act (5 U.S.C. 552, 553, 554, 557, 558); National Environmental Policy Act of 1969 (42 U.S.C. 4332); 44 U.S.C. 3504 note. Section 2.205(j) also issued under Sec. 31001(s), Pub. L. 104-134, 110 Stat. 1321-373 (28 U.S.C. 2461 note).

2. In § 2.390, revise paragraph (a)(5) to read as follows:

**§ 2.390 Public inspections, exemptions, requests for withholding.**

(a) \* \* \*

(5) Interagency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

\* \* \* \* \*

**PART 9 — PUBLIC RECORDS**

3. The authority citation for part 9 continues to read as follows:

**Authority:** Atomic Energy Act of 1954, sec. 161 (42 U.S.C. 2201); Energy Reorganization Act of 1974, sec. 201 (42 U.S.C. 5841); 44 U.S.C. 3504 note. Subpart A also issued under 31 U.S.C. 9701. Subpart B also issued under 5 U.S.C. 552a. Subpart C also issued under 5 U.S.C. 552b.

4. In § 9.17, revise paragraph (a)(5), redesignate paragraph (c) as paragraph (d), and add new paragraph (c) to read as follows:

**§ 9.17 Agency records exempt for public disclosure.**

(a) \* \* \*

(5) Interagency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

\* \* \* \* \*

(c)(1) The NRC shall withhold information under this subpart only if—

(i) The NRC reasonably foresees that disclosure would harm an interest protected by an exemption described in paragraph (a) of this section; or

(ii) Disclosure is prohibited by law.

(2) Nothing in this subpart requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under 5 U.S.C. 552(b)(3).

\* \* \* \* \*

**§ 9.19 [Amended]**

5. In § 9.19(b)(1), remove “(a)” after “§ 9.17”.

6. In § 9.21, revise the introductory text of paragraph (c) and paragraph (c)(5) to read as follows:

**§ 9.21 Publicly available records.**

\* \* \* \* \*

(c) The following records of NRC activities are available for public inspection in an electronic format:

\* \* \*

(5) Copies of all records, regardless of form or format—

(i) That have been released to any person under § 9.23; and

(ii)(A) That because of the nature of their subject matter, the NRC determines have become or are likely to become the subject of subsequent requests for substantially the same records; or

(B) That have been requested 3 or more times;

\* \* \* \* \*

7. In § 9.25, revise paragraph (c) and in the first sentence in paragraph (f) remove “(a)” after “§ 9.17”. The revision to read as follows:

**§ 9.25 Initial disclosure determination.**

\* \* \* \* \*

(c) *Exceptional circumstances.* A requester may be notified in certain exceptional circumstances, when it appears that a request cannot be completed within the allowable time, and will be provided an opportunity to limit the scope of the request so that it may be processed in the time limit, or to agree to a reasonable alternative time frame for processing. When

notifying a requester under this paragraph, the NRC, to aid the requester, shall make available its FOIA Public Liaison to assist in the resolution of any disputes between the requester and the agency and shall notify the requester of the requester's right to seek dispute resolution services from the Office of Government Information Services within the National Archives and Records Administration. For purposes of this paragraph, the term "exceptional circumstances" does not include delays that result from the normal predictable workload of FOIA requests or a failure by the NRC to exercise due diligence in processing the request. A requester's unwillingness to agree to reasonable modification of the request or an alternative time for processing the request may be considered as factors in determining whether exceptional circumstances exist and whether the agency exercised due diligence in responding to the request.

\* \* \* \* \*

8. In § 9.27, revise add a second sentence to paragraph (a), in paragraph (b)(5) remove the number "30" and add in its place the number "90", and add paragraphs (b)(6) and (7).

The revision and additions to read as follows:

**§ 9.27 Form and content of responses.**

(a) \* \* \* The NRC's response will notify the requester of the requester's right to seek assistance from the NRC's FOIA Public Liaison. \* \* \*

(b) \* \* \*

(6) A statement that the requester has a right to seek assistance from the NRC's FOIA Public Liaison; and

(7) A statement that the requester has a right to seek dispute resolution services from the NRC's FOIA Public Liaison or the Office of Government Information Services within the National Archives and Records Administration.

\* \* \* \* \*

**§ 9.29 [Amended]**

9. In § 9.29(a) remove the number "30" and add in its place the number "90".

10. Add § 9.30 to read as follows:

**§ 9.30 Contact for dispute resolution services.**

(a) NRC's FOIA Public Liaison:

(1) By mail – 11555 Rockville Pike, Rockville, MD 20852;

(2) By facsimile – 301-415-5130; and

(3) By e-mail – FOIA.Resource@nrc.gov.

(b) Office of Government Information Services within National Archives and Records

Administration:

(1) By mail – 8601 Adelphi Road-OGIS, College Park, MD 20740;

(2) By facsimile – 202-741-5769; and

(3) By e-mail – ogis@nara.gov.

11. In § 9.39, add paragraph (f) to read as follows:

**§ 9.39 Search and duplication provided without charge.**

\* \* \* \* \*

(f)(1) Except as described in paragraphs (f)(2), (3), and (4) of this section, if the NRC fails to comply with any time limit under §§ 9.25 or 9.29, it may not charge search fees or, in the case of requests from requesters described in § 9.33(a)(2), may not charge duplication fees.

(2) If the NRC has determined that unusual circumstances, as defined in § 9.13, apply and the NRC provided timely written notice to the requester in accordance with the Freedom of Information Act, a failure to comply with the time limit shall be excused for an additional 10 days.

(3) If the NRC has determined that unusual circumstances, as defined in § 9.13, apply and more than 5,000 pages are necessary to respond to the request, the NRC may charge search fees or, in the case of requests from requesters described in § 9.33(a)(2), may charge duplication fees, if the NRC has provided timely written notice to the requester in accordance with the Freedom of Information Act and the NRC has discussed with the requester via written mail, e-mail, 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).

(4) If a court has determined that exceptional circumstances exist, as defined by 5 U.S.C. 552(a)(6)(C), a failure to comply with the time limit shall be excused for the length of time provided by the court order.

### **§ 9.43 [Amended]**

12. In § 9.43(d), remove the number “30” and add in its place the number “90”.

13. Revise § 9.45 to read as follows:

**§ 9.45 Annual report to the Attorney General of the United States and Director of the Office of Government Information Services.**

(a) On or before February 1 of each year, the NRC will submit a report covering the preceding fiscal year to the Attorney General of the United States and to the Director of the Office of Government Information Services which shall include the information required by 5 U.S.C. 552(e)(1).

(b) The NRC will make its annual FOIA reports available to the public at the NRC web site, *http://www.nrc.gov*.

Dated at Rockville, Maryland, this 15th day of December, 2016.

For the Nuclear Regulatory Commission.

Michael R. Johnson  
Acting Executive Director  
for Operations

[FR Doc. 2016-31595 Filed: 12/29/2016 8:45 am; Publication Date: 12/30/2016]