

Freedom of Information Act: U.S. Environmental Protection Agency Finalizes Phase II Rule Revisions



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

09/15/2023

The United States Environmental Protection Agency (“EPA”) published a final rule in the September 14th Federal Register finalizing revisions to the federal agency’s regulations under the Freedom of Information Act (“FOIA”). See 88 Fed. Reg. 63020.

The basis of FOIA has been described as ensuring an informed citizenry, vital to the functioning of a democratic society needed to check against corruption and to hold the governors accountable to the governor. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

EPA characterizes the revisions as supporting its mission of updating the process by which the public may access information about its actions and activities.

The EPA FOIA regulations are found at 40 C.F.R. Part 2.

The FOIA was enacted in 1966 to provide the public the right to access records from any federal agency. Federal agencies are required to disclose any information requested under the FOIA unless it falls under one of nine exemptions which are generally described as protecting personal privacy, national security, and law enforcement. See Title V of the United States Code, Section 552.

The nine FOIA exemptions include:

1. Classified national defense and foreign relations information
2. Internal agency rules and practices
3. Information that is prohibited from disclosure by another federal law
4. Trade secrets and other confidential information
5. Inter-agency or intra-agency communications that are protected by legal privileges
6. Information involving matters of personal privacy (protected under the Privacy Act or containing sensitive personally identifiable information)
7. Information compiled for law enforcement purposes:
 1. To the extent the production of those records could reasonably be expected to interfere with enforcement proceedings
 2. Would deprive a person of a right to a fair trial or an impartial adjudication

3. Could reasonably be expected to constitute an unwarranted invasion of personal privacy
 4. Could reasonably be expected to disclose the identify of a confidential source
 5. Would disclose techniques and procedures for law enforcement, investigations, or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions
 6. Could reasonably be expected to endanger the life or physical safety of any individual
8. Information relating to the supervision of financial institutions
 9. Geological information on wells

EPA makes certain types of records available in its Record Center and on the internet through the National Online FOIA Library. An FOIA request is not typically required to obtain such records. Records that must be obtained pursuant to an FOIA request are submitted to EPA's National FOIA Office in Headquarters.

EPA records are:

- Those created or obtained by EPA
- Are under control of EPA
- Agency records that do not pertain to tangible objects (furniture, equipment, etc.)

The September 14th final rule is deemed "Phase II" because EPA previously finalized revisions that were described as a Phase I rule in 2019. The agency had stated its intent at that point to conduct a second rulemaking phase to make what it described as "discretionary and modernizing changes."

Revisions to the final rule include:

- Time for Response to Modification Request (adds a statement requiring a requester to modify request within 20 calendar days after an EPA notice that the request is not reasonably described)
- Readability and Useful Information (reorganizes but makes no substantive changes to 40 C.F.R. 2.100(a) to improve readability)
- Consistency with Government-Wide Policy (discusses the preservation of records, handling of appeals after FOIA litigation and the contents of adverse administrative appeals decisions)
- 2019 Phase I Regulations (removes the clause in 40 C.F.R. 2.103(b) that describes the phase "determinations required by 5 U.S.C. 552(a)(6)(A))
- General Processing Changes (changes the "ordinary" search cut-off date identified in Section 2.103(a) from the date the request was received to the date EPA begins its search for responsive records)
- Fee Rates Update (establishes new fee rates)
- Minimum Fee Threshold (increases the minimum fee threshold)
- Automatic Agreement to Pay Fees (removes the provision specifying that a requester automatically agrees to pay up to \$25 in fees when they submit an FOIA request)
- Assurance of Payment Threshold (raises the assurance of payment threshold to an amount calculated by formula which as of the date of the publication of the rule is \$250)
- Advanced Payment Threshold (increases the advanced payment threshold to an amount that would currently calculate to \$450 and proposes a formula for calculating the advanced payment threshold that will be self-escalating as EPA's costs increase in future years)
- Estimated or Actual Fee Assessment (language is added explaining that EPA's reassessment of actual or estimated fees may result in the agency's re-seeking assurance of payment or advanced payment)
- Failure to Pay Charged Fees (revises the provisions applicable to delinquent requesters)
- Environmental Justice Expedited Processing Criteria (allows requesters to seek expedited processing of the request if the records sought pertain to an environmental justice-related need and will be used to inform an affected community)

- Definition of Reasonably Described Requests (requesters must reasonably describe the records sought in sufficient detail to enable a professional employee who is familiar with the subject area of the request to locate the records with a reasonable amount of effort)
- Grammatical Edit (no hyphen is needed in the phrase “90-calendar days” and should be removed, which EPA did)

A copy of the Federal Register can be downloaded [here](#).