



May 27, 2011

Amias Gerety
Deputy Assistant Secretary
Financial Stability Oversight Council
1500 Pennsylvania Ave. NW
Washington, DC 20220

Re: RIN 4030-AA02
Implementation of the Freedom of Information Act, 76 FR 17038

Dear Mr. Gerety:

OMB Watch welcomes the opportunity to comment on the Financial Stability Oversight Council's (FSOC) proposed Freedom of Information Act (FOIA) regulations. As a nonprofit organization dedicated to open government, accountability, and citizen participation since 1983, OMB Watch has long worked for improvements to the FOIA process. Ensuring that agencies have up-to-date FOIA regulations that support transparency is a crucial element for the effective functioning of the FOIA system, and we appreciate FSOC's steps to draft FOIA regulations. As a new agency, FSOC has an opportunity to learn from the FOIA implementation lessons of other agencies and start off with the full benefit of modern technology and forward looking policies.

To contribute to the successful development of a modern and efficient FOIA program at FSOC, OMB Watch offers the following recommendations:

- Strengthen the proposed regulations relating to online disclosures;
- Allow requesters to submit FOIA requests electronically; and
- Revise the proposed regulations regarding request deficiencies.

Online Disclosures

OMB Watch is concerned that the proposed regulations do not seem to fully embrace the use of online disclosure for FOIA requested records. We appreciate the provisions in § 1301.3(a)(4) and (b) that emphasize FSOC's responsibility to disseminate information online. The Electronic Freedom of Information Act Amendments of 1996 (P.L. 104-231, 110 Stat. 3048) requires agencies to post online records that have been released in response to a FOIA request and that are likely to become the subject of subsequent requests. However, the proposed regulations deviate from the statute by limiting online disclosure to such records as are "clearly of interest to

the public at large.” We echo the comments of Public Citizen and the Project on Government Oversight in recommending that this additional phrase be eliminated so that the regulations fully mirror the statutory language.

Also, the proposed regulations state that records requested three times shall be processed ahead of any backlog and posted online. However, FSOC need not wait until a record has been requested three times to determine that it is “likely to become the subject of subsequent requests.” FSOC should amend the proposed regulations to clarify that all records requested three times shall be posted online, and in addition, that *each* request shall be evaluated to determine whether the requested records are “likely to become the subject of subsequent requests,” in which case the records shall be posted online.

We further suggest that FSOC explore posting online *all* responses to FOIA requests that were not jointly made under the Privacy Act, a practice that the Department of Defense has begun to implement and that was recommended in *Moving Toward a 21st Century Right-to-Know Agenda*, a 2008 report by OMB Watch and other transparency advocates.

In addition to online disclosures in response to a request, President Obama, in his Jan. 21, 2009 FOIA memo, and Attorney General Holder, in his March 19, 2009 FOIA memo, establish agencies’ responsibility to post information online *in advance* of receiving a FOIA request. FSOC should amend its proposed regulations to recognize this new approach and formally establish the agency’s responsibility to pursue proactive disclosures as a part of its FOIA implementation. For instance, the FOIA regulations proposed by the Department of Justice on March 21, 2011 (RIN 1105-AB27, 76 FR 15236) affirm the department’s responsibility for “determining which of its records are required to be made publicly available, *as well as identifying additional records of interest to the public that are appropriate for public disclosure*, and for posting such records” (emphasis added); FSOC should adopt similar language.

Along the lines of such proactive disclosure, we echo the comments of the Office of Government Information Services (OGIS) in recommending that FSOC adopt a policy of proactively posting online the calendars and travel records for high-level FSOC officials. OMB Watch strongly encourages the agency to work with stakeholders to identify other information that would increase accountability of the agency that should be regularly posted online, such as an employee directory, reports and other communications with Congress, and agency contracts.

Electronic Submission of FOIA Requests

OMB Watch is also concerned that the proposed FOIA regulation do not allow for electronic submission of requests. The proposed regulations in § 1301.5(b)(1) seem to require that all FOIA requests be sent to the agency via mail. We echo the comments of OGIS, Public Citizen, and the Project on Government Oversight in recommending that FSOC clearly establish that requests may be submitted by email. FSOC should also consider establishing a web form to submit requests.

In addition to submitting requests, FSOC should ensure that requesters can communicate electronically with the agency throughout the FOIA process. The proposed regulations require that requesters include a “mailing address, telephone number, and, if available, an e-mail address at which the Council may contact the requester regarding the request.” To reduce printing and postage costs and to increase timeliness, FSOC should establish that it will communicate with requesters via email unless the requester specifies otherwise. FSOC should also establish that requesters may make any subsequent communications to the agency via email, such as administrative appeals.

Furthermore, we recommend that FSOC update the proposed regulation’s references to “envelopes” to apply to email, either by eliminating references to envelopes or by requiring that information alternatively be included in the subject line of an email. Additionally, if FSOC retains its requirement that administrative appeals be signed by the requester, it should adopt that a low-burden method for electronic signatures, bearing in mind the requirement of the Government Paperwork Elimination Act (P.L. 105-277, 112 Stat. 2681) that “electronic signatures ... shall not be denied legal effect, validity, or enforceability.”

Request Deficiencies

We again echo the concerns of OGIS, Public Citizen, the Project on Government Oversight, and Better Markets regarding § 1301.5(c) of the proposed regulations. President Obama, in his Jan. 21, 2009 FOIA memo, stated that “in responding to requests under the FOIA, [agencies] should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.” By strictly enforcing bureaucratic requirements for a request to even be considered by FSOC, the proposed regulations betray the president’s intentions. OMB Watch recommends that FSOC revise the proposed regulations to ensure they streamline the processing of FOIA requests without imposing unnecessary burdens on requesters.

OMB Watch appreciates the opportunity to comment on FSOC's proposed FOIA regulations. We hope you take our recommendations into consideration. If you have questions about our comments or want to discuss the issues further, please feel free to contact us.

Sincerely,



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OMB Watch



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