

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

**Date: January 19, 2021**

**MEMORANDUM TO GEN. MITCHELL ZAIS**

**ACTING SECRETARY OF EDUCATION**

*Re: Freedom of Information Act Compliance*

 The Office of the General Counsel is the Secretary’s principal adviser on all legal matters affecting Departmental programs and activities. 20 U.S.C. § 3421;<https://www2.ed.gov/about/offices/list/om/docs/delegations/eaeg109.pdf>. Accordingly, I bring to your attention our concerns regarding the need for improvements in the Department’s compliance with the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and our recommendations for better aligning the Department’s regulations and processes with controlling statutes and court decisions.

 A. By way of background, the purpose of FOIA is to promote government transparency and accountability. It was enacted in 1966 to protect “one of our most essential principles: “No one should be able to pull curtains of secrecy around the decisions which can be revealed without injury to the public interest.” Statement by the President upon Signing S.1160, Office of the White House Press Secretary (July 4, 1966). Since FOIA became law, the federal courts have repeatedly made clear that it is to be interpreted broadly and always with the goal of disclosure. *See, e.g., Environmental Protection Agency v. Mink*, 410 U.S. 73, 80 (1973) (“Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.”). It is not “an easy task to balance the opposing interests, but it is not an impossible one either. . . Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.” *Id.*

FOIA contains a series of exemptions from disclosure. 5 U.S.C. § 552(b). An agency must not only show that information falls within the scope of an exemption to lawfully withhold it from the public, but also must clear an additional hurdle: the agency must demonstrate that release of that specific information would harm an interest protected by that exemption or is prohibited by some other law. 5 U.S.C. § 552(a)(8)(i). If the foreseeable harm standard is not met, then “the document should be released.” 114 Cong. Rec. S1496 (Mar. 15, 2016) (statement of Sen. Leahy). Also, the agency must consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and take reasonable steps necessary to segregate and release nonexempt information. 5 U.S.C. § 552(a)(8)(ii).

B. The Office of the General Counsel has identified the following critical compliance concerns:

1. The Department’s FOIA regulations, 34 C.F.R. Part 5, do not provide requesters and other external stakeholders with sufficient clarity to understand how their requests will be processed at the Department. For example, the Department’s regulations have not been reviewed to determine whether changes are warranted to fully reflect the Supreme Court’s recent opinion in *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 915 (2019), examining FOIA Exemption 4 governing confidential business information. *Compare* 34 CFR 5.11. Additionally, the regulations could and should provide the public with clearer information regarding the Department’s processes for applying statutory exemptions and seeking additional guidance or information during the review process, either from a third-party submitter or from other agencies, as in “White House equity” consultations. Addressing these issues would expedite production, increase transparency, reduce taxpayer cost, and decrease the opportunity for undue political influence in production.

1. Decentralized processing poses significant challenges to consistency in administrative processing, search parameters and reviews for exempt material. It also increases processing time through procedural bottlenecks and inefficient use of resources.
2. Current staffing limitations present challenges in meeting statutory deadlines.

C. To better meet statutory obligations by increasing the alignment of the Department’s regulations and processes with controlling statutes and court decisions, we recommend the following:

* Comprehensively overhaul the Department’s FOIA regulations to: (1) fully reflect significant shifts in caselaw; (2) clarify and set forth the Department’s FOIA processes, particularly those processes which depend on outside consultations; and (3) provide the public with a transparent and consistent processing path for all incoming FOIA requests.
* Centralize FOIA processing to the extent practicable, and/or implement a single FOIA procedure for all POCs to maximize the efficiency, consistency, and legal sufficiency of the Department’s FOIA responses. To the extent that the Office of the General Counsel is given a more significant role in this process, commit additional resources to that office to support FOIA activities.
* Commit additional resources to ensure that each POC has a dedicated FTE FOIA liaison working in cooperation with the FOIA processing center and the Office of the General Counsel, to streamline POC FOIA workloads, provide quality control, and be accountable for meeting statutory and internal deadlines.
* Include FOIA processing responsibilities in employees’ REACH performance plan, as appropriate.

Please contact us if we may be of further assistance.

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Reed D. Rubinstein

Principal Deputy General Counsel delegated

 the authority and duties of the General Counsel