



November 5, 2012

Executive Secretariat  
Equal Employment Opportunity Commission  
131 M Street Northeast, Suite 6NE03F  
Washington, DC 20507  
*via* Regulations.gov

Re: RIN 3046-AA90  
Availability of Records (77 FR 53814)

Dear Commissioners:

OMB Watch welcomes the opportunity to comment on the Equal Employment Opportunity Commission's 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. We appreciate the Commission's steps to update its FOIA regulations.

Although the Commission states that the proposed revisions are intended to implement the OPEN Government Act and E-FOIA Act, certain aspects of those laws are not reflected in the Commission's proposal, as we explain below. In addition, we highlight other leading practices that the Commission should consider adopting.

To contribute to the successful development of an effective and efficient FOIA program at the Commission, OMB Watch offers the following recommendations:

1. Strengthen the regulations to expand online disclosures;
2. Allow requesters to submit appeals electronically; and
3. Notify requesters of alternatives to litigation.

### **1. Strengthen the regulations to expand online disclosures**

OMB Watch is concerned that the proposed regulations do not seem to fully embrace the use of online disclosure for public information under FOIA. Expanding online disclosure is an important method to efficiently maximize the Commission's transparency. Posting information

*Promoting Government Accountability and Citizen Participation Since 1983*

1742 Connecticut Ave. NW  
Washington, DC 20009

tel: 202.234.8494  
fax: 202-234.8584

email: [ombwatch@ombwatch.org](mailto:ombwatch@ombwatch.org)  
web: <http://www.ombwatch.org>

online maximizes the impact of the agency's FOIA efforts by allowing the public to access and use the information disclosed. Additionally, online disclosure can save agency resources by reducing duplicative requests.

*a. Clarify information to be posted online*

We appreciate the Commission's proposed revision in § 1610.18 that the specified types of information will be made available electronically. However, the proposed wording is ambiguous as to whether this information will be *disclosed proactively* or only *upon request*. We encourage the Commission to clarify that it will routinely post the specified types of information on its website.

*b. Post documents released in response to FOIA requests*

The E-FOIA Act requires agencies to post online information that has been released in response to a FOIA request and is "likely to become the subject of subsequent requests."<sup>1</sup> The Commission should add this type of information to the list of specified types in § 1610.18.

Furthermore, we encourage the Commission to go beyond the statutory minimum and instead adopt the best practice to post online *all* responses to FOIA requests, except those made jointly under the Privacy Act. This practice makes more information available to the public and eliminates the need for the agency to evaluate each request to determine whether it is likely to become the subject of subsequent requests. The Air Force and the Office of the Secretary of Defense and Joint Staff have adopted this policy.<sup>2</sup>

We note that the multi-agency portal, FOIAonline, provides participating agencies with features to automatically post released documents.<sup>3</sup> OMB Watch believes that FOIAonline has great promise to increase transparency and encourages the Commission to consider becoming a participant.<sup>4</sup>

*c. Expand proactive disclosure*

We encourage the Commission to adopt a policy to proactively disclose information to the greatest extent possible. The Commission should follow Attorney General Holder's FOIA

---

<sup>1</sup> 5 U.S.C. 552(a)(2)(D).

<sup>2</sup> U.S. Government Accountability Office, "Freedom of Information Act: Additional Actions Can Strengthen Agency Efforts to Improve Management," GAO-12-828, July 31, 2012, pp. 24-25.

<sup>3</sup> <http://foiaonline.regulations.gov/>

<sup>4</sup> See OMB Watch, "New Website Will Make Government Information Easier to Obtain," Oct. 1, 2012, available at <http://www.ombwatch.org/new-site-will-make-govt-info-easier-to-obtain>.

guidelines, which directed agencies to “readily and systematically post information online in advance of any public request.”<sup>5</sup>

*i. Expand categories of records to disclose regularly*

The Commission should adopt a policy to “establish categories of records that can be disclosed regularly,” as recommended by the Office of Government Information Services (OGIS).<sup>6</sup> These categories should include those specified in § 1610.18, but be expanded and updated frequently. The Commission should consult with stakeholders to identify such categories of records.<sup>7</sup>

*ii. Identify records of interest to the public*

The Commission should adopt a policy to identify additional records of interest to the public and to post such records online. The Special Inspector General for Afghanistan Reconstruction has adopted such a policy.<sup>8</sup> In addition, the Department of Justice has proposed to adopt such a policy.<sup>9</sup>

## **2. Allow requesters to submit appeals electronically**

The Commission’s proposed regulations permit the public to submit requests via website, email, or fax, in addition to postal mail or physical delivery.<sup>10</sup> However, the Commission’s proposed regulations do not offer the same options for submitting appeals; instead, appeals may only be submitted via postal mail or physical delivery.<sup>11</sup>

We support electronic submission options because they can increase timeliness and convenience to requesters. We encourage the Commission to offer the same electronic submission options for appeals as for requests.

Additionally, the Commission should ensure that requesters can communicate electronically with the agency throughout the FOIA process. To reduce printing and postage costs and to increase timeliness, the Commission should establish that it will communicate with requesters via email, if provided, unless the requester specifies otherwise.

---

<sup>5</sup> Eric Holder, “The Freedom of Information Act (FOIA),” Office of the Attorney General, March 19, 2009, available at <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

<sup>6</sup> Office of Government Information Services, “FOIA Requirements, Agency Best Practices, and OGIS Recommendations,” available at <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf>.

<sup>7</sup> The open government community has identified several types of information that agencies should regularly post online; see <http://www.ombwatch.org/files/info/OpennessFloor-aug2012.pdf>.

<sup>8</sup> Special Inspector General for Afghanistan Reconstruction, “Freedom of Information Act and Privacy Act Procedures,” June 27, 2012, 77 FR 38171.

<sup>9</sup> Justice Department, “Freedom of Information Act Regulations,” March 21, 2011, 76 FR 15236.

<sup>10</sup> Proposed § 1610.7(b).

<sup>11</sup> Proposed § 1610.11(a).

We note that FOIAonline provides participating agencies with functions to accept appeals online and to communicate with requesters via email.

### 3. Notify requesters of alternatives to litigation

The Commission's proposed regulations provide that agency FOIA determinations notify requesters of the procedures for filing an administrative appeal and that appellate decisions notify requesters of their right to judicial review.<sup>12</sup> In both cases, the Commission should also notify requesters of the services offered by the Office of Government Information Services (OGIS), including mediation as an alternative to litigation.

In the OPEN Government Act, Congress created OGIS within the National Archives and Records Administration and directed it to offer mediation services for FOIA requesters.<sup>13</sup> These services can facilitate communication between requesters and agencies and may reduce litigation under FOIA.

The Commission should also notify requesters about these services in its FOIA regulations and on its FOIA website.

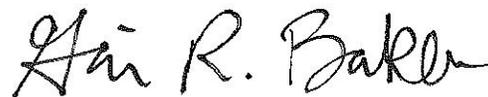
### Conclusion

OMB Watch appreciates the opportunity to comment on the Commission'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,



Sean Moulton  
Director, Federal Information Policy  
OMB Watch



Gavin Baker  
Federal Information Policy Analyst  
OMB Watch

---

<sup>12</sup> Proposed § 1610.10; proposed § 1610.11(c).

<sup>13</sup> Sec. 10, OPEN Government Act of 2007, P.L. 110-175.