



6570-01

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1610

RIN: 3046-AA90

Availability of Records

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final Rule.

SUMMARY: The Equal Employment Opportunity Commission (“EEOC” or “Commission”) is issuing a final rule revising its Freedom of Information Act (FOIA) regulations in order to implement the substantive and procedural changes to the FOIA identified in the FOIA Improvement Act of 2016 and update two district office addresses and the Office of Legal Counsel’s fax number.

DATES: Effective [Insert date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Stephanie D. Garner, Assistant Legal Counsel, FOIA Programs, or Draga G. Anthony, Senior Attorney Advisor, Office of Legal Counsel, U.S. Equal Employment Opportunity Commission, at (202) 663-4640 (voice) or (202) 663-7026 (TTY). These are not toll-free telephone numbers. This final rule also is available in the following formats: large print, Braille, audiotape, and electronic file on computer disk. Requests for this final rule in an alternative format should be made to EEOC’s Publications Center at 1-800-669-3362 (voice) or 1-800-800-3302 (TTY).

SUPPLEMENTARY INFORMATION:

Introduction

On December 29, 2016, EEOC published in the Federal Register an interim final rule setting forth revisions to EEOC’s FOIA regulations at 29 CFR Part 1610. 81 FR 95869 (2016). The purpose of the revisions is to update the Commission’s FOIA regulations so that they are consistent with current Commission practice in responding to FOIA requests as reflected in the FOIA Improvement Act of 2016. The revisions also are intended to update two district office addresses and the Office of Legal Counsel’s fax number. The interim final rule sought public comments which were due on or before January 30, 2017.

EEOC received four comments in response to the interim final rule. Two comments were submitted by an individual, and the remaining two comments were submitted by the National Archives and Records Administration’s Office of Government Information Services (hereinafter “OGIS”).

The individual commenter suggested that EEOC reconsider the fifteen cent per page duplication fee charged for copies. This comment is outside the scope of the interim final rule, which did not propose changes to the duplication fees associated with processing FOIA requests. Therefore, the EEOC declines to change the duplication fees. The second comment asked the EEOC to remove the word “professional” in 1610.9 (f)(3), which identifies the requirements of a requester seeking expedited processing. Congress strongly favors uniform FOIA regulations. The Office of Information Policy, to assist agencies in issuing uniform regulations, provided a template for agencies to utilize when revising FOIA regulations. In order to conform with the Office of Information Policy template language, the EEOC declines to remove the word “professional.”

The Commission has considered carefully the comments from OGIS and has made some changes to the final rule in response to them. The OGIS comments concerning Sections 1610.11 and 1610.13 and EEOC’s changes to the final rule are discussed in more detail below.

Section 1610.2 – Statutory requirements

The EEOC determined that the final two sentences of Section 1610.2(a) of the Draft Final Rule should be deleted. Those sentences read as follows: “As a matter of policy, the Commission may make discretionary disclosures of records or information exempt from disclosure under the FOIA whenever disclosure would not foreseeably harm an interest protected by the FOIA exemption. This policy does not create any right enforceable in Court.” The final rule now more closely aligns with the statutory language at 5 U.S.C. 552(a)(8). The FOIA Improvement Act of 2016 codified the foreseeable harm standard; therefore, release of the records is no longer a matter of agency policy. Records must be released unless there is a risk of foreseeable harm.

Section 1610.5 – Request for records

Section 1610.5(a)(2), of the interim final rule said that “(2)A requester who is making a request for records about himself or herself must comply with the verification of identity requirements as determined by the Commission. Requesters may not be required to verify their identity without guidance; therefore, the section will be deleted. Section 1610.5(b)(5) of the Interim Final Rule has also been deleted. That section said: “Where a request is not considered reasonably descriptive or requires the production of voluminous records, or necessitates the utilization of a considerable number of work hours to the detriment of the business of the Commission, the Commission may require the person making the request or such person's agent to confer with a Commission representative in order to attempt to verify the scope of the request and, if possible, narrow such request.” The FOIA Improvement Act of 2016 does not require a requester to speak with the EEOC about narrowing a voluminous request. If the request is voluminous or time-intensive but the requested records are reasonably described, the EEOC must process the request.

Section 1610.11 – Appeals to the Legal Counsel from initial denials

OGIS requested that the EEOC substitute the words “dispute resolution” for the word “mediation” in paragraph (c) Decision on appeals and paragraph (d) Engaging in dispute resolution services provided by

OGIS. We have done so. This change conforms to OGIS’s updated FOIA rules published on December 29, 2016.

Section 1610.13 – Maintenance of files

OGIS advised the EEOC that General Records Schedule 4.2 replaced General Records Schedule 14. Therefore, the EEOC has changed the General Records Schedule reference to 4.2.

Regulatory Procedures

Executive Order 12866

This final rule has been drafted and reviewed in accordance with Executive Order 12866, 58 FR 51735 (Sept. 30, 2003), section 1(b), Principles of Regulation, and Executive Order 13563, 76 FR 3821 (January 1, 2011), Improving Regulation and Regulatory Review. The rule is not a “significant regulatory action” under section 3(f) of Executive Order 12866.

Paperwork Reduction Act

This final rule contains no new information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Regulatory Flexibility Act

The Commission certifies under 5 U.S.C. 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities, because the changes to the rule do not impose any burdens upon FOIA requesters, including those that might be small entities. Therefore, a regulatory flexibility analysis is not required by the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This final rule will not result in the expenditure by State, local, or tribal governments in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

List of Subjects in 29 CFR Part 1610

Freedom of Information.

For the Commission,

Dated: August 20, 2017.

Victoria A. Lipnic

Acting Chair

For the reasons set forth in the preamble, the interim rule amending 29 CFR part 1610 which was published at 81 FR 95869 on December 29, 2016, is adopted as final with the following changes:

PART 1610—AVAILABILITY OF RECORDS

1. The authority citation for part 1610 continues to read as follows:

Authority: 42 U.S.C. 2000e-12(a), 5 U.S.C. 552 as amended by Pub. L. 93-502, Pub. L. 99-570 and Pub. L. 105-231; for § 1610.15, non-search or copy portions are issued under 31 U.S.C. 9701.

2. Revise §1610.2 to read as follows:

§ 1610.2 Statutory requirements.

(a) This subpart contains the rules that the Commission will follow in processing requests for records under the Freedom of Information Act (“FOIA”), 5 U.S.C. 552. These rules should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget (“OMB Guidelines”). Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed in accordance with the Commission’s Privacy Act regulations as well as under this subpart. The Commission should administer the FOIA with a presumption of openness.

(b) As referenced in this subpart, “component” means each separate office within the Commission that is responsible for processing FOIA requests. The rules described in this regulation that apply to the Commission also apply to its components.

3. Revise §1610.5 to read as follows:

§ 1610.5 Request for records.

(a) *General information.* (1) To make a request for records, a requester should write directly to the Commission’s FOIA office that maintains the records sought. A request will receive the quickest possible response if it is addressed to the Commission FOIA office that maintains the records sought. Information concerning the Commission’s FOIA offices is listed at: <https://www.eeoc.gov/eeoc/foia/index.cfm> and any additional requirements for submitting a request to the agency are listed at paragraphs (b) and (d) of this section. The Commission’s website contains instructions for submitting FOIA requests and other resources to assist requesters in determining where to send their requests.

(2) Where a request for records pertains to another individual, a requester may receive greater access by submitting either a notarized authorization signed by that individual or a declaration made in compliance with the requirements set forth in 28 U.S.C. 1746 by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual is deceased (for example, a copy of a death certificate or an obituary). As an exercise of administrative discretion, the Commission can

require a requester to supply additional information if necessary in order to verify that a particular individual has consented to disclosure.

(b) *Description of records sought.* Requesters must describe the records sought in sufficient detail to enable Commission personnel to locate them with a reasonable amount of effort. To the extent possible, requesters should include specific information that may help the Commission identify the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number. Before submitting their requests, requesters may contact the Commission's District Office FOIA contact or FOIA Public Liaison to discuss the records they seek and to receive assistance in describing the records. If after receiving a request the Commission determines that it does not reasonably describe the records sought, the Commission must inform the requester what additional information is needed or why the request is otherwise insufficient. Requesters who are attempting to reformulate or modify such a request may discuss their request with the Commission's FOIA contact or FOIA Public Liaison. If a request does not reasonably describe the records sought, the agency's response to the request may be delayed.

(1) A written request for inspection or copying of a record of the Commission may be presented in person, by mail, by fax, by email at FOIA@eoc.gov, online at <https://publicportalfoiapal.eoc.gov/palMain.aspx>, or through the Commission employee designated in §1610.7.

(2) A request must be clearly and prominently identified as a request for information under the "Freedom of Information Act." If submitted by mail, or otherwise submitted under any cover, the envelope or other cover must be similarly identified.

(3) A respondent must always provide a copy of the "Filed" stamped court complaint when requesting a copy of a charge file. The charging party must provide a copy of the "Filed" stamped court complaint when requesting a copy of the charge file if the Notice of Right to Sue has expired as of the date of the charging party's request.

(4) Each request must contain information which reasonably describes the records sought and, when known, should contain date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number and location for the records requested in order to permit the records to be promptly located.

(c) *Format.* Requests may specify the preferred form or format (including electronic formats) for the records the requester seeks. The Commission will accommodate the request if the records are readily reproducible in that form or format.

(d) *Requester information.* Requesters must provide contact information, such as their phone number, email address, and/or mailing address, to assist the agency in communicating with them and providing released records

4. Amend §1610.11 by revising paragraphs (c) and (d) to read as follows:

§ 1610.11 Appeals to the legal counsel from initial denials.

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(c) *Decisions on appeals.* The Commission must provide its decision on an appeal in writing. A decision that upholds the Commission's determination in whole or in part must contain a statement that identifies the reasons for the affirmance, including any FOIA exemptions applied. The decision must provide the requester with notification of the statutory right to file a lawsuit and will inform the requester of the dispute resolution services offered by the Office of Government Information Services of the National Archives and Records Administration as a non-exclusive alternative to litigation. If the Commission's decision is remanded or modified on appeal, the Commission will notify the requester of that determination in writing. The Commission will then further process the request in accordance with that appeal determination and will respond directly to the requester.

(d) *Engaging in dispute resolution services provided by OGIS.* Dispute resolution is a voluntary process. If the Commission agrees to participate in the dispute resolution services provided by OGIS, it will actively engage as a partner to the process in an attempt to resolve the dispute.

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5. Revise §1610.13 to read as follows:

§ 1610.13 Maintenance of files.

The Commission must preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until disposition or destruction is authorized pursuant to Title 44 of the United States Code or the General Records Schedule 4.2 of the National Archives and Records Administration. The Commission must not dispose of or destroy records while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

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