



OFFICE OF LEGAL AFFAIRS

Legal Services Corporation
America's Partner For Equal Justice

MEMORANDUM

TO: Operations and Regulations Committee

FROM: Victor M. Fortuno
Vice President & General Counsel

DATE: October 17, 2008

SUBJECT: Staff Report on DRAFT Final Rule – 45 CFR Part 1602 – OPEN Government Act Implementation

At the last meeting, the Board of Directors approved the publication for comment a Notice of Proposed Rulemaking (NPRM) proposing necessary changes to LSC's Freedom of Information Act (FOIA) regulation at 45 CFR Part 1602 to implement various provisions of the OPEN Government Act, as well as to propose a few technical changes not required by the OPEN Government Act. The NPRM was published on August 14, 2008. The comment period closed on September 15, 2008. LSC received no comments on the NPRM. Accordingly, Management recommends the adoption and publication of the changes as proposed. Copies of the DRAFT Final Rule and a "Redline" showing the changes are attached.

Summary of the DRAFT Final Rule

§1602.2(g) – Records

Under LSC's regulations, "records" are various materials "made or received by the Corporation in connection with the transaction of the Corporation's business and preserved by the Corporation." Section 9 of the OPEN Government Act expands the statutory definition of "record" to include any information that is maintained for an agency by an entity under Government contract, for the purposes of records management. The NPRM proposed to amend §1602.2(g) to include conform the regulation with the expanded statutory definition to specifically reference information maintained by LSC under contract for the purposes of records management. Management recommends the adoption of the revision to §1606.2(g), as proposed.

§1602.2(h) – Representatives of News Media

FOIA provides that "representatives of the news media" may not be charged fees for search and review time associated with responding to their FOIA requests. The term "representative of the news media" is not defined in FOIA, but LSC's FOIA regulation at Part 1602 currently contains a definition of "representative of the news media" based on a definition of that term appearing in guidance published by the Office of Management and Budget. The

OPEN Government Act of 2007 provides a new definition of “representatives of the news media” for the purposes of the fee structure. The NPRM proposed to amend the existing definition of “representative of the news media” to incorporate the new statutory definition. Management recommends the adoption of the revision to the definition of “representative of the news media,” as proposed.

§1602.5 – Public reading room

When the Corporation last amended Part 1602 in 2003, the Corporation was in the process of moving its offices from 750 First St. NE, Washington, DC to its current location. Section 1602.5, which sets forth the address of LSC’s public reading room and is also the address referenced in the instructions for the submission of FOIA requests in §1602.8(b), was amended at that time to include both addresses. The reference to the First St. NE address is now obsolete. Accordingly, the NPRM proposed to delete the reference to that obsolete address. Management recommends the adoption of the revision deleting the obsolete address as proposed.

§1602.8 – Requests for Records

Under FOIA, agencies are required to make determinations on whether to comply with FOIA requests within twenty (20) business days of receipt of a request. LSC has incorporated this requirement into its regulations at 45 CFR §1602.8(i). The OPEN Government Act provides additional instruction to clarify when the time limit begins to run. The NPRM proposed to incorporate this clarification into the regulations.

The NPRM also proposed another change to this section beyond what is required by the OPEN Government Act. Unlike some agencies subject to FOIA, LSC has had only one component designated to receive requests, the Office of Legal Affairs. The Office of Inspector General (OIG) is not a separate component designated to receive FOIA requests under LSC’s regulations, although the General Counsel or designee forwards requests for records maintained by the OIG for processing and response. The NPRM proposed to amend 45 CFR Part 1602.8(i) to designate the Office of Inspector General as a component authorized to receive FOIA requests for its records. The NPRM also proposed another technical change to §1602.8(b) to update the email address requesters are required to use to submit FOIA requests. Management recommends the adoption of the revisions to the §1602.8, as proposed.

§1602.9 – Exemptions for Withholding Records

Under FOIA, entire documents or portions thereof may be withheld from disclosure if one or more specified exemptions apply. If a particular document contains information that can be withheld from disclosure which may reasonably be segregated from the material which must be released, the agency must (with limited exception) release the segregable portion of the record and indicate the amount of information which has been deleted. Section 12 of the OPEN Government Act imposes a further requirement that the agency inform requesters of the exemption under which redacted information is being withheld. The NPRM proposed

incorporating this new requirement into its regulations. Management recommends the adoption of the revision to the definition of "representative of the news media," as proposed.

§1602.13 – Fees

FOIA provides for the assessment of fees on requesters associated with the processing of their FOIA requests. Prior to the adoption of the OPEN Government Act, applicable fees could be assessed when authorized under FOIA, regardless of the timeliness of the response to the requester. Section 6 of the OPEN Government Act has changed that, providing now that, for requests received on or after December 31, 2008, an agency which fails to provide a timely response may not assess search fees on requesters, except in cases involving unusual or exceptional circumstances. In the case of requesters who are representatives of the news media, since they are already not subject to search charges, the OPEN Government Act provides that applicable duplication fees will not be charged when the agency provides an untimely response. The NPRM proposed to implement this statutory change. Management recommends the adoption of the revision to regarding fees with minor modification to the text for clarity and to explicitly reference that the new provision applies only the requests received on or after the effective date of the revision.

Management Recommendation

Management recommends that the Operations and Regulations Committee recommend to the Board of Directors that the Board adopt as final the proposed revisions to 45 CFR Part 1602 as proposed and approve the Draft Final Rule for publication in the Federal Register.

Attachments