

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

FEDERAL TRADE COMMISSION

Fee Schedule Rulemaking

16 CFR Part 4.8, Project No. P122102

March 29, 2013

By notice published on February 28, 2013, the Federal Trade Commission (“Commission” or “FTC”) has proposed to revise its Freedom of Information Act (“FOIA”) fee regulations.¹ Pursuant to the notice, the Electronic Privacy Information Center (“EPIC”) submits these comments to largely support the Commission’s proposals and make specific recommendations to further strengthen the Proposed Rule. Specifically, EPIC urges the FTC to: (1) update its definition for news media representative; (2) clarify which documents are public information and ensure that hyperlinks to those records work properly; (3) disclose private sector contract rates for FOIA processing; (4) refrain from prematurely closing FOIA requests; and (5) adopt alternative dispute resolution or arbitration when resolving delinquent FOIA fees.

EPIC is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values. EPIC regularly submits administrative agency comments encouraging federal agencies to uphold the FOIA.²

¹ Freedom of Information Act, 78 Fed. Reg. 13,570 (proposed Feb. 28, 2013) (to be codified at 16 CFR pt. 4) [hereinafter “Proposed Rule”].

² See, e.g., EPIC, Comments of the Elec. Privacy Info. Ctr. to the Dep’t of the Interior on Proposed Freedom of Information Act Regulations (Nov. 13, 2012) (RIN 1093-AA15); EPIC, EPIC Comments
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EPIC frequently submits FOIA requests to the FTC.³ EPIC also engages in extensive Freedom of Information Act litigation.⁴ Additionally, EPIC publishes *Litigation Under Federal Open Government Laws Guide*, a leading guide for FOIA practitioners and requesters, and has specific expertise with respect to the history and purpose of the FOIA.⁵

I. The Scope of the Proposed Rule

The Commission proposes to revise and adopt certain provisions within 16 CFR part 4 that pertain to FOIA fee regulations. The proposed revisions impact various agency practices concerning FOIA fee processing, and on the whole, the agency's proposals benefit FOIA requesters. For example, the Commission proposes increasing the threshold for small charge fee waivers "from those that do not exceed \$14 to those under \$25."⁶

The Commission explains its rationale:

Under the Federal Claims Collection Standards, 31 CFR 900-904, the Commission is obligated to refer FOIA fee debts that are overdue more than 180 days to the Financial Management Services ("FMS") at the Department of Treasury. However, FMS does not typically pursue repayment for any debts that are under \$25 except for certain situations . .

Comments of the Elec. Privacy Info. Ctr. to the Dep't of Justice on Proposed Freedom of Information Act Regulations (Oct. 18, 2011) (RIN 1105-AB27).

³ See, e.g., FOIA Request from Ginger McCall and David Jacobs, EPIC, to Office of Gen. Counsel, Fed. Trade Comm'n (Jan. 4, 2013) (seeking records concerning the FTC's Google antitrust investigation), *available at* <http://epic.org/foia/EPIC-FOIA-FTC-Antitrust.pdf>; FOIA Request from Ginger McCall and Maria Elena Stiteler, EPIC, to Office of Gen. Counsel, Fed. Trade Comm'n (Feb. 1, 2012) (seeking records concerning Google's reported compliance with FTC consent order), *available at* <http://epic.org/privacy/ftc/google/EPIC-Google-FTC-FOIA-Request-02-01-12.pdf>; FOIA Request from Melissa Ngo, EPIC, to Office of Gen. Counsel, Fed. Trade Comm'n (Dec. 17, 2007) (seeking records concerning Doubleclick conflict of interest), *available at* <http://epic.org/privacy/ftc/google/ftc121707.pdf>.

⁴ See, e.g., *Elec. Privacy Info. Ctr. v. U.S. Dept. of Homeland Sec.*, 811 F. Supp. 2d 216 (D.D.C. 2011); *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30 (D.D.C. 2006); *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5 (D.D.C. 2003); *Litigation Docket, EPIC*, <http://epic.org/privacy/litigation/>.

⁵ EPIC, *Litigation Under the Federal Open Government Laws 2010* 138 (Harry A. Hammitt, Ginger McCall, Marc Rotenberg, John A. Verdi, and Mark S. Zaid, eds., 2010).

⁶ Proposed Rule, 78 Fed. Reg. 13,572.

. The Commission believes that the FTC should not charge any fees that the Department of Treasury will not attempt to collect.

The Commission also proposes to insert the following language at 16 CFR § 4.8(b)(7). The provision would establish that the agency would not assess search fees for untimely Commission responses:

(7) *Untimely responses.* Search fees will not be assessed for responses that fail to comply with the time limits in which to respond to a Freedom of Information Act request, provided at 5 U.S.C. § 552(a)(4)(A) (viii) and § 4.11(a)(1)(ii), and if there are no unusual or exceptional circumstances, as those terms are defined by 5 U.S.C. §552(a)(6)(a)(6) and § 4.11(a)(1)(ii). Duplication fees will not be assessed for an untimely response, where there are no unusual or exceptional circumstances, made to a requester qualifying for one of the fee categories set forth in paragraph (b)(2) of this section.

This language models the FOIA mandate that agencies may not assess search fees for untimely responses.⁷ This is a positive addendum to the Commission's regulations because it clarifies and acknowledges individual rights under the FOIA.

EPIC commends the Commission for removing obstacles to those seeking information under the FOIA. However, several of the Commission's fee proposals create barriers for FOIA requesters or otherwise frustrate the spirit of the law. EPIC therefore makes the following recommendations.

II. EPIC Recommends the Commission Incorporate the Following Revisions in its Proposed FOIA Fee Regulations

Representative of the News Media

Commission Rule 4.8(b)(2), 16 CFR§ 4.8(b)(2) currently reads (in relevant part):

(b) Fees. User fees pursuant to 31 U.S.C. § 483(a) and 5 U.S.C. § 552(a) shall be charged according to this paragraph. A representative of the news media is any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. News means

⁷ 5 U.S.C. § 552(a)(4)(A)(viii).

information that is about current events or that would be of current interest to the public.

The Commission proposes to amend the definition for “representative of the news media” to:

A representative of the news media is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to the public. The term “news” means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances where they can qualify as disseminators of news) who make their products available for purchase by or subscription by the general public or free distribution to the general public. These examples are not intended to be all-inclusive. As traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would provide a solid basis for such an expectation, but the past publication record of a requester may also be considered in making such a determination.

This proposed change recognizes “representative of the news media” may use a wide variety of technologies to disseminate information the public. However, the phrases “electronic dissemination of newspapers through telecommunications services” and the definition of a “freelance” journalist are particularly dated. EPIC recommends that this provision be revised as follows:

The term “representative of the news media” refers to any person actively gathering information to publish or broadcast news to the public. The term “news” means information that is about current events or that would be of current interest to the public. Examples of news media entities include print, broadcast and webcast news services available for purchase or subscription by the general public, or available to the general public by means of an online search

Materials Available Without Charge

Commission Rule 4.8(b)(5), 16 CFR § 4.8 (b)(5) currently reads:

(5) Materials available without charge. These provisions do not apply to recent Commission decisions and other materials that may be made available to all requesters without charge while supplies last.

The Commission proposes to revise the rule to:

(5) *Materials available without charge.* These provisions do not apply to recent Commission decisions and other *public* materials that may be made available to all requesters without charge while supplies last. (Emphasis added)

Under the Electronic Freedom of Information Act Amendments of 1996 (E-FOIA Amendments), the Commission must make four distinct categories of records electronically “available for public inspection and copying”: (1) final opinions and orders “made in the adjudication of cases”; (2) agency statements of policy that are not published in the Federal Register; (3) administrative staff manuals and instructions to staff; and (4) copies of records released under the FOIA that, “because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.”⁸ Therefore, the Commission is required to make Commission decisions publicly available, and cannot limit “reading room” records solely to recent Commission decisions, as they are described in the proposed (and current) regulations.

Second, in the digital reading room context, making public information available “while supplies last” is inapposite. Unlike paper copies of records, digital reading room records can always be hosted on the Commission website, and are available 24/7. The Commission can never “run out” of digital reading room records. Therefore, the phrase

⁸ 5 U.S.C. § 552(a)(2)(A)-(E).

“while supplies last” should be removed from the proposed regulation. But to guarantee that digital reading room records are always available, the Commission must ensure that all links it posts to its reading room properly link to documents. For example, on the Commission’s “Frequently Requested Records” webpage, the hyperlink for the September 2003 FTC Identity Theft Survey Raw Data link is broken.⁹ To comply with the E-FOIA Act, and the genuine spirit of transparency, the Commission should fix that hyperlink and any other broken links in its digital reading room. Incorporating the aforementioned recommendations, the Commission should revise the proposal to:

(5) Materials available without charge. These provisions do not apply to public records, including but not limited to Commission decisions, orders, and other public materials that may be made available to all requesters without charge.

Additionally, the Commission should take this opportunity to publish more documents on its website. Currently, the Commission’s webpage for frequently requested records lists only ten requested records and corresponding Commission responses.¹⁰ The Commission should publish more FOIA requests of great public interest and agency responses.

Fees Schedule (Commission Rule 4.8(b)(6), 16 CFR § 4.8(b)(6))

The Commission proposes to update its fee schedule “to reflect current costs and types of products and services” that it provides under the FOIA.¹¹ The Commission is generally transparent in its explanation and rationale for fee updates. For example, the Commission explains its proposal to increase certification service fees to “cover the

⁹ FEDERAL TRADE COMMISSION, *Frequently Requested Records-Identity Theft Survey Raw Data-FTC, September 2003*, http://www.consumer.ftc.gov/features/feature-0014-identity-theftdownloads/synovate_report.pdf (last visited Mar. 28, 2013).

¹⁰ FEDERAL TRADE COMMISSION, *Frequently Requested Records*, <http://www.ftc.gov/foia/frequentrequest.shtm> (last visited Mar. 28, 2013).

¹¹ Proposed Rule, 78 Fed. Reg. 13,572.

increased costs of attorney and clerical staff time in preparing” records for certification.¹² The Commission also states that while it has ceased providing most microfiche services, the agency maintains microfiche storage and management contracts with Iron Mountain Archival Services and the National Archive and Records Administration’s Washington National Records Center.¹³ The agency further states that the fees it charges for microfiche conversion “are in accordance with the terms of the FTC’s two contracts.”¹⁴ The proposed fee schedule, however, does not detail the specific contract rates for microfiche conversion; the proposed fee schedule simply states that services provided by the contracts are at “contract rates.”¹⁵ Instead, the Commission should list the contract rates in the same fashion that the agency details other fees in the schedule. In the present rulemaking proceeding, commentators cannot provide an informed view as to whether the Commission should adopt the proposed fee schedule concerning contract rates because the proposed rule does not detail what the contract rates are. Therefore, the Commission should not adopt to contract rates without first explicitly providing the contract rates and seeking public comment on the rates. Further, disclosing private sector contract prices and government spending and bidding is one of the FOIA’s capstones: “the Freedom of Information Act has led to the disclosure of waste, fraud, abuse, and wrongdoing in the Federal Government.”¹⁶ EPIC therefore anticipates that the Commission will not adopt the proposed fee schedule for records maintained at Iron Mountain or Washington National Records Center facilities.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Proposed Rule, 78 Fed. Reg. 13,574.

¹⁶ Text of House FOIA Amendment Bill, H.R. 3802, *available at* http://www.justice.gov/oip/foia_updates/Vol_XVII_3/page2.htm.

Fee Payment as Condition for Processing Request

Commission Rule 4.8(d)(3), 16 CFR § 4.8(d)(3) currently reads:

(d) Agreement to pay fees. (3) If the agreement required by this section is absent, and if the estimated fees exceed \$25.00, the requester will be advised of the estimated fees and the request will not be processed until the requester agrees to pay such fees.

The Commission proposes the following language:

If the agreement required by this section is absent, and if the estimated fees exceed \$25.00, the requester will be advised of the estimated fees and the request will not be processed until the requester agrees to pay such fees. If the requester does not respond to the notification that the estimated fees exceed \$25.00 within 10 calendar days from the date of the notification, the request will be closed.

The Commission should not adopt the proposed language because it curtails FOIA requesters' access to information by imposing an arbitrary time for requesters to agree to pay estimated fees. The Commission should grant requesters additional time to assess their financial ability to pay fees associated with processing their FOIA requests. EPIC recommends that requesters be given at least 30 workdays to provide assurance that they will pay any estimated fees. EPIC understands that the Commission expends numerous resources to produce documents pursuant to the FOIA, and that the agency has an interest in resolving FOIA matters in an organized and timely fashion. The FOIA, however, was created for oversight, transparency, and accountability in government functions. By imposing arbitrary deadlines on requesters, the Commission violates the FOIA by curtailing the public's opportunity to receive information on government functions. This ten-day deadline simply works to hinder requesters' ability to obtain documents. At a minimum, a more reasonable timeframe for requesters to amend their request is 30 workdays. And the agency should not close the file prematurely if

requesters do not respond to the Commission within this timeframe, but instead can relegate the request to a lower processing track.

The revised regulation should read

If the agreement required by this section is absent, and if the estimated fees exceed \$25.00, the requester will be advised of the estimated fees and the request will not be processed until the requester agrees to pay such fees. If the requester does not respond to the notification that the estimated fees exceed \$25.00 within 30 calendar days from the date of the notification, the request may lose priority in the agency's processing track.

Debt Collection

Commission Rule 4.8(k), 16 CFR § 4.8(k) currently reads:

(k) Effect of the Debt Collection Act of 1982 (Pub. L. 97-365). The Commission may pursue repayment, where appropriate, by employing the provisions of the Debt Collection Act, (Public Law 97-365), including disclosure to consumer reporting agencies and use of collection agencies.

The Commission proposes the following revision:

(k) Effect of the Debt Collection Act of 1982 (Pub. L. 97-365), as amended by the Debt Collection Improvement Act of 1996 (Pub.L.104-134). The Commission will pursue repayment, where appropriate, by employing the provisions of the Debt Collection Act of 1982, as amended by the Debt Collection Improvement Act of 1996, the Federal Claims Collection Standards (FCSS), 31 CFR 900-904, and any other applicable authorities in collecting unpaid fees assessed under this section, including disclosure to consumer reporting agencies and use of collection agencies. The FCSS does not limit the agency's ability to pursue other authorized remedies such as alternative dispute resolution and arbitration.

Instead of stating that the FCSS does not proscribe alternative dispute resolution and arbitration, the Commission should explicitly state that it would pursue non-adversarial methods before resorting to consumer reporting agencies and collection agencies. The FTC is the “nation’s consumer protection agency,” charged with enforcing the Fair Debt

Collection Practices Act (FDCPA).¹⁷ In this role, the FTC routinely observes abusive debt collection practices. In fact, the agency recently reached a \$799,958 settlement with debt collectors Security Credit Services, LLC, and Jacob Law Group, PLLC.¹⁸ In its complaint, the FTC alleged that the defendants violated the FDCPA by “deceptively charging consumers a fee for payments authorized by telephone.”¹⁹ Among other allegations, the FTC alleged that the debt collectors “implied [they] would file lawsuits to collect the debts even when [they] did not intend to do so.”²⁰ Because the FTC routinely investigates debt collection abuse and therefore understands the grave implications of debt collection abuse, it should use its regulations to clarify that it will first pursue non-adversarial means of debt collection, such as alternative dispute resolution and arbitration. Accordingly, the Commission should adopt the following language for its regulations.

(k) Effect of the Debt Collection Act of 1982 (Pub. L. 97-365), as amended by the Debt Collection Improvement Act of 1969 (Pub. L. 104-134). The Commission can pursue repayment, where appropriate, by employing the provisions of the Debt Collection Act of 1982, as amended by the Debt Collection Improvement Act of 1996, the Federal Claims Collection Standards (FCSS), 31 CFR 900-904, and any other applicable authorities in collecting unpaid fees assessed under this section. The Commission will first pursue authorized remedies such as alternative dispute resolution and arbitration. If after pursuing these remedies, the Commission is unable to collect its fees, the agency may decide to pursue other avenues, including disclosure to consumer reporting agencies and use of collection agencies.

¹⁷ FEDERAL TRADE COMMISSION, *Debt Collection*, <http://www.consumer.ftc.gov/articles/0149-debt-collection> (last visited Mar. 28, 2013).

¹⁸ FEDERAL TRADE COMMISSION, *In Settlement with FTC, Debt Collectors Agree to Stop Deceiving Consumers and Pay Nearly \$800,000*, <http://www.ftc.gov/opa/2013/03/securitycredit.shtm> (last visited Mar. 28, 2013).

¹⁹ *Id.*

²⁰ *Id.*

III. By Adopting Fee Regulations that Benefit Requesters, the Commission Adheres to the Administration’s “Presumption of Openness”

Many of the agency’s proposed changes adhere to the Obama Administration’s stated commitment to transparency. On January 21, 2009, President Obama issued a memorandum on the Freedom of Information Act, transparency and open government, and announced his intention to make the federal government more transparent:²¹

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.²²

The President stated the central importance of transparency under his new Administration, “We will achieve our goal of making this administration the most open and transparent administration in history not only by opening the doors of the White House to more Americans, but by shining a light on the business conducted inside it.”²³

On March 19, 2009, Attorney General Eric Holder issued new guidelines that establish a “presumption of openness” governing federal records.²⁴ On September 30, 2009, Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, stated that the Committee “will continue to do its part to advance freedom of information, so that the right to know is preserved for future generations.”²⁵

²¹ President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies re: Freedom of Information Act, Jan. 21, 2009, http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/; President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies re: Transparency and Open Government, Jan. 21, 2009, http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment.

²² *Id.*

²³ *Id.*

²⁴ Attorney General Eric Holder, Memorandum for the Heads of Executive Departments and Agencies re: Transparency and Open Government, Mar. 19, 2009, <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>.

²⁵ Statement Of Senator Patrick Leahy, Committee On The Judiciary,

IV. Conclusion

As stated above, EPIC generally supports the Commission's proposed fee regulations because they promote the purpose of the FOIA. However, the Commission should revise its proposals to: (1) update its definition for news media representative; (2) clarify which documents are public information and ensure that hyperlinks to those records work properly; (3) disclose private sector contract rates for FOIA processing; (4) refrain from prematurely closing FOIA requests; and (5) adopt alternative dispute resolution or arbitration when resolving delinquent FOIA fees.

Respectfully submitted,

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