

RULEMAKING ISSUE NOTATION VOTE

February 20, 2004

SECY-04-0026

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations

SUBJECT: PROPOSED RULE TO AMEND 10 CFR 9, SUBPART A, FREEDOM OF INFORMATION ACT REGULATIONS AND SUBPART B, PRIVACY ACT REGULATIONS

PURPOSE:

The purpose of this paper is to obtain the Commission's approval to issue a proposed rule amending 10 CFR Part 9, Subpart A, Freedom of Information Act (FOIA) Regulations and Subpart B, Privacy Act (PA) Regulations.

BACKGROUND:

The FOIA grants individuals the right to seek access to agency records and the right to appeal an initial agency denial of access to the requested records. The PA allows an individual to request records filed under his or her name, or personal identifier, and to appeal a denial of access to those records. In January 2001, the Commission announced a reorganization that directed the Chief Information Officer (CIO) to report to the Executive Director for Operations (EDO). To conform with this reporting relationship, the proposed rule would transfer the appellate authority previously delegated to the Secretary of the Commission to serve as the appellate official for denial of requests for fee waivers and requests for expedited processing to the EDO or a Deputy EDO. Also, because of the abolishment of the Assistant Secretary position, the Executive Assistant to the Secretary of the Commission has been designated as the initial denying official for records located in the Office of the Commissioners, the Office of the Secretary, and for records of Advisory Committees.

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Executive Order 12600 (predisclosure notification procedures for confidential commercial information) was issued on June 25, 1987, and requires agencies to implement by regulation procedures for pre-disclosure notification to submitters of confidential business and financial information. The proposed rule would establish these procedures which reflect NRC current practice, as defined in Management Directive 3.1, Freedom of Information Act. Also, several additional changes have been made, either to clarify the regulations or to bring them up-to-date with current practice.

DISCUSSION:

The authority previously delegated to the Secretary of the Commission to serve as the appellate official for denial of requests for fee waivers and requests for expedited processing has now been delegated to the EDO as a result of the January 2001 reorganization that directed the CIO to report to the EDO. 10 CFR 9.29 and 9.43 would be changed to reflect that an appeal of a denial of a request for a waiver or reduction of fees, or a denial of a request for expedited processing under the FOIA would be appealed to the EDO rather than to the Secretary of the Commission. Also, §§9.25(g) and 9.29 would be renumbered and reorganized so that each type of appeal or appellate official responsibility is described in separate paragraphs. Sections 9.23, 9.29, 9.53, 9.65, and 9.66 would be amended to state that requests and appeals are to be sent to the FOIA/PA Officer rather than directly to the appellate official, and are not deemed received until they are actually received by and recorded as received by the FOIA/PA Officer. The purpose of this provision is to ensure that appeals directed to the EDO, Secretary of the Commission, and Inspector General are uniformly tracked. Also, §9.67 would be revised to clarify where to send a "Statement of Disagreement" of disputed information in PA Systems of Records. Sections 9.65, 9.66, and 9.67 would be revised to state that calendar days are used to calculate the time within which an appeal of denial of access to a record in a PA System of Records must be made and within which a Statement of Disagreement must be submitted.

Section 9.21(c)(5) and (6) would be changed to address FOIA provisions at 5 U.S.C. 552(a)(2) that require agencies to make indexes publicly available for records that have been made available for public inspection and copying under that provision.

Sections 9.25(g) and 9.29 would be changed to reflect that the Executive Assistant to the Secretary of the Commission would make the initial determination to deny agency records, in whole or in part, under §9.17(a), instead of the Assistant Secretary of the Commission. Also, §9.25 would be revised to clarify that the independent determination by the FOIA/PA Officer would apply to records other than those records for which the initial disclosure determination is made by the Executive Assistant to the Secretary of the Commission, the General Counsel, or the Assistant Inspector General for Investigations.

Several additional administrative changes would be made to conform to or clarify current practice. Section 9.23(a)(1)(ii) would clarify that to obtain copies of records expeditiously, a person may open an account with the NRC's Public Document Room (PDR) reproduction contractor, and payment for reproduction services would be made directly to that contractor. Section 9.27(a) would be revised to indicate that records made publicly available would be made available through the Agencywide Documents Access and Management System, located in the NRC's Electronic Reading Room that can be accessed via the NRC Web site. Section 9.35(d)

would be revised to state that if a copyrighted publication is responsive to a FOIA request, the requester will be informed of the citation to the copyrighted publication and advised to contact the PDR staff to arrange to view the publication. This change would emphasize the responsibility of the requester to make arrangements with the PDR staff to view a publication.

Section 9.28, a new section, would establish procedures for pre-disclosure notification to submitters of confidential business and financial information. This would implement the requirement of Executive Order 12600 which directs agencies to establish these procedures by regulation. Section 9.28 would be included in the list of sections containing information collection requirements that appears in Section 9.8(b).

Section 9.40(f) would be revised to add a provision to the effect that failure to pay applicable fees billed by another agency for processing a previous FOIA request would constitute a basis for not processing a new request received from the same requester. This would conform NRC regulations to past NRC and government-wide practice.

Section 9.54 would change the word "photocopy" to "copy" to ensure that copies made by any type of technology would be acceptable for identity verification. Section 9.61 would be revised to eliminate the reference to a specific Executive Order number and to state that the exempted information is information classified pursuant to criteria established by an Executive Order. This is consistent with the statutory language that does not refer to a specific Executive Order number, and would eliminate the need to change the regulations as successive Administrations reissue the Executive Order establishing criteria for classifying information. The reference to §9.95 would be deleted because the proposed changes to that section would delete references to specific exemptions.

Section 9.62 would be revised to establish a uniform approach for dealing with requests for PA records under the control of another Government agency by indicating that the requester would be provided the name of the controlling agency, if known. Previously, there were special procedures for records in the possession of the Public Health Service that were applicable when that organization supported the NRC Headquarters Health Center.

Section 9.85 would remove the fee waiver provision for PA records since it is not needed. The agency's practice is to provide a free copy of the information under the PA to the individual about whom the information pertains. It also would note that fees may be charged where the information is disclosed from PA Systems of Records under the FOIA. This would apply where the information is exempt under the PA but the information is disclosed under the FOIA. This normally occurs because an entire system of records containing criminal law enforcement records is exempt from being accessed under the PA exemption (j)(2). Thus, a request for records from such a system will be processed under the FOIA and the FOIA fee standards apply.

Section 9.95 would be revised to indicate that specific exemptions applicable to each PA System of Record are found in the PA notice published in the Federal Register and that a current version is available at the NRC Web site, <http://www.nrc.gov>. This avoids the need to revise NRC regulations each time a change is made to an exemption section of a PA notice for a PA

System of Record, and ensures that those who need this information will be able to obtain the most current information, with greater ease, from the NRC Web site.

COORDINATION:

The Office of the General Counsel has no legal objection to this paper.

The Office of the Chief Financial Officer has reviewed this Commission paper for resource implications and has no objections.

RECOMMENDATIONS:

That the Commission:

1. Approve for publication in the Federal Register, the proposed amendments to 10 CFR Part 9 (Attachment).
2. Note:
 - a. That the proposed amendment will be published in the Federal Register, allowing 75 days for public comment.
 - b. That the Chief Counsel for Advocacy of the Small Business Administration will be informed of the certification and the reasons for it, as required by the Regulatory Flexibility Act, 5 U.S.C. 605(b).
 - c. That an Environmental Assessment and Regulatory Analysis will not be prepared for this rulemaking.
 - d. That appropriate Congressional committees will be informed of this action.
 - e. That an Office of Management and Budget information collection clearance package is required.

/RA Carl J. Paperiello Acting for/

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Executive Director
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Attachment:
Federal Register Notice

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Attachment:
Federal Register Notice

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