Updates
July 19, 2019

EPA Revises Its FOIA Regulations

The Environmental Protection Agency issued a final rule June 26, 2019, revising the agency's Freedom of Information Act regulations. According to EPA, those regulations, last updated in 2002, required revision to comply with the 2007, 2009 and 2016 amendments to FOIA and to "clarify" and "improve" the agency's FOIA process. The revisions, which take effect July 25, 2019, without opportunity for public comment, centralize the agency's handling of FOIA requests and specify which officials have the authority to make final determinations, and on what basis.

Key Changes to Implement FOIA Amendments

The key revisions to the agency's handling of FOIA requests are as follows:

- **Centralized Processing of FOIA Requests.** Until now, EPA's 10 regional offices have been able to accept FOIA requests. The new rule centralizes the agency's FOIA process, designating its National FOIA Office within the Office of General Counsel as the entry point for all requests. Requests sent to an EPA program or regional office will not be considered received by the agency.
- **Elimination of List of FOIA Exemptions.** EPA has repealed the list of FOIA exemptions in its regulations at 40 C.F.R. 2.105, stating it is redundant with the statutory exemptions.
- **Other Procedural Changes to Implement the 2016 Amendments**:
    - Provides that EPA may toll its response time once during the first 20 working days to obtain necessary clarification from a requester and as many times as necessary to address issues related to fees. FOIA provides that agencies have 20 working days to respond to requests unless "unusual circumstances" exist.
    - Extends the time in which a requester is required to file an administrative appeal from 30 to 90 calendar days.
    - Requires that EPA's final determination on a FOIA request inform the requester of her right to seek assistance from the FOIA Public Liaison, and in the case of an adverse determination, of the existence and role of the Office of Government Information Services in providing dispute resolution services in FOIA-related matters.

"Clarification" of the Authority to Respond to Requests

In addition to revisions that implement FOIA amendments, EPA made changes to "clarify" and "improve" its FOIA process. A key change is to the language at 40 C.F.R. sect 2.103(b) addressing authority within the agency to respond to FOIA requests.

The preexisting EPA regulations provide that "[t]he head of an office, or that individual's designee, is authorized to grant or deny any request for a record…." The new rule revises this provision to specify that the following officials are authorized to make a final determination: the administrator, deputy administrators, assistant administrators, deputy assistant administrators, regional administrators, deputy regional administrators, general counsel, deputy general counsels, regional counsels, deputy regional counsels and inspector general or those

individuals' delegates.

The revised language also states that final determinations by these officials may be reached "on the basis of responsiveness" and that their authority extends to issuance of "no records" responses. The preexisting EPA FOIA regulation did not address the basis for the exercise of authority to make a final determination on a FOIA request.

Controversy Surrounding the Changes

The new rule has generated controversy despite EPA's statements that the changes are consistent with the FOIA amendments and past FOIA regulations. A coalition of 39 news media organizations penned a letter to EPA July 9 taking issue with the changes and urging the agency to suspend implementation to provide opportunity for public comment. The coalition's position is that FOIA does not permit officials to withhold a portion of a record on the ground it is not "responsive" to a request. The coalition also takes issue with the reference to a "no records" determination in the new rule, saying it requires clarification of the circumstances in which it will be used, namely whether a senior official may unilaterally inform a requester that no responsive records exist.

In response to criticism, EPA issued a statement that "the 2019 regulation does not grant any additional authorities to 'reject' FOIA requests by claiming 'no records.' A response that yields 'no records' is simply a request in which a search has been conducted and no responsive records are found, it is a frequent determination that has existed since the passage of the FOIA and has been available to any official authorized to issue FOIA determinations." EPA's statement did not address responsiveness as a basis for a final determination on a request.

In addition to controversy surrounding its substantive changes, EPA has been criticized for not opening the rule to public comment. The agency stated the rule is exempt from typical notice and comment procedures under two provisions of the Administrative Procedure Act: (1) the "procedural" exemption, where an agency issues interpretive rules, general statements of policy, or rules of agency organization, procedure and practice, and (2) the "good cause" exemption, on the basis that EPA lacks discretion to reach a different outcome in response to comment.

Other FOIA Developments

The revisions to EPA's FOIA procedures come amidst several other developments in FOIA law. In December 2018, the Interior Department proposed a new FOIA rule which, among other changes, would codify that "the bureau will not honor a request that requires an unreasonably burdensome search or requires the bureau to locate, review, redact, or arrange for inspection of a vast quantity of material." And on June 24, 2019, in *Food Marketing Institute v. Argus Leader Media*, the U.S. Supreme Court took a broad reading of the FOIA exemption for confidential records, holding that an agency may withhold from disclosure records submitted by a private entity when that entity had kept the records secret and the agency had promised to keep the records from disclosure. Citing his frustration with both the EPA and Interior regulatory changes as well as the Supreme Court ruling, Senator Chuck Grassley (R-IA) has stated he is drafting legislation to improve public access to federal records under FOIA.

There is also a widening circuit split regarding the "consultant corollary" theory, recognized by several federal circuit courts of appeals, which interprets FOIA Exemption 5 to protect from disclosure certain documents generated by third-party consultants. In *Rojas v. Federal Aviation Administration*, a split panel of the U.S. Court of Appeals for the Ninth Circuit recently joined the U.S. Court of Appeals for the Sixth Circuit in ruling the consultant corollary is an improper application of Exemption 5—records created by contractors are not "intra-

agency memorandums or letters" under that exemption, and to hold otherwise would contravene FOIA's policy of broad disclosure. The court acknowledged that "some privileged documents from third-party consultants will be subject to disclosure under FOIA" following this ruling. This is consequential considering the volume of work performed by government contractors, particularly in the environmental arena.

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