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(Submitted to the Federal eRulemaking Portal and via e-mail to RegComments@fhfa.gov as per instructions in the Federal Register notice, Vol. 76, No. 99/Monday, May 23, 2011/Rules and Regulations)

RE: The Federal Housing Finance Agency Interim Final Regulation to change its Freedom of Information Act Regulation, 12 CFR Part 1202, RIN 2590-AA-44, Docket No. FHFA-2011-0015

These comments are offered on behalf of the National Archives and Records Administration's Office of Government Information Services (OGIS) regarding the Federal Housing Finance Agency's Interim Final Regulation to change its Freedom of Information Act (FOIA) regulation, 12 CFR Part 1202, RIN 2590-AA-44, Docket No. FHFA-2011-0015.

General comment from the Office of Government Information Services (OGIS)

OGIS commends the Federal Housing Finance Agency (FHFA) for updating its Freedom of Information (FOIA) regulations and suggests several additions to strengthen the regulations, including alerting FOIA requesters of the statutory right to seek assistance from OGIS, the FOIA Ombudsman.

OGIS's suggested changes and comments to the FHFA FOIA regulations

§ 1202.1 Why did FHFA issue this regulation?

(c): OGIS has observed that there is a fair amount of public confusion over the difference between first-party access requests (most often, but not always, Privacy Act requests) and FOIA requests. In addition, the Justice Department's Office of Information Policy recommends that agencies process all requests under both the FOIA and Privacy Act of 1974 in order to afford requesters the greatest degree of access to the requested information. *See U.S. Department of Justice's Guide to the Freedom of Information Act (FOIA Guide)* at 46, n. 115. OGIS notes that, as written, subsection (c) is a bit confusing and suggests that FHFA revise this subsection as follows:



“If you want to request information about yourself, this is considered a first-party or Privacy Act request, and you should file it using FHFA’s Privacy Act regulations at part 1204 of this title. If you file a request for access to information about yourself, FHFA will process this request under both the FOIA and Privacy Act of 1974 in order to give you the greatest degree of access to any responsive information.”

§ 1202.2 What do the terms in this regulation mean?

OGIS suggests that FHFA add several terms to this section, including FOIA Public Liaison, fee waiver and requester category.

The following definition for FOIA Public Liaison comes directly from 5 U.S.C. 552 § (l). We suggest including it to reflect the position’s statutorily enhanced role in the 2007 FOIA amendments.

“FOIA Public Liaison means an agency official who is responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.”

We have found that even experienced requesters can still confuse the concepts of requester category and fee waiver, and as such, we suggest including the following definitions.

“Fee waiver means the waiver or reduction of processing fees if a requester can demonstrate that certain statutory standards are satisfied.”

“Requester category means one of the three categories that agencies place requesters in for the purpose of determining whether a requester will be charged fees for search, review and duplication. The three categories are commercial; news media, scientific institution or educational; and ‘all other.’”

Direct costs: OGIS suggests adding clarifying language that, with regard to contract services, the ultimate cost to the requester will be no greater than it would be if the agency itself had performed these tasks, in accordance with OMB Guidelines. (See OMB Guidelines for FOIA Fees, 1987, http://www.doi.gov/foia/2010/OMBGuidelines_FOIAFees.pdf).

Unusual circumstances (1): OGIS suggests this language be clarified to differentiate between FHFA’s 12 Federal Home Loan Banks located across the country and an office that is on another floor or a few blocks away.



§ 1202.3 What information can I obtain through FOIA?

(b): OGIS notes that although it is clear that FOIA does not require FHFA to provide narrative responses to questions or queries in order to respond to requests, it is less clear that FOIA would not call for the creation of a compilation of information in response to a request, especially if a compilation can be produced through a few keystrokes. OGIS has observed an increase in the receipt by Federal agencies of requests for access to information contained in government databases. In these cases, a compilation of information might be the proper response to the request. For this reason, and in the interest of government transparency, OGIS suggests the FHFA reconsider including this phrase in this subsection.

§ 1202.4 What information is exempt from disclosure?

OGIS applauds the FHFA for subsection (b) directing agency FOIA professionals that although “records or parts of them may be exempt from disclosure, FHFA or FHFA-OIG may elect under the circumstances of any particular request not to apply an exemption.” This subsection falls right in line with Attorney General Eric Holder’s FOIA Memorandum (See Memorandum for Heads of Executive Departments and Agencies, March 19, 2009, <http://www.justice.gov/ag/foia-memo-march2009.pdf>).

(d) Exempt and redacted material: OGIS suggests that FHFA revise this subsection as follows:

“FHFA and FHFA-OIG are not required to provide an itemized index correlating each withheld document (or redacted portion) with a specific exemption justification **at the administrative stage of processing a request.**”

§ 1202.5 How do I request information from FHFA or FHFA-OIG under FOIA?

(c) through (g), OGIS suggests that in the interests of open government and good customer service, FHFA consider changing the word “must” to “should.”

The use of the word “must” throughout this section is understandable, but OGIS would suggest taking a more customer-friendly approach by making these provisions permissive, which would build an open government commitment into FHFA’s processes. This approach also would encourage adherence to the Attorney General’s FOIA Memorandum encouraging agencies not to create unnecessary bureaucratic hurdles in administering FOIA, which does not expressly require that a request state that it is a FOIA request.



(d), which as written requires FOIA requesters to identify their status for fee purposes, OGIS has observed that there is a fairly significant knowledge gap in the understanding of fee category versus the requirements for obtaining a fee waiver. This gap exists both inside and outside of the government. For some requesters, requiring them to self-designate a fee category will mean that they cannot meet this requirement. OGIS suggests replacing “must” with “should attempt to.”

§ 1202.7 How will FHFA and FHFA-OIG respond to my FOIA request?

(c): OGIS applauds FHFA for notifying requesters of referrals. OGIS suggests that requesters be notified of the name of the agency to which the request has been referred and of the part of the request that has been referred. OGIS suggests that FHFA also provide the requester with a point of contact within the receiving agency to whom the requester can speak regarding the referral. This is an OGIS recommendation (<http://blogs.archives.gov/foiablog/2011/05/11/ogistance-what%e2%80%99s-up-with-referrals-these-days/>) and reflects guidance issued by the Department of Justice’s Office of Information Policy (http://www.justice.gov/oip/foia_updates/Vol_XII_3/page2.htm).

(d) Responses to FOIA requests. OGIS notes that FHFA conducts searches for records responsive to FOIA requests as of the date of the request, which is commonly known as the search cut-off date. OGIS suggests that FHFA consider establishing a search cut-off date based on the date of the search because this search cut-off date could result in a much fuller search. *See FOIA Guide* at 80.

§ 1202.9 How do I appeal a response denying my request?

Regarding (b), the 30-day time-limit for filing an appeal, OGIS has observed that some agencies have difficulty receiving mail because of screening requirements. OGIS suggests 45 days or even 60 days.

OGIS recommends that in accordance with Department of Justice official guidance (*See* “OIP Guidance: Notifying Requesters of the Mediation Services Offered by OGIS,” FOIA Post, July 9, 2010, <http://www.justice.gov/oip/foiapost/2010foiapost21.htm>), FHFA insert language in a new subsection after (f)--designated (g)--stating that in its final appeal determinations it will alert FOIA requesters to OGIS’s services.

Specifically, OGIS suggests the following language:

“A response to an appeal will advise the requester that the 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation



services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. A requester may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road, Room 2510
College Park, MD 20740
E-mail: ogis@nara.gov
Telephone: 301-837-1996
Facsimile: 301-837-0348
Toll-free: 1-877-684-6448”

In addition, OGIS recommends that the FHFA add language to this section in accordance with the 2007 amendments to FOIA (5 U.S.C. § 552 (h)), that would direct FHFA to work with OGIS to resolve disputes between FOIA requesters and the Council as a non-exclusive alternative to litigation.

At the end of this section, OGIS suggests that another section be added to these regulations to address OGIS’s role in mediating FOIA disputes. OGIS makes this suggestion in light of the fact that agency regulations also serve to inform the public as to the procedures to follow when doing business with the Government. Specifically, OGIS suggests the following language:

“OGIS was established as a new entity, through the 2007 FOIA amendments, to work with executive branch agencies and requesters to improve the administration of FOIA. OGIS has a statutory role to provide mediation services to resolve FOIA disputes. These disputes may arise at any point in the FOIA process prior to litigation and may concern substantive, procedural, or policy issues related to FOIA.

OGIS respects agencies’ existing administrative process and will work cooperatively with that process. Whenever practical, OGIS encourages the requester to exhaust his/her remedies within the agency before opening a case with OGIS. OGIS will encourage requesters to work first with the FOIA Public Liaisons within the agencies to resolve disputes, in accordance with the 2007 amendments to FOIA (5 U.S.C. § 552 (l)). OGIS may work with the requester and the FOIA Public Liaison to facilitate communication and try to reach amicable resolutions.”



§ 1202.11 What will it cost to get the records I requested?

(a) Assessment of fees, generally. OGIS suggests that FHFA provide requesters with a breakdown of the fees for search, review and/or duplication. This is an OGIS best practice.

(b) Assessment of fees, categories of requesters. OGIS notes that in subsection (2) and (3) FHFA will charge these requester categories for duplication in excess of an electronic equivalent of 100 pages. OGIS suggests that it would be helpful for the public to understand how FHFA will determine the electronic equivalent of 100 pages of duplication.

(h) Fee waiver requests. OGIS suggests FHFA consider adding a broader provision that allows for waiving fees generally “as a matter of administrative discretion.” For example, the CIA’s FOIA regulations allow administrative discretion to release records without charge or at a reduced rate whenever the Agency determines “[t]hat, as a matter of administrative discretion, the interest of the United States Government would be served.”

(www.foia.cia.gov/txt/32CFR.pdf) OGIS has seen fee disputes that have consumed agency resources that in the end were not worth fighting, serving only to waste agency resources and delay release of requested documents. OGIS suggests this in the interest of better serving FOIA and making government more efficient.

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