

The National Security Archive

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Postal Regulatory Commission
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TO: Stephen L. Sharfman, General Counsel
Postal Regulatory Commission
901 New York Avenue N.W., Suite 200
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DATE: August 10, 2009

RE: Comments of the National Security Archive on the Postal Regulatory
Commission's Proposed Freedom of Information Act Regulations., 74 Fed. Reg.
33388 (July 13, 2009)

Mr. Sharfman:

The National Security Archive ("Archive") submits these comments regarding the proposed rule of the Postal Regulatory Commission implementing the Freedom of Information Act. 74 Fed. Reg. 33388 (July 13, 2009).

The National Security Archive is an independent, non-governmental research institute and library located at the George Washington University that collects and publishes declassified documents concerning United States foreign policy and national security matters. The Archive is a frequent user of the Freedom of Information Act (FOIA) and the mandatory declassification review program and has expertise in the agency policies and regulations that relate to these programs.

We commend the Postal Regulatory Commission ("Commission") for updating its FOIA regulations to reflect both the changes in FOIA occasioned by the OPEN Government Act of 2007 and President Obama's January 21 memoranda directing federal agencies to administer the FOIA with a presumption of openness. See Pub. L. 110-175, 121 Stat. 2524 (2007); Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 26, 2009). Furthermore, we believe the Commission's commitment to continuing its policy of proactive disclosure exemplifies the pro-transparency vision articulated by the President. The Archive submits the following recommendations:

- Amend proposed rules §§ 3004.10 and 3004.11 to make clear that all records of the Commission are public records, and that many of FOIA's statutory exemptions are discretionary in nature.
- Amend proposed rule § 3004.12(b) to more accurately reflect the Commission's legal obligation to post certain records, including frequently requested records, in its electronic reading room.

An Independent non-governmental research institute and library located at the George Washington University, the Archive collects and publishes declassified documents obtained through the Freedom of Information Act. Publication royalties and tax deductible contributions through The National Security Archive Fund, Inc. underwrite the Archive's Budget.

- Remove proposed rule § 3004.52(e)'s reference to charging fees for partially-granted requests when the remainder of the request is pending beyond FOIA's 20 day statutory time limit.

Detailed Explanation of Recommendations

Proposed sections 3004.10 and 3004.11

Section 3004.10 concerning public records of the Commission may lead to confusion as to what records are required to be publicly released under FOIA. All records of the Postal Regulatory Commission are public records; the distinction made by the FOIA is between those records that must be released either affirmatively under 5 U.S.C. § 552(a) or upon proper request under § 552(b), and those records that may be withheld because they are statutorily exempt from disclosure. See 5 U.S.C. § 552(a)(1)-(2), (b) (2006).

Section 3004.10 states that the Commission will categorically make publicly available as proactive releases, without a specific FOIA request, the types of records enumerated in the proposed rule. We commend the Commission for establishing a plan to proactively post the records of its proceedings. Nonetheless, the references to "public records" suggest that these are the only records to which the public is entitled. In the same vein, § 3004.11, concerning "non-public records," suggests that some Commission records are not subject to FOIA. The Commission does not have the authority to categorically exclude records from FOIA. The so-called "non-public" records are subject to FOIA requests but may be denied *if* they fall within an exemption. We are concerned that the term "non-public" is likely to lead to confusion for members of the public and possibly the improper withholding of requested records.

We recommend therefore, that the references to "public records" be replaced with the descriptive term "public record of the Commission's proceedings," and references to "non-public" records should be deleted from the rule.

Proposed section 3004.11

The proposed rule should also be amended to reflect the discretionary nature of several FOIA exemptions. At present, § 3004.11 states that "the public records of the Commission *do not include* records that" implicate one of FOIA's first seven statutory exemptions. 74 Fed. Reg. at 33391 (emphasis added). However, as noted in recent Office of Information Policy guidance implementing Attorney General Holder's FOIA Guidelines, discretionary disclosures are not only possible, but encouraged with respect to materials that may be covered by Exemptions 2, 5, 7, 8, and 9. See FOIA Post, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines – Creating a 'New Era of Open Government'" (Apr. 17, 2009), available at <http://www.usdoj.gov/oip/foiapost/2009foiapost8.htm> [hereinafter "OIP Holder Guidelines Guidance"]. This section should be amended to comply with the Commission's commitment to administering FOIA requests with a "clear presumption of openness," making clear

that discretionary releases of information are strongly encouraged, and that no category of information is exempt from FOIA *per se*, but rather is subject to review and particularized determination by the Commission. See 74 Fed. Reg. at 33391; cf. Office of the Att’y Gen., Memorandum for Heads of Executive Departments and Agencies, at 1 (Mar. 19, 2009) (updating FOIA guidelines) (“I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.”).

Likewise, subsections 3004.11(b)(1)-(3) should be omitted from the final regulation. As noted above, the examples do not recognize that several of the FOIA exemptions – most notably Exemptions 2 and 5 – are discretionary in nature. See “OIP Holder Guidelines Guidance.” Therefore, guiding Commission employees to categorically withhold documents which are superficially akin to these exemplars could result in improper withholding of responsive records. For example, item (2), characterizing “[r]eports and records compiled or created by the Inspector General of the Commission designated as confidential” as being exempt from disclosure under FOIA misstates the law. In order to implicate one of the nine specific exemptions in the FOIA, the contents of the record itself must meet the statutory criteria in order to be lawfully exempt from disclosure. The Inspector General’s designation of the requested material as “confidential” is insufficient in and of itself to justify withholding.

Additionally, subsection 3004.11(a)(5) appears to misstate Exemption 5 of the FOIA. 5 U.S.C. § 552(b)(5). Exemption 5 is meant to exempt from disclosure government records that would otherwise be protected by legal privileges, including the deliberative process privilege, work product privilege, and attorney-client privilege. See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-54 (1975); Fed. Trade Comm’n v. Grolier, Inc., 462 U.S. 19 (1983); Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 862-64 (D.C. Cir. 1980). However, read literally, § 3004.11(a)(5) appears to indicate that interagency or intra-agency memoranda or letters not available to “a person or entity in litigation with the Commission” would not be public records of the Commission. This formulation, is, at the very least, extraordinarily confusing and could result in the withholding of documents that should be made available to requesters under FOIA. This subsection should either be stricken or clarified in order to provide appropriate guidance to employees processing FOIA requests on how and when to apply Exemption 5.

We recommend that § 3004.11 be redrafted to read as follows:

§ 3004.11. Use of Exemptions.

(a) Under the FOIA (5 U.S.C. 552(b)), there are *nine exemptions* which may be used to protect information from disclosure. The Commission has paraphrased the exemptions, below, for your information. The paraphrases are not intended to be interpretations of the exemptions.

(1) National security information concerning national defense or foreign policy, provided that such information has been properly classified, in accordance with an Executive Order;

- (2) Information related solely to the internal personnel rules and practices of an agency;
 - (3) Information specifically exempted from disclosure by statute;
 - (4) Trade secrets and commercial or financial information which is obtained from a person and is privileged or confidential;
 - (5) 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;
 - (6) Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
 - (7) Records or information compiled for law enforcement purposes, the release of which:
 - (A) Could reasonably be expected to interfere with enforcement proceedings;
 - (B) Would deprive a person of a right to a fair trial or an impartial adjudication;
 - (C) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;
 - (D) Could reasonably be expected to disclose the identity of a confidential source;
 - (E) Would disclose techniques, procedures, or guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or
 - (F) Could reasonably be expected to endanger the life or physical safety of any individual.
 - (8) Information contained in or related to examination, operating, or condition reports, prepared by, or on behalf of, or for the use of an agency responsible for regulating or supervising financial institutions; and
 - (9) Geological and geophysical information and data, including maps, concerning wells.
- (b) It is Commission policy to make records publicly available upon request, unless the record qualifies for exemption under one or more of the nine exemptions. It is Commission policy to make discretionary releases whenever possible; however, a discretionary release is normally not appropriate for records **clearly** exempt under exemptions 1, 3, 4, 6, 7 (C) and 7(F). Exemptions 2, 5, and 7(A), (B), (D) and (E) are discretionary in nature, and discretionary releases are encouraged whenever possible. Exemptions 4, 6 and 7(C) cannot be claimed when the requester is the submitter of the information.

Proposed subsection 3004.12(b)

Subsection 3004.12(b), concerning the contents of the Commission's on-site public reading room and electronic reading room, should be amended to reflect the Commission's legal obligation under the E-FOIA Amendments of 1996 to electronically post certain categories of records, including frequently requested materials. At present, § 3004.12(b) states that "[t]he records available for public inspection include...copies of selected records released under FOIA..." 74

Fed. Reg. at 33392. This language should be strengthened to reflect the E-FOIA Amendments' requirement that the Commission make available to the public

copies of all records, regardless of form or format, which have been released to any person under [5 U.S.C. § 552(a)(3)] and 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.

5 U.S.C. § 552(a)(2)(D). This obligation extends both to making records available at a physical reading room and via the agency's electronic reading room. See id. § 552(a)(2). Subsection 3004.12(b) should be redrafted to ensure that its guidance is consonant with this important legal requirement.

Proposed subsection 3004.52(e)

Subsection 3004.52(e) violates the OPEN Government Act, which, with limited and narrow exceptions, forbids agencies from assessing fees to requesters if the agency fails to make a determination on their request within a 20 day period from the date of receipt. See 5 U.S.C. § 552(a)(4)(viii). As presently written, § 3004.52(e) states that an agency may "charge fees for a partial grant of a request while it reviews other sensitive records, which may be responsive to the request, if it is made within the applicable time limits." 74 Fed. Reg. at 33394. The notice of proposed rulemaking published by the Commission states that this "[p]roposed rule...is added to reflect a change in the statute which does not allow an agency to recover fees if it fails to comply with time limits imposed by the statute." Id. at 33390.

Congress has spoken clearly on this question. Beyond the statutory 20 business day window, agencies "shall not assess" fees of requesters, unless there are "unusual or exceptional circumstances," as specifically defined within the statute, that apply to the processing of the request. See 5 U.S.C. § 552(a)(4)(viii). Nowhere within the Act itself or its legislative history did Congress make any mention of allowing agencies to charge fees for partial determinations of requests. In fact, even the Commission's proposed rule governing response to requests, §3004.43(a), does not contemplate a partial determination: it simply states that "the Secretary of the Commission will notify the requester of its determination *to grant or deny the request.*" 74 Fed. Reg. at 33392 (emphasis added).

Further undermining the statutory basis for 3004.52(e) is its reference to "other sensitive records." Id. at 33394. This phrase is defined nowhere within the proposed regulation, existing Commission regulations, or the text of the FOIA itself, as amended by the OPEN Government Act. Presumably, "other sensitive records" refer to records that require closer scrutiny because they may implicate a FOIA exemption. Even if this were the case, however, it is clear from the highly-specific language of the OPEN Government Act that the routine task of reviewing responsive records to determine if they are exempt from disclosure is neither an "unusual or exceptional circumstance[]" warranting the assessment of fees beyond FOIA's 20-day time limit.

As drafted, the Commission's proposed rule creates an inefficient and inappropriate incentive for the Commission to release whatever records it can most easily aggregate before the time limit runs, simply to have a basis for charging fees. This is contrary to Congress's expressed intentions, and would disserve the public.

In order for an agency interpretation of a statute to be valid, Congress must have delegated interpretive authority to that agency, and the agency's interpretation of the statute must be reasonable. See Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 (1984). Where, however, "Congress has directly spoken to the precise question at issue...the agency[] must give effect to the unambiguously expressed intent of Congress." Id. at 842-43. In the OPEN Government Act, Congress expressed an unambiguous intent to "put teeth" in FOIA's time limits by imposing consequences on agencies that fail to meet them. See Open Government: Reinvigorating the Freedom of Information Act: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 6 (2007) (statement of Sen. Coburn). The Commission's proposed rule § 3004.52(e) will essentially nullify this provision by allowing the Commission to recover fees on partially-granted requests while deferring the remainder of the request for an indefinite period of time without further consequences. This position finds no support in the plain language of the OPEN Government Act.

Furthermore, deference is not generally granted under Chevron to an agency's construction of a general statute that no single agency is charged with interpreting. See Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 643 n.30 (1986) (where twenty-seven agencies had promulgated regulations under a particular statute, "[t]here is...not the same basis for deference predicated on expertise as we found...in [Chevron].") The D.C. Circuit explicitly discussed the application of this rule in the FOIA context in Tax Analysts v. IRS, stating that it "will not defer to an agency's view of FOIA's meaning." 117 F.3d 607, 613 (D.C. Cir. 1997). The court explained that because the FOIA mandates uniformity among all government agencies, the need for consistency across agencies outweighs the usual reasons for deferring to one agency: "The meaning of FOIA should be the same no matter which agency is asked to produce its records. One agency's interpretation of FOIA is therefore deserving of no more respect than the interpretation of any other agency." Id. This rule of construction indicates that the Commission's partial grant fee rule would not survive a direct legal challenge.

We recommend that the Commission replace proposed rule § 3004.52(e) with the following, adapted from the FOIA regulations proposed by the Office of the Comptroller of the Currency, 74 Fed. Reg. 18659, 18662 (Apr. 24, 2009):

The Commission will not assess search and/or duplication fees, as applicable, if it fails to respond to a requester's FOIA request within the time limits specified under [proposed rules §§ 3004.43 and 3004.45], and no "unusual" circumstances (as defined in 5 U.S.C. 552(a)(6)(B)) or "exceptional" circumstances (as defined in 5 U.S.C. 552(a)(6)(C)) apply to the processing of the request.

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Thank you for considering our comments.

Sincerely,

/S/

Meredith Fuchs
General Counsel