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OFFICE OF SPECIAL COUNSEL

5 CFR Part 1820

Revision of Regulations Governing Freedom of Information Act Requests and Appeals

AGENCY: U.S. Office of Special Counsel.

ACTION: Final rule.

SUMMARY: The rule updates the U.S. Office of Special Counsel's (OSC's) FOIA regulations to reflect substantive and procedural changes to the FOIA. In addition, in response to comments received on a different rulemaking, this final rule clarifies that our consultation procedures may include consultation with other offices prior to OSC responding to a FOIA request, incorporates existing records retention obligations, and updates the definition of representatives of the news media.

DATES: This final rule is effective on March 30, 2017.

FOR FURTHER INFORMATION CONTACT:

Amy Beckett, Senior Litigation Counsel, U.S. Office of Special Counsel, by telephone at (202) 254-3600, by facsimile at (202) 254-3711, or by email at abeckett@osc.gov.

SUPPLEMENTARY INFORMATION:

Background

The FOIA Improvement Act of 2016, Public Law 114-185, 130 Stat. 538 (the Act) mandated several changes to agency FOIA programs, and it required agencies to review and update relevant FOIA regulations. In addition, OSC is updating its regulations in response to comments received during a recent rulemaking. At that time, OSC made a few additional mechanical changes responsive to the comments, but stated it would consider the comments proposing broader changes pending OSC's regulatory review required by the Act.

OSC has now considered the remaining comments, and has adopted some of them including a suggestion

that § 1820.6 refer to the statutory 20-day appeal response window. In response to a comment that OSC include language regarding existing records retention obligations, OSC added provisions at §§ 1820.5(d) and 1820.6(d) that address the requirement to retain FOIA-related federal records. In addition, OSC updated the definition of "news media" in § 1820.7. In response to a comment regarding the consultation provision at § 1820.3, OSC clarified the circumstances under which it would consult with non-OSC offices prior to OSC issuing a FOIA response. When consulting on records responsive to an OSC-received FOIA request, OSC retains the responsibility for responding to the request.

Accordingly, OSC updates its FOIA regulations as follows:

FOIA Regulations. In accordance with the Act, OSC extends the time period for submitting appeals from 45 to 90 days; codifies OSC's existing practice of informing requesters of the availability of the Agency's Public Liaison and the dispute resolution services of the National Archives and Records Administration's (NARA) Office of Government Information Services (OGIS); and notifies requesters of FOIA's intent to offer dispute resolution services at every stage of the FOIA process. OSC clarifies its FOIA consultation provisions relating to the need to sometimes consult with other offices when preparing its response to a FOIA request. OSC also updates its definition of "representative of the news media" to conform to current statutory language. This updated definition also responds to ongoing changes in the gathering and delivery of news.

OSC adds language to 5 CFR 1820.5 to establish OSC's FOIA dispute resolution program, including requiring OSC to notify requesters of the availability of dispute resolution services and language emphasizing that dispute resolution is available to requesters at every phase of the FOIA request and appeals process. OSC also adds language regarding records retention for FOIA-related federal records.

The existing language of 5 CFR 1820.6 is changed to notify requesters of their new statutory 90-day time limit to appeal. OSC also adds language regarding records retention for FOIA-related federal records.

The revisions to 5 CFR 1820.7 update language requiring that a member of the news media be a "person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public," removing the "organized and operated" standard previously included. The change also includes a non-exhaustive list of entities that meet the updated definition of "member of the news media."

Procedural Determinations

Administrative Procedure Act (APA): OSC finds that good cause exists, pursuant to 5 U.S.C. 553(b), that notice and public comment on this rulemaking would be unnecessary and contrary to the public interest because most of these revisions to OSC's FOIA regulations are mandated by the FOIA Improvement Act of 2016 and OSC is not exercising any discretion in issuing these revisions; and also because the additional changes respond to previously considered comments on a recent rulemaking. This action is taken under the Special Counsel's authority at 5 U.S.C. 1212(e) to publish regulations in the **Federal Register**.

Executive Order 12866 (Regulatory Planning and Review): This rule is not a significant regulatory action as defined in section 3.f of Executive Order 12866.

Congressional Review Act (CRA): The rule is not subject to the reporting requirement of 5 U.S.C. 801 because it does not substantially affect the rights or obligations of non-agency parties and therefore is not a "rule" as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1998).

Regulatory Flexibility Act (RFA): Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

Unfunded Mandates Reform Act (UMRA): This revision does not impose any federal mandates on state, local, or tribal governments, or on the private sector within the meaning of the UMRA.

National Environmental Policy Act (NEPA): This rule will have no physical impact upon the environment and therefore will not require any further review under NEPA.

Paperwork Reduction Act (PRA): This rule does not impose any new recordkeeping, reporting, or other

information collection requirements on the public.

Executive Order 13132 (Federalism): This revision does not have new federalism implications under Executive Order 13132.

Executive Order 12988 (Civil Justice Reform): This rule meets applicable standards of 3(a) and 3(b)(2) of Executive Order 12988.

List of Subjects in 5 CFR Part 1820

Administrative practice and procedure, Dispute resolution, Freedom of information, Government employees, Tough regulations.

For the reasons stated in the preamble, OSC amends 5 CFR part 1820 as follows:

PART 1820—FREEDOM OF INFORMATION ACT REQUESTS; PRODUCTION OF RECORDS OR TESTIMONY

■ 1. The authority citation for 5 CFR part 1820 is revised to read as follows:

Authority: 5 U.S.C. 552 and 1212(e).

■ 2. Section 1820.3 is revised to read as follows:

§ 1820.3 Consultations and referrals.

When OSC receives a FOIA request for a record in the agency's possession, it may determine that another office is better able to decide whether or not the record is exempt from disclosure under the FOIA. If so, OSC will either:

(a) Respond to the request for the record after consulting with the other office that has a substantial interest in the record; or

(b) Refer the responsibility for responding to the request to another Federal agency deemed better able to determine whether to disclose it. Consultations and referrals will be handled according to the date that the FOIA request was initially received by the first agency or Federal government office.

■ 3. Section 1820.5 is amended by adding paragraphs (c) and (d) to read as follows:

§ 1820.5 Responses to requests.

* * * * *

(c) *Dispute resolution program.* OSC shall inform FOIA requesters at all stages of the FOIA process of the availability of dispute resolution services. In particular, OSC's FOIA acknowledgement letters shall notify requesters that the FOIA Liaison is available to assist them with requests. The acknowledgment letter and any agency response will include a notice that the FOIA Public Liaison may

provide dispute resolution services, and will also notify the requester of the dispute resolution services provided by the National Archives and Records Administration's (NARA) Office of Government Information Services (OGIS).

(d) *Maintenance of files.* OSC must preserve federal record correspondence and copies of requested records until disposition is authorized pursuant to Title 44 of the United States Code and the relevant approved records retention schedule.

■ 4. Section 1820.6 is revised to read as follows:

§ 1820.6 Appeals.

(a) *Appeals of adverse determinations.* A requester may appeal a determination denying a FOIA request in any respect to the Office of General Counsel, U.S. Office of Special Counsel, 1730 M Street NW., Suite 218, Washington, DC 20036-4505. The appeal must be in writing, and must be submitted either by:

(1) Regular mail sent to the address listed in this subsection, above; or

(2) By fax sent to the FOIA Officer at, (202) 254-3711, or the number provided on the FOIA page of OSC's Web site <https://osc.gov/Pages/FOIAResources.aspx>; or

(3) By email to foiaappeal@osc.gov, or other electronic means as described on the FOIA page of OSC's Web site, <https://osc.gov/Pages/FOIAResources.aspx>.

(b) *Submission and content.* The Office of General Counsel must receive the appeal within 90 days of the date of the letter denying the request. For the quickest possible handling, the appeal letter and envelope or any fax cover sheet or email subject line should be clearly marked "FOIA Appeal." The appeal letter must clearly identify the OSC determination (including the assigned FOIA request number, if known) being appealed. OSC will not ordinarily act on a FOIA appeal if the request becomes a matter of FOIA litigation.

(c) *Responses to appeals.* Ordinarily, OSC shall have 20 business days from receipt of the appeal to issue an appeal decision. 5 U.S.C. 552(a)(6)(A)(ii). OSC's decision on an appeal will be in writing. A decision affirming a denial in whole or in part shall inform the requester of the provisions for judicial review of that decision. If the denial is reversed or modified on appeal, in whole or in part, OSC will notify the requester in a written decision and OSC will reprocess the request in accordance with that appeal decision. OSC will notify the requester of the availability of dispute

resolution services provided by the FOIA Public Liaison and the dispute resolution services provided by the National Archives and Records Administration's (NARA) Office of Government Information Services (OGIS).

(d) *Maintenance of files.* OSC must preserve federal record correspondence and copies of requested records until disposition is authorized pursuant to Title 44 of the United States Code and the relevant approved records retention schedule.

■ 5. Section 1820.7(b)(6) is revised to read as follows:

§ 1820.7 Fees.

* * * * *

(b) * * *

(6) "Representative of the news media" or "news media requester" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. A non-exhaustive list of news media entities could include, in addition to television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances where they can qualify as disseminators of "news"), electronic outlets for print newspapers, magazines, and television and radio stations, and web-only outlets or other alternative media as methods of news delivery evolve. For "freelance" journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization, whether print or electronic. A publication contract would be the clearest proof, but OSC may also look to the past publication record of a requester in making this determination. To be in this category, a requester must not be seeking the requested records for a commercial use. A request for records supporting the news-dissemination function of the requester shall not be considered to be for a commercial use.

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Dated: March 21, 2017.

Bruce Gipe,
Chief Operating Officer.

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