



April 12, 2013

Ms. Michelle Ghim
Office of the General Counsel
National Endowment for the Humanities
1100 Pennsylvania Ave. NW, Room 529
Washington, DC 20506
via email to gencounsel@neh.gov

Re: FOIA Regulations
RIN 3136-AA32
Public Access to NEH Records Under the Freedom of Information Act (78 F.R. 9654)

Dear Ms. Ghim:

The Center for Effective Government welcomes the opportunity to comment on the National Endowment for the Humanities' (NEH) proposed Freedom of Information Act (FOIA) regulations.

Up-to-date FOIA regulations that support transparency are important for supporting the effective functioning of the FOIA system. Given that importance, we must register our disappointment at NEH's proposed update to its FOIA regulations. The agency's proposal amounts to an absolute minimum approach to its responsibilities under FOIA – far short of President Obama's call for a “new era of open government.”¹ The proposed regulations fail to genuinely incorporate the improvements intended by Congress with the OPEN Government Act of 2007² or the principles of openness that President Obama has espoused. Furthermore, the proposal does not include best practices recommended by the Office of Government Information Services and guidance issued by the Office of Information Policy.

The Center for Effective Government urges NEH to revise the proposed regulations to address these failings and offers the following recommendations:

1. Strengthen the regulations to expand online disclosures;
2. Notify requesters of dispute resolution services; and
3. Revise unnecessarily restrictive provisions of the proposed resolutions.

¹ Barack Obama, “Freedom of Information Act,” The White House, Jan. 21, 2009, *available at* http://www.whitehouse.gov/the_press_office/FreedomofInformationAct.

² P.L. 110-175.



1. Strengthen the regulations to expand online disclosures

The Center for Effective Government encourages NEH to strengthen its proposed regulations to more fully embrace the use of online disclosure for public information under FOIA.

Expanding online disclosure is an important method to efficiently maximize NEH's transparency. Posting information 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. Post records released in response to FOIA requests

NEH's proposed regulations commit to post online records required to be made publicly available under FOIA.³ Under the E-FOIA Act, this includes information that has been released in response to a FOIA request and is "likely to become the subject of subsequent requests."⁴

We encourage NEH to go beyond the statutory minimum and instead adopt the best practice to generally post online *all* records released in response to FOIA requests. 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.⁵ To protect privacy, NEH could exclude first-person requests for personal information, such as those made jointly under the Privacy Act.⁶

Additionally, we note that the multi-agency portal, FOIAonline, provides participating agencies with features to automatically post records released under FOIA.⁷ The Center for Effective Government believes that FOIAonline has great promise to increase transparency and encourages NEH to consider becoming a participant.⁸

Recommendation: Revise the proposed regulations at § 1171.4 to provide that NEH will generally post online all records released in response to FOIA requests.

Recommendation: Consider joining the multi-agency FOIAonline portal.

³ Proposed at § 1171.4(a), (c).

⁴ Sec. 4, Electronic Freedom of Information Act Amendments of 1996, P.L. 104-231; 5 U.S.C. § 552(a)(2)(D).

⁵ 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.

⁶ 5 U.S.C. § 552a; *cf.* 5 U.S.C. § 552(a)(2) ("To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes ... copies of records referred to in subparagraph (D)").

⁷ <http://foiaonline.regulations.gov/>

⁸ 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>.

b. Expand proactive disclosure

We encourage NEH to adopt a policy to proactively disclose information to the greatest extent possible. NEH should follow President Obama’s FOIA memorandum, which stated that “agencies should take affirmative steps to make information public,”⁹ and Attorney General Holder’s FOIA guidelines, which directed agencies to “readily and systematically post information online in advance of any public request.”¹⁰

Whenever possible, NEH should make information available to the public without requiring requesters to navigate the administrative process of the FOIA. NEH should adopt a policy to proactively identify records of interest to the public and to post such records online.¹¹

In addition, NEH should adopt a policy to “establish categories of records that can be disclosed regularly,” as recommended by the Office of Government Information Services (OGIS).¹² Establishing categories of records to routinely post online ensures that NEH’s proactive disclosure of information is systematic and not merely *ad hoc*. NEH should consult with stakeholders, including the open government community, to identify categories of records that would be useful to disclose.¹³

Recommendation: Revise the proposed regulations at § 1171.4 to provide that NEH will proactively identify records of interest to the public and post such records online.

Recommendation: Revise the proposed regulations at § 1171.4 to provide that NEH will establish categories of records that can be disclosed regularly and post such records online.

2. Notify requesters of dispute resolution services

a. Office of Government Information Services

NEH’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. In addition, NEH should notify requesters of the dispute resolution services offered by the Office of Government Information Services (OGIS).

⁹ *Ibid.* 1.

¹⁰ Eric Holder, “The Freedom of Information Act (FOIA),” Office of the Attorney General, March 19, 2009, <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

¹¹ See Interior Department at 43 C.F.R. § 2.67; Special Inspector General for Afghanistan Reconstruction at 5 C.F.R. § 9301.4. Cf. Justice Department, “Freedom of Information Act Regulations,” proposed rule, March 21, 2011, 76 F.R. 15236 (“Each component is responsible 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.”).

¹² 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>.

¹³ The open government community has identified several types of information that agencies should regularly post online; see <http://www.foreffectivegov.org/files/info/open-gov-min-standards-final.pdf>.

In the OPEN Government Act, Congress created OGIS within the National Archives and Records Administration and directed it to offer dispute resolution services for FOIA requesters as a non-exclusive alternative to litigation.¹⁴ These services can facilitate communication between requesters and agencies and may reduce litigation under FOIA.

Recommendation: Revise the proposed regulations at § 1171.8(c) and § 1171.10(b) to provide that decision letters notify requesters that dispute resolution services are offered by OGIS as a non-exclusive alternative to litigation and include contact information for OGIS.

Recommendation: Create a new § 1171.13, “Dispute resolution,” to describe how requesters may access OGIS dispute resolution services.

Recommendation: Include information about OGIS dispute resolution services on the NEH FOIA website.

b. FOIA Public Liaison

In the OPEN Government Act, Congress specified that “each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency.”¹⁵ NEH should notify requesters of the availability of its FOIA Public Liaison when acknowledging requests.

Recommendation: Revise the proposed regulations at § 1171.8(a) to provide that acknowledgment letters notify requesters that the FOIA Public Liaison is available to assist in the resolution of any disputes.

Recommendation: Create a new § 1171.13, “Dispute resolution,” to describe how requesters may access the FOIA Public Liaison.

3. Revise unnecessarily restrictive provisions of the proposed resolutions

a. Publish online indexes of disclosed records

Recommendation: Revise the proposed regulations at § 1171.4(b) to state, “The NEH will publish on the NEH’s Web site current indexes as required by 5 U.S.C. 552(a)(2) of the FOIA.”

¹⁴ *Ibid.* 2, at Sec. 10; 5 U.S.C. § 552(h)(3).

¹⁵ *Ibid.* 2, at Sec. 6; 5 U.S.C. § 552(a)(6)(B)(ii); *also see* 5 U.S.C. § 552(l).

b. Provide requesters with contact information when requests are referred

Recommendation: Revise the proposed regulations at § 1171.6(d) to state, “Whenever the NEH refers all or any part of the responsibility for responding to a request to another agency, the NEH will notify the requester of the referral, provide the name of the agency to which the referral was directed, and include that agency’s FOIA contact information.”¹⁶

c. Allow requesters to submit appeals electronically

Recommendation: Revise the proposed regulations at § 1171.10(a) to provide that requesters may submit administrative appeals by email and fax.

d. Provide adequate time limits for requesters to submit appeals

Recommendation: Revise the proposed regulations at § 1171.10(a) to provide a minimum of 60 days for requesters to submit administrative appeals.

e. Comply with the statutory prohibition against fees for requests exceeding time limits

Recommendation: Revise the proposed regulations at § 1171.11 to provide that NEH will not charge fees for requests if the agency fails to comply with statutory time limits.¹⁷

f. Provide a reasonable threshold for minimum fee charges

Recommendation: Revise the proposed regulations at § 1171.11(d)(2) to provide that NEH will not charge a fee if the total fee is \$50 or less.

Conclusion

The Center for Effective Government appreciates the opportunity to comment on NEH’s proposed FOIA regulations. Without significant improvements, the proposed regulatory changes will result in a tremendous missed opportunity to bring the agency’s policies and practices into alignment with best practices.

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.

¹⁶ See U.S. Department of Justice Office of Information Policy, “Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest in Them,” Dec. 5, 2011, *available at* <http://www.justice.gov/oip/foiapost/2011foiapost42.html>.

¹⁷ *Ibid.* 2, at Sec. 6; 5 U.S.C. § 552(a)(4)(A)(viii).

Sincerely,



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