

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF MANAGEMENT AND BUDGET

5 CFR Part 1303

RIN 0348-AB42

Freedom of Information Act

AGENCY: Office of Management and Budget, Executive Office of the President.

ACTION: Proposed rule.

SUMMARY: The Office of Management and Budget (OMB) seeks public comment on a proposed rule that would revise OMB's regulations implementing 5 U.S.C. 552, the Freedom of Information Act (FOIA). These revisions are being proposed to simplify and streamline OMB's FOIA regulations, as well as to implement the Electronic Freedom of Information Act Amendments of 1996 (Pub. L. 104-231).
DATES: Comments must be received no later than December 8, 1997.

ADDRESSES: Comments on the proposed rule should be addressed to: Darrell A. Johnson, Deputy Assistant Director for Administration, Office of Management and Budget, Room 9026, New Executive Office Building, Washington, D.C. 20503. Comments up to three pages in length may be submitted via facsimile to (202) 395-3504. Electronic mail comments may be submitted via Internet to FOIAREG@A1.EOP.GOV. Please include the full body of electronic mail comments in the text and not as an attachment. Please include the name, title, organization, postal address, and E-mail address in the text of the message.

FOR FURTHER INFORMATION CONTACT: Darrell A. Johnson, Deputy Assistant Director for Administration, Office of Management and Budget, at (202) 395-5715.

SUPPLEMENTARY INFORMATION: OMB is seeking public comment on proposed revisions to OMB's regulations at Part 1303 implementing the Freedom of Information Act (FOIA). Currently, OMB's FOIA regulations consist of the

regulations as issued in 1982 (47 FR 33483; August 3, 1982), and as amended in 1987 (52 FR 4512; December 30, 1987). The proposed revisions are intended to: implement the Electronic Freedom of Information Act Amendments of 1996, P.L. 104-231 (E-FOIA); update OMB's regulations to reflect current practice; and streamline OMB's regulations to eliminate redundant or otherwise unnecessary materials. The following is a summary of the proposed changes.

Section 1303.2 ("Authority and functions"), which summarizes OMB's authority and functions, has been streamlined.

Section 1303.3 ("Organization") has been revised to reflect changes over time in OMB's organizational structure.

Section 1303.10 ("Methods of operation") has been revised to update information and to reflect the provisions of E-FOIA. Among the revisions to Section 1303.10 are provisions revising the initial response period from 10 days to 20 days (see Section 8(b) of E-FOIA, amending 5 U.S.C. 552(a)(6)(A)(i)); establishing an expedited-response process (see Section 8(a) of E-FOIA, adding 5 U.S.C. 552(a)(6)(E)); establishing a requirement that administrative appeals of OMB denials be made within 30 days of receipt of the denial (the current regulations do not set a deadline); and providing for OMB consultations with a requester to determine if a FOIA request may be modified in order to allow for a timely response, or to arrange an alternative time frame for a response (see Section 7(b) of E-FOIA, amending 5 U.S.C. 552(a)(6)(B)). Finally, Section 1303.10 explains that OMB materials may be obtained electronically from OMB's home page; these materials include documents described in 5 U.S.C. 552(a)(2).

Section 1303.20 ("Inspection, copying, and exceptions") has been streamlined by deleting subsections (b) and (c). The deletion of subsection (b) is consistent with the courts' decisions in *Ryan v. Department of Justice*, 617 F.2d 781, 786-89 (D.C. Cir. 1980), and *Meyer v. Bush*, 981 F.2d 1288, 1292 n.2, 1294 (D.C. Cir. 1993), and it also reflects OMB's practice (in response to FOIA requests, the files of the OMB units described in subsection (b) are searched for responsive documents, and such documents are reviewed for applicable

exemptions, in the same manner as the files of other OMB units). Subsection (c) has been deleted because its recitation of the exemptions in 5 U.S.C. 552(b) is unnecessary (i.e., OMB may directly rely upon the statutory exemptions).

Section 1303.30 ("Definitions") has been revised to reflect E-FOIA by more clearly defining the terms "search" and "duplication." See Section 5 of E-FOIA, amending 5 U.S.C. 552(a)(3).

Finally, Section 1303.60 ("Miscellaneous fee provisions") has been revised to conform to the aggregation provision in Section 1303.10(g), and to the new time limit under the FOIA for initial responses.

In implementing E-FOIA, OMB considered adopting a multi-track processing system that would distinguish simple and complex FOIA requests and place them on separate processing tracks. See Section 7(a) of E-FOIA, adding 5 U.S.C. 552(a)(6)(D). However, after considering this option, OMB decided to retain its current system. Unlike other agencies, OMB does not have a central office dedicated to searching for documents in response to FOIA requests; instead, OMB has a decentralized system, with the primary responsibility for responding to individual FOIA requests generally assigned to the program office with responsibility for the subject matter of the particular request. Accordingly, pending FOIA requests are generally processed concurrently, rather than on a consecutive, request-by-request basis. For this reason, the time needed to respond to complex requests generally does not delay OMB's ability to respond to simple requests. Thus, the adoption of multitask processing would not be likely to accelerate OMB's ability to respond to requests.

OMB requests comments on the proposed revisions to OMB's FOIA regulations.

Regulatory Flexibility Act, Unfunded Mandates Reform Act, and Executive Orders 12866 and 12875

For purposes of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the proposed rule will not, if promulgated, have a significant economic effect on a substantial number of small entities; the proposed rule addresses the procedures to be followed when responding to requests for information under the Freedom of Information Act. For purposes of the Unfunded Mandates

Reform Act of 1995 (Pub. L. 104-4), as well as Executive Orders No. 12866 and 12875, the proposed rule would not significantly or uniquely affect small governments, and would not result in increased expenditures by State, local, and tribal governments, or by the private sector, of \$100 million or more.

Franklin D. Raines,
Director.

For the reasons set forth in the preamble, OMB proposes to amend 5 CFR Part 1303 as follows:

PART 1303—[AMENDED]

1. The authority citation for part 1303 is revised to read as follows:

Authority: 5 U.S.C. 552.

2. Section 1303.2 is revised to read as follows:

§ 1303.2 Authority and functions.

The general functions of the Office of Management and Budget, as provided by statute and executive order, are to develop and execute the budget, oversee implementation of Administration policies and programs, advise and assist the President, and develop and implement management policies for the government.

3. Section 1303.3 is revised to read as follows:

§ 1303.3 Organization.

(a) The brief description of the central organization of the Office of Management and Budget follows:

(1) The Director's Office includes the Director, the Deputy Director, the Deputy Director for Management, and the Executive Associate Director.

(2) Staff Offices include General Counsel, Legislative Affairs, Communications, Administration, and Economic Policy.

(3) Offices that provide OMB-wide support include the Legislative Reference and Budget Review Divisions.

(4) *Resource Management Offices.* These offices develop and support the President's management and budget agenda in the areas of Natural Resources, Energy and Science, National Security and International Affairs, Health and Personnel, Human Resources, and General Government and Finance.

(5) Statutory offices include the Office of Federal Financial Management, Office of Federal Procurement Policy, and the Office of Information and Regulatory Affairs.

(b) The Office of Management and Budget is located in Washington, DC, and has no field offices. Staff are housed in either the Old Executive Office

Building, 17th Street and Pennsylvania Ave, NW, or the New Executive Office Building, 725 17th Street NW, Washington, D.C. 20503. Persons desiring to visit offices or employees of the Office of Management and Budget, in either building, must write or telephone ahead to make an appointment. Security in both buildings prevents visitors from entering the building without an appointment.

5. Section 1303.10 is revised to read as follows:

§ 1303.10 Access to information.

(a) The Office of Management and Budget makes available information pertaining to matters issued, adopted, or promulgated by OMB, that are within the scope of 5 U.S.C. 552(a)(2). A public reading area is located in the Executive Office of the President Library, Room G-102, New Executive Office Building, 725 17th Street NW, Washington, D.C.

20503, phone (202) 395-5715. Some of these materials are also available from the Executive Office of the President's Publications Office, Room 2200 New Executive Office Building, 725 17th Street NW, Washington, D.C. 20503, phone (202) 395-7332. OMB issuances are also available via fax-on-demand at (202) 395-9068, and are available electronically from the OMB homepage at <http://www.whitehouse.gov/WH/EOP/omb>. In addition, OMB maintains the Office of Information and Regulatory Affairs (OIRA) Docket Library, Room 10102, New Executive Office Building, 725 17th Street NW, Washington, D.C. 20503, phone (202) 395-6880. The Docket Library contains records related to information collections sponsored by the Federal government and reviewed by OIRA under the Paperwork Reduction Act of 1995. The Docket Library also maintains records related to proposed Federal agency regulatory actions reviewed by OIRA under Executive Order 12866 "Regulatory Planning and Review". Telephone logs and materials from meetings with the public attended by the OIRA Administrator are also available in the Docket Library.

(b) The Deputy Assistant Director for Administration is responsible for acting on all initial requests. Individuals wishing to file a request under the Freedom of Information Act (FOIA) should address their request in writing to the Deputy Assistant Director for Administration, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503, Phone 395-5715. Requests for information shall be as specific as possible.

(c) Upon receipt of any request for information or records, the Deputy

Assistant Director for Administration will determine within 20 days (excepting Saturdays, Sundays and legal public holidays) after the receipt of such request whether it is appropriate to grant the request and will immediately provide written notification to the person making the request. If the request is denied, the written notification to the person making the request shall include the names of the individuals who participated in the determination, the reasons for the denial, and a notice that an appeal may be lodged within the Office of Management and Budget. (Receipt of a request as used herein means the date the request is received in the office of the Deputy Assistant Director for Administration.)

(d) Expedited processing. (1) Requests and appeals will be taken out of order and given expedited treatment whenever it is determined that they involve:

(i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information;

(iii) The loss of substantial due process rights; or

(iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which effect public confidence.

(2) A request for expedited processing may be made at the time of the initial request for records or at any later time.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct to the best of that person's knowledge and belief, explaining in detail the basis for requesting expedited processing. For example, a requester within the category described in paragraph (d)(1)(ii) of this section, if not a full-time member of the news media, must establish that he or she is a person whose main professional activity or occupation is information dissemination, though it need not be his or her sole occupation. A requester within the category (d)(1)(ii) of this section also must establish a particular urgency to inform the public about the government activity involved in the request, beyond the public's right to know about government activity generally. The formality of certification may be waived as a matter of administrative discretion.

(4) Within ten days of its receipt of a request for expedited processing, OMB

will decide whether to grant it and will notify the requester of the decision. If a request for expedited treatment is granted, the request will be given priority and will be processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision will be acted on expeditiously.

(e) Appeals shall be set forth in writing within 30 days of receipt of a denial and addressed to the Deputy Assistant Director for Administration at the address specified in paragraph (b) of this section. The appeal shall include a statement explaining the basis for the appeal. Determinations of appeals will be set forth in writing and signed by the Deputy Director, or his designee, within 20 days (excepting Saturdays, Sundays, and legal public holidays). If, on appeal, the denial is in whole or in part upheld, the written determination will also contain a notification of the provisions for judicial review and the names of the persons who participated in the determination.

(f) In unusual circumstances, the time limits prescribed in paragraphs (c) and (e) of this section may be extended for not more than 10 days (excepting Saturdays, Sundays, or legal public holidays). Extensions may be granted by the Deputy Assistant Director for Administration. The extension period may be split between the initial request and the appeal but in no instance may the total period exceed 10 working days. Extensions will be by written notice to the persons making the request and will set forth the reasons for the extension and the date the determination is expected.

(g) With respect to a request for which a written notice under paragraph (f) of this section extends the time limits prescribed under paragraph (c) of this section, the agency shall notify the person making the request if the request cannot be processed within the time limit specified in paragraph (f) of this section and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of 5 U.S.C. 552 (a)(6)(C). When OMB reasonably believes that a requester, or a group of requestors acting in concert, has submitted requests that constitute a single request, involving clearly related matters, OMB may aggregate those

requests for purposes of this paragraph. One element to be considered in determining whether a belief would be reasonable is the time period over which the requests have occurred.

(h) As used herein, but only to the extent reasonably necessary to the proper processing of the particular request, the term *unusual circumstances* means:

(1) The need to search for and collect the requested records from establishments that are separated from the office processing the request;

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency which have a substantial subject matter interest therein.

6. Section 1303.20 is revised to read as follows:

§ 1303.20 Inspection and copying.

When a request for information has been approved pursuant to § 1303.10, the person making the request may make an appointment to inspect or copy the materials requested during regular business hours by writing or telephoning the Deputy Assistant Director for Administration at the address or telephone number listed in § 1303.10(b). Such materials may be copied and reasonable facilities will be made available for that purpose. Copies of individual pages of such materials will be made available at the price per page specified in § 1303.40(d); however, the right is reserved to limit to a reasonable quantity the copies of such materials which may be made available in this manner when copies also are offered for sale by the Superintendent of Documents.

7. Section 1303.30 (d) and (e) are revised to read as follows:

§ 1303.30 Definitions.

(d) The term search means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. OMB employees should ensure that searching for material is done in the most efficient and least

expensive manner so as to minimize costs for both the agency and the requester. For example, employees should not engage in line-by-line search when merely duplicating an entire document would prove the less expensive and quicker method of complying with a request. Search should be distinguished, moreover, from review of material in order to determine whether the material is exempt from disclosure (see paragraph (f) of this section).

(e) The term duplication means the making of a copy of a document, or of the information contained in it, necessary to respond to a FOIA request. Such copies can take the form of paper, microform, audio-visual materials, or electronic records (e.g., magnetic tape or disk), among others. The requesters specified preference of form or format of disclosure will be honored if the record is readily reproducible in that format.

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8. In § 1303.60, paragraph (c) and the concluding text of paragraph (d) are revised to read as follows:

§ 1303.60 Miscellaneous fee provisions.

* * * * *

(c) *Aggregating requests.* A requester may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When OMB reasonably believes that a requester, or a group of requestors acting in concert, has submitted requests that constitute a single request, involving clearly related matters, OMB may aggregate those requests and charge accordingly. One element to be considered in determining whether a belief would be reasonable is the time period over which the requests have occurred.

(d) Advance payments. * * *

(1) * * *

(2) * * *

When OMB acts under paragraph (d)(1) or (2) of this section, the administrative time limits prescribed in the FOIA, 5 U.S.C. 552(a)(6) (i.e., 20 working days from receipt of initial requests and 20 working days from receipt of appeals from initial denial, plus permissible extensions of these time limits) will begin only after OMB has received fee payments described above.

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