

7050-01-P-01-P

LEGAL SERVICES CORPORATION

45 CFR Part 1602

Procedures for Disclosure of Information under the Freedom of Information Act

AGENCY: Legal Services Corporation

ACTION: Notice of Proposed Rulemaking.

SUMMARY: This NPRM proposes several revisions to the LSC regulations implementing the Freedom of Information Act. The proposed revisions would add provisions detailing the submitter's rights process, provide LSC with express authority to defer action on pending and additional requests and appeals when a requester has an outstanding fee balance, and clarify the applicable fee waiver standards. LSC also proposes to revise the applicable fee structure to better reflect LSC's costs in complying with FOIA. Finally, the NPRM contains proposed technical changes to reflect current LSC nomenclature.

DATES: Comments on this NPRM are due on [insert date 60 days from the date of publication].

ADDRESSES: Written comments may be submitted by mail, fax or email to Mattie C. Condray at the addresses listed below.

FOR FURTHER INFORMATION CONTACT: Mattie C. Condray, Senior Assistant General Counsel, Office of Legal Affairs, Legal Services Corporation, 750 First Street, N.E., Washington,

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SUPPLEMENTARY INFORMATION: LSC is subject to the Freedom of Information Act (FOIA) by the terms of the Legal Services Corporation Act. 42 U.S.C. 2996d(g).¹ LSC has implemented FOIA by adopting regulations which contain the rules and procedures the Corporation follows in making agency records available to the public under FOIA. As part of an overall review of LSC's regulations, LSC determined that a variety of amendments to LSC's FOIA regulation are in order and Part 1602 was assigned a high priority for rulemaking. In light of the above, at the August 24, 2002, meeting of the Board of Directors, the Board identified Part 1602 as an appropriate subject for rulemaking and LSC subsequently announced that it was initiating a Notice and Comment rulemaking to consider revisions to its FOIA regulations.

Submitter's Rights Process

Pursuant to current LSC practice, if a request is received for the grant application records of a current or prospective recipient, LSC provides that applicant with an opportunity to request that some or all of the records requested be withheld from disclosure prior to LSC sending its response to the requester. This practice, which is consistent with current FOIA law, is not described or discussed in the regulations. The submitter's rights process affords important rights to grant applicants and also impacts requesters who have to wait until the submitter's rights process has been completed to obtain releasable records subject to this process. LSC believes that it is important, therefore, for this process to be explicitly set forth in Part 1602. Accordingly, LSC proposes to add a

¹ Absent this authority, LSC would not otherwise be subject to FOIA since LSC is not an agency, department or instrumentality of the Federal government. 42 U.S.C. 2996d(e)(1).

new section 1602.14, Submitter's rights process, which would formally incorporate the Corporation's current practice into the regulations.

At the outset, LSC notes that its submitter's rights process is based on the submitter's rights process outlined in Federal Executive Order No. 12,600 (June 23, 1987). E.O. 12,600 required Federal agencies to "establish procedures to notify submitters of records containing *confidential information* [information arguably subject to FOIA Exemption 4] . . . when those records are requested under the Freedom of Information Act" (Emphasis added) Although LSC is not a Federal agency, and, therefore, not subject to E.O. 12,600, LSC chose to develop a policy consistent with the Order. LSC believes that grant application records are the only records likely to contain "confidential information," the release of which could cause competitive harm. Thus, the current submitter's rights process is only invoked in relation to requests for grant application information, but not other records submitted by recipients. LSC is, at this time, proposing to keep the process limited to requests for grant application materials, but specifically invites comment on whether there are other records submitted by recipients which would likely be subject to withholding under Exemption 4.

Under the proposed new section, when the Corporation receives a FOIA request seeking the release of a submitter's grant application(s), or portions thereof, the Corporation would provide prompt written notice of the request to the submitter in order to afford the submitter with an opportunity to object to the disclosure of the requested records (or any portion thereof). If a submitter who has received notice of a request for the submitter's records objects to the disclosure of the records (or any portion thereof), the submitter would have to submit a written detailed statement identifying the information for which disclosure is objected to and specifying the grounds for

withholding the information under the confidential information exemption of FOIA or this Part. The submitter's statement would have to be provided to LSC within seven business days of the date of the notice from the Corporation and if the submitter failed to respond to the notice from LSC within that time, LSC would deem the submitter to have no objection to the disclosure of the information.

Upon receipt of written objection to disclosure by a submitter, LSC would be required to consider the submitter's objections and specific grounds for withholding in deciding whether to release the disputed information. Whenever LSC decided to disclose information over the objection of the submitter, LSC would be required to give the submitter written notice that the Corporation was rejecting the submitter's withholding request (including an explanation of why the request was being rejected) and informing the submitter that the submitter shall have 5 business days from the date of the notice of proposed release to appeal that decision to the LSC President, whose decision would be final.

Under proposed paragraph (d), the submitter's rights process would not apply if (1) LSC determines, upon initial review, that the information requested is exempt from disclosure; (2) the information has been previously published or officially made available to the public; or (3) disclosure of the information is required by statute (other than FOIA) or LSC regulations.

In addition, LSC proposes to include provisions requiring that: (1) whenever a requester files a lawsuit seeking to compel disclosure of a submitter's information, LSC would have to promptly notify the submitter; (2) whenever LSC provides a submitter with notice and opportunity to object to disclosure under this section, LSC would also notify the requester; and (3) whenever a submitter files a lawsuit seeking to prevent the disclosure of the submitter's information, LSC would notify the requester.

LSC also proposes to add a definition of the term “submitter” as that term would be used in this section. The definition proposed to be added at section 1602.2(k) would define “submitter” as any person or entity from whom the Corporation receives a grant application.

Authority to Defer Action Pending Receipt of Payment of Fees

Many, if not most, agency FOIA regulations contain a provision permitting the agency to suspend continuing work on any pending requests and appeals from requesters who are 30 or more days in arrears on FOIA fees which they have been charged. Our regulations provide LSC with the authority to require anticipated fees for new requests be paid in advance for requesters with outstanding overdue bills, but do not expressly contain the authority to cease processing other existing requests, including appeals. Having this express authority would be helpful to the Corporation to avoid wasting resources on “nuisance” requesters who chronically have several requests and/or appeals pending before the Corporation at the same time, while being in arrears on properly assessed fees from prior requests to the Corporation. Accordingly, LSC proposes to add a new paragraph to section 1602.13, Fees, to provide for this authority. Specifically, the proposed new language would provide express authority to the Corporation to cease processing existing requests, including action on appeals, from a requester who is more than 30 days late in paying a properly assessed FOIA fee. This new language would appear as a new paragraph (j) and the current paragraphs (j), (k) and (l) would be redesignated as paragraphs (k), (l), and (m), respectively.

Fee Waiver Criteria

Requesters of records under FOIA are generally expected to pay reasonable fees related to the processing of FOIA requests. However, the statute also provides for waivers or reductions of fees when certain enumerated criteria are met. Section 1602.13(f) of the current regulation restates

the basic fee waiver criteria as set forth in the statute. By way of contrast, the Department of Justice (DOJ) FOIA regulations on fee waiver criteria are more detailed, providing more guidance, based on long standing case law in this area, on the meaning of each of the factors to be considered in assessing fee waiver requests. LSC believes it would be helpful to both LSC and requesters for the LSC FOIA regulations to provide additional guidance in this area. By having a better understanding of the criteria, requesters can better prepare fee waiver requests and there will be less opportunity for disagreements and confusion as to when a fee waiver or reduction is appropriate. LSC is, accordingly, proposing to add language to each of the subparagraphs setting forth the factors upon which fee waiver determinations are made that provides a greater explanation of that factor.

Specifically, 1602.13(f)(1) of the current regulation lists the factors that the Corporation assesses in order to determine whether disclosure of information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Corporation or Federal government. The first factor currently reads:

- (i) The subject of the request: Whether the subject of the requested records concerns “the operations or activities of the Corporation or Federal government.”

LSC proposes to add a sentence to this subparagraph explaining that the subject of the requested records must concern identifiable operations or activities of the Corporation or the Federal government, with a connection that is direct and clear, not remote or attenuated.

The second factor currently reads:

- (ii) The informative value of the information to be disclosed: Whether the disclosure is “likely to contribute” to an understanding of Corporation or Federal government operations or activities.

LSC proposes to add language noting that the requested records must be meaningfully informative about government operations or activities in order to be likely to contribute to an increased public understanding of those operations or activities and that the disclosure of information that is already in the public domain, in either a duplicative or a substantially identical form, would not be likely to contribute to such understanding where nothing new would be added to the public's understanding.

The third factor currently reads:

(iii) The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested records will contribute to "public understanding."

LSC proposes to provide additional guidance on the meaning of this factor by adding language explaining that: the disclosure must contribute to a reasonably broad audience of persons interested in the subject, as opposed to the personal interest of the requester; a requester's expertise in the subject area and ability and intention to effectively convey information to the public shall be considered; and that it shall be presumed that a representative of the news media will satisfy this consideration.

The fourth factor currently reads:

(iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of Corporation or Federal government operations or activities.

LSC proposes to include additional guidance in this factor that 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 significant extent.

Section 1602.13(f)(2) sets forth the factors used by LSC to determine whether disclosure of the information is not primarily in the commercial interest of the requester. The first factor currently reads:

- (i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure.

LSC proposes to add a sentence to this subparagraph explaining that LSC shall consider any commercial interest of the requester (with reference to the definition of “commercial use” in this Part) or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure.

The second factor reads:

- (ii) The primary interest in disclosure: Whether the magnitude of the identified commercial interest is sufficiently large, in comparison with the public interest in disclosure, that disclosure is “primarily” in the commercial interest of the requester.

LSC proposes to add language specifying that a fee waiver or reduction is justified where the public interest standard is greater in magnitude than that of any identified commercial interest in disclosure and that LSC ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. That is, if the public interest standard has been satisfied, the fact that a news media requester has a commercial interest (i.e., in selling newspapers, etc.) will not ordinarily serve to prevent that requester from getting a fee waiver or reduction. LSC further proposes to add language providing that disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed primarily to serve a public interest.

In each of these cases, the language proposed to be added is consistent with the current regulations and LSC practice, FOIA case law and government-wide FOIA practice. As noted above, LSC believes the additions will aid in public understanding of the meaning and application of the fee waiver criteria.

Miscellaneous Amendments

There are several instances throughout the regulation where the regulation makes reference to the “Office of the General Counsel.” The Office of the General Counsel was renamed the Office of Legal Affairs in 1999. LSC, therefore, proposes to substitute the name “Office of Legal Affairs” for “Office of the General Counsel” each time it appears in sections 1602.6 and 1602.8 of the regulations.

Section 1602.5, Public reading room, sets forth, among other things, the address of LSC’s public reading room. The address listed, 750 First Street, N.E., Washington, DC, 20002, is currently correct. However, LSC will be moving in June 2003 to new permanent headquarters. LSC proposes to add language to this section providing the address of the LSC public reading room in LSC’s new home: 3333 K St., N.W., Washington, DC 20007.

In accordance with FOIA, LSC charges fees for processing FOIA requests and providing copies of requested documents. LSC’s schedule of applicable fees is set forth in section 1602.13(e). The current schedule of fees was adopted in 1998 and no longer accurately reflects LSC’s costs in responding to FOIA requests. LSC, therefore, proposes to increase fees for search and review time and for copying.

LSC’s fees for search and review time are based on LSC’s pay schedule, which is divided into broad “pay bands.” In the four years since the regulation was last amended, LSC’s pay bands

have increased to keep up with inflation. The current midpoint of each band is now:

Band 1: \$16.15

Band 2: \$26.66

Band 3: \$39.15

Band 4: \$51.41

Band 5: \$54.99

LSC proposes to amend the search and review rates to reflect these current 2002 pay rates. LSC notes that the current regulation provides for one blended rate for Bands 4 and 5. LSC is proposing to separate these rates, providing separate search and review time rates for Bands 4 and 5. These changes will permit LSC to recover fees that are more in line with its actual costs relating to search and review activities.

Under the current regulation, LSC charges \$0.10 per page for standard paper photocopying. LSC's actual costs for photocopying are now closer to \$0.15 per page. LSC proposes to increase copying costs to \$0.13 per page so as to better reflect LSC's costs, while still providing a small discount to requesters. In addition, LSC proposes to substitute the term "Express mail" for "special delivery" where it appears in section 1602.13(e)(7) to reflect current terminology.

For reasons set forth above, LSC proposes to amend 45 CFR Part 1602 as follows:

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FREEDOM OF INFORMATION ACT**

1. The authority citation continues to read as follows:

42 U.S.C. 2996d(g); 5 U.S.C. 552

2. Section 1602.2, Definitions, would be amended by adding a new paragraph (k) to read as follows:

* * * * *

(k) Submitter means any person or entity from whom the Corporation receives grant application records.

3. Paragraph (a) of section 1602.5, Public reading room, would be amended by adding a new second sentence, such that the paragraph would read:

(a) The Corporation will maintain a public reading room at its office at 750 First Street, N.E., Washington, D.C., 20002. After June 1, 2003, the Corporation's public reading room will be located at its office at 3333 K Street, N.W., Washington, DC, 20007. This room will be supervised and will be open to the public during the regular business hours of the Corporation for inspecting and copying records described in paragraph (b) of this section.

4. Section 1602.6, Procedures for use of public reading room, would be amended by replacing the words "Office of the General Counsel" in the second sentence with the words "Office of Legal Affairs."

5. Paragraph (b) of section 1602.8, Requests for records, would be amended by replacing the words “Office of the General Counsel” each of the three times that phrase appears in the paragraph with the words “Office of Legal Affairs.”

6. Paragraph (e) of section 1602.13, Fees, would be amended to read as follows:

* * * * *

(e) The schedule for charges for services regarding the production or disclosure of the Corporation’s records is as follows:

(1) Manual search for and review of records will be charged as follows:

(i) Band 1: \$16.15

(ii) Band 2: \$26.66

(iii) Band 3: \$39.15

(iv) Band 4: \$51.41

(v) Band 5: \$54.59

(vi) Charges for search and review time less than a full hour will be billed by quarter-hour segments;

(2) Computer time: actual charges as incurred;

(3) Duplication by paper copy: 13 cents per page;

(4) Duplication by other methods: actual charges as incurred;

(5) Certification of true copies: \$1.00 each;

(6) Packing and mailing records: no charge for regular mail;

(7) Express mail: actual charges as incurred.

7. Paragraph (f) of section 1602.13, Fees, would be amended to read as follows:

* * * * *

(f) Fee waivers. A requester may seek a waiver or reduction of fees below the fees established under paragraph (e) of this section. A fee waiver or reduction request will be granted where LSC has determined that the requester has demonstrated that disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations of the Corporation or Federal government and is not primarily in the commercial interest of the requester.

(1) In order to determine whether disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Corporation or Federal government, the Corporation shall consider the following four factors:

(i) The subject of the request: Whether the subject of the requested records concerns “the operations or activities of the Corporation or Federal government.” The subject of the requested records must concern identifiable operations or activities of the Corporation or Federal government, with a connection that is direct and clear, not remote or attenuated.

(ii) The informative value of the information to be disclosed: Whether the disclosure is “likely to contribute” to an understanding of Corporation or Federal government operations or activities. The requested records must be meaningfully informative about government 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 a substantially identical form, would not be likely to contribute to such understanding where nothing new would be added to the public's understanding.

(iii) The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested records will contribute to "public understanding." The disclosure must contribute to a reasonably broad audience of persons interested in the subject, as opposed to the personal interest of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media will satisfy this consideration.

(iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of Corporation or Federal government operations or activities. 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 significant extent.

(2) In order to determine whether disclosure of the information is not primarily in the commercial interest of the requester, the Corporation will consider the following two factors:

(i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure. LSC shall consider any commercial interest of the requester (with reference to the definition of "commercial use" in this Part) or of any person on whose behalf the

requester may be acting, that would be furthered by the requested disclosure.

(ii) The primary interest in disclosure: Whether the magnitude of the identified commercial interest is sufficiently large, in comparison with the public interest in disclosure, that disclosure is “primarily” in the commercial interest of the requester.

A fee waiver or reduction is justified where the public interest is greater in magnitude than that of any identified commercial interest in disclosure. LSC ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed primarily to serve a public interest.

(3) Where LSC has determined that a fee waiver or reduction request is justified for only some of the records to be released, LSC shall grant the fee waiver or reduction for those records.

(4) Requests for fee waivers and reductions shall be made in writing and must address the factors listed in this paragraph as they apply to the request.

8. Section 1602.13, Fees, would be further amended by redesignating current paragraph (j) as paragraph (k); redesignating current paragraph (k) as paragraph (l); redesignating current paragraph (l) as paragraph (m) and adding a new paragraph (j) to read as follows:

* * * * *

(j) When a requester has previously failed to pay a properly charged FOIA fee within 30 days of the

date of billing, the Corporation may require the requester to pay the full amount due, plus any applicable interest, and to make an advance payment of the full amount of any anticipated fee before the Corporation begins to process a new request or continues to process a pending request (including appeals) from that requester.

9. A new section 1602.14, Submitter's rights process, would be added to read as follows:

(a) When the Corporation receives a FOIA request seeking the release of a submitter's grant application(s), or portions thereof, the Corporation shall provide prompt written notice of the request to the submitter in order to afford the submitter with an opportunity to object to the disclosure of the requested records (or any portion thereof). The notice shall reasonably describe the records requested and inform the submitter of the process required by paragraph (b) of this section.

(b) If a submitter who has received notice of a request for the submitter's records desires to object to the disclosure of the records (or any portion thereof), the submitter must identify the information for which disclosure is objected and provide LSC with a written detailed statement to that effect. The statement must be submitted to the FOIA Officer in the Office of Legal Affairs and must specify the grounds for withholding the information under FOIA or this Part. In particular, the submitter must demonstrate why the information is commercial or financial information that is privileged or confidential. The submitter's statement must be provided to LSC within seven business days of the date of the notice from the Corporation. If the submitter fails to respond to the notice from LSC within that time, LSC will deem the submitter to have no objection to the disclosure of the information.

(c) Upon receipt of written objection to disclosure by a submitter, LSC shall consider the

submitter's objections and specific grounds for withholding in deciding whether to release the disputed information. Whenever LSC decides to disclose information over the objection of the submitter, LSC shall give the submitter written notice which shall include:

(1) A description of the information to be released and a notice that LSC intends to release the information;

(2); A statement of the reason(s) why the submitter's request for withholding is being rejected; and

(3) Notice that the submitter shall have 5 business days from the date of the notice of proposed release to appeal that decision to the LSC President, whose decision shall be final.

(d) The requirements of this section shall not apply if:

(1) LSC determines upon initial review of the requested records they should not be disclosed;

(2) The information has been previously published or officially made available to the public;
or

(3) Disclosure of the information is required by statute (other than FOIA) or LSC regulations.

(e) Whenever a requester files a lawsuit seeking to compel disclosure of a submitter's information, LSC shall promptly notify the submitter.

(f) Whenever LSC provides a submitter with notice and opportunity to oppose disclosure under this section, LSC shall notify the requester that the submitter's rights process under this section has been triggered. Whenever a submitter files a lawsuit seeking to prevent the disclosure of the submitter's information, LSC shall notify the requester.

Victor M. Fortuno

General Counsel and Vice President for Legal Affairs

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