



EPA Amends Freedom of Information Act Regulations

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On June 26, 2019, the Environmental Protection Agency (EPA or Agency) issued a final rule, *Freedom of Information Act Regulations Update* (published at 84 Fed. Reg. 30,028 (June 26, 2019)), which revises the Agency's regulations under the Freedom of Information Act (FOIA or Act) by updating the process by which individuals and entities may request information about EPA actions and activities. This rule corrects, clarifies, and strikes provisions contained in the EPA's prior regulations that are considered repetitive or obsolete and to make EPA's process consistent with recently enacted laws. The final rule is effective on July 26, 2019 without taking public comment in accordance with specific exceptions outlined in the Administrative Procedure Act.

Background

EPA's FOIA regulations (40 C.F.R. Part 2) set forth the process and administrative rules governing how the EPA handles FOIA requests. The Agency has not substantively updated these regulations since 2002. Since then, Congress has enacted three separate amendments to the FOIA. In 2007, Congress passed amendments which addressed several procedural issues that concern FOIA administration. In 2009, Congress passed amendments which revised the requirements of FOIA Exemption 3, regarding records exempt from disclosure by other statutes. Finally, in 2016, Congress passed amendments which addressed a range of procedural and substantive issues and directed all agencies to amend their FOIA regulations to incorporate these required changes.

Why EPA's Freedom of Information Act Regulations Are Being Updated

Due to the three sets of amendments since 2002, the Agency is updating its FOIA regulations to ensure compliance with Congressional amendments and to correct obsolete information. This final rule also aims to reflect internal EPA realignment and processing changes to improve the Agency's FOIA response process. EPA claims that these revisions do not change the substantive standards the Agency applies in implementing the FOIA. The revisions are not intended to significantly affect the substantive rights of the general public or other regulated entities.

Final Enhancements to FOIA Regulations

The final revisions EPA made to its FOIA regulations make the following key changes:

- Establishes the National FOIA Office (NFO) in the Office of General Counsel as a central location to which requesters may submit a FOIA request. Requests now may be submitted only by the following methods: (1) The EPA's FOIA submission website; (2) an electronic government submission website; (3) U.S. mail sent to the NFO; and (4) overnight delivery service to the NFO. A request triggers the statutory time-period for response and the tolling period only when the request has been received through one of these authorized methods. The purpose of these revisions is to minimize the amount of misdirected requests sent to the Agency.
- Revises when the Agency may toll its time-period for responding to requests. The Agency may now toll the response once during the first 20 working-days to obtain clarification from the requester and toll as many times as necessary thereafter to address issues related to fees.
- Makes the FOIA Public Liaison available to requesters to resolve disputes. This action includes providing information about the existence and role of the EPA's FOIA Public Liaison.
- Eliminates restating the list of FOIA exemptions due to their unnecessary and redundant nature. EPA explains that removal of the list reduces the need for conforming amendments to the regulations in the future should Congress enact further changes.
- Amends the regulations to permit electronic submission of FOIA requests to the Agency through an agency or government wide electronic submission tool that may be approved in the future.

- Extends the time in which a requester is required to file an administrative appeal from 30 to 90 days.

In addition to the key revisions related to the FOIA amendments, EPA is making procedural changes to improve the way in which the Agency responds to requests as well as non-substantive edits for clarity. Some of these revisions include clarifying that the Administrator and Deputy Administrator and all Assistant Administrator-level positions and Regional Administrator positions, their deputies and certain other office heads have the authority to respond to FOIA requests.

Implications and Next Steps

EPA is issuing these revisions as a final rule, exempt from notice and comment under the good cause and procedural exceptions of the Administrative Procedure Act. The Agency has determined that these provisions allow an agency to issue interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice without providing notice and comment because EPA is updating its rules to reflect the Agency's organizational structure and implement statutorily directed changes with no discretion to reach a different outcome in response to comments. Given that these revisions do not change the substantive standards the Agency applies in implementing the FOIA, EPA asserts that the revisions will not significantly affect the substantive rights of regulated entities or the general public.

While most of these revisions are not controversial and even benefit FOIA requesters, the establishment of the National FOIA Office may cause issues for some groups. Having one central office intake all requests seems to allow for better internal coordination and review; however, the NFO will have to delegate response responsibilities to regional and other offices in possession of the requested material which may prove to slow down the process. In addition, the agency will no longer consider submittals sent by facsimile nor those sent directly to regional or program offices. The rule does not provide for a transition period, states that the agency will not reroute any requests and does not appear to provide any contemporaneous notice to constituents of their error. This means these improperly directed requests would remain unanswered rather than being redirected. Finally, even though EPA is publishing all these changes in one final notice, the Agency intends that the revisions detailed above are severable from each other for purposes of judicial review.

FOR MORE INFORMATION

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