

July 30, 2013

Regulations Division  
Office of General Counsel  
Department of Housing and Urban Development  
451 7th Street SW, Room 10276  
Washington, DC 20410-0500  
*via Regulations.gov*

Re: Revision of Freedom of Information Act Regulation (78 F.R. 32595)  
Docket No. FR-5624-P-01, RIN 2501-AD57

The Center for Effective Government welcomes the opportunity to comment on the Department of Housing and Urban Development's (HUD) proposed Freedom of Information Act (FOIA) regulations.

Up-to-date FOIA regulations that support transparency are important to the effective functioning of the FOIA system. We are concerned that HUD's proposed regulations fail to comply with statutory requirements or to adopt best practices in several regards. Therefore, we encourage HUD to revise its proposed regulations to incorporate key transparency improvements.

We offer the following recommendations to strengthen the proposed regulations:

1. Expand online disclosures
  - a. Proactively identify and disclose additional records of interest to the public
  - b. Post records released in response to FOIA requests
  - c. Publish online indexes of disclosed records
2. Clarify fees and fee waivers
  - a. Comply with statutory requirements for fee waivers and reductions
  - b. Adopt a reasonable threshold for minimum fee charges
  - c. Reduce duplication fees
3. Improve communication with requesters
  - a. Contact the requester before denying requests as unreasonable
  - b. Provide estimated time to complete the request and opportunities to reformulate
  - c. Inform requesters of status updates
  - d. Communicate with requesters by email where appropriate

- e. Use plain language in all communications with requesters
- f. Notify requesters when referring requests
- g. Notify requesters when processing is delayed
- 4. Apply the presumption of openness
  - a. Adopt the foreseeable harm standard for withholding
  - b. Release records on a rolling basis
- 5. Streamline the processing of potential confidential business information
  - a. Avoid frivolous claims of confidential business information
  - b. Require submitters' objections to disclosure to be prompt
- 6. Improve administrative appeals
  - a. Provide adequate time limits for requesters to submit appeals
  - b. Provide a website and/or email address for submitting appeals
  - c. Notify requesters of dispute resolution services in appeal determinations
- 7. Technical amendments

## 1. Expand online disclosures

We encourage HUD 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 HUD's transparency.<sup>1</sup> Posting information online maximizes the impact of the agency's FOIA efforts by allowing the public to access and use the information disclosed.<sup>2</sup> For instance, millions more Americans visit government websites to seek information than file FOIA requests.<sup>3</sup>

FOIA contains minimum obligations for agencies to disclose information proactively, in advance of any request.<sup>4</sup> But agencies can, and should, go far beyond the statutory minimum.<sup>5</sup> Whenever

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<sup>1</sup> Department of Justice, "Proactive Disclosures," *DOJ Guide to the Freedom of Information Act 2009 Edition*, 2009, p.11, available at [http://www.justice.gov/oip/foia\\_guide09/proactive-disclosures.pdf](http://www.justice.gov/oip/foia_guide09/proactive-disclosures.pdf) ("Proactive disclosures are an efficient means to make records publicly available that otherwise might be sought through less efficient FOIA requests.").

<sup>2</sup> U.S. Department of Justice Office of Information Policy, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines," April 17, 2009, available at <http://www.justice.gov/oip/foiapost/2009foiapost8.htm> ("[A]gencies must recognize that proactively disclosing information about the operations and activities of their agency is an integral part of achieving transparency").

<sup>3</sup> See Center for Effective Government, "Fixes Early in FOIA Process Offer Greatest Potential for Impact," May 7, 2013, available at <http://www.foreffectivegov.org/fixes-early-foia-process-offer-greatest-potential-impact>.

<sup>4</sup> 5 U.S.C. § 552(a)(1), (2); also see U.S. Department of Justice Office of Information Policy, "Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements," June 27, 2008, available at <http://www.justice.gov/oip/foiapost/2008foiapost21.htm> ("[T]he Reading Room provision of the FOIA imposes an affirmative disclosure requirement").

<sup>5</sup> Department of Justice, "Proactive Disclosures," *DOJ Guide to the Freedom of Information Act 2009 Edition*, 2009, p.10, available at [http://www.justice.gov/oip/foia\\_guide09/proactive-disclosures.pdf](http://www.justice.gov/oip/foia_guide09/proactive-disclosures.pdf) ("Agencies should also exercise their discretion to make a broader range of records available beyond the minimum required by the statute.").

possible, HUD should make information available to the public without requiring requesters to navigate the administrative process of FOIA.

Additionally, online disclosure can save agency resources by reducing duplicative requests. For example, after the Department of Agriculture posted online a searchable database of 50,164 animal care inspection reports for 2006-2008, the number of incoming FOIA requests dropped by nearly 35 percent.<sup>6</sup>

President Obama's FOIA memorandum,<sup>7</sup> Attorney General Holder's FOIA guidelines,<sup>8</sup> and the Open Government Directive<sup>9</sup> have also emphasized the importance of posting information online. Therefore, HUD should proactively disclose information to the greatest extent possible and include provisions within its regulations outlining the agency's responsibilities in this area.

*a. Proactively identify and disclose additional records of interest to the public*

HUD should adopt a policy to proactively identify records of interest to the public and to post such records online.<sup>10</sup> HUD has a public service obligation to promptly disclose matters that would be of public interest, without waiting for a FOIA request.<sup>11</sup> This obligation is reflected in regulations adopted by the Department of the Interior<sup>12</sup> and the Special Inspector General for Afghanistan Reconstruction,<sup>13</sup> as well as regulations proposed by the Department of Justice.<sup>14</sup>

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

<sup>7</sup> Barack Obama, Presidential Memorandum, "Freedom of Information Act," The White House, Jan. 21, 2009, available at [http://www.whitehouse.gov/the\\_press\\_office/FreedomofInformationAct](http://www.whitehouse.gov/the_press_office/FreedomofInformationAct) ("[A]gencies should take affirmative steps to make information public").

<sup>8</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> ("[A]gencies should readily and systematically post information online in advance of any public request").

<sup>9</sup> Peter R. Orszag, "Open Government Directive," Office of Management and Budget, December 8, 2009, available at [http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf) ("[A]gencies should proactively use modern technology to disseminate useful information, rather than waiting for specific requests under FOIA.").

<sup>10</sup> Department of Justice, "OIP Guidance and Suggested Practices for Improving Transparency," Sept. 1, 2010, p.3, available at <http://www.justice.gov/oip/docs/best-practices-guidance-sept-2010.pdf> ("All agencies should ensure that they, including all their components, are identifying documents for proactive disclosure and have an on-going process of posting documents of interest to the public").

<sup>11</sup> Barack Obama, Presidential Memorandum, "Freedom of Information Act," The White House, Jan. 21, 2009, available at [http://www.whitehouse.gov/the\\_press\\_office/FreedomofInformationAct](http://www.whitehouse.gov/the_press_office/FreedomofInformationAct) ("[Agencies] should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government. ").

<sup>12</sup> 43 C.F.R. § 2.67(a) ("Each bureau must ... [i]dentify additional records of interest to the public that are appropriate for public disclosure ... [and] [p]ost those records in FOIA libraries.").

<sup>13</sup> 5 C.F.R. § 9301.4 ("SIGAR will also identify records of interest to the public that are appropriate for public disclosure, and then post these records.").

<sup>14</sup> Justice Department, "Freedom of Information Act Regulations," proposed rule, March 21, 2011, 76 F.R. 15236 ("Each component is responsible for ... identifying additional records of interest to the public that are appropriate for public disclosure, and for posting such records.").

**Recommendation:** Revise the proposed regulations at § 15.101 to add, “HUD will proactively identify and disclose additional records of interest to the public.”

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

HUD should adopt a policy to post online all records released in response to FOIA requests.<sup>15</sup>

Many members of the public have expressed interest in having regular access to any information released under FOIA.

The E-FOIA Act of 1996 mandated agencies to post online any information that has been released in response to a FOIA request and is “likely to become the subject of subsequent requests.”<sup>16</sup> Some agencies, including the Air Force<sup>17</sup> and the Office of the Secretary of Defense and Joint Staff,<sup>18</sup> have adopted the best practice of posting *all* released records, which 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.

**Recommendation:** Revise the proposed regulations at § 15.101 to add, “HUD will post all records released in response to FOIA requests in a searchable format on the agency website.”

**Implementation suggestions:**

1. To protect privacy, HUD could exclude first-person requests for personal information, such as those made jointly under the Privacy Act.<sup>19</sup>
2. HUD should consider joining the multi-agency portal, FOIAonline,<sup>20</sup> which offers agencies the functionality to post released records.

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<sup>15</sup> Office of Government Information Services, “FOIA Requirements, Agency Best Practices, and OGIS Best Practices,” March 19, 2009, p.2, available at <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf> (“Post online significant documents that have been released under FOIA without waiting for a second FOIA request”).

<sup>16</sup> Electronic Freedom of Information Act Amendments of 1996, P.L. 104-231, at Sec. 4; 5 U.S.C. § 552(a)(2)(D).

<sup>17</sup> Air Force Manual, “Freedom of Information Act Program,” sec. C2.1.2.4.3.1, Oct. 21, 2010, available at <http://www.foia.af.mil/shared/media/document/AFD-070702-060.pdf> (“The FOIA RSC will consider any requested record that has been previously partially or fully released as a frequently requested record ... and make it publicly available electronically ... FOIA managers will ensure that there is no personally identifiable information (PII) posted to the e-Reading Room even if it is fully released, i.e., first or third party request”).

<sup>18</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>19</sup> 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)”).

<sup>20</sup> <http://foiaonline.regulations.gov/>.

*c. Publish online indexes of disclosed records*

HUD should adopt a policy to publish online its indexes of disclosed records.

The E-FOIA Act required agencies to publish indexes of records that agencies have made available for public inspection.<sup>21</sup> The most effective way to publish such indexes is on the agency website. For example, the National Archives and Records Administration (NARA) has adopted this policy.<sup>22</sup>

**Recommendation:** Revise the proposed regulations at § 15.101 to add, “HUD will publish on its Web site current indexes of information made available for public inspection under 5 U.S.C. 552(a)(2) of the FOIA.”

## **2. Clarify fees and fee waivers**

Many requesters have expressed frustration with the FOIA fee system, including fee-related delays in processing requests, inconsistent treatment, and high charges. HUD should ensure that its procedures for FOIA fees are prompt, clear, and judicious. Fee assessment and waiver policies should reflect President Obama’s statement that agencies “should act promptly and in a spirit of cooperation,”<sup>23</sup> and fees should never be used as an impediment to disclosure.<sup>24</sup>

*a. Comply with statutory requirements for fee waivers and reductions*

FOIA requires agencies to waive or reduce fees “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”<sup>25</sup>

However, HUD proposes to add another factor to consider when deciding fee waiver or reduction requests. In the proposed regulations, § 15.106(k)(5) states, “In deciding to grant

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<sup>21</sup> Electronic Freedom of Information Act Amendments of 1996, P.L. 104-231, at Sec. 4; 5 U.S.C. § 552(a)(2)(E).

<sup>22</sup> 36 C.F.R. § 1250.12 (“NARA makes available for public inspection and copying the following materials described in subsection (a)(2) of the FOIA: ... An index, updated quarterly, to these materials. ... Any of this material that was created after October 31, 1996, will also be placed on NARA’s web site at [http://www.archives.gov/research\\_room/foia\\_reading\\_room/foia\\_reading\\_room.html](http://www.archives.gov/research_room/foia_reading_room/foia_reading_room.html)”).

<sup>23</sup> Barack Obama, Presidential Memorandum, “Freedom of Information Act,” The White House, Jan. 21, 2009, available at [http://www.whitehouse.gov/the\\_press\\_office/FreedomofInformationAct](http://www.whitehouse.gov/the_press_office/FreedomofInformationAct).

<sup>24</sup> Peter J. Kadzik, letter to Reps. Darrell Issa and Elijah Cummings, U.S. Department of Justice Office of Legislative Affairs, June 10, 2013, p. 6, available at <http://freebeacon.com/wp-content/uploads/2013/06/DOJ-OIP-Response.pdf> (“[A]gencies should never use fees for the purpose of dissuading requesters from making requests”).

<sup>25</sup> 5 U.S.C. § 552(a)(4)(A)(iii) (“Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”).

waivers or reductions of fees, HUD will exercise its discretion to consider the cost effectiveness of its investment of administrative resources.”

This proposal stands in contradiction to the plain language of the statute, which provides that agencies *shall* waive or reduce fees if the statutory conditions are met. The statute does not authorize HUD to consider additional factors in deciding whether to grant fee waiver or reduction requests.

We are concerned that the proposed regulations could result in HUD denying fee waivers or reductions to requesters who are legally entitled to them. HUD should strike the proposed language, which exceeds its statutory authority.

**Recommendation:** Strike § 15.106(k)(5) of the proposed regulations.

*b. Adopt a reasonable threshold for minimum fee charges*

HUD should revise the proposed regulations to provide that it will not charge a fee if the total fee is \$50 or less. The proposed regulations at § 15.106(d)(4) would establish a \$25 minimum fee, which is likely too low to be effective.<sup>26</sup>

Recouping charges for producing small FOIA requests is uneconomical and may contribute to processing delays. FOIA processing would be streamlined by not charging a fee for processing that costs the agency less than \$50. Agencies including the Department of the Interior have adopted a \$50 minimum threshold for fee charges.<sup>27</sup>

**Recommendation:** Revise the proposed regulations at § 15.106(d)(4) to state, “HUD will not charge a fee whenever a total fee calculated under paragraph (c) of this section is likely to be less than HUD’s cost to collect and process the payment. Whenever a total fee calculated is \$50 or less, HUD will not charge a fee.”

*c. Reduce duplication fees*

HUD should revise the proposed regulations to reduce its per-page charges for photocopies of requested records.

The proposed regulations § 15.106(c)(2) would establish copy charges of \$0.18 per page. These fees are unusually high and could burden requesters. Several other agencies that have recently

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<sup>26</sup> 5 U.S.C. § 552(a)(4)(A)(iv)(I) (“No fee may be charged by any agency under this section if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee”).

<sup>27</sup> 43 C.F.R. § 2.49 (a)(1)

adopted FOIA regulations have established lower duplication fees: for instance, the White House Office of Science and Technology Policy,<sup>28</sup> the Consumer Financial Protection Bureau,<sup>29</sup> and the Special Inspector General for Afghanistan Reconstruction<sup>30</sup> adopted charges of \$0.10 per page, while the Defense Nuclear Facilities Safety Board adopted a \$0.12 fee per page.<sup>31</sup>

**Recommendation:** Revise the proposed regulations § 15.106(c)(2) to strike “\$0.18 per page” and insert “\$0.10 per page.”

### 3. Improve communication with requesters

Clear and open communication between requesters and agency staff is vital to an effective, user friendly FOIA process. HUD should strive to provide the best service to requesters by maintaining open lines of communication and providing requesters with relevant updates throughout the process.<sup>32</sup>

Providing requesters with information to make informed decisions, as well as status updates, can generally improve the experience of the requester, reduce unnecessary delays, and avoid disputes.

#### *a. Contact the requester before denying requests as unreasonable*

HUD should adopt a policy that it will contact the requester to seek clarification before denying a request for not reasonably describing the records sought. Doing so can improve customer service and avoid disputes. Agencies including the National Labor Relations Board<sup>33</sup> and the Administrative Conference of the United States<sup>34</sup> have adopted such a policy.

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<sup>28</sup> Office of Science and Technology Policy, “Implementation of the Freedom of Information Act,” rule, 78 F.R. 33209, June 4, 2013.

<sup>29</sup> Consumer Financial Protection Bureau, “Disclosure of Records and Information,” rule, 78 F.R. 11483, Feb. 15, 2013.

<sup>30</sup> Special Inspector General for Afghanistan Reconstruction, “Freedom of Information Act and Privacy Act Procedures,” rule, 77 F.R. 38171, June 27, 2012.

<sup>31</sup> Defense Nuclear Facilities Safety Board, “FOIA Fee Schedule Update,” rule, 77 F.R. 41258, July 13, 2012.

<sup>32</sup> Barack Obama, Executive Order 13571, “Streamlining Service Delivery and Improving Customer Service,” The White House, April 27, 2011 (“The public deserves competent, efficient, and responsive service from the Federal Government.”).

<sup>33</sup> 29 C.F.R. § 102.117(c)(1) (“If the Agency determines that a request does not reasonably describe records, it may contact the requester to inform the requester either what additional information is needed or why the request is insufficient. Requesters may be given an opportunity to discuss their request so that requests may be modified to meet the requirements of this section”).

<sup>34</sup> 1 C.F.R. § 304.3(b) (“If the agency determines that your request does not reasonably describe records, then it will tell you either what additional information is needed or why your request is otherwise insufficient. It also will give you an opportunity to discuss your request by telephone so that you may modify it to meet the requirements of this section.”).

**Recommendation:** Revise the proposed regulations at § 15.102(d)(2) to state that FOIA requests should “Reasonably describe the records sought. The more specific the FOIA request for records, the more likely HUD officials will be able to locate the records requested. Whenever possible, requests should include detailed and specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record. Requests for categories of information should be for specific and well-defined categories.”

Revise the proposed regulations at § 15.103 to add, “If HUD believes that a request may not reasonably describe the records sought, HUD will contact the requester to seek clarification. HUD will provide at least 30 days for the requester to respond. If the request has not been clarified after 30 days, HUD may decide to deny the request for not reasonably describing the records sought. If HUD determines that it must deny the request for not reasonably describing the records sought, it will notify the requester under the procedures in § 15.105(d)(2).”

*b. Provide estimated time to complete the request and opportunities to reformulate*

HUD should adopt a policy that the agency, as soon as practicable, will notify requesters of the estimated time to complete the request and provide requesters with the opportunity to reformulate the request if they so choose.

In the OPEN Government Act, Congress directed agencies to provide requesters with an estimated date of completion for processing the request.<sup>35</sup> HUD should communicate that estimate to requesters as early as possible. In addition, HUD should notify requesters that, if they would prefer to complete processing sooner, they may be able to shorten the time necessary to complete the request by amending their request to limit the scope.

Agencies including the Occupational Safety and Health Review Commission<sup>36</sup> have adopted such a policy.

**Recommendation:** (i) Revise the proposed regulations at § 15.10.5 to add, “As soon as practicable after receiving a request, HUD will provide the requester with the estimated

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<sup>35</sup> P. L. 110-175, at Sec. 7; 5 U.S.C. § 552(a)(7)(B) (“Each agency shall ... establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including ... an estimated date on which the agency will complete action on the request.”).

<sup>36</sup> 29 C.F.R § 2201.6(d)(3) (“The Commission will notify a requester when its request is placed in the second track for processing and that notification will include the estimated time for completion. ... In the case of a request expected to take more than 30 working days for action, a requester may modify the request to allow it to be processed faster or to reduce the cost of processing.”).



date it will complete processing the request. HUD will give the requester an opportunity to reformulate the request, at the requester's option.”

(ii) Revise the proposed regulations at § 15.104(d)(2) to state, “When HUD uses multitrack processing, it will contact requesters in its slower track(s) to provide an opportunity to limit the scope of their requests in order to qualify for faster processing within the specified limits of HUD's faster track(s).”

*c. Inform requesters of status updates*

HUD should inform requesters of updates on the status of their requests.

The OPEN Government Act requires agencies to establish a service allowing requesters to inquire about the status of their requests.<sup>37</sup> Providing automated status updates on the agency website can reduce the time spent communicating such basic information to requesters and can allow FOIA personnel to focus on processing requests. Agencies including the Department of the Interior,<sup>38</sup> Federal Housing Finance Agency,<sup>39</sup> General Services Administration,<sup>40</sup> and Federal Labor Relations Authority<sup>41</sup> have adopted this practice.

**Recommendation:** Revise the proposed regulations at § 15.105 to add, “HUD will provide automated updates on the status of FOIA requests on the agency's website.”

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<sup>37</sup> P. L. 110-175, at Sec. 7; 5 U.S.C. § 552(a)(7)(B); *also see* Department of Justice, “OIP Guidance: Assigning Tracking Numbers and Providing Status Information Requests,” *FOIA Post*, Nov. 18, 2008, *available at* <http://www.justice.gov/oip/foiapost/2008foiapost30.htm>; *also see* Office of Government Information Services, “FOIA Requirements, Agency Best Practices, and OGIS Best Practices,” March 19, 2009, p.5, *available at* <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf> (“Establish telephone or web service that provides information about the status of a request using the case tracking number”).

<sup>38</sup> Department of the Interior, “2013 Chief FOIA Officer Report,” March 2013, p.10, *available at* [http://www.doi.gov/foia/upload/2013-DOI-CFO-Report\\_posted.pdf](http://www.doi.gov/foia/upload/2013-DOI-CFO-Report_posted.pdf). (“FOIA requesters can now retrieve personalized results, using their FOIA tracking number, in real time. The results include the request date, receipt date, processing track, request status, and fee category.”).

<sup>39</sup> Federal Housing Finance Agency, “2013 Chief FOIA Officer Report,” March 11, 2013, p.8, *available at* <http://www.fhfa.gov/webfiles/25017/Final%20FHFA%202013%20Chief%20FOIA%20Officers%20Report.pdf> (“The information provided to the requester through the tracking system is as follows: Received date, Assigned, Perfected, On hold for information/clarification, Request for documents sent, Closed, Fees due.”).

<sup>40</sup> General Services Administration, “2013 Chief FOIA Officer Report,” March 2013, p. 8, *available at* <http://www.gsa.gov/portal/getMediaData?mediaId=166295> (“GSA FOIA website allows users to track and obtain the status of their FOIA requests. The system in place is not currently designed with real time status information, but GSA is considering ways to improve such information.”).

<sup>41</sup> Federal Labor Relations Authority, “2013 Chief FOIA Officer Report,” March 2013, p.5, *available at* [http://www.flra.gov/webfm\\_send/687](http://www.flra.gov/webfm_send/687) (“Using FOIAonline, a requester can determine: (1) if the request has been submitted; (2) if the request is being evaluated to determine whether it is perfected; (3) if the request has been assigned; (4) if the request is being processed; and (5) if the request is closed.”).

**Implementation suggestion:** HUD should consider joining the multi-agency portal, FOIAonline, which allows requesters to track the status of requests online.

*d. Communicate with requesters by email where appropriate*

HUD should adopt a policy that it will communicate with requesters by email where appropriate.

Digital communications are changing the way government connects with citizens. HUD should take advantage of information technology to deliver fast and effective communications with the public.<sup>42</sup> Email communication can also result in cost savings for the agency. Agencies including the Office of the U.S. Trade Representative have adopted this practice.<sup>43</sup>

**Recommendation:** Revise the proposed regulations at § 15.105 to add, “HUD will generally communicate with the requester by email, unless he or she specifies otherwise.”

*e. Use plain language in all communications with requesters*

HUD should adopt a policy that all written communications with requesters will use plain language.

The Plain Writing Act of 2010 directs agencies to use “writing that is clear, concise, well-organized, and follows other best practices appropriate to the subject or field and intended audience” in any document that “provides information about any Federal Government benefit or service.”<sup>44</sup>

Citizens deserve clear communications from the government. All HUD communications with requesters should be easy to read, understand, and use.

**Recommendation:** Revise the proposed regulations at § 15.105 to “HUD will use plain language in all communications with requesters.”

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<sup>42</sup> Barack Obama, Executive Order 13571, “Streamlining Service Delivery and Improving Customer Service,” The White House, April 27, 2011, (“[B]est practices include increasingly popular lower-cost, self-service options accessed by the Internet or mobile phone and improved processes that deliver services faster and more responsively, reducing the overall need for customer inquiries and complaints.”).

<sup>43</sup> Office of the U.S. Trade Representative, “Chief Freedom of Information Act Officer Annual Report,” March 11, 2013, available at <http://www.ustr.gov/sites/default/files/USTR%20CHIEF%20FOIA%20OFFICER%20Report%202012.pdf> (“USTR is likewise working toward mostly electronic communications with requesters and generally transmits FOIA responses via email”).

<sup>44</sup> P. L. 111-274; also see Janet Reno, “The Freedom of Information Act,” Office of the Attorney General, Oct. 4, 1993, available at [http://www.justice.gov/oip/foia\\_updates/Vol\\_XIV\\_3/page3.htm](http://www.justice.gov/oip/foia_updates/Vol_XIV_3/page3.htm) (announcing a “comprehensive review of all standard FOIA forms and correspondence ... for their correctness, completeness, consistency, and particularly for their use of clear language”).

*f. Notify requesters when requests are rerouted*

HUD should adopt a policy that it will notify requesters if their request has been rerouted to another HUD FOIA office.

The OPEN Government Act established that agencies must process a FOIA request delivered to any FOIA office that has been designated by agency regulation. Upon receipt of a request, an agency FOIA office is provided a 10-day period within which to reroute a received request to another agency FOIA office.<sup>45</sup>

If HUD receives a request at a FOIA office other than the office in which the records are located, HUD should notify requesters that HUD has rerouted the request.<sup>46</sup>

**Recommendation:** Revise the proposed regulations at § 15.104 to add, “Whenever a HUD FOIA office reroutes all or any part of the responsibility for responding to a request to another HUD FOIA office, the office that first received the request will notify the requester of the rerouting and provide the name and contact information of the office to which the request was rerouted.”

*g. Notify requesters when referring requests*

HUD should adopt a policy that it will notify requesters if it refers their request to another agency, and that HUD will provide the requester with contact information for the receiving agency.<sup>47</sup>

When searching for records requested under FOIA, it is not uncommon for an agency to locate a responsive document that originated outside of the agency. If HUD refers a request to another agency for processing, the requester needs to know where the request has been sent and whom to

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<sup>45</sup> P. L. 110-175, at Sec. 6(a); 5 U.S.C. § 552(a)(6)(A) (“The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency’s regulations under this section to receive requests under this section.”).

<sup>46</sup> Department of Justice Office of Information Policy, “OIP Guidance: New Requirement to Route Misdirected FOIA Requests,” *FOIA Post*, November 18, 2008, available at <http://www.justice.gov/oip/foiapost/2008foiapost31.htm> (“In those instances where a receiving FOIA office has routed a misdirected request to another FOIA office within the agency for processing, the receiving FOIA office is encouraged to notify the requester of the routing.”).

<sup>47</sup> 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> (“Advise the FOIA requester that a referral of records has been made, provide the name of the agency to which the referral was directed, and include that agency’s FOIA contact information.”).

contact with questions. Agencies including the Consumer Financial Protection Bureau have adopted this policy.<sup>48</sup>

**Recommendation:** Revise the proposed regulations at § 15.105(b) to add, “Whenever HUD refers all or any part of the responsibility for responding to a request to another agency, HUD will notify the requester of the referral, provide the name of the agency to which the request was referred, and include that agency’s FOIA contact information.”

**Implementation suggestion:** HUD should ensure that referrals are successfully received and processed by the receiving agency.

#### *h. Notify requesters when processing is delayed*

HUD should adopt a policy to notify requesters when processing will be delayed, as required by law.<sup>49</sup>

Agencies including the Administrative Conference of the United States<sup>50</sup> have adopted this policy.

**Recommendation:** Revise the proposed regulations at § 15.103(c) to strike the first sentence and insert, “In unusual circumstances, as defined in this paragraph, HUD may extend the time period for processing a FOIA request. HUD will notify the requester in writing of the extension, explaining the unusual circumstances and providing the date by which it expects to complete processing of the request.”

#### **4. Apply the presumption of openness**

HUD serves the public and should favor disclosure to improve government openness for the benefit of the public. As President Obama has commented, “All agencies should adopt a

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<sup>48</sup> 12 C.F.R. § 1070.15(d) (“Whenever the CFPB refers all or any part of the responsibility for responding to a request to another agency, it will notify the requester of the referral and inform the requester of the name of each agency to which the request has been referred, in whole or in part.”).

<sup>49</sup> 5 U.S.C. § 552(a)(6)(B)(i) (providing that, in unusual circumstances, the time limits for processing a request “may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched”); *also see* U.S. Department of Justice Office of Information Policy, “OIP Guidance: The Importance of Good Communication with FOIA Requesters,” March 4, 2010, available at <http://www.justice.gov/oip/foiapost/2010foiapost5.htm>.

<sup>50</sup> 1 C.F.R. § 304.5(c)(1) (“Where the statutory time limits for processing a request cannot be met because of ‘unusual circumstances,’ as defined in the FOIA, and the agency determines to extend the time limits on that basis, it will as soon as practicable notify the requester in writing of the unusual circumstances and of the date by which processing of the request can be expected to be completed.”).

presumption in favor of disclosure,”<sup>51</sup> and withholding should be narrowly limited.<sup>52</sup> Furthermore, minimizing withholding can reduce disputes with requesters and avoid litigation.

*a. Adopt the foreseeable harm standard for withholding*

HUD should adopt a policy that the agency will apply a presumption of openness in processing requests, will only withhold information if it reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions,<sup>53</sup> or if disclosure is prohibited by law.

Congress has noted that FOIA “establishes a strong presumption in favor of disclosure.”<sup>54</sup> President Obama’s FOIA memorandum likewise stated that the law “should be administered with a clear presumption: In the face of doubt, openness prevails.”<sup>55</sup> Attorney General Holder’s FOIA guidelines explained that “an agency should not withhold information simply because it may do so legally.” Specifically, the guidelines provide that “the Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.”<sup>56</sup> The Office of Information Policy has recommended that agencies adopt procedures to affirmatively consider making “discretionary disclosures” where agencies cannot identify harm that would result from the release of information.<sup>57</sup>

Applying this “foreseeable harm standard” helps to ensure that agencies do not withhold information improperly and do uphold the FOIA’s spirit of transparency while protecting privacy

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<sup>51</sup> Barack Obama, Presidential Memorandum, “Freedom of Information Act,” The White House, Jan. 21, 2009, available at [http://www.whitehouse.gov/the\\_press\\_office/FreedomofInformationAct](http://www.whitehouse.gov/the_press_office/FreedomofInformationAct).

<sup>52</sup> *FBI v. Abramson*, 456 U. S. 615, 630 (1982) (providing that FOIA exemptions must be “narrowly construed”).

<sup>53</sup> Department of Justice, “Guide to Discretionary Disclosure and Waiver,” *DOJ Guide to the Freedom of Information Act 2009 Edition*, 2009, p.686, available at [http://www.justice.gov/oip/foia\\_guide09/proactive-disclosures.pdf](http://www.justice.gov/oip/foia_guide09/proactive-disclosures.pdf) (“Accordingly, and inasmuch as the FOIA’s exemptions are discretionary, not mandatory, agencies may make ‘discretionary disclosures’ of exempt information, as a matter of their administrative discretion, where they are not otherwise prohibited from doing so.”)

<sup>54</sup> P. L. 110-175, at Sec. 2 (“[T]he Freedom of Information Act establishes a ‘strong presumption in favor of disclosure’ as noted by the United States Supreme Court in *United States Department of State v. Ray* (502 U.S. 164 (1991)), a presumption that applies to all agencies governed by that Act”).

<sup>55</sup> Barack Obama, Presidential Memorandum, “Freedom of Information Act,” The White House, Jan. 21, 2009, available at [http://www.whitehouse.gov/the\\_press\\_office/FreedomofInformationAct](http://www.whitehouse.gov/the_press_office/FreedomofInformationAct).

<sup>56</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> (“I strongly encourage agencies to make discretionary disclosures of information ... [T]he Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.”).

<sup>57</sup> U.S. Department of Justice Office of Information Policy, “OIP Guidance and Suggested Best Practices for Improving Transparency,” Sept. 1, 2010, available at <http://www.justice.gov/oip/docs/best-practices-guidance-sept-2010.pdf> (“Agencies should institute a system, or add a step in their processing procedures, to affirmatively consider whether more information can be released as a matter of administrative discretion”).

rights and national security information. Agencies including the Department of Defense<sup>58</sup> and the National Archives and Records Administration<sup>59</sup> have adopted this policy.

**Recommendation:** Revise the proposed regulations at § 15.107 to add, “HUD will apply a presumption of openness when processing requests and will only withhold requested information if it reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions or if disclosure is prohibited by law. Before withholding information, HUD will conduct a foreseeable harm analysis, which clearly identifies the harm that would occur with disclosure.”

*b. Release records on a rolling basis*

Agencies should adopt a policy to make rolling releases of records whenever possible, as recommended by OIP guidance<sup>60</sup> and OGIS best practices.<sup>61</sup> Releasing records as they are processed, rather than waiting to complete processing of the entire request, increases the timeliness of disclosure. Agencies including the Department of State<sup>62</sup> have adopted this practice.

**Recommendation:** Revise the proposed regulations at § 15.105 to add, “If a request involves a voluminous amount of material or searches in multiple locations, HUD will provide the requester with interim responses, releasing the information on a rolling basis.”

## 5. Streamline the processing of potential confidential business information

Many FOIA requesters have raised concerns about overly-broad claims of confidential business information restricting access to important information that is properly public. Additionally, the

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<sup>58</sup> 32 C.F.R. § 286.23(c) (“To deny a requested record that is in the possession and control of a DoD Component, it must be determined that disclosure of the record would result in a foreseeable harm to an interest protected by a FOIA exemption, and the record is exempt under one or more of the exemptions of the FOIA.”).

<sup>59</sup> 36 C.F.R. § 1250.36 (“We will only withhold information where we must (such as information which remains classified, or information which is specifically closed by statute) or we reasonably foresee that disclosure would cause a harm”).

<sup>60</sup> U.S. Department of Justice Office of Information Policy, “OIP Guidance: The Importance of Good Communication with FOIA Requesters,” March 4, 2010, *available at* <http://www.justice.gov/oip/foiapost/2010foiapost5.htm> (“When an agency is working on a request that involves a voluminous amount of material or which involves searches in multiple locations, whenever feasible, the agency should provide the requester with interim responses rather than waiting until all records are located and processed”).

<sup>61</sup> Office of Government Information Services, “FOIA Requirements, Best Practices, and OGIS Recommendations,” *available at* <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf>.

<sup>62</sup> Office of Government Information Services, “Improving the FOIA Process,” *The First Year: Building Bridges Between FOIA Requesters and Federal Agencies*, March 2011, *available at* <https://ogis.archives.gov/about-ogis/ogis-reports/the-first-year/improving-the-foia-process.htm> (“The State Department makes rolling releases of information to requesters rather than waiting until processing ends”).

procedures that many agencies have instituted to notify submitters about requests for submitted information are lengthy or open-ended and may contribute to delays in FOIA processing. HUD should adopt regulations on confidential business information that avoid overly broad claims or delay responses to FOIA requests.

*a. Avoid frivolous claims of confidential business information*

HUD should require submitters to use good faith effort to designate any submitted information that submitters consider to be exempt from disclosure under FOIA's Exemption 4. Specifically, HUD should indicate what it considers a "good faith effort" to designate such claims and should reject obviously frivolous claims. Agencies including the Department of Education<sup>63</sup> have adopted such a policy.

Additionally, to avoid undue delays, HUD should notify submitters about requests for submitted information only when necessary. In particular, HUD should establish that it is unnecessary to notify submitters if the agency determines that the submitter has made an obviously frivolous claim of confidential business information. Agencies including the White House Office of Science and Technology Policy,<sup>64</sup> the National Labor Relations Board,<sup>65</sup> and the Administrative Conference of the United States<sup>66</sup> have adopted this policy.

**Recommendation:** *(i)* Revise the proposed regulations at § 15.108(b) to add, "A blanket designation on each page of a submission that all information contained on the page is protected from disclosure under Exemption 4 presumptively will not be considered a good faith effort."

*(ii)* Revise the proposed regulations at § 15.108(g) to state, "The notice requirements of paragraphs (c) and (f) of this section will not apply if HUD determines that:

- (1) The information must be withheld under FOIA's exemptions;
- (2) The information lawfully has been published or made available to the public;
- (3) Disclosure of the information is required by statute (other than FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600; or

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<sup>63</sup> 34 C.F.R. § 5.11(c)(1).

<sup>64</sup> 32 C.F.R. § 2402.6(h)(4).

<sup>65</sup> 29 C.F.R. § 102.117(c)(2)(iv)(F).

<sup>66</sup> 1 C.F.R. § 304.7(h)(4).

(4) The designation made by the submitter appears obviously frivolous—except that, in such a case, HUD will, no fewer than five working days prior to a specified disclosure date, give the submitter written notice of any final decision to disclose the information.”

*b. Require submitters’ objections to disclosure to be prompt*

HUD should provide specific time limits for submitters to object to the release of submitted information.

FOIA generally requires agencies to respond to requesters within 20 working days.<sup>67</sup> In order to avoid delays in processing requests, HUD should require submitters to promptly respond if they wish to object to disclosure. Agencies including the National Archives and Records Administration<sup>68</sup> have adopted such a policy.

**Recommendation:** Revise the proposed regulations at § 15.108(e) to strike the first two sentences and insert, “HUD will allow a submitter a reasonable time – generally, five working days – to respond to the notice described in paragraph (c) of this section and will specify that time period within the notice. If a submitter wishes to object to disclosure, the submitter must submit a detailed written statement specifying the grounds for withholding any portion of the information under any exemption of FOIA and, in the case of Exemption 4, the submitter must show why the information is a trade secret or commercial or financial information that is privileged or confidential.”

## **6. Improve administrative appeals**

The administrative appeal process is an important element of oversight of the FOIA system and a useful opportunity for a FOIA requester to get a “second opinion.” HUD should ensure that its appeal process is accessible to requesters and that appellate reviews are robust. Maintaining a meaningful and user-friendly appeal process can reduce disputes and avoid litigation.

*a. Provide adequate time limits for requesters to submit appeals*

HUD should provide a minimum of 60 days for requesters to submit administrative appeals. The proposed regulations provide only 30 days, which may not enough time for a requester to gather all the facts relevant to the request and prepare any arguments they wish to make in the appeal.

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<sup>67</sup> 5 U.S.C. § 552(a)(6)(A)(i).

<sup>68</sup> 36 C.F.R. § 1250.82(b) (“The submitter will have 5 working days from the receipt of our notice to object to the release and to explain the basis for the objection. The NARA FOIA Officer may extend this period for an additional 5 working days.”).



Providing a minimum of 60 days would provide adequate time for requesters to prepare and submit appeals. Agencies including the Special Inspector General for Afghanistan Reconstruction<sup>69</sup> provide a 60-day deadline to submit appeals.

**Recommendation:** Revise the proposed regulations at § 15.110(a) to strike “30 calendar days” and insert “60 calendar days,” and to strike “30th calendar day” and insert “60th calendar day.”

*b. Provide a website and/or email address for submitting appeals*

HUD should provide requesters the ability to submit their administrative appeals by email or through the agency website. Under the proposed regulations, requesters must submit appeals “in writing to the address specified in HUD’s notice responding to the FOIA request.” It is unclear whether such addresses would include options for online submission.

Allowing requesters to submit their administrative appeals by email or on the agency website may be faster, less expensive, and more convenient for requesters and agency employees processing the appeals. Several agencies, including the Special Inspector General for Afghanistan Reconstruction,<sup>70</sup> allow FOIA requesters to submit their appeals by email.

**Recommendation:** HUD should clarify that requesters may submit their administrative appeals by email or through the agency website.

**Implementation suggestion:** HUD should consider joining the multi-agency portal, FOIAonline, which offers the functionality for requesters to submit appeals through the website.

*c. Notify requesters of dispute resolution services in appeal determinations*

HUD should adopt a policy to notify requesters of dispute resolution services in appeal determination letters.

The OPEN Government Act of 2007 created an Office of Government Information Services (OGIS) within the National Archives and Records Administration (NARA). One of the OGIS mission statements is to mediate disputes between FOIA requesters and government agencies as a nonexclusive alternative to litigation.<sup>71</sup>

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<sup>69</sup> 5 C.F.R. § 9301.6(d).

<sup>70</sup> 5 C.F.R. § 9301.6(d).

<sup>71</sup> P. L. 110-175, at Sec. 10; 5 U.S.C. § 552(h)(3).

Making the dispute resolution services easily available to requesters can help address questions or issues which might otherwise result in costly litigation. Agencies including the Special Inspector General for Afghanistan Reconstruction<sup>72</sup> have adopted this policy.

**Recommendation:** Revise the proposed regulations at § 15.111(a)(2)(ii) to add, “HUD will provide the requester with the name and contact information of the Office of Government Information Services, which offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation.”

## 7. Technical amendments

In the proposed regulation at § 15.107(a), HUD should update the reference to the executive order on classified information to refer to the current order (Executive Order 13526 of December 29, 2009).

## Conclusion

The Center for Effective Government appreciates the opportunity to comment on HUD’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,



Gavin R. Baker  
Open Government Policy Analyst

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<sup>72</sup> 5 C.F.R. § 9301.6 (d)(3) (“Response to an appeal will advise the requester that the 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation”).