

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 15

[Docket No. FR-5069-P-01]

RIN 2501-AD22

Revisions to the Public Access to HUD Records Under the Freedom of Information Act (FOIA) Regulations

AGENCY: Office of the Secretary, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would clarify and explain the procedures to be followed by requesters seeking a waiver or a reduction of fees under the Freedom of Information Act (FOIA). This proposed rule describes the information that must be included in a FOIA request and the demonstrations that must be made in order for a waiver or reduction in fees to be granted. This proposed rule would also revise the FOIA fee schedule, clarify the time at which HUD will begin processing a FOIA request, and modify HUD's policy on the use of outside contractors to fulfill FOIA requests. HUD is undertaking this effort in order to make the regulations governing fee waivers more informative and helpful in accordance with the President's recently issued Executive Order 13392, "Improving Agency Disclosure of Information."

DATES: *Comment Due Date:* December 4, 2006.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Office of General Counsel, Rules Docket Clerk, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410-0001. Communications should refer to the above docket number and title and should contain the information specified in the "Request for Comments" section.

Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at www.regulations.gov. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make comments immediately available to the public. Comments submitted electronically through the www.regulations.gov Web site can be viewed by other commenters and interested members of the public.

Commenters should follow the instructions provided on that site to submit comments electronically.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable. In all cases, communications must refer to the docket number and title.

Public Inspection of Public Comments. All comments and communications submitted to HUD will be available, without charge, for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at (202) 708-3055 (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the toll-free Federal Information Relay Service at 1-(800) 877-8339. Copies of all comments submitted are available for inspection and downloading at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Holly Salamido, Assistant General Counsel for Litigation, Freedom of Information Act (FOIA) Division, Office of Litigation, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10248, Washington, DC 20410-5000; telephone (202) 708-3866 (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the toll-free Federal Information Relay Service at 1-(800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

On December 14, 2005, President Bush issued Executive Order 13392, entitled "Improving Agency Disclosure of Information," which acknowledged the importance of participation by an informed citizenry in the effective functioning of our constitutional democracy. Executive Order 13392 was published in the **Federal Register** on December 19, 2005 (70 FR 75373). FOIA provides the means by which the public can obtain information regarding Federal agencies. Under FOIA, the public can request records from any agency, which the agency must provide, subject to certain exemptions and statutory exclusions.

In issuing Executive Order 13392, the President emphasized that agencies are providing a service to FOIA requesters and shall respond accordingly. The President also advised agencies to process requests under FOIA in an efficient and appropriate manner and to

achieve tangible and measureable improvements in FOIA processing. According to the Executive Order, if agencies' FOIA programs are not meeting these goals, the programs should be reformed in order to better reflect the policy goals and objectives described in the Executive Order.

HUD's regulations at 24 CFR part 15, entitled "Public Access to HUD Records under the Freedom of Information Act and Testimony and Production of Information by HUD Employees," describe the policies and procedures governing public access to HUD records under FOIA. Those regulations describe how the public is to make a FOIA request, what must be included in the request, how the request will be processed, any applicable fees that will be charged, and the process for appealing a denial of a request or a fee determination.

II. This Proposed Rule

The revisions contained in this proposed rule respond to Executive Order 13392, which has served as an impetus for each agency to review its FOIA regulations to determine whether its regulations are as helpful as they can be, especially since these regulations reach out to the public generally and are not specific to participants in particular government programs.

A. Revision to Fee Waiver Provisions

In its review of 24 CFR part 15, HUD determined that a good starting point for possible revisions to its FOIA regulations pertains to the regulatory provisions governing fee waiver and reduction of fees. HUD determined that these regulations could provide more helpful information and explanation about what a requester must include in its request for a fee waiver or fee reduction and the elements that HUD will evaluate in determining whether a waiver or reduction of fees should be granted. HUD recognizes that members of the public are not only interested in seeking information from HUD, but also are interested in the cost of obtaining that information.

This proposed rule would revise the regulations at 24 CFR part 15 to clarify the public interest provision governing waivers and reductions of fees. Section 15.110(h), entitled "Waiver or reduction of fees in the public interest," would be revised to provide more detailed and illustrative information on the type of demonstrations that a requester must make in order to qualify for either a waiver or reduction of fees. The revisions would also clarify what is meant by seeking information that is in the public interest. HUD will make a

determination as to whether the disclosure of the information sought would be in the public interest and, if the necessary showings are made, HUD may waive or reduce the fee.

Currently, § 15.110(h) merely reiterates the statutory criteria contained in FOIA. The proposed revisions would not replace the statutory criteria as the basis of HUD's regulations, but instead would provide supplemental guidance as to the elements that a requester must establish, and the criteria HUD will consider in determining whether such demonstrations have been made. FOIA requires Federal departments and agencies to furnish documents at no charge or at a reduced fee provided that disclosure of the information contained therein is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. As proposed, HUD's regulations would address and explain this statutory mandate.

B. Other Revisions

In its review of the regulations governing public access to records under FOIA, HUD has also taken the opportunity to revise other regulatory provisions of FOIA to better reflect the policy goals expressed in Executive Order 13392. HUD proposes to amend other subparagraphs of § 15.110, which addresses fees, in general. In § 15.110(c), the hourly rates to be charged for search and review of requested documents by professional and clerical employees would be revised. Rather than listing a specific hourly rate, the regulations would be amended so that the actual salary rate of the employee involved, plus 16 percent of the salary rate, to cover employee benefits, would be assessed. This change would make the regulations more in line with actual costs. By inserting the proposed language, subsequent revisions to the regulation would not be needed to reflect future increases in salary costs.

Section 15.110(i) would be amended to clarify that if the estimated fee is more than \$250.00 or if the requester has a history of failing to pay FOIA fees in a timely manner, HUD will not begin processing a FOIA request until payment of estimated fees and past due charges have been forwarded to HUD. This revision would make the processing of FOIA requests more efficient by avoiding the expenditure of time and resources on requests where the requester is not willing to pay the requisite cost.

Section 15.110(k) would be revised to notify requesters that HUD may contract

with the private sector to fulfill FOIA requests, but would do so only if it would be the most efficient, least costly method, and will not cost more than if HUD had performed the services itself. HUD is conscientious in its effort to make its processing of FOIA requests more results-oriented and efficient.

III. Findings and Certifications

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The regulatory amendments that would be made by this proposed rule are procedural and explanatory in nature. The FOIA statute establishes criteria by which waivers of fees or reduction of fees may be obtained for a FOIA request. Furthermore, the fees charged under this rule are limited by FOIA to direct costs of searching for, reviewing, and duplicating the records processed for requesters and are not economically significant.

Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities. Notwithstanding HUD's determination that this rule will not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

Paperwork Reduction Act

The Department has reviewed the proposed rule with reference to the Paperwork Reduction Act and has concluded that it does not involve a "collection of information" within the requirements of the Act.

The rule would not require any person to fill out a form or otherwise provide specific information (other than self-identification and appropriate certifications) to the Department in order to make a FOIA request or a request for a waiver or reduction in fees. Pursuant to regulations of the Office of Management and Budget (OMB) implementing the Paperwork Reduction Act, affidavits, oaths, affirmations, certifications, receipts, changes of address, consents, or acknowledgments are not "information collections" under the law (5 CFR 1320.3(h)(1)).

Consistent with the FOIA, the proposed rule would require those seeking fee waivers to address specific requirements set forth by the law. Each requester would need to address a different factual situation that is tailored to the issue in the specific request. Pursuant to OMB regulations implementing the Paperwork Reduction Act, facts or opinions requested from a single person are not "information collections" under the law (5 CFR 1320.3(h)(6)).

Environmental Impact

This proposed rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this proposed rule is categorically excluded from the requirements of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has Federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This proposed rule does not have Federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This proposed rule does not impose any Federal mandates on any state, local, or tribal governments, or on the private sector, within the meaning of UMRA.

List of Subjects in 24 CFR Part 15

Classified information, Courts, Freedom of information, Government employees, Reporting and recordkeeping requirements.

Accordingly, for the reasons discussed in the preamble, HUD

proposes to amend 24 CFR part 15 to read as follows:

PART 15—PUBLIC ACCESS TO HUD RECORDS UNDER THE FREEDOM OF INFORMATION ACT AND TESTIMONY AND PRODUCTION OF INFORMATION BY HUD EMPLOYEES

1. The authority citation for part 15 continues to read as follows:

Authority: 42 U.S.C. 3535(d).

2. Revise § 15.103(d)(4) to read as follows:

§ 15.103 How can I get other records from HUD?

* * * * *

(d) * * *

(4) *State your agreement to pay the fee.* You may specify a dollar amount above which you want HUD to consult with you before you will agree to pay the fee. If you are seeking a waiver or reduction of fees, you must include such a request at the same time as your request for disclosure, and you must describe how the disclosure of the requested information is in the public interest and not primarily in the commercial interest of the requester (see section § 15.110(h));

* * * * *

3. In § 15.110(c), revise the FOIA Fee Schedule, chart, as follows:

a. Revise subparagraphs (1) through (4) so that the Rate column for each reads, “Actual salary rate of employee involved, plus 16 percent of salary rate;” and

b. Revise the Rate of subparagraph (7) to read, “\$0.18 per page.”

4. In § 15.110, revise paragraphs (h) and (i), and remove the first three sentences of (k) and add two new sentences in their place to read as follows:

§ 15.110 Fees.

* * * * *

(h) *Waiver or reduction of fees in the public interest.* If HUD determines that disclosure of the information you seek is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Federal government, and that you are not seeking the information primarily for your own commercial interests, HUD may waive or reduce the fee.

(1) In order to qualify for a waiver or a reduction of fees, a requester must make the following demonstrations in the FOIA request:

(i) Disclosure of the requested information is in the public interest

because it is likely to contribute significantly to public understanding of the operations or activities of the Federal government.

(A) *The subject of the request pertains to the operations or activities of the Federal government.* Requesters must be seeking documents and records that contain information regarding identifiable operations or activities of the Federal government. The connection between the content of the records and Federal governmental operations or activities must be direct and clear.

(B) *The informative value of the information to be disclosed is consequential.* The disclosable portions of the requested records must be meaningfully informative about Federal governmental operations or activities in order to be “likely to contribute” to an increased public understanding of those operations or activities. The disclosure of information that is already in the public domain, in either a duplicative or substantially identical form, would not be as likely to contribute to the public’s understanding of Federal governmental operations or activities.

(C) *The disclosure is likely to contribute to an understanding of the subject by the public.* The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester, in order to provide a great benefit to the public at large. A requester’s expertise in the subject area and ability and intention to effectively convey the information will be considered.

(D) *The contribution to public understanding is significant.* The public’s understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a substantial degree. HUD will not make value judgments about whether the information to be disclosed is worthy or important enough to be made public, but rather whether it would contribute substantially to public understanding of the operations or activities of the government.

(ii) Disclosure of the information is not primarily in the commercial interest of the requester.

(A) *The existence and magnitude of a commercial interest.* The requester must describe and explain any commercial interest that would be furthered by the requested disclosure, whether personally benefiting the requester or any person on whose behalf the

requester may be acting. See the definition of a “commercial use requester” in paragraph (b)(1) of this section for further explanation.

(B) *Primary interest in disclosure.* A fee waiver or reduction in fees is justified where the requester has demonstrated that the public interest in disclosure is greater in magnitude than that of any identified commercial interest in disclosure. However, disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(2) Requests for waivers must address the elements listed in paragraph (1) of this section, insofar as they apply to each request. HUD will exercise its discretion in considering the cost-effectiveness of its investment of administrative resources in deciding whether to grant waivers or reductions of fees, in consultation with appropriate offices as needed. Requests for the waiver or reduction of fees must be submitted with the request.

(3) When only some of the requested records satisfy the requirements for a waiver of fees, a waiver will be granted for only those records.

(4) When a fee waiver request is denied, HUD will do no further work on the request until it receives an assurance of payment, or an appeal of the fee waiver adverse determination is filed and HUD has made a final appeal determination pursuant to § 15.112.

(i) *When do I pay the fee?* HUD will bill you when it responds to your request. You must pay within 31 calendar days. If the estimated fee is more than \$250.00 or you have a history of failing to pay FOIA fees to HUD in a timely manner, HUD will ask you to remit the estimated amount and any past due charges before processing and sending you the records.

* * * * *

(k) *Contract services.* HUD will contract with private sector sources to locate, reproduce, and disseminate records in response to FOIA requests when that is the most efficient and least costly method. HUD will ensure that the ultimate cost to the requester is no greater than it would be if the agency itself had performed these tasks. * * *

Dated: September 11, 2006.

Roy A. Bernardi,

Deputy Secretary.

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