Docket Operations
U.S. Department of Transportation
M-30, Room W12-140
1200 New Jersey Avenue SE
Washington, DC 20590-0001
via Regulations.gov

Re: Data and Information Distribution Policy (78 F.R. 25521; 78 F.R. 33146) FAA-2013-0392

We welcome the opportunity to comment on the Federal Aviation Administration's (FAA) proposed Data and Information Distribution Policy.

Clear and effective policies are important for upholding transparency and ensuring citizen access to public information. Therefore, we urge FAA to revise and clarify the proposed policy in order to strengthen open government and ensure compliance with law and government-wide policy.

While we do not oppose FAA's stated goals of streamlining the distribution of information and increasing information security, FAA should ensure that it does not weaken public access to information in doing so. Instead, we encourage FAA to seek ways to strengthen transparency and accountability, and offer the following recommendations in that regard:

- 1. Align the proposed policy with existing law and government-wide policy;
- 2. Clarify the proposed policy;
- 3. Emphasize the presumption of openness and access obligations; and
- 4. Ensure cost recovery does not unduly limit public access.

### 1. Align the proposed policy with existing law and government-wide policy

FAA should ensure that the proposed policy and its implementation align with existing law and government-wide policy.

Add and correct authorities

FAA should expand the authorities listed in the "Supplementary Information" section to include:

• Building a 21st Century Digital Government, Presidential Memorandum for the Heads of Executive Departments and Agencies, issued May 23, 2012.

- Making Open and Machine Readable the New Default for Government Information, Executive Order 13642, issued May 9, 2013.
- Open Data Policy–Managing Information as an Asset, OMB Memorandum for the Heads of Executive Departments and Agencies, M-13-13, issued May 9, 2013.
- Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 et seq.).
- Transparency and Open Government, Presidential Memorandum for the Heads of Executive Departments and Agencies, issued January 21, 2009.

In addition, FAA should correct the references to the E-Government Act of 2002. The proposed policy incorrectly refers to the law as the "E-Government & Information Technology Act of 2002." Additionally, FAA should correct the references to the E-Government Act's U.S. Code location; the act is encoded at 44 U.S.C. chapter 3601 *et seq.*, while the proposed policy incorrectly refers to 44 U.S.C. &101.

Use definitions consistent with government-wide policy

In the "Glossary" section, FAA's proposed definitions of "information" and "data" should mirror those in Circular A-130<sup>1</sup> and OMB Memorandum M-13-13, 2 respectively. If FAA declines to adopt the definitions provided in these government-wide policies, FAA should explain why it considers these definitions to be inadequate for its purposes.

Address OMB open data policy

The government-wide open data policy established in OMB Memorandum M-13-13, as directed by Executive Order 13642, includes numerous requirements that are not addressed in the proposed policy. We suggest that FAA incorporate those requirements into the proposed policy in order to ensure compliance with the government-wide policy and streamline implementation.

#### 2. Clarify the proposed policy

The proposed policy's brevity and use of technical jargon make it difficult to predict the policy's impacts. FAA should clarify the proposed policy by adding further explanation where

<sup>&</sup>lt;sup>1</sup> Office of Management and Budget, "Management of Federal Information Resources," Circular A-130, Transmittal Memorandum No. 4, Nov. 28, 2000, *available at* <a href="http://www.whitehouse.gov/omb/circulars\_a130\_a130trans4">http://www.whitehouse.gov/omb/circulars\_a130\_a130trans4</a> (defining "information" as "any communication or representation of knowledge such as facts, data, or opinions in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual forms").

<sup>2</sup> Sylvia M. Burwell, et al., "Open Data Policy–Managing Information as an Asset," Office of Management and Budget, Memorandum M-13-13, May 9, 2013, p. 4 (defining "data" as "all structured information, unless otherwise noted" (footnote omitted)).

appropriate, writing the policy in plain language,<sup>3</sup> and expanding the "Glossary" section to add definitions of technical terms.

## 3. Emphasize the presumption of openness and access obligations

Congress<sup>4</sup> and President Obama<sup>5</sup> have both noted that agencies should adopt a presumption of openness with regard to government information. Similarly, Executive Order 13642 establishes that openness should be the default state for government data.<sup>6</sup> E.O. 13642<sup>7</sup> and the Paperwork Reduction Act of 1995<sup>8</sup> also obligate agencies to manage information with the goal of maximizing public access and utility.

However, the proposed policy makes no reference to these presumptions and obligations. Furthermore, the proposed does not distinguish between public access as the "rule" and limited access under the terms of the proposed policy as the "exception."

FAA should emphasize the presumption of openness and clarify the scope of the policy by inserting at the beginning of the proposed policy:

FAA will make information and data openly available to the greatest extent practicable, consistent with the presumption of openness and applicable law and policy.

FAA will design and manage information, data, and systems to maximize public access to government information, consistent with applicable law and policy.

Where open access to data is not immediately possible, FAA will provide access to data under the terms of this policy.

<sup>&</sup>lt;sup>3</sup> See Barack Obama, Executive Order 13563, "Improving Regulation and Regulatory Review," The White House, Jan. 18, 2011 ("Our regulatory system must ... ensure that regulations are accessible, consistent, written in plain language, and easy to understand"); William J. Clinton, "Plain Language in Government Writing," Presidential Memorandum, June 1, 1998, 63 F.R. 31885 ("I direct you to ... use plain language in all proposed and final rulemaking documents published in the Federal Register").

<sup>&</sup>lt;sup>4</sup> OPEN Government Act of 2007, P. L. 110-175, at Sec. 2 (finding that "the 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>5</sup> Barack Obama, "Freedom of Information Act," Presidential Memorandum, Jan. 21, 2009, 74 F.R. 4683 ("All agencies should adopt a presumption in favor of disclosure").

<sup>&</sup>lt;sup>6</sup> Barack Obama, "Making Open and Machine Readable the New Default for Government Information," Executive Order 13642, issued May 9, 2013 (directing that "the default state of new and modernized Government information resources shall be open and machine readable").

<sup>&</sup>lt;sup>7</sup> *Id.* ("Government information shall be managed as an asset throughout its life cycle to promote interoperability and openness, and, wherever possible and legally permissible, to ensure that data are released to the public in ways that make the data easy to find, accessible, and usable.").

<sup>&</sup>lt;sup>8</sup> 44 U.S.C. § 3506(b)(1)(C) ("each agency shall manage information resources to improve the integrity, quality, and utility of information to all users within and outside the agency, including capabilities for ensuring dissemination of public information, public access to government information, and protections for privacy and security").

# 4. Ensure cost recovery does not unduly limit public access

We are concerned that the aspects of the proposed policy relating to cost recovery (paragraphs 6 and 7) could unduly limit public access to information and appear inconsistent with existing law and government-wide policy.

Consider the benefits of dissemination, not just the costs

Paragraph 6 of the proposed policy states that FAA will "consider cost and cost recovery in making FAA data/information available to external users."

However, the proposed policy would not require FAA to consider the corresponding *benefits* of making information available. This contradicts OMB Memorandum M-13-13, which directs agencies to "weigh[] the value of openness against the cost of making those data public." <sup>9</sup>

FAA should revise paragraph 6 of the proposed policy as follows:

6. Consider the benefits and costs of making FAA data and information available to external users.

Take into account the purposes of dissemination

In considering the benefits of dissemination, FAA should take into account the purposes of a proposed use. In particular, FAA should differentiate between commercial uses and other uses.

Paragraph 7 of the proposed policy states that FAA will "consider requests for data and information that is not readily available if external users can and do bear the full cost of development, connection, transmission, processing, and maintenance." This may be appropriate for commercial users, but FAA should minimize costs for non-commercial users, who are likely to be more heavily burdened by costs imposed as a condition of access.

FAA should revise paragraph 7 of the proposed policy as follows:

7. Consider requests for data and information that is not readily available if external commercial users can and do bear the full cost of development, connection, transmission, processing, and maintenance. FAA will waive or reduce costs for data requests for non-commercial purposes.

<sup>&</sup>lt;sup>9</sup> *Id.* 2, p. 6.

Open access and non-exclusivity must prevail over cost recovery

When considering requests for data under the proposed policy, FAA should ensure that open access and non-exclusivity (as presented in paragraph 2 of the proposed policy) take priority over cost recovery.

To the greatest extent possible, FAA should design systems to efficiently provide open access to data. Where existing systems do not provide open access and FAA grants "requests for data and information that is not readily available" under paragraph 7 of the proposed policy, FAA should design solutions that allow the data to be released to all.

Additionally, FAA should ensure that any provisions for cost recovery comply with the requirements of the Paperwork Reduction Act. 11

#### Conclusion

We appreciate the opportunity to comment on FAA's proposed Data and Information Distribution Policy. 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,

Center for Effective Government (formerly OMB Watch)
Freedom of Information Center at the Missouri School of Journalism
National Freedom of Information Coalition
OpenTheGovernment.org

<sup>&</sup>lt;sup>10</sup> See id., pp. 6-8 (directing agencies to "collect or create information in a way that supports downstream information processing and dissemination activities" and to "build information systems to support interoperability and information accessibility").

<sup>&</sup>lt;sup>11</sup> 44 U.S.C. § 3506(d)(4) ("[E]ach agency shall not, except where specifically authorized by statute, establish an exclusive, restricted, or other distribution arrangement that interferes with timely and equitable availability of public information to the public; restrict or regulate the use, resale, or redissemination of public information by the public; charge fees or royalties for resale or redissemination of public information; or establish user fees for public information that exceed the cost of dissemination.").