

FOIA Interim Final Rule—RIN 2590-AA86, Published at 82 FR 13743 (Mar. 15, 2017)

Comment submitted by the Department of Justice, Office of Information Policy
May 15, 2017

Section	Comment
1202.2	The definition for discretionary release is not necessary and could create confusion with the foreseeable harm standard. Applying the foreseeable harm standard is now a requirement of the FOIA; accordingly, releases under this standard would not be discretionary. As to any other discretionary releases (for instance, if there would be harm but the agency sees greater benefit to release), it is not necessary to include in the regs because most of the FOIA's exemptions are discretionary in the first place.
1202.4(b)	Suggest removing (b) as it is unnecessary. Because the exemptions are inherently discretionary, there is no need to state this in the regulations.
1202.4(d)-(e)	For (d), this is not necessary, but if you would like to retain it, please clarify that FHFA is not required to provide a Vaughn index during the administrative stage of processing the request. (e) is not necessary because it simply restates the statutory provision.
1202.5(f)	Suggest revising to state " may state in what form or format..." Requiring requesters to state a format preference seems unnecessary, although if a requester wants a specific format, they must request it. Otherwise, the agency can provide the records in the format that is most readily reproducible for them. It's easiest for the agency if the requester only specifies a format when they want something different than what the agency would provide by default.
1202.5(g)	You may ask requesters to specify an amount, if any, that they are willing to pay. However, the regulation currently requires all requesters to agree to pay up \$100 upfront. OMB Fee Guidelines require agencies to notify requesters of any fees above \$25. Requiring a requester to agree to pay \$100 before they know if any fees will be incurred is inconsistent with the OMB Guidelines. This does not leave open the possibility that a requester only seeks the statutory entitlements (100 free pages and 2 hours of search).
1202.6	Suggest removing "overly broad, unduly burdensome to process" because "overly broad" is covered by "does not reasonably describe the records you seek." The unduly burdensome standard applies to search, not processing, and would also be covered by not reasonably described. We suggest giving requesters 30 days to modify requests. 15 calendar days seems somewhat short. Additionally, we suggest removing the last sentence. Because the clock has not started for unperfected requests, "tolling" (stopping the clock) would not take place.
1202.6(b)	Suggest removing "or if the additional information you provide is still incomplete or insufficient." It is confusing to a requester to state that their request was withdrawn when in fact it was closed because it did not reasonably describe the records or did not meet all the requirements.
1202.7(b)	We suggest changing this to date the search began. Courts have favored "date-of-search" cut-off dates rather than date of request cut off. See page 54 of the Procedural Requirements of the DOJ Guide to the FOIA. https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/procedural-requirements.pdf#p39

1202.7(d)	<p>Suggest revising to reference records that are being referred instead of requests. Agencies should not refer requests to other agencies, they should only reroute requests internally to other components, or refer responsive records for processing to another agency where appropriate. Agencies may direct the requester to another agency, but they should not forward the request itself to a separate agency. This can create confusion for the requester and the other agency.</p> <p>Also suggest adding language about consultations with other agencies. See OIP's Regulation Template Section IV(d) https://www.justice.gov/oip/template-agency-foia-regulations.</p>
1202.7(g)	<p>Suggest revising this section to talk about unusual circumstances generally, without reference to specific tracks. The requirements of unusual circumstances apply regardless of the track. There may be a "complex" track requests that only requires additional 10 days. Additionally, when giving notice that it will take longer than 30 days, the agency is required to give notice of dispute resolutions services provided by OGIS. See our language in Section V(c) of the reg template https://www.justice.gov/oip/template-agency-foia-regulations.</p>
(c)(2)(1)	<p>Suggest removing "confidential" and "confidential business" because at this point it may not be clear whether the information is CBI.</p>
(e)(4)	<p>Please revise this to track the language of the EO. (e)(4) is missing "unless the agency has substantial reason to believe that disclosure of the information would result in competitive harm."</p>
1202.9(e)	<p>There is no legal grounds to prevent the requester from filing a lawsuit.</p>
1202.9(g)	<p>Suggest removing the last sentence. By definition, mediation is a process by which the parties work to come to an agreement--it is not a decision issued by OGIS. Additionally, we are now required by law to notify requesters about the availability of mediation through OGIS. While agencies are not required to engage in mediation or refer disputes to OGIS, this sentence can be confusing given that we are required to notify requesters about OGIS services.</p>
1202.10(c)	<p>Edit to indicate that FHFA will respond to a request for expedited processing within 10 calendar days. See 5 U.S.C. 552 (a)(6)(E)(iii)</p>
1202.11(d)	<p>As noted above, OMB Guidelines require agencies to notify requesters whenever fees will exceed \$25. FHFA may choose to establish a higher threshold for charging fees, but otherwise, they must provide notice when they anticipate fees will be more than \$25.</p>
1202.11(e)(1)	<p>Flagging to note that the FOIA permits agencies to require advance payment for \$250. Additionally, it is not clear how this provision squares with (e)(2), which says that if the estimate exceeds \$1,000, FHFA may require advance payment.</p>
1202.11(h)	<p>Flagging for awareness that we have updated the FW factors for clarity. See Section X(k) of the Regulation Template.</p>

1202.11(j)	These restrictions are incomplete and do not account for the new restrictions that resulted from the FOIA Improvement Act of 2016. Agencies are now restricted from charging fees if the response time exceeds 30 days when there are unusual circumstances, unless 5,000 pages or more are necessary to respond and other requirements are satisfied. Please see Section X(d)(2) of the Regulation Template for sample language.
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