

August 15, 2016

Department of Health and Human Services (HHS)
Freedom of Information Officer
Hubert H. Humphrey Building, room 729H
200 Independence Avenue, SW
Washington D.C., 20201

RE: Comment on RIN 0991-AC04

Dear FOIA Officer:

The undersigned organizations write to provide comments on the proposal to amend the Department of Health and Human Services (HHS) regulations under the Freedom of Information Act (FOIA). We appreciate the efforts by the HHS to update and streamline the language of several of its FOIA procedural provisions, and to incorporate changes brought about by the amendments to the FOIA under the OPEN Government Act of 2007, and the E-FOIA Act of 1996. We nonetheless have concerns that certain provisions of the proposed regulations could hinder the FOIA process, and believe the proposed regulations can go further to ensure greater access to public interest information. Furthermore, any updated FOIA regulations must be revised to incorporate the reforms made to the FOIA in the FOIA Improvement Act of 2016, signed into law by the President on June 30, 2016.¹ Accordingly, we submit the following comments that are designed to ensure that the HHS FOIA regulations uphold requesters' rights under the FOIA Statute, and conform to the new provisions of the FOIA Improvement Act.

A. Comments

Subpart A – General Information About Freedom of Information Act Requests

§ 5.1 Purpose

Subpart (b) of this section states, in part, that “This part does not apply to: (1) Records that are currently available, either from HHS or from another Federal government agency, under a statute that provides for charging fees for those records[.]”

We recommend this language be removed in its entirety. There is no provision in FOIA that permits an agency to withhold records in response to a request simply because a statute provides for charging fees for those records. While the amount of fees an agency may assess can be set by a separate statute, 5 U.S.C. § 552(a)(4)(A)(vi), and while those records need not be affirmatively published pursuant to the provisions of 5 U.S.C. § 552(a)(2), such records are not exempt from FOIA. Because this language may be read as an attempt to exempt records from the scope of FOIA for reasons not authorized by the statute, it should be removed.

¹ According to the FOIA Improvement Act, within 180 from the enactment of the Act, the head of each agency shall review the regulations of such agency and shall issue regulations on procedures for the disclosure of records under section 552 of title 5, USC, in accordance with the amendments made by Section 2 of the FOIA Improvement Act. See Sec.3 (a) of the FOIA Improvement Act, <https://www.congress.gov/bill/114th-congress/senate-bill/337/text>.

§ 5.2 Presumption of openness and proactive disclosures

The proposed HHS FOIA regulations include a new section (§ 5.2), which asserts the Department's commitment to provide access to public records and increase openness and transparency. Currently, this section reads;

“In administering the FOIA, we are committed to providing access to public records as part of the Department's efforts to increase openness and transparency, but with due regard for protecting the legitimate interests of entities that have submitted records to the Department, the privacy interests of individuals who would be affected by release of records, and the interests of the agency in creating policy, making operating decisions and carrying out its mission.”

We support the first clause of this statement, but object to the inclusion of the second part of the paragraph that begins “...but with due regard for protecting the legitimate interest and entities...” This clause is unnecessary: the FOIA statute indicates clearly that foreseeable harm standard does not require “disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under subsection (b)(3).”²

Therefore, we recommend this section be revised to closely conform to the provisions in the FOIA Improvement Act, which codified the presumption of openness into the statute. We request the following language on the presumption of openness be included, without qualification:

“When responsive records are located, we adopt a presumption of disclosure and openness. This means we evaluate records with a view toward what can be disclosed, rather than what can be withheld.”³

We will not withhold information merely because we can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption. A record may not be withheld unless HHS reasonably foresees that its disclosure would harm an interest protected by an exemption or disclosure is prohibited by law. We note that mere “speculative or abstract fears,” or fear of embarrassment, are an insufficient basis for withholding information from the public.”⁴

With regards to part (b) [reserved]: we are operating under the assumption that this section was reserved for future language in the expectation that the FOIA Improvement Act would be signed into law before the public comment period was completed. Therefore, we recommend that this section follow the provisions in the FOIA Improvement Act, and include the following language on proactive disclosure:

² See The FOIA Improvement Act, Sec. 2. Amendments to FOIA.

³ See Civil Society Model FOIA Regulations, Updated Jul. 15, 2014, §1001.3 Availability of records, (d): <http://www.modelfoiaregs.org/2014/07/model-foia-regulations-updated-7152014.html>.

⁴ President Barack Obama, *Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act* (Jan. 21, 2009); Office of the Attorney General, *Memorandum for Heads of Executive Departments and Agencies, Subject: The Freedom of Information Act*, (Mar. 19, 2009).

(b) We make available for public inspection in an electronic format copies of all records, regardless of format, that have been released under FOIA to any person; and that because of the nature of their subject matter, we determine have become or are likely to become the subject of subsequent requests for substantially the same records, or those records have been requested 3 or more times.⁵

§ 5.3 Definitions

Representative of the news media

The last line in the paragraph defining a representative of the news media currently reads: “We decide whether to grant a requester media status on a case-by-case basis, based on the requester’s intended use of the requested records.”

We request that this line be removed as it is contrary to FOIA’s requirements. The Court of Appeals for the D.C. Circuit has made explicitly clear that if a requester “satisfies the five criteria [of the definition of a representative of the news media] as a general matter, it does not matter whether any of the individual FOIA requests does so.”⁶ While it is appropriate for the public interest fee waiver test to be applied on a case by case basis, “the news-media waiver, by contrast, focuses on the nature of the *requester*, not its request.”⁷

Therefore, we recommend the above paragraph be replaced with the following;

Representative of the news media means any person or entity that gathers information of potential public interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. Examples of news media entities include television or radio stations that broadcast “news” to the public at large and publishers of periodicals that disseminate “news” and make their products available through a variety of means to the general public, as well as organizations that publish partially or solely on the internet or in a digital format. We do not consider requests for records that support the news-dissemination function of the requester to be a commercial use. Alternative media will be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination. These examples are not all-inclusive.

Furthermore, with the passage of the FOIA Improvement Act of 2016, the link to the current text of FOIA should be changed to the following updated address: <https://www.justice.gov/oip/freedom-information-act-5-usc-552>.

Subpart B – How to Request Records under FOIA

⁵ See The FOIA Improvement Act, Sec. 2. Amendments to FOIA.

⁶ *Cause of Action v. F.T.C.*, 799 F.3d 1108, 1121 (D.C. Cir. 2015).

⁷ *Id.* (emphasis in original).

§ 5.25 How does HHS process my FOIA request?

Subpart (b)(1) of this section lays out a variety of criteria for a “perfected request.” This section should be removed in its entirety, as it is directly contrary to the statute. FOIA provides that “The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency’s regulations under this section to receive requests under this section.”⁸ The additional language proposed by HHS attempts to add additional requirements not authorized by law and as such should be removed.

Subpart (b)(2) of this section states in part, that “We provide at least 10 working days for you to respond to a request to perfect your request, after notification. Should you not answer any correspondence, or should the correspondence be returned as undeliverable, we reserve the right to administratively close the FOIA request.” We recommend that this language be removed in its entirety. There is no authorization in FOIA for an agency to unilaterally “administratively close” a FOIA request. It may grant a request in full or in part or deny it, but it cannot “close” a request. If this language is not completely removed, it should be at least modified to afford the requester no less than 30 days to respond to such an inquiry in order to ensure that they have sufficient time to respond.

Subpart (c) of this section in part, repeats the language of the subpart (b)(2) section about only providing a requestor with 10 days to respond to requests for additional information or clarification regarding the specifics of a request or fee assessment. This should be modified to provide the requestor no less than 30 days to respond to such an inquiry. The section also repeats the assertion that “Should you not answer any correspondence, or should the correspondence be returned undeliverable, we reserve the right to administratively close the FOIA request.” We again recommend that this language be removed in its entirety. Administrative closures of requests are controversial and should not be done based simply on the lack of response to one correspondence or a single message being returned as undeliverable.

Subpart (e) of this section explains that requests that cannot be responded to within 20 working days will be placed into a complex processing queue. The Department commits to notifying the requestor “of potential complicating factors in our acknowledgement letter or email, or in subsequent communications regarding your request, and you may choose to limit the scope of your request to reduce the processing time for your request.” However this leaves out notifying the requestor of the estimated completion time for processing the request. The language should be modified to include a commitment to provide an estimated completion date to all requestors whose requests are placed in the complex processing queue.

Subpart (f) of this section again lacks language committing the Department to include an estimated completion date in a notification about complex processing queue factors. The section explains that requestors “will be notified if it is necessary for us to take an additional ten working days to process your

⁸ 5 U.S.C. § 552(a)(6)(A).

request.” This language should be modified to include a commitment to also provide an estimated completion date.

Subpart (h) of this section explains that when the Department needs to extend the deadline for more than an additional 10 working days, the Department will ask if the requestor wishes to modify the request so it can be processed more quickly. The section concludes that only if the requestor does not wish to modify the request will an estimated completion date be provided. This is putting the cart before the proverbial horse. While it is reasonable and useful to have discussions about modifying requests that will take a long time to process, requestors must first be informed about the Department’s projection for the initial request. The language should be modified to include a commitment that in such cases the agency will immediately notify the requestor of the expected delay, which would include an explanation of the unusual circumstances necessitating the delay and an estimated completion date for processing the request as submitted. Without being so informed a requestor cannot reasonably participate in a discussion about changes to the request.

§ 5.25 How does HHS determine estimated completion dates for FOIA requests?

Subpart (a) of this section the language implies that estimated completion dates are only provided when requestors ask for such information. That should not be the case. The Department should provide estimated completion dates for all requests placed in the complex processing queue. Requestors should receive these estimated completion dates when their request is first placed in the queue, whenever the Department determines the estimated completion date must change for a request, or when a requestor asks for an update on expected completion date. The language of this section should be modified to make that clear.

Subpart C – Exemptions to Disclosure

§ 5.31 What are the reasons records may be withheld?

This section is generally unnecessary, and at most should simply re-state the exemptions set forth in 5 U.S.C. § 552(b). The scope of those exemptions is determined by courts, not agency regulations. Nonetheless, if HHS does not remove this section, we recommend the following changes:

(d) Exemption 4.

First, this subpart erroneously states that Exemption 4 “requires” HHS to withhold certain types of information. However, FOIA’s exemptions, including Exemption 4, are discretionary, not mandatory.⁹ Therefore, “requires” should be changed to “authorizes.”

Second, the description of Exemption 4, describes the category of “commercial or financial” information as exempt from disclosures, and adds that HHS interprets this category of information broadly. We

⁹ *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979) (“Congress did not design the FOIA exemptions to be mandatory bars to disclosure.”).

reject the “broad” interpretation of commercial or financial information when applying Exemption 4 to withhold information from disclosure under FOIA. There is nothing in the statute that permits such a “broad” interpretation of this exemption. Indeed, the Supreme Court has repeatedly held that FOIA’s exemptions are to be construed narrowly.¹⁰ We recommend subsection (d) be replaced with the language that merely states Exemption 4 permits HHS to withhold trade secrets and commercial or financial information obtained from a person and privileged or confidential, along with the following paragraph:

“Any person relying on Exemption 4 to request the withholding of information by our agency must specify why the information is a trade secret or commercial or financial information that is privileged and confidential and why its disclosure would harm an interest protected by the exemption.”

(e) Exemption 5: the description of Exemption 5 provides for an overly-broad interpretation and application of this exemption. We recommend it be replaced with the following:

“Exemption 5 protects from disclosure 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 us, 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.”¹¹

Additionally, at the end of this section, we recommend that the following language be added, in accordance with the provisions in the FOIA Improvement Act:

“Presumption of openness.

(1) Before relying on any of the above enumerated exemptions to withhold information, we will apply a presumption of openness and only withhold requested information if:

(i) We reasonably foresee that disclosure will harm an interest protected by one of the statutory exemptions; or

(ii) Disclosure is prohibited by law.”¹²

§ 5.32 Records not subject to the requirements of the FOIA – law enforcement exclusions

We find it unnecessary and highly irregular for an agency that is not a law enforcement agency to include a description of the law enforcement record exclusions.

At most, the HHS regulations should require that the agency include the boilerplate paragraph that tells all requesters that exclusions are possible, just as the FBI and other agencies are required to do. We recommend this section be removed and replaced with the following language:

“Use of record exclusions.

(1) In the event that an agency identifies records that may be subject to exclusion from the

¹⁰ See, e.g. *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

¹¹ See Civil Society Model FOIA Regulations, Updated Jul. 15, 2014, §1001.4 Categories of exemptions, (a)(5).

¹² See Civil Society Model FOIA Regulations, Updated Jul. 15, 2014, §1001.4 Categories of exemptions, (b).

requirements of the FOIA pursuant to 5 U.S.C. § 552(c), the agency must confer with Department of Justice, Office of Information Policy, to obtain approval to apply the exclusion.

(2) Any agency invoking an exclusion must maintain an administrative record of the process of invocation and approval of the exclusion by OIP.”¹³

We thank you for the opportunity to submit comments, and appreciate your consideration. For further information, please contact Patrice McDermott at OpenTheGovernment.org (pmcdermott@openthegovernment.org) with any questions.

Sincerely yours,

Association of Research Libraries
Bill of Rights Defense Committee
Center for Science and Democracy at Union of Concerned Scientists
Citizens for Responsibility and Ethics
Defending Dissent Foundation
Demand Progress
Electronic Privacy Information Center
Government Accountability Project
OpenTheGovernment.org
Project On Government Oversight
National Security Archive
Reporters Committee for Freedom of the Press
Sunlight Foundation
Transactional Records Access Clearinghouse

¹³ This language models the Template for Agency FOIA Regulations, developed by the Office of Information Policy (OIP), Department of Justice: <https://www.justice.gov/oip/template-agency-foia-regulations>.