

FEDERAL ELECTION COMMISSION

11 CFR Part 4

Public Records and Freedom of Information Act

AGENCY: Federal Election Commission.

ACTION: Final rule.

SUMMARY: This notice contains the final Federal Election Commission regulations setting forth procedures to implement the Freedom of Information Act (5 USC § 552) and creates a new part, Part 4, to be added to 11 CFR, Chapter 1.

EFFECTIVE DATE: June 8, 1979.

FOR FURTHER INFORMATION CONTACT: Frederick S. Eiland, Public Information Officer, (202) 523-4065.

SUPPLEMENTARY INFORMATION: The proposed regulation was published on November 22, 1977, at 42 FR 59944. A comment period was specified and a single party commented. The Commission adopted one of the suggestions made by that commentator and revised proposed 11 CFR 4.5(a)(3) to reflect a two-prong test for determining whether information is specifically exempted from disclosure by statute.

In addition, the Commission made several other changes to the proposed regulations. With the exception of the change to 11 CFR 4.4(a)(4) which was revised to provide for the availability of transcripts made from tapes of Commission meetings, all changes were minor.

Only minor changes have been made from the proposed rule and comments were received from only one party. The Commission at present has no FOIA regulations in effect. There is therefore good cause to dispense with the 30 day waiting period before the regulations may become effective. Pursuant to 5 USC 553(d)(3), the regulations are made effective upon publication.

Dated: June 4, 1979.

Robert O. Tiernan,

Chairman, Federal Election Commission.

Chapter I of Title 11, Code of Federal Regulations, is amended by the addition of the following new part:

PART 4—PUBLIC RECORDS AND THE FREEDOM OF INFORMATION ACT

Sec.

- 4.1 Definitions.
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AUTHORITY: 5 U.S.C. 552

§ 4.1 Definitions.

As used in this part:

(a) "Commission" means the Federal Election Commission, established by the Federal Election Campaign Act of 1971, as amended.

(b) "Commissioner" means one of the six appointees confirmed by the Senate who is a voting member of the Commission.

(c) "Request" means to seek the release of records under 5 U.S.C. 552.

(d) "Requestor" is any person who submits a request to the Commission.

(e) "Act" means the Federal Election Campaign Act of 1971, as amended by the Federal Election Campaign Act Amendments of 1974, and 1976, and unless specifically excluded, includes Chapters 95 and 96 of the Internal Revenue Code of 1954 relating to public financing of Federal elections.

§ 4.2 Policy on disclosure of records.

(a) The Commission will make the fullest possible disclosure of records to the public, consistent with the rights of individuals to privacy, the rights of persons contracting with the Commission with respect to trade secret and commercial or financial information entitled to confidential treatment, and the need for the Commission to promote free internal policy deliberations and to pursue its official activities without undue disruption.

(b) All Commission records shall be available to the public unless they are specifically exempt under this part.

(c) To carry out this policy, the Commission shall designate a Freedom of Information Act Officer.

§ 4.3 Scope.

(a) The regulations in this part implement the provisions of the Freedom of Information Act, 5 U.S.C. 552, with respect to the availability of records for inspection and copying.

(b) The regulations in this part do not apply to release of the following records:

(1) Reports of receipts and expenditures, designations of campaign depositories, statements of organization candidate designations of campaign committees; and the indexes compiled from the filings therein.

(2) Requests for advisory opinions, written comments submitted thereto and responses issued by the Commission;

(3) With respect to enforcement matters under the provisions of 2 U.S.C. 437g, the results of any conciliation

attempt, including any conciliation agreement entered into by the Commission; and any determination by the Commission that no violation of the Act has occurred.

(4) Copies of studies published pursuant to the Commission's duty to serve as a national clearinghouse on election law administration.

(c) Release of the records identified in subsection (b)(1)-(4) above (11 CFR 4.3(b)(1)-(4)) are governed by the provisions of 2 U.S.C. 438(a)(5), 437f(c), 437g(a)(6)(C) and 438(b) and are available to the public from the Office of Public Records located on the first floor at 1325 K Street, Northwest, Washington, D.C. This office is open Monday through Friday from 9:00 a.m. to 5:00 p.m. except legal holidays.

§ 4.4 Availability of records.

(a) In accordance with 5 U.S.C. 552 (a)(2) and (a)(3) the Commission shall make the following materials available for public inspection and copying:

(1) Statements of policy and interpretation which have been adopted by the Commission;

(2) Administrative staff manuals and instructions to staff that affect a member of the public;

(3) Opinions of Commissioners rendered in enforcement cases and General Counsel reports and 2 U.S.C. 437g investigatory materials in enforcement files 60 days after the Commission has voted to close a case and to take no further action; provided that no civil action under 2 U.S.C. 437g (a)(9) has been filed to compel the Commission to take further action. In the event that such civil action is filed, if the court sustains the Commission's action in closing the case, the materials will be made available thereupon. If the Court orders the Commission to take further action, the materials will be made available when the case is again closed;

(4) Letter requests for guidance and responses thereto;

(5) The minutes of Commission meetings and transcripts made from tapes of Commission meetings;

(6) Material routinely prepared for public distribution, e.g. campaign guidelines, FEC Record, press releases, speeches, notices to candidates and committees.

(7) Proposals submitted in response to a request for proposals formulated pursuant to the Federal Procurement Regulations. 41 CFR 1-1.001 *et seq.*

(8) Contracts for services and supplies entered into by the Commission.

(9) Statements and certifications (with respect to closing meetings) as required

by the Government in the Sunshine Act, 5 U.S.C. 552b.

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

(c) The Freedom of Information Act and the provisions of this part apply only to existing records; they do not require the creation of new records.

(d) If documents or files contain both disclosable and nondisclosable information, the nondisclosable information will be deleted and the disclosable information released unless the disclosable portions cannot be reasonably segregated from the other portions in a manner which will allow meaningful information to be disclosed.

(e) All records created in the process of implementing provisions of 5 U.S.C. 552 will be maintained by the Commission in accordance with the authority granted by General Records Schedule 14, approved by the National Archives and Records Service of the General Services Administration.

§ 4.5 Categories of exemptions.

(a) 5 U.S.C. 552(b) establishes nine categories of matters which are exempt from the mandatory disclosure requirements of 5 U.S.C. 552(a). No requests under 5 U.S.C. 552 shall be denied release unless the record contains, or its disclosure would reveal, matters that are:

(1) Specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order;

(2) Related solely to the internal personnel rules and practices of the Commission;

(3) Specifically exempted from disclosure by statute, provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to

particular types of matters to be withheld;

(4) Trade secrets and commercial or financial information obtained from a person which are privileged or confidential. Such information includes confidential business information which concerns or relates to the trade secrets, processes, operations, style of works, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, or amount of source of income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, if the disclosure is likely to have the effect of either impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions, or causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained, unless the Commission is required by law to disclose such information. These procedures shall be used for submitting business information in confidence:

(i) A request for confidential treatment shall be addressed to the FOIA officer, Federal Election Commission, 1325 K Street, Northwest, Washington, D.C. 20463, and shall indicate clearly on the envelope that it is a request for confidential treatment.

(ii) With each submission of, or offer to submit, business information which a submitter desires to be treated as confidential under paragraph (a)(4) of this section, the submitter shall provide the following, which may be disclosed to the public: (A) A written description of the nature of the subject information, and a justification for the request for its confidential treatment, and (B) a certification in writing under oath that substantially identical information is not available to the public.

(iii) Approval or denial of requests shall be made only by the FOIA officer or his or her designees. A denial shall be in writing, shall specify the reason therefore, and shall advise the submitter of the right to appeal to the Commission.

(iv) For good cause shown, the Commission may grant an appeal from a denial by the FOIA Officer or his or her designee if the appeal is filed within fifteen (15) days after receipt of the denial. An appeal shall be addressed to the FOIA Officer, Federal Election Commission, 1325 K Street, Northwest, Washington, D.C. 20463 and shall clearly indicate that it is a confidential submission appeal. An appeal will be decided within twenty (20) days after its receipt (excluding Saturdays, Sundays and legal holidays) unless an extension,

stated in writing with the reasons therefore, has been provided the person making the appeal.

(v) Any business information submitted in confidence and determined to be entitled to confidential treatment shall be maintained in confidence by the Commission and not disclosed except as required by law. In the event that any business information submitted to the Commission is not entitled to confidential treatment, the submitter will be permitted to withdraw the tender unless it is the subject of a request under the Freedom of Information Act or of judicial discovery proceedings.

(vi) Since enforcement actions under 2 U.S.C. 437g are confidential by statute, the procedures outlined in § 4.5(a)(4) (i) thru (v) are not applicable.

(5) Inter-agency or intra-agency memoranda or letters which would not be available by law to a party in litigation with the Commission.

(6) Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(7) Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (i) interfere with enforcement proceedings, (ii) deprive a person of a right to a fair trial, (iii) constitute an unwarranted invasion of personal privacy, (iv) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (v) disclose investigative techniques and procedures, or (vi) endanger the life or physical safety of law enforcement personnel.

(b) Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt.

(c) If a requested record is one of another government agency or deals with subject matter to which a government agency other than the Commission has exclusive or primary responsibility, the request for such a record shall be promptly referred by the Commission to that agency for disposition or guidance as to disposition.

(d) Nothing in this part authorizes withholding of information or limiting the availability of records to the public, except as specifically provided in this

part; nor is this part authority to withhold information from Congress.

§ 4.6 Discretionary release of exempt records.

The Commission may, in its discretion, release requested records despite the applicability of the exemptions in § 4.5(a), if it determines that it is in the public interest and that the rights of third parties would not be prejudiced.

§ 4.7 Requests for records.

(a) A request to inspect or copy Commission public records as described in § 4.3(b) may be made in person or by mail. The Public Records Office is open Monday through Friday between the hours of 9:00 a.m. and 5:00 p.m. and is located on the first floor, 1325 K Street, Northwest, Washington, D.C. 20463.

(b) Oral or written requests for copies of records not available in the Public Records Office shall be addressed to FOIA Officer, Federal Election Commission, 1325 K Street, Northwest, Washington, D.C. 20463. The request shall reasonably describe the records sought with sufficient specificity with respect to names, dates and subject matter to permit the records to be located. A requestor will be promptly advised if the records cannot be located on the basis of the description given and that further identifying information must be provided before the request can be satisfied.

(c) Records or copies thereof will normally be made available either immediately upon receipt of a request or within ten working days thereafter, or twenty working days in the case of an appeal, unless in unusual circumstances the time is extended. In the latter event, the requestor shall be notified of the reasons for the extension and the date on which a determination is expected to be made, but in no case shall the extended time exceed ten working days. An extension may be made if it is (1) necessary to locate records or transfer them from physically separate facilities; or (2) necessary to search for, collect, and appropriately examine a large quantity of separate and distinct records which are the subject of a single request; or (3) necessary for consultation with another agency which has a substantial interest in the determination of the request, or with two or more components of the Commission which have a substantial subject matter interest therein.

(d) Any person denied access to records by the Commission shall be notified immediately giving reasons therefore, and notified of the right of

such person to appeal such adverse determination to the Commission.

(e) The date of receipt of a request under this part shall be the date on which the FOIA Officer actually receives the request.

§ 4.8 Appeal of denial.

(a) Any person who has been notified pursuant to § 4.6(d) of this part that his/her request for inspection of a record or for a copy has been denied, or who has received no response within ten working days (or within such extended period as is permitted under § 4.7(c) of this part) after the request has been received by the Commission, may appeal the adverse determination or the failure to respond by requesting the Commission to direct that the record be made available.

(b) The appeal request shall be in writing, shall clearly and prominently state on the envelope or other cover and at the top of the first page "FOIA Appeal", and shall identify the record in the form in which it was originally requested.

(c) The appeal request should be delivered or addressed to the FOIA Officer, Federal Election Commission, 1325 K Street, Northwest, Washington, D.C. 20463.

(d) The requestor may state facts and cite legal or other authorities as he/she deems appropriate in support of the appeal request.

(e) For good cause shown, the Commission may disclose a record which is subject to one of the exemptions listed in § 4.5 of this part.

(f) The Commission will make a determination with respect to any appeal within twenty days (excluding Saturdays, Sundays and legal holidays) after receipt of the appeal (or within such extended period as is permitted under § 4.7(c) of this part). If on appeal, the denial of the request for a record or a copy is in whole or in part upheld, the Commission shall advise the requestor of the denial and shall notify him/her of the provisions for judicial review of that determination as set forth in 5 U.S.C. 552(a)(4).

(g) Because of the risk of misunderstanding inherent in oral communications, the Commission will not entertain any appeal from an alleged denial or failure to comply with an oral request. Any person who has orally requested a copy of a record that he/she believes to have been improperly denied should resubmit the request in writing as set forth in § 4.7.

§ 4.9 Fees.

(a) Fees will be charged for copies of records which are furnished a requestor under this part and for time spent in locating and reproducing them in accordance with the fee schedule below:

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| Record search time—1st ¼ hour free; Each additional ¼ hour..... | \$2.50 |
| Reproduction of documents, per page..... | .10 |
| Transcript of tape-recorded matter, per page..... | 3.00 |

(b) In the event fees for pending requests under this part from the same requestor exceed \$25.00, such records will not be searched for or made available, nor copies furnished, unless the requestor first pays or make acceptable arrangements to pay the total amount due, or if the fee is not precisely ascertainable, the approximate amount due upon the completion of the Commission's search and/or copying. In the event an advance payment hereunder shall differ from the actual fees due, an appropriate adjustment will be made at the time the copies are delivered or made available or a denial of same is notified.

(c) The Commission may reduce or waive payments of fees hereunder if such reduction or waiver would be in the public interest.

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