

April 18, 2024

The Honorable J. Michael Johnson
Speaker of the House of Representatives
H-232, The Capitol
Washington, D.C. 20515

Dear Mr. Speaker:

Enclosed please find Interim Final Rules on the FOIA Improvement Act of 2016 that were approved by the Federal Election Commission on Thursday, April 18, 2024. The Commission is amending its regulations to implement a statutory mandate to change how certain records and documents are made available for public inspection.

The enclosed notice of the Interim Final Rules, which includes a detailed explanation and justification of the rules, will be published in the *Federal Register*. By this letter, the FEC is transmitting the rules to the House of Representatives in accordance the Federal Election Campaign Act of 1971, § 311(d)(1) (*codified at* 52 U.S.C. § 30111(d)(1)). Similar letters will be sent to the Senate as well. The Interim Final Rules will take effect on July 1, 2024, which assumes that thirty legislative days without Congressional disapproval will have passed by that date.

Thank you for your consideration.

Sincerely,

J. Duane Pugh
Director, Congressional Affairs

Enclosure

cc: The Honorable Bryan G. Steil, Chairman
The Honorable Joseph D. Morelle, Ranking Member
Committee on House Administration

April 18, 2024

The Honorable Kamala D. Harris
President of the Senate
S-212, The Capitol
Washington, D.C. 20510

Dear Madam President:

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Thank you for your consideration.

Sincerely,

J. Duane Pugh
Director, Congressional Affairs

Enclosure

cc: The Hon. Amy Klobuchar, Chairwoman
The Hon. Deb Fischer, Ranking Member
Committee on Rules and Administration

April 18, 2024

The Honorable Patty Murray
President *Pro Tempore* of the Senate
United States Senate
S-126, The Capitol
Washington, DC 20510

Dear Madam President:

Enclosed please find Interim Final Rules on the FOIA Improvement Act of 2016 that were approved by the Federal Election Commission on Thursday, April 18, 2024. The Commission is amending its regulations to implement a statutory mandate to change how certain records and documents are made available for public inspection.

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Thank you for your consideration.

Sincerely,

J. Duane Pugh
Director, Congressional Affairs

Enclosure

cc: The Hon. Amy Klobuchar, Chairwoman
The Hon. Deb Fischer, Ranking Member
Committee on Rules and Administration

FEDERAL ELECTION COMMISSION

11 CFR Part 4

[Notice 2024-13]

FOIA Improvement Act

AGENCY: Federal Election Commission.

ACTION: Interim final rule; request for comments.

SUMMARY: Congress enacted the FOIA Improvement Act of 2016, which amends the Freedom of Information Act, as relevant here, to require federal agencies to change how certain records and documents are made available for public inspection. The Commission is amending its regulations to implement this statutory mandate. The Commission is accepting comments on these revisions to its regulations, and any comments received may be addressed in a subsequent rulemaking document.

DATES: Effective July 1, 2024. Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: All comments should be addressed to Ms. Amy L. Rothstein, Assistant General Counsel, and must be submitted in either written or electronic form. Commenters are encouraged to submit comments electronically via the Commission's website at <http://sers.fec.gov/fosers>, reference REG 2024-02. Alternatively, comments may be submitted in paper form addressed to the Federal Election Commission, Attn.: Ms. Amy L. Rothstein, Assistant General Counsel, 1050 First Street NE, Washington, DC.

Each commenter must provide, at a minimum, the commenter's first name, last name, city, and state. All properly submitted comments, including attachments, will become part of the public record, and the Commission will make comments available for public viewing on the

Commission's website and in the Commission's Public Records Office. Accordingly, commenters should not provide in their comments any information that they do not wish to make public, such as a home street address, personal email address, date of birth, phone number, social security number, or driver's license number, or any information that is restricted from disclosure, such as trade secrets or commercial or financial information that is privileged or confidential.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Rothstein, Assistant General Counsel, Ms. Joanna Waldstreicher or Ms. Sarah Herman Peck, Attorneys, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION:

A. Background

The FOIA Improvement Act of 2016 (the “FOIA Improvement Act”) amends the Freedom of Information Act (“FOIA”), as relevant here, to require federal agencies to change how certain records and documents are made available for public inspection.¹ In particular, the FOIA Improvement Act directs federal agencies to make certain records available in electronic format for public inspection; prohibits, subject to exception, an agency from charging fees to a FOIA requester if the agency misses a deadline after receiving a FOIA request; requires agencies to notify FOIA requesters who have received adverse determinations about their right to seek dispute resolution services; prohibits agencies from withholding information requested under FOIA unless the agencies reasonably foresee that disclosure would harm an interest protected by a FOIA exemption or the disclosure is prohibited by law; requires agencies withholding information requested under FOIA to consider whether partial disclosure is possible; and eliminates an exemption from disclosure under FOIA of certain agency records created at least

¹ Pub. L. No. 114-185, 130 Stat. 538 (2016).

25 years before the date of the FOIA request.² The FOIA Improvement Act also explicitly directs the head of each federal agency to promulgate regulations to implement these changes to its FOIA practices.³

To implement the FOIA Improvement Act’s mandates, the Commission is now amending 11 CFR 4.4-4.5 and 4.7-4.9, setting forth the Commission’s obligations and procedures for disclosing documents under FOIA. Before final promulgation of any rules or regulations to carry out the provisions of the Federal Election Campaign Act, the Commission transmits the rules or regulations to the Speaker of the House of Representatives and the President of the Senate for a thirty-legislative-day review period.⁴ The effective date of this final rule is July 1, 2024. The Commission welcomes public comment on this interim final rule and may address any comments received in a later rulemaking document.

The Commission is promulgating these amendments without advance notice or an opportunity for comment because they fall under the “good cause” exemption of the Administrative Procedure Act.⁵ The Commission finds that notice and comment are unnecessary here because the changes are technical amendments to conform with explicit statutory requirements. Amending these regulatory provisions does not involve any exercise of discretion by the Commission. Moreover, because Congress has already enacted the changes to FOIA through the FOIA Improvement Act, the new “administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public.”⁶ For

² *Id.* § 2.

³ *Id.* § 3.

⁴ 52 U.S.C. 30111(d)(2).

⁵ 5 U.S.C. 553(b)(B).

⁶ *See Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 94 (D.C. Cir. 2012) (internal citation omitted).

these reasons, the Commission is not required to publish a notice of proposed rulemaking to promulgate these regulatory provisions.

For the same reasons, these amendments fall within the “good cause” exception to the delayed effective date provisions of the Administrative Procedure Act and the Congressional Review Act.⁷ Moreover, because this amendment is exempt from the notice and comment procedure of the Administrative Procedure Act under 5 U.S.C. 553(b), the Commission is not required to conduct a regulatory flexibility analysis under 5 U.S.C. 603 or 604.⁸

B. Revisions to 11 CFR Part 4 – Public Records and the Freedom of Information Act

Part 4 of the Commission regulations sets forth the Commission’s public records obligations under FOIA. Section 4.4 requires the Commission to make specific categories of materials available for public inspection, subject to exceptions outlined in 11 CFR 4.5.⁹ Section 4.7 specifies the framework for requesting access to Commission records, and the appeal process for denied requests is delineated in 11 CFR 4.8. Notice requirements for any associated fees is provided in 11 CFR 4.9. The Commission is amending each of these five sections within 11 CFR part 4 pursuant to the FOIA Improvement Act.

(i). Revisions to 11 CFR 4.4 – Availability of Records

The Commission is amending 11 CFR 4.4(a) and (c) and adding new subsection (h) to reflect new standards for the availability of certain records.

⁷ 5 U.S.C. 553(d)(3), 808(2).

⁸ See 5 U.S.C. 601(2), 604(a).

⁹ Exempt documents include records that are classified, records that relate to internal personnel rules, records that are exempted by statute, records that contain trade secrets or commercial or financial information that is privileged or confidential, certain inter-agency or intra-agency documents, personnel and medical files, and certain records compiled for law enforcement purposes.

First, current 11 CFR 4.4(a) requires the Commission to make certain materials available for public inspection and copying. The Commission is amending subsection (a) to provide that the Commission will make those materials available for public inspection in an electronic format.

Second, current 11 CFR 4.4(a)(4) requires the Commission to make available for public inspection copies of all records that have been released to any person under subsection (a) and which the agency has determined have become or are likely to become the subject of subsequent requests. The Commission is amending subsection (a)(4) to provide that the Commission will make available for public inspection copies of all records that have been released to any person under subsection (a) three or more times or which the agency determines have become or are likely to become subject to subsequent requests.

Third, current 11 CFR 4.4(c) provides, in part, that the Commission must maintain and make available current indexes providing identifying information regarding any matter issued, adopted, or promulgated after April 15, 1975, as required by 5 U.S.C. 552(a)(2)(C) and (E). The Commission is amending subsection (c) to provide that these indexes will be made available in an electronic format.

Lastly, the Commission is adding new 11 CFR 4.4(h) to provide that the Commission will withhold releasing information under section 4.4 only if the Commission reasonably foresees that disclosure would harm an interest protected by an exemption listed in 11 CFR 4.5(a) or disclosure is prohibited by law. New subsection (h) also provides that, when the Commission determines full disclosure of a requested record is not possible, the Commission will consider whether partial disclosure is possible and will take reasonable steps necessary to segregate and release nonexempt information.

(ii). Revisions to 11 CFR 4.5 – Categories of Exemptions

Current 11 CFR 4.5(a)(5) provides that no FOIA request will be denied release unless the record contains, or its disclosure would reveal, inter-agency or intra-agency memoranda or letters that would not be available by law to a party in litigation with the Commission. The Commission is amending this provision to specify that the exemption applies only to documents not available to a party other than an agency in litigation with the Commission, and that the deliberative process privilege will not apply to records created 25 years or more before the request date, consistent with the FOIA Improvement Act.

(iii). Revisions to 11 CFR 4.7 – Requests for Records

The Commission is amending 11 CFR 4.7(c) and (h) and adding subsection (j) to include new requirements for notifying requesters about the status of a request.

First, current 11 CFR 4.7(c) requires the Commission to determine, within twenty working days after receiving a request or granting an appeal, whether to comply with the request, unless in unusual circumstances the time is extended or subject to § 4.9(f)(3), which governs advance payments. The Commission is amending 11 CFR 4.7(c) to provide that the Commission will immediately notify the requester of the determination, the reasons therefore, and the requester's right to seek assistance from the Commission's FOIA Public Liaison and to seek dispute resolution services from the National Archives and Records Administration ("NARA"), Office of Government Information Services.

Second, current 11 CFR 4.7(h) provides that any person denied access to records by the Commission must be notified immediately, stating the reasons for the denial. The notice must also state that the person denied access to records may appeal the adverse determination to the Commission. The Commission is amending this subsection to provide that the person denied

access will be notified of that person's right to appeal within 90 days from the date of the adverse determination. Such notice also must state that the person denied access to records may seek dispute resolution services from the Commission's FOIA Public Liaison or NARA's Office of Government Information Services.

Finally, the Commission is adding 11 CFR 4.7(j) to explain the role of, and provide contact information for, the FOIA Public Liaison.

(iv). Revisions to 11 CFR 4.8 – Mediation Services and Appeal of Denial

The Commission is amending 11 CFR 4.8 by adding subsection (h), which will notify requesters that they may seek non-compulsory, non-binding mediation services to help resolve FOIA disputes. The Commission is also amending the heading of 11 CFR 4.8 to reflect the availability of such mediation services.

(v). Revisions to 11 CFR 4.9 – Fees

Finally, the Commission is amending 11 CFR 4.9(a), which lists exceptions to fee charges. The Commission is adding subsection (a)(5) to address time limits for compliance.

New 11 CFR 4.9(a)(5)(i) provides that the Commission will not charge a fee to any requester if the Commission does not comply with the time limits in 11 CFR 4.7(c) or 4.8(f).

New 11 CFR 4.9(a)(5)(ii) provides that a failure to comply with the time limits is excused for another ten days if the Commission has determined that unusual circumstances (as defined in 5 U.S.C. § 552(a)(6)(B)(i) and 11 CFR 4.7(c)) apply and has provided timely written notice to the requester under 11 CFR 4.7(c). New 11 CFR 4.9(a)(5)(ii) further provides that the Commission may not assess any search or duplication fees if it fails to comply with the extended time period.

New 11 CFR 4.9(a)(5)(iii) describes the circumstances under which the Commission may charge search or duplication fees after determining that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request.

Finally, new 11 CFR 4.9(a)(5)(iv) provides that when a court has determined that exceptional circumstances exist, a failure to comply with the time limit shall be excused for the length of time provided by the court's order.

List of Subjects

11 CFR Part 4

Freedom of Information

For the reasons set out in the preamble, the Federal Election Commission amends 11 CFR chapter I, as follows:

Part 4—Public records and the Freedom of Information Act

1. Authority: 5 U.S.C. 552, as amended.
2. Amend § 4.4 by revising the introductory sentence of paragraph (a), revising paragraphs (a)(4) and (c), and adding paragraph (h) to read as follows:

§ 4.4 Availability of records

(a) In accordance with 5 U.S.C. 552(a)(2), the Commission shall make the following materials available for public inspection in an electronic format:

* * * * *

(4) Copies of all records, regardless of form or format, which have been released to any person under this paragraph (a) and (i) which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records, or (ii) which have been requested three or more times; and

* * * * *

(c) The Commission shall maintain and make available for public inspection in an electronic format current indexes and supplements providing identifying information regarding any matter issued, adopted, or promulgated after April 15, 1975 as required by 5 U.S.C. 552(a)(2)(C) and (E). These indexes and supplements shall be published and made available on at least a quarterly basis for public distribution unless the Commission determines by Notice in the *Federal Register* that publication would be unnecessary, impracticable, or not feasible due to budgetary considerations. Nevertheless, copies of any index or supplement shall be made available upon request at a cost not to exceed the direct cost of duplication.

* * * * *

(h) The Commission will withhold information under this section only if the Commission reasonably foresees that disclosure would harm an interest protected by an exemption described in § 4.5(a); or disclosure is prohibited by law. The Commission will consider whether partial disclosure of information is possible whenever it determines that full disclosure of a requested record is not possible, and the Commission will take reasonable steps necessary to segregate and release nonexempt information.

* * * * *

3. Amend § 4.5 by revising paragraph (a)(5) to read as follows:

§ 4.5 Categories of exemptions

(a) * * *

(5) Inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the Commission, 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.

* * * * *

4. Amend § 4.7 by revising paragraphs (c) and (h) and adding paragraph (j) to read as follows:

§ 4.7 Requests for records

* * * * *

(c) The Commission shall determine within twenty working days after receipt of a request, or twenty working days after an appeal is granted, whether to comply with such request, unless in unusual circumstances the time is extended or subject to § 4.9(f)(3), which governs advance payments. The Commission shall immediately notify the requester of such determination, the reasons therefor, and the right of the requester to seek assistance from the FOIA Public Liaison for the Commission and to seek dispute resolution services from the Office of Government Information Services. In the event the time is extended, the requester shall be notified of the reasons for the extension and the date on which a determination is expected to be made, but in no case shall the extended time exceed ten working days. An extension may be made if it is—

* * * * *

(h) Any person denied access to records by the Commission shall be notified immediately giving reasons therefor, and notified of the right of such person to appeal such adverse determination to the Commission within 90 days from the date of the adverse determination and the right of such person to seek dispute resolution services from the FOIA Public Liaison for the Commission or the Office of Government Information Services.

* * * * *

(j) FOIA Public Liaison. The FOIA Public Liaison is responsible for reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes. The FOIA Public Liaison may be contacted at the address identified in the definition of “Commission” in § 1.2.

5. Amend § 4.8 by revising the heading and adding paragraph (h) to read as follows:

§ 4.8 Mediation services and appeal of denial

* * * * *

(h) Additional resource. The National Archives and Records Administration (NARA), Office of Government Information Services (OGIS) offers non-compulsory, non-binding mediation services to help resolve FOIA disputes as a non-exclusive alternative to litigation. A requester may contact OGIS at: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001; email: ogis@nara.gov; telephone 202-741-5770; fax: 202-741-5769; online: <https://www.archives.gov/ogis>.

6. Amend § 4.9 by adding paragraph (a)(5) to read as follows:

§ 4.9 Fees

(a) * * *

(5) Time limit for compliance.

(i) The Commission will not charge a fee under this section to any requester if the Commission does not comply with the time limits in §§ 4.7(c) or 4.8(f).

(ii) If the Commission has determined that unusual circumstances (as defined in 5 U.S.C. 552(a)(6)(B)(iii) and § 4.7(c)(1)–(3)) apply and the Commission provided timely written notification to the requester in accordance with § 4.7(c), a failure to comply with the time limit is excused for an additional 10 days. If the Commission fails to comply with the extended time limit, the Commission may not assess any search fees or, where applicable, duplication fees.

(iii) If the Commission has determined that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, the Commission may charge search fees or, where applicable, duplication fees, if the Commission has provided timely written notification to the requester in accordance with § 4.7(c) and the Commission has discussed with the requester

via written mail, electronic 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 §4.7(d).

(iv) If a court has determined that exceptional circumstances exist, a failure to comply with the time limit shall be excused for the length of time provided by the court order.

* * * * *

Dated: April 18, 2024
On behalf of the Commission,

Sean J. Cooksey,
Chairman,
Federal Election Commission