

157 FERC ¶ 61,116
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 375 and 388

[Docket No. RM17-5-000; Order No.832]

Regulations Implementing the FOIA Improvement Act of 2016 and Clarifying the FOIA
Regulations

(Issued November 17, 2016)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule.

SUMMARY: On June 30, 2016, President Obama signed the Freedom of Information Act Improvement Act of 2016. The Act requires agencies to revise their regulations within 180 days to account for the new statutory mandates. After undertaking a review of Commission regulations in accordance with Section 3 of the Act, the Commission is revising its FOIA regulations to incorporate the statutory mandates. Additionally, this rule updates the delegation regulations with respect to determinations made by the General Counsel in response to FOIA administrative appeals.

DATE: This rule will become effective [**Insert_Date 30 days after publication in the FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT:

Mark Hershfield
Office of the General Counsel
888 First Street, NE
Washington, DC 20426
(202) 502-8597
mark.hershfield@ferc.gov

Christopher MacFarlane
Office of the General Counsel
888 First Street, NE
Washington, DC 20426
(202) 502-6761
christopher.macfarlane@ferc.gov

SUPPLEMENTARY INFORMATION:

157 FERC ¶ 61,116
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, and Colette D. Honorable.

Regulations Implementing the FOIA Improvement
Act of 2016 and Clarifying the FOIA Regulations.

Docket No. RM17-5-000

ORDER NO. 832

FINAL RULE

(Issued November 17, 2016)

I. Introduction

1. On June 30, 2016, President Obama signed the Freedom of Information Act (FOIA) Improvement Act of 2016 (FOIA Improvement Act or the Act).¹ The Act directs agencies to: (1) make information that has been requested and disclosed three times publically accessible in an electronic format;² (2) institute a sunset period of 25 years on records protected under the deliberative process privilege; (3) codify the Department of

¹ FOIA Improvement Act of 2016, Pub. L. 114-185, 130 Stat. 538 (June 2016). The Act also requires several actions that do not necessitate a revising of the regulations such as FOIA officers offering additional FOIA training.

² See Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request, OIP Guidance (Oct. 5, 2015), <https://www.justice.gov/oip/oip-guidance-5>.

Justice's foreseeability of harm standard when rendering FOIA determinations;³ (4) take reasonable steps to segregate exempt information from nonexempt information; (5) limit fees in unusual circumstances when the agency response is delayed; and (6) provide additional notice requirements to FOIA requesters in agency determination letters.

2. Section 3 of the Act requires agencies to revise their regulations to account for the new statutory mandates. The Act provides that agencies must revise their rules within 180 days to incorporate the statutory changes. Accordingly, the Commission is revising its regulations to implement the FOIA Improvement Act. Consistent with the FOIA administrative appeal provisions in section 388.110, the Commission also is clarifying under section 375.309 that the General Counsel or a designee may issue final determinations on administrative FOIA appeals.

II. Discussion

3. After undertaking a review of Commission regulations in accordance with Section 3 of the Act, the Commission is revising its FOIA regulations in 18 CFR sections 388.106-10 (2016), as follows.

³ See 5 U.S.C. 552(b)(5)(2012) (incorporating various privileges including the deliberative process privilege covering "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.")

A. Revisions to Section 375.309

4. The FOIA administrative appeal provisions in section 388.110 provide that a FOIA administrative appeal must be directed to the General Counsel for determination, and that the General Counsel or the General Counsel's designee will make a determination on that appeal within the statutory timeframe.⁴ Consistent with the Commission's FOIA administrative appeal provisions in section 388.110, the Commission is clarifying, in section 375.309, that the General Counsel or a designee will provide determinations in response to FOIA administrative appeals.

B. Revisions to Section 388.106

5. The FOIA Improvement Act requires agencies to "make available for public inspection in an electronic format" records that have been released and "that have been requested 3 or more times." Section 388.106 concerns Commission records available in the public reference room at the Commission's headquarters or on the Commission's website. The Commission is revising that section to codify this requirement.

C. Revisions to Section 388.107

6. The FOIA Improvement Act provides that the deliberative process privilege no longer exempts a document that is 25 years or older. Section 388.107 describes material that is exempt from public disclosure under the Commission's regulations, and a provision in that section describes material that would traditionally fall under the

⁴ See 5 U.S.C. 552(a)(6)(A)(ii) (2012).

protection of deliberative process privilege. The Commission is revising section 338.107(e) to reflect the 25 year limitation on material that would otherwise be exempt under the deliberative process privilege.

D. Revisions to Section 388.108

7. The FOIA Improvement Act requires agencies to codify the Department of Justice’s foreseeable harm standard. Under that standard, agencies “shall withhold information” under the FOIA “only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.” The standard does not require the release of material “that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under [Exemption] 3.” The Act also directs agencies to make reasonable efforts to segregate and release nonexempt material. Consistent with Section 3 of the Act, the Commission revises section 388.108 to codify these practices.

E. Revisions to Section 388.109

8. The Act directs agencies to waive processing fees, under certain unusual circumstances, where the agency’s response was delayed.⁵ The Commission is revising

⁵ See Prohibition on Assessing Certain Fees When the FOIA's Time Limits Are Not Met, OIP Guidance (Oct. 19, 2016), <https://www.justice.gov/oip/oip-guidance/prohibition-on-assessing-certain-fees-when-foia-time-limits-not-met>.

its regulations on FOIA processing fees, section 388.109, to provide for fee waivers in the unusual circumstances described in the Act.

F. Revisions to Section 388.110

9. The FOIA Improvement Act also provides changes to administrative appeals and provides mandatory language that must go in initial response letters. The Act requires that all determination letters must notify the requester that they can seek assistance from the FOIA Public Liaison. Each adverse FOIA determination letter must notify the requester of the option to seek dispute resolution services from Office of Government Information Services (OGIS).

10. The Act also directs Agencies to extend the timeframe to file an administrative appeal from 45 days to at least 90 days. Additionally, the Act mandates that agencies advise requesters that they may seek the assistance of OGIS when the agency extends the response time by ten or more days for unusual circumstances. The Commission will take these steps and revises section 388.110 of its regulations to codify this practice.

III. Information Collection Statement

11. Office of Management and Budget (OMB) regulations require OMB to approve certain information collection requirements imposed by agency rule.⁶ However, this instant Final Rule does not contain any information collection requirements. Therefore, compliance with OMB regulations is not required.

⁶ 5 CFR 1320.12 (2016).

IV. Environmental Analysis

12. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.⁷ Issuance of this Final Rule does not represent a major federal action having a significant adverse effect on the human environment under the Commission's regulations implementing the National Environmental Policy Act of 1969. Part 380 of the Commission's regulations lists exemptions to the requirement to draft an Environmental Analysis or Environmental Impact Statement. Included is an exemption for procedural, ministerial, or internal administrative actions.⁸ This rulemaking is exempt under that provision.

V. Regulatory Flexibility Act

13. The Regulatory Flexibility Act of 1980 (RFA)⁹ generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. This Final Rule makes procedural modifications as directed by statute. The Commission certifies that it will not have a significant economic impact

⁷ *Regulations Implementing the National Environmental Policy Act of 1969*, Order No. 486, (Dec. 17, 1987), FERC Stats. & Regs. ¶ 30,783 (1987).

⁸ 18 CFR 380.4(a)(1) (2016).

⁹ 5 U.S.C. 601-12 (2012).

upon participants in Commission proceedings. An analysis under the RFA is not required.

VI. Document Availability

14. In addition to publishing the full text of this document in the *Federal Register*, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (<http://www.ferc.gov>) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, NE, Room 2A, Washington, DC 20426.

15. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

16. User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at (202) 502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

VII. Effective Date

17. The Commission is issuing this rule as a Final Rule without a period for public comment. Under 5 U.S.C. 553(b)(3)(A), notice and comment procedures are unnecessary for “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . .” This rule merely makes modification to existing procedures as directed by statute. The rule will not significantly affect regulated entities or the general public.

18. These regulations are effective [**insert date 30 days after publication in the *Federal Register***].

List of Subjects in 18 CFR Part 375

Authority delegations (Government agencies); Seals and insignia; Sunshine Act.

List of Subjects in 18 CFR Part 388

Confidential business information; Freedom of information.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

In consideration of the foregoing, the Commission amends Parts 375 and 388, Chapter 1, Title 18, Code of Federal Regulations, as follows:

PART 375— THE COMMISSION

1. The authority citation for part 375 continues to read as follows:

Authority: 5 U.S.C. 551-557; 15 U.S.C. 717-717w, 3301-3432; 16 U.S.C. 791-825r, 2601-2645; 42 U.S.C. 7101-7352.

2. In section 375.309, Paragraph (h) is added as follows

Section 375.309 Delegations to the General Counsel.

* * * * *

(i) Deny or grant, in whole or in part, an appeal of a Freedom of Information Act determination by the Director of the Office of External Affairs.

PART 388— INFORMATION AND REQUESTS

1. The authority citation for part 388 continues to read as follows:

Authority: 5 U.S.C. 301-305, 551, 552 (as amended), 553-557; 42 U.S.C. 7101-7352.

2. Amend section 388.106 by adding paragraph (a)(24), to read as follows

Section 388.106 Requests for Commission records available in the Public Reference Room and from the Commission’s web site, <http://www.ferc.gov>.

* * * * *

(a) * * *

(24) Records that have been requested three or more times and determined eligible for public disclosure will be made publicly available on the Commission's website or through other electronic means.

* * * * *

3. Amend section 388.107 by revising paragraph (e), to read as follows

Section 388.107 Commission records exempt from public disclosure.

* * * * *

(e) Interagency or intraagency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency, except that the deliberative process privilege shall not exempt any record 25 years or older.

* * * * *

4. Amend section 388.108 by revising paragraph (c) to read as follows:

Section 388.108 Requests for Commission records not available through the Public Reference Room (FOIA requests).

* * * * *

(c) * * *

(4) The Director will consider whether partial disclosure of information is possible whenever it is determined that a document is exempt and will take reasonable steps to segregate and release nonexempt information.

(5) The Director will only withhold information where it is reasonably foreseeable that disclosure would harm an interest protected by an exemption or disclosure is prohibited by law or otherwise exempted from disclosure under FOIA Exemption 3.

5. Amend section 388.109 by adding paragraph (f), to read as follows

Section 388.109 Fees for record requests.

* * * * *

(f) The Commission will not charge search fees (or duplication fees for requesters with preferred fee status) where, after extending the time limit for unusual circumstances, as described in section 388.110, the Director does not provide a timely determination.

(1) If there are unusual circumstances, as described in Section 388.110, and there are more than 5,000 responsive pages to the request, the Commission may charge search fees (or, for requesters in preferred fee status, may charge duplication fees) where the requester received timely written notice and the Commission has discussed with the requester via written mail, electronic mail, or telephone (or made not less than 3 good-faith attempts to do so) how the requester could effectively limit the scope of the request; or

(2) If a court determines that exceptional circumstances exist, the Commission's failure to comply with a time limit will be excused for the length of time provided by the court order.

6. Amend section 388.110 by revising paragraphs (a) and (b) to read as follows:

Section 388.110 Procedure for appeal of denial of requests for Commission records not publicly available or not available through the Public Reference Room, denial of...fee waiver or reduction, and denial of requests for expedited processing.

* * * * *

(a) (1) Determination letters shall indicate that a requester may seek assistance from the FOIA Public Liaison. A person whose request for records, request for fee waiver, or request for expedited processing is denied in whole or in part may seek dispute resolution services from the Office of Government Information Services, or may appeal the determination to the General Counsel or General Counsel's designee within 90 days of the determination.

(2) Appeals filed pursuant to this section must be in writing, addressed to the General Counsel of the Commission, and clearly marked "Freedom of Information Act Appeal." Such an appeal received by the Commission not addressed and marked as indicated in this paragraph will be so addressed and marked by Commission personnel as soon as it is properly identified and then will be forwarded to the General Counsel. Appeals taken pursuant to this paragraph will be considered to be received upon actual receipt by the General Counsel.

(3) The General Counsel or the General Counsel's designee will make a determination with respect to any appeal within 20 working days after the receipt of such appeal. An appeal of the denial of expedited processing will be considered as expeditiously as possible within the 20 working day period. If, on appeal, the denial of the request for

records, fee reduction, or expedited processing is upheld in whole or in part, the General Counsel or the General Counsel's designee will notify the person making the appeal of the provisions for judicial review of that determination.

(b) * * *

(5) Whenever the Commission extends the time limit, pursuant to (b)(1) of this paragraph, by more than ten additional working days, the written notice will notify the requester of the right to seek dispute resolution services from the Office of Government Information Services.