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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C.

**AGENDA DOCUMENT NO. 24-14-A**  
**AGENDA ITEM**  
**For meeting of Apr. 18, 2024**

April 11, 2024

**MEMORANDUM**

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*  
Acting General Counsel

Neven F. Stipanovic *NFS*  
Associate General Counsel

Amy Rothstein *NFS for ALR*  
Assistant General Counsel

Joanna Waldstreicher *JSW*  
Attorney

Sarah Herman Peck *SHP*  
Attorney

SUBJECT: REG 2024-02 (Implementation of the FOIA Improvement Act)

Attached is draft Interim Rule for REG 2024-02 (Implementation of the FOIA Improvement Act). One or more Commissioners have asked for this draft to be made public and placed on the agenda for the Commission's April 18, 2024, Open Meeting.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 4**

3 **[Notice 2024-XX]**

4 **FOIA Improvement Act**

5 **AGENCY:** Federal Election Commission.

6 **ACTION:** Interim final rule; request for comments.

7 **SUMMARY:** Congress enacted the FOIA Improvement Act of 2016, which amends the  
8 Freedom of Information Act, as relevant here, to require federal agencies to change how certain  
9 records and documents are made available for public inspection. The Commission is amending  
10 its regulations to implement this statutory mandate. The Commission is accepting comments on  
11 these revisions to its regulations, and any comments received may be addressed in a subsequent  
12 rulemaking document.

13 **DATES:** Effective [insert date at least 30 legislative days after rule is transmitted to Congress].  
14 Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF  
15 PUBLICATION IN THE FEDERAL REGISTER].

16 **ADDRESSES:** All comments should be addressed to Ms. Amy L. Rothstein, Assistant General  
17 Counsel, and must be submitted in either written or electronic form. Commenters are  
18 encouraged to submit comments electronically via the Commission's website at  
19 *http://sers.fec.gov/fosers*, reference REG 2024-02. Alternatively, comments may be submitted in  
20 paper form addressed to the Federal Election Commission, Attn.: Ms. Amy L. Rothstein,  
21 Assistant General Counsel, 1050 First Street NE, Washington, DC.

22 Each commenter must provide, at a minimum, the commenter's first name, last name,  
23 city, and state. All properly submitted comments, including attachments, will become part of the

1 public record, and the Commission will make comments available for public viewing on the  
2 Commission's website and in the Commission's Public Records Office. Accordingly,  
3 commenters should not provide in their comments any information that they do not wish to make  
4 public, such as a home street address, personal email address, date of birth, phone number, social  
5 security number, or driver's license number, or any information that is restricted from disclosure,  
6 such as trade secrets or commercial or financial information that is privileged or confidential.

7 **FOR FURTHER INFORMATION CONTACT:** Ms. Amy Rothstein, Assistant General  
8 Counsel, Ms. Joanna Waldstreicher or Ms. Sarah Herman Peck, Attorneys, (202) 694-1650 or  
9 (800) 424-9530.

10 **SUPPLEMENTARY INFORMATION:**

11 **A. Background**

12 The FOIA Improvement Act of 2016 (the “FOIA Improvement Act”) amends the  
13 Freedom of Information Act (“FOIA”), as relevant here, to require federal agencies to change  
14 how certain records and documents are made available for public inspection.<sup>1</sup> In particular, the  
15 FOIA Improvement Act directs federal agencies to make certain records available in electronic  
16 format for public inspection; prohibits, subject to exception, an agency from charging fees to a  
17 FOIA requester if the agency misses a deadline after receiving a FOIA request; requires agencies  
18 to notify FOIA requesters who have received adverse determinations about their right to seek  
19 dispute resolution services; prohibits agencies from withholding information requested under  
20 FOIA unless the agencies reasonably foresee that disclosure would harm an interest protected by  
21 a FOIA exemption or the disclosure is prohibited by law; requires agencies withholding  
22 information requested under FOIA to consider whether partial disclosure is possible; and

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<sup>1</sup> Pub. L. No. 114-185, 130 Stat. 538 (2016).

1 eliminates an exemption from disclosure under FOIA of certain agency records created at least  
2 25 years before the date of the FOIA request.<sup>2</sup> The FOIA Improvement Act also explicitly  
3 directs the head of each federal agency to promulgate regulations to implement these changes to  
4 its FOIA practices.<sup>3</sup>

5 To implement the FOIA Improvement Act’s mandates, the Commission is now amending  
6 11 CFR 4.4-4.5 and 4.7-4.9, setting forth the Commission’s obligations and procedures for  
7 disclosing documents under FOIA. Before final promulgation of any rules or regulations to  
8 carry out the provisions of the Federal Election Campaign Act, the Commission transmits the  
9 rules or regulations to the Speaker of the House of Representatives and the President of the  
10 Senate for a thirty-legislative-day review period.<sup>4</sup> The effective date of this final rule is [insert  
11 date at least 30 legislative days after rule is transmitted to Congress]. The Commission  
12 welcomes public comment on this interim final rule and may address any comments received in  
13 a later rulemaking document.

14 The Commission is promulgating these amendments without advance notice or an  
15 opportunity for comment because they fall under the “good cause” exemption of the  
16 Administrative Procedure Act.<sup>5</sup> The Commission finds that notice and comment are unnecessary  
17 here because the changes are technical amendments to conform with explicit statutory  
18 requirements. Amending these regulatory provisions does not involve any exercise of discretion  
19 by the Commission. Moreover, because Congress has already enacted the changes to FOIA  
20 through the FOIA Improvement Act, the new “administrative rule is a routine determination,

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<sup>2</sup> *Id.* § 2.

<sup>3</sup> *Id.* § 3.

<sup>4</sup> 52 U.S.C. 30111(d)(2).

<sup>5</sup> 5 U.S.C. 553(b)(B).

1 insignificant in nature and impact, and inconsequential to the industry and to the public.”<sup>6</sup> For  
2 these reasons, the Commission is not required to publish a notice of proposed rulemaking to  
3 promulgate these regulatory provisions.

4 For the same reasons, these amendments fall within the “good cause” exception to the  
5 delayed effective date provisions of the Administrative Procedure Act and the Congressional  
6 Review Act.<sup>7</sup> Moreover, because this amendment is exempt from the notice and comment  
7 procedure of the Administrative Procedure Act under 5 U.S.C. 553(b), the Commission is not  
8 required to conduct a regulatory flexibility analysis under 5 U.S.C. 603 or 604.<sup>8</sup> Nor is the  
9 Commission required to submit this amendment for congressional review under the Federal  
10 Election Campaign Act of 1971, as amended, the Presidential Election Campaign Fund Act, as  
11 amended, or the Presidential Primary Matching Payment Account Act, as amended.<sup>9</sup>

12 **B. Revisions to 11 CFR Part 4 – Public Records and the Freedom of Information Act**

13 Part 4 of the Commission regulations sets forth the Commission’s public records  
14 obligations under FOIA. Section 4.4 requires the Commission to make specific categories of  
15 materials available for public inspection, subject to exceptions outlined in 11 CFR 4.5.<sup>10</sup> Section  
16 4.7 specifies the framework for requesting access to Commission records, and the appeal process  
17 for denied requests is delineated in 11 CFR 4.8. Notice requirements for any associated fees is  
18 provided in 11 CFR 4.9. The Commission is amending each of these five sections within 11  
19 CFR part 4 pursuant to the FOIA Improvement Act.

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<sup>6</sup> See *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 94 (D.C. Cir. 2012) (internal citation omitted).

<sup>7</sup> 5 U.S.C. 553(d)(3), 808(2).

<sup>8</sup> See 5 U.S.C. 601(2), 604(a).

<sup>9</sup> See 52 U.S.C. 30111(d)(1), (4) (providing for congressional review when Commission “prescribe[s]” a “rule of law”); 26 U.S.C. 9009(c)(1), (4), 9039(c)(1), (4) (same).

<sup>10</sup> Exempt documents include records that are classified, records that relate to internal personnel rules, records that are exempted by statute, records that contain trade secrets or commercial or financial information that is privileged or confidential, certain inter-agency or intra-agency documents, personnel and medical files, and certain records compiled for law enforcement purposes.

1           **(i).     Revisions to 11 CFR 4.4 – Availability of Records**

2           The Commission is amending 11 CFR 4.4(a) and (c) and adding new subsection (h) to  
3 reflect new standards for the availability of certain records.

4           First, current 11 CFR 4.4(a) requires the Commission to make certain materials available  
5 for public inspection and copying. The Commission is amending subsection (a) to provide that  
6 the Commission will make those materials available for public inspection in an electronic format.

7           Second, current 11 CFR 4.4(a)(4) requires the Commission to make available for public  
8 inspection copies of all records that have been released to any person under subsection (a) and  
9 which the agency has determined have become or are likely to become the subject of subsequent  
10 requests. The Commission is amending subsection (a)(4) to provide that the Commission will  
11 make available for public inspection copies of all records that have been released to any person  
12 under subsection (a) three or more times or which the agency determines have become or are  
13 likely to become subject to subsequent requests.

14           Third, current 11 CFR 4.4(c) provides, in part, that the Commission must maintain and  
15 make available current indexes providing identifying information regarding any matter issued,  
16 adopted, or promulgated after April 15, 1975, as required by 5 U.S.C. 552(a)(2)(C) and (E). The  
17 Commission is amending subsection (c) to provide that these indexes will be made available in  
18 an electronic format.

19           Lastly, the Commission is adding new 11 CFR 4.4(h) to provide that the Commission  
20 will withhold releasing information under section 4.4 only if the Commission reasonably  
21 foresees that disclosure would harm an interest protected by an exemption listed in 11 CFR  
22 4.5(a) or disclosure is prohibited by law. New subsection (h) also provides that, when the  
23 Commission determines full disclosure of a requested record is not possible, the Commission

1 will consider whether partial disclosure is possible and will take reasonable steps necessary to  
2 segregate and release nonexempt information.

3 **(ii). Revisions to 11 CFR 4.5 – Categories of Exemptions**

4 Current 11 CFR 4.5(a)(5) provides that no FOIA request will be denied release unless the  
5 record contains, or its disclosure would reveal, inter-agency or intra-agency memoranda or letters  
6 that would not be available by law to a party in litigation with the Commission. The  
7 Commission is amending this provision to specify that the exemption applies only to documents  
8 not available to a party other than an agency in litigation with the Commission, and that the  
9 deliberative process privilege will not apply to records created 25 years or more before the  
10 request date, consistent with the FOIA Improvement Act.

11 **(iii). Revisions to 11 CFR 4.7 – Requests for Records**

12 The Commission is amending 11 CFR 4.7(c) and (h) and adding subsection (j) to include  
13 new requirements for notifying requesters about the status of a request.

14 First, current 11 CFR 4.7(c) requires the Commission to determine, within twenty  
15 working days after receiving a request or granting an appeal, whether to comply with the request,  
16 unless in unusual circumstances the time is extended or subject to § 4.9(f)(3), which governs  
17 advance payments. The Commission is amending 11 CFR 4.7(c) to provide that the Commission  
18 will immediately notify the requester of the determination, the reasons therefore, and the  
19 requester’s right to seek assistance from the Commission’s FOIA Public Liaison and to seek  
20 dispute resolution services from the National Archives and Records Administration (“NARA”),  
21 Office of Government Information Services.

22 Second, current 11 CFR 4.7(h) provides that any person denied access to records by the  
23 Commission must be notified immediately, stating the reasons for the denial. The notice must

1 also state that the person denied access to records may appeal the adverse determination to the  
2 Commission. The Commission is amending this subsection to provide that the person denied  
3 access will be notified of that person's right to appeal within 90 days from the date of the adverse  
4 determination. Such notice also must state that the person denied access to records may seek  
5 dispute resolution services from the Commission's FOIA Public Liaison or NARA's Office of  
6 Government Information Services.

7 Finally, the Commission is adding 11 CFR 4.7(j) to explain the role of, and provide  
8 contact information for, the FOIA Public Liaison.

9 **(iv). Revisions to 11 CFR 4.8 – Mediation Services and Appeal of Denial**

10 The Commission is amending 11 CFR 4.8 by adding subsection (h), which will notify  
11 requesters that they may seek non-compulsory, non-binding mediation services to help resolve  
12 FOIA disputes. The Commission is also amending the heading of 11 CFR 4.8 to reflect the  
13 availability of such mediation services.

14 **(v). Revisions to 11 CFR 4.9 – Fees**

15 Finally, the Commission is amending 11 CFR 4.9(a), which lists exceptions to fee  
16 charges. The Commission is adding subsection (a)(5) to address time limits for compliance.

17 New 11 CFR 4.9(a)(5)(i) provides that the Commission will not charge a fee to any  
18 requester if the Commission does not comply with the time limits in 11 CFR 4.7(c) or 4.8(f).

19 New 11 CFR 4.9(a)(5)(ii) provides that a failure to comply with the time limits is excused  
20 for another ten days if the Commission has determined that unusual circumstances (as defined in  
21 5 U.S.C. § 552(a)(6)(B)(i) and 11 CFR 4.7(c)) apply and has provided timely written notice to  
22 the requester under 11 CFR 4.7(c). New 11 CFR 4.9(a)(5)(ii) further provides that the



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1 Commission may not assess any search or duplication fees if it fails to comply with the extended  
2 time period.

3 New 11 CFR 4.9(a)(5)(iii) describes the circumstances under which the Commission may  
4 charge search or duplication fees after determining that unusual circumstances apply and more  
5 than 5,000 pages are necessary to respond to the request.

6 Finally, new 11 CFR 4.9(a)(5)(iv) provides that when a court has determined that  
7 exceptional circumstances exist, a failure to comply with the time limit shall be excused for the  
8 length of time provided by the court's order.

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1 **List of Subjects**

2

3 11 CFR Part 4

4 Freedom of Information

5

1 For the reasons set out in the preamble, the Federal Election Commission amends 11  
2 CFR chapter I, as follows:

3 **Part 4—Public records and the Freedom of Information Act**

4 1. Authority: 5 U.S.C. 552, as amended.

5 2. Amend § 4.4 by revising the introductory sentence of paragraph (a), revising paragraphs  
6 (a)(4) and (c), and adding paragraph (h) to read as follows:

7 **§ 4.4 Availability of records**

8 (a) In accordance with 5 U.S.C. 552(a)(2), the Commission shall make the following materials  
9 available for public inspection in an electronic format:

10 \* \* \* \* \*

11 (4) Copies of all records, regardless of form or format, which have been released to any person  
12 under this paragraph (a) and (i) which, because of the nature of their subject matter, the agency  
13 determines have become or are likely to become the subject of subsequent requests for  
14 substantially the same records, or (ii) which have been requested three or more times; and

15 \* \* \* \* \*

16 (c) The Commission shall maintain and make available for public inspection in an electronic  
17 format current indexes and supplements providing identifying information regarding any matter  
18 issued, adopted, or promulgated after April 15, 1975 as required by 5 U.S.C. 552(a)(2)(C) and  
19 (E). These indexes and supplements shall be published and made available on at least a quarterly  
20 basis for public distribution unless the Commission determines by Notice in the *Federal Register*  
21 that publication would be unnecessary, impracticable, or not feasible due to budgetary  
22 considerations. Nevertheless, copies of any index or supplement shall be made available upon  
23 request at a cost not to exceed the direct cost of duplication.

1 \* \* \* \* \*

2 (h) The Commission will withhold information under this section only if the Commission  
3 reasonably foresees that disclosure would harm an interest protected by an exemption described  
4 in § 4.5(a); or disclosure is prohibited by law. The Commission will consider whether partial  
5 disclosure of information is possible whenever it determines that full disclosure of a requested  
6 record is not possible, and the Commission will take reasonable steps necessary to segregate and  
7 release nonexempt information.

8 \* \* \* \* \*

9

10 3. Amend § 4.5 by revising paragraph (a)(5) to read as follows:

11 **§ 4.5 Categories of exemptions**

12 (a) \* \* \*

13 (5) Inter-agency or intra-agency memoranda or letters which would not be available by law  
14 to a party other than an agency in litigation with the Commission, provided that the deliberative  
15 process privilege shall not apply to records created 25 years or more before the date on which the  
16 records were requested.

17 \* \* \* \* \*

18

19 4. Amend § 4.7 by revising paragraphs (c) and (h) and adding paragraph (j) to read as  
20 follows:

21 **§ 4.7 Requests for records**

22 \* \* \* \* \*

1 (c) The Commission shall determine within twenty working days after receipt of a request, or  
2 twenty working days after an appeal is granted, whether to comply with such request, unless in  
3 unusual circumstances the time is extended or subject to § 4.9(f)(3), which governs advance  
4 payments. The Commission shall immediately notify the requester of such determination, the  
5 reasons therefor, and the right of the requester to seek assistance from the FOIA Public Liaison  
6 for the Commission and to seek dispute resolution services from the Office of Government  
7 Information Services. In the event the time is extended, the requester shall be notified of the  
8 reasons for the extension and the date on which a determination is expected to be made, but in no  
9 case shall the extended time exceed ten working days. An extension may be made if it is—

10 \* \* \* \* \*

11 (h) Any person denied access to records by the Commission shall be notified immediately  
12 giving reasons therefor, and notified of the right of such person to appeal such adverse  
13 determination to the Commission within 90 days from the date of the adverse determination and  
14 the right of such person to seek dispute resolution services from the FOIA Public Liaison for the  
15 Commission or the Office of Government Information Services.

16 \* \* \* \* \*

17 (j) FOIA Public Liaison. The FOIA Public Liaison is responsible for reducing delays, increasing  
18 transparency and understanding of the status of requests, and assisting in the resolution of  
19 disputes. The FOIA Public Liaison may be contacted at the address identified in the definition of  
20 “Commission” in § 1.2.

21  
22 5. Amend § 4.8 by revising the heading and adding paragraph (h) to read as follows:

23 **§ 4.8 Mediation services and appeal of denial**

24 \* \* \* \* \*

1 (h) Additional resource. The National Archives and Records Administration (NARA), Office of  
2 Government Information Services (OGIS) offers non-compulsory, non-binding mediation  
3 services to help resolve FOIA disputes as a non-exclusive alternative to litigation. A requester  
4 may contact OGIS at: Office of Government Information Services, National Archives and  
5 Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001; email:  
6 ogis@nara.gov; telephone 202-741-5770; fax: 202-741-5769; online:  
7 <https://www.archives.gov/ogis>.

8

9 6. Amend § 4.9 by adding paragraph (a)(5) to read as follows:

10 **§ 4.9 Fees**

11 (a) \* \* \*

12 (5) Time limit for compliance.

13 (i) The Commission will not charge a fee under this section to any requester if the  
14 Commission does not comply with the time limits in §§ 4.7(c) or 4.8(f).

15 (ii) If the Commission has determined that unusual circumstances (as defined in 5 U.S.C.  
16 552(a)(6)(B)(iii) and § 4.7(c)(1)-(3)) apply and the Commission provided timely written  
17 notification to the requester in accordance with § 4.7(c), a failure to comply with the time limit is  
18 excused for an additional 10 days. If the Commission fails to comply with the extended time  
19 limit, the Commission may not assess any search fees or, where applicable, duplication fees.

20 (iii) If the Commission has determined that unusual circumstances apply and more than  
21 5,000 pages are necessary to respond to the request, the Commission may charge search fees or,  
22 where applicable, duplication fees, if the Commission has provided timely written notification to  
23 the requester in accordance with § 4.7(c) and the Commission has discussed with the requester

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1 via written mail, electronic mail, or telephone (or made not less than three good-faith attempts to  
2 do so) how the requester could effectively limit the scope of the request in accordance with §  
3 4.7(d).

4 (iv) If a court has determined that exceptional circumstances exist, a failure to comply  
5 with the time limit shall be excused for the length of time provided by the court order.

6 \* \* \* \* \*

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9 Dated: \_\_\_\_\_  
10 On behalf of the Commission,

11 Sean J. Cooksey,  
12 *Chairman,*  
13 *Federal Election Commission*  
14

15