



BAC 7710-FW-P

POSTAL REGULATORY COMMISSION

39 CFR Part 3004

[Docket No. RM2017-2; Order No. 3812]

Revising Procedures for the Freedom of Information Act

AGENCY: Postal Regulatory Commission.

ACTION: Final Rule.

SUMMARY: The Commission issuing a set of rules amending existing regulations governing requests for agency records made under the Freedom of Information Act (FOIA), in accordance in with the FOIA Improvement Act of 2016.

DATES: *Effective* [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202-789-6820.

SUPPLEMENTARY INFORMATION:

Regulatory History

81 FR 95069 (Dec. 27, 2016)

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I. Introduction

On December 19, 2016, the Commission issued a notice of proposed rulemaking to revise its regulations governing requests for agency records made under the Freedom of Information Act (FOIA), 5 U.S.C. 552, to comply with the FOIA Improvement Act of 2016 (the Act), Pub. L. 114-185, 130 Stat. 538 (2016).¹ For the reasons discussed below, the Commission adopts the following final rules, which include minor revisions to the proposed rules.

II. Background

The FOIA Improvement Act of 2016 was signed into law on June 30, 2016. Among other things, the Act expands the dispute resolution process available to requesters, limits the use of FOIA exemptions, and codifies the so-called “Rule of 3” for frequently requested records.

On December 19, 2016, the Commission issued Order No. 3671, introducing proposed revisions to its rules. As Order No. 3671 indicates, revisions to the affected sections of 39 CFR part 3004 are necessary to implement the Act.

III. Review of Comments

The Commission received two sets of comments on the proposed rules. The National Archives and Records Administration’s Office of Government

¹ Notice of Proposed Rulemaking to Revise Procedures for the Freedom of Information Act, December 19, 2016 (Order No. 3671).

Information Services (OGIS) and the Public Representative submitted comments.²

A. OGIS Comments

Comments. OGIS notes that it has a statutory mandate under FOIA to offer mediation services to resolve disputes between requesters and federal agencies. OGIS Comments at 1. As part of this mission, OGIS states that it regularly monitors and comments on FOIA-related proposed rules. *Id.*

OGIS has reviewed the Commission's proposed rules and commends the Commission for its efforts in reviewing its disclosure policies and revising its regulations to comply with the Act. *Id.* OGIS also suggests two modifications to the Commission's rules related to OGIS' mediation services. *Id.* at 1-3.

First, OGIS suggests that the Commission clarify proposed § 3004.43, governing request responses. *Id.* at 2. OGIS notes that FOIA requires the Commission to notify requesters of their ability to seek dispute resolution services from the Commission's FOIA Public Liaison or OGIS when the Commission makes an adverse determination on a given request. *Id.* OGIS recommends that the Commission restructure proposed § 3004.43 to more clearly state that these dispute resolution services are available even when the adverse determination is not a denial. *Id.*

² Comments of National Archives and Records Administration on Proposed Rulemaking to Change its Freedom of Information Act Regulation, 39 CFR Part 3004, Docket No. 2016-30905, January 26, 2017 (OGIS Comments); Public Representative Comments on Notice of Proposed Rulemaking to Revise Procedures for the Freedom of Information Act, January 26, 2017 (PR Comments).

Second, OGIS recommends that the Commission supplement its rule on final denials of appeals, set out in § 3004.44(c)(1). *Id.* at 2-3. OGIS proposes additional language to ensure requesters are made aware that dispute resolution with OGIS is available as a non-exclusive alternative to litigation. *Id.*

B. Public Representative Comments

Comments. The Public Representative comments that the proposed rules are “effective in implementing the Act.” PR Comments at 2. Furthermore, she commends the Commission for clarifying how requesters can file FOIA requests with the Commission and for making its records more accessible to the public. *Id.* She also offers several editorial suggestions designed to provide additional clarity.

Specifically, the Public Representative recommends that proposed § 3004.13 be revised to define how the Commission determines that a record is frequently requested. *Id.* The proposed language replaces the words “frequently requested agency records” with “agency records that have been requested three or more times” to explicitly state the standard. *Id.* Furthermore, the Public Representative suggests that the Commission add corresponding language to § 3004.12(b) and (c) to make clear that the Commission will provide frequently requested records for review in its public reading room. *Id.*

The Public Representative also recommends that the Commission include its deadline for requesters to appeal adverse determinations in § 3004.44, the section addressing FOIA appeals. *Id.* at 3. The current Commission rules

provide the deadline in § 3004.43(d)(3), which covers responses to FOIA requests.

IV. Changes to Proposed Rules

The Commission's final rules incorporate the commenters' suggested revisions, as well as several additional changes that the Commission determined would be prudent upon review of guidance published by the Department of Justice, Office of Information Policy (OIP).³ These changes provide greater clarity and improve the accessibility of the FOIA process. For this reason, the Commission adopts the changes in its final rules.

The Commission accepts OGIS' proposed changes to help accommodate OGIS' statutory role as a mediator between agencies and FOIA requesters. The Commission finds that the proposed revisions will assist requesters by raising awareness that dispute resolution is available through OGIS. Furthermore, the Commission makes conforming changes to proposed § 3004.44 to clarify that administrative appeal is available even when the adverse determination is not a denial.

The Commission finds that the Public Representative's suggested changes supplement the proposed rules with additional explanation and improve their accessibility to the public. Accordingly, the Commission accepts the Public Representative's proposed changes.

³ OIP issued suggested language, in template form, to assist agencies in revising their regulations on its Web site, <https://www.justice.gov/oip/template-agency-foia-regulations> (last updated on February 22, 2017).

The final rules also incorporate OIP's guidance on two of the FOIA request fee rules. The revisions eliminate a cross reference in proposed § 3004.52(e)(2) and revise proposed § 3004.52(f) to clarify which fees the Commission can collect when it issues a timely partial response but an untimely complete response. These changes clarify the Act's modifications to the FOIA fee structure in accordance with OIP's template.

V. Ordering Paragraphs

It is ordered:

1. Part 3004 of title 39, Code of Federal Regulations, is amended as set forth below the signature of this Order, effective 30 days after publication in the **Federal Register**.

2. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Stacy L. Ruble,

Secretary.

List of Subjects in 39 CFR Part 3004

Administrative practice and procedure, Freedom of information, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Commission amends chapter III of title 39 of the Code of Federal Regulations as follows:

Part 3004—PUBLIC RECORDS AND FREEDOM OF INFORMATION ACT

1. The authority citation for part 3004 continues to read as follows:

Authority: 5 U.S.C. 552; 39 U.S.C. 503.

2. Revise § 3004.2 to read as follows:

§ 3004.2 Presumption of openness.

(a) The Commission shall be proactive and timely in identifying and posting public records and other frequently requested records to its Web site.

(b) It is the stated policy of the Commission that FOIA requests shall be administered with a clear presumption of openness. The Commission will only withhold information if it reasonably foresees that disclosure would harm an interest protected by a FOIA exemption, as enumerated in § 3004.11, or disclosure is otherwise prohibited by law.

3. Add § 3004.3 to read as follows:

§ 3004.3 How to make a request.

(a) To request Commission records, please contact the Secretary of the Commission via letter or use the online request form provided on the Commission's Web site at <http://www.prc.gov/foia/onlinerequest>.

(b) Requests must describe the records sought in sufficient detail to enable the Commission to locate them with a reasonable amount of effort. To the extent possible, the requests should provide any specific information that might assist the Commission in responding to the request.

(c) Requesters must provide contact information to assist the Commission in communicating with them concerning requests and responding to the request.

4. Amend § 3004.11 by revising paragraph (f) to read as follows:

§ 3004.11 Use of exemptions.

* * * * *

(f) Inter-agency or intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency. This exemption shall not apply to records created 25 years or more before the date on which the records were requested.

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5. Amend § 3004.12 by revising paragraph (c) to read as follows:

§ 3004.12 Reading room.

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(c) The Commission shall make available, in an electronic and physical reading room, records previously released under FOIA and which the

Commission determines are or are likely to become of significant public interest, including agency records that have been requested three or more times.

6. Amend § 3004.13 by revising paragraph (a) to read as follows:

§ 3004.13 Notice and publication of public information.

(a) Decisions, advisory opinions, orders, public reports, and agency records that have been requested three or more times will be made available to the public by posting on the Commission's Web site at *http://www.prc.gov*.

* * * * *

7. Amend § 3004.43 by revising paragraph (a) to read as follows:

§ 3004.43 Response to requests.

(a) Within 20 days (excluding Saturdays, Sundays, and legal holidays) after receipt of a request for a Commission record, the Secretary or Assistant Secretary will notify the requester of its determination to grant or deny the request and the right to seek assistance from the Commission's FOIA Public Liaison. In the case of an adverse determination, the Commission will notify the requester of their right to appeal and right to seek dispute resolution services from the Commission's FOIA Public Liaison or the Office of Government Information Services.

* * * * *

8. Amend § 3004.44 by revising paragraphs (b) and (c)(1) to read as follows:

§ 3004.44 Appeals.

* * * * *

(b) A requester who seeks to appeal any adverse determination must file an appeal with the Commission within 1 year of the date of the Commission's response.

(c)(1) The Commission will grant or deny the appeal in writing within 20 days (excluding Saturdays, Sundays, and legal holidays) of the date the appeal is received. If on appeal the adverse determination is upheld, the Commission will notify the requester of the availability of dispute resolution services from the Office of Government Information Services as a voluntary, non-exclusive alternative to litigation and the provisions for judicial review of that determination pursuant to 5 U.S.C. 552(c).

* * * * *

9. Revise § 3004.45 to read as follows:

§ 3004.45 Extension of response time limit.

(a) The Commission may extend the time limit for a response to a request or appeal for up to 10 business days due to unusual circumstances, as specified in 5 U.S.C. 552(a)(6)(B)(iii). In such a case, the Commission will notify the requester in writing of the unusual circumstance causing the extension and the date by which the Commission estimates that the request can be processed.

(b) If an extension will exceed 10 business days, the Commission will:

(1) Provide the requester with an opportunity to limit the scope of the request or to arrange an alternative timeframe for processing the request or a

modified request. The applicable time limits are not tolled while the Commission waits for a response from the requester under this subsection; and

(2) Make its FOIA Public Liaison available to the requester and apprise the requester of their right to seek dispute resolution services from the Office of Government Information Services.

10. Amend § 3004.52 by revising paragraph (e) and adding paragraph (f) to read as follows:

§ 3004.52 Fees—general provisions.

* * * * *

(e) No requester will be charged a fee after any search or response which occurs after the applicable time limits as described in §§ 3004.43 and 3004.44, unless:

(1) The Commission extends the time limit for its response due to unusual circumstances, pursuant to § 3004.45(a), and the Commission completes its response within the extension of time provided under that section; or

(2) The Commission extends the time limit for its response due to unusual circumstances and more than 5,000 pages are necessary to respond to the request and the Commission has discussed with the requester how they could effectively limit the scope of the request or made at least three good faith attempts to do so; or

(3) A court has determined that exceptional circumstances exist and excused the Commission from responding by court order.

(f) The Commission may, however, charge fees for review, and in some cases duplication, for a partial grant of a request while it reviews records that may be exempt and may be responsive to the request, so long as the partial grant is made within the applicable time limits.

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