

DEPARTMENT OF ENERGY

Federal Energy Regulatory
Commission

18 CFR Part 388

[Docket No. RM97-8-000; Order No. 597]

Information and Requests

Issued January 28, 1998.

AGENCY: Federal Energy Regulatory
Commission.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is amending its regulations governing information and requests to reflect the requirements and specifications of the Electronic Freedom of Information Act Amendments of 1996. This final rule also corrects minor editorial inconsistencies in the regulations.

EFFECTIVE DATE: March 5, 1998.

ADDRESSES: Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT: Charles A. Beamon, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, (202) 208-0780.

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Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, Linda Breathitt, and Curt Hebert, Jr.

I. Introduction

This final rule amends 18 CFR Part 388 to implement the provisions of the Electronic Freedom of Information Act Amendments of 1996 (the Act).¹ The Act amended the Freedom of Information Act (FOIA)² by imposing a number of new requirements governing the public availability of information, including electronic information. This final rule also clarifies minor discrepancies in Part 388.

II. Background*A. The Act*

The Act expands FOIA's definition of a record to include information maintained in electronic format; requires agencies to accommodate requesters' reasonable format preferences; and to conduct reasonable agency searches for electronic records.

The Act provides for the electronic availability of all "public reading room" materials created as of November 1, 1996.

The Act expands the scope of public reading room documents to include FOIA documents that are subject to repeated requests, a related index of such documents, and certain references and guides for accessing public information.

The Act increases the time for processing FOIA requests from 10 to 20 working days; allows extensions beyond the former 10-day deadline in limited circumstances; and gives requesters the opportunity to avoid extensions by limiting the scope of their requests.

The Act allows multitrack processing of FOIA requests (*i.e.*, simple requests are processed on a fast track, and complex requests are processed on slower tracks). The Act mandates expedited treatment for requesters who demonstrate an imminent threat to life or safety, and for journalists (and others engaged in dissemination of information) who demonstrate an

urgency to inform the public concerning Federal Government activity.

B. Commission's Notice of Proposed Rulemaking

On September 25, 1997, the Commission issued a notice of proposed rulemaking (NOPR)³ to implement the provisions of the Act. The NOPR listed new categories of information for inclusion in the Public Reference Room, including applicable FOIA information, and the electronic availability of such information [§ 388.106]. The NOPR described procedures for multitrack processing and expedited processing, and specified the new time limit for processing FOIA requests [§ 388.108]. The NOPR described procedures for effecting an extension of time [§ 388.110], and made several minor grammatical and technical changes for the sake of clarity.

III. Discussion

Only one party, the Missouri Basin Systems Group (MBSG), has submitted comments on the NOPR. MBSG seeks an expansion of the FOIA information that is electronically available under section 388.106 of the NOPR. In particular, MBSG seeks electronic access (and presumably Public Reference Room availability) for all FOIA documents "cleared for release," dating back to the past two years. MBSG argues that "immediate access" would limit future FOIA requests for these documents. MBSG also opposes the new 20 working day deadline for processing FOIA requests under section 388.108.

MBSG's request for the availability of additional electronic FOIA information is not justified. Section 388.106(b)(21), which tracks the pertinent language of the Act,⁴ already makes FOIA documents that "are likely to be requested again" available in the Public Reference Room, and by electronic means, if they were compiled on or after November 1, 1996. Making available those FOIA documents most likely to be requested again (as compared to all FOIA documents cleared for release) more efficiently balances the agency's resources with the public need. There is no basis for routinely making available large quantities of FOIA documents for which there is little or no continuing public demand. Moreover, in view of the statutory November 1, 1996 cutoff date, there is no justification for adopting the "two year" cutoff which MBSG proposes.

³ Information and Requests, 62 FR 51610 (Oct. 2, 1997).

⁴ 5 U.S.C. 552(a)(D), as amended.

¹ Pub. L. No. 104-231, 110 Stat. 3048 (1996).

² 5 U.S.C. 552.

Similarly, the Commission is not persuaded by MBSG's argument opposing the 20 working day time limit for processing an FOIA request. The new deadline was explicitly approved by Congress, which recognized that the former 10 working day deadline was unrealistic. Accordingly, the Commission adopts the 20-day deadline approved by Congress.

Although there were no other comments, the Commission is also revising the proposed language of § 388.106(a)(2) to make clear that only documents created by FERC on or after November 1, 1996 will immediately be electronically available, and those will only be available on the Commission's World Wide Web site and through the Bulletin Board Network. All public documents created or received by the Commission since November 1995 will be electronically available upon implementation of the Records and Information Management System (RIMS) on the Web.

The Commission adopts its NOPR as revised.

IV. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act of 1980 (RFA) ⁵ generally requires a description and analysis of rules that will have significant economic impact on a substantial number of small entities. Pursuant to section 605(b) of the RFA, the Commission hereby certifies that this rule will not have a significant impact on a substantial number of small entities. The revisions improve the public's access to information, and impose additional obligations on the Commission to ensure the availability of such information. By comparison, the public's obligations would not significantly increase.

V. Environmental Statement

Issuance of this final rule would not represent a major federal action having a significant adverse effect on the human environment under the Commission regulations implementing the National Environmental Policy Act.⁶ This final rule falls within the regulatory exemption which specifies that information gathering, analysis, and dissemination are not major federal actions that have a significant effect on the human environment.⁷ Thus, neither an environmental impact statement nor

an environmental assessment is required.

VI. Information Collection Statement

OMB regulations require that OMB approve certain information collection requirements imposed by agency rule.⁸ This final rule contains no information reporting requirements, and is not subject to OMB approval.

VII. Effective Date and Congressional Notification

This rule will be effective March 5, 1998. The Small Business Regulatory Enforcement Fairness Act of 1996 requires agencies to report to Congress on the promulgation of certain final rules prior to their effective dates.⁹ That reporting requirement does not apply to this final rule because this rule addresses agency organization, procedure and practice, and does not substantially affect the rights or obligations of non-agency parties.¹⁰ Congressional notification of this final rule therefore is not required.

List of Subjects in 18 CFR Part 388

Freedom of information, Public reference materials.

By the Commission.
Linwood A. Watson, Jr.,
Acting Secretary.

In consideration of the foregoing, the Commission amends part 388, chapter I, title 18, *Code of Federal Regulations*, as set forth below.

PART 388—INFORMATION AND REQUESTS

1. The authority citation for part 388 is revised to read as follows:

Authority: 5 U.S.C. 301–305, 551, 552 (as amended), 553–557; 42 U.S.C. 7101–7352.

2. In § 388.106, paragraph (a) is redesignated as (a)(1); paragraph (a)(2) is added; paragraph (b) introductory text is revised; paragraph (b)(19) is redesignated as (b)(23); new paragraphs (b)(19) through (b)(22) are added; and paragraph (c)(1) is revised to read as follows:

§ 388.106 Requests for Commission records available in the Public Reference Room.

(a)(1) * * *

(2) Documents created by FERC on or after November 1, 1996, or earlier in some instances, also are electronically available on the Commission's World Wide Web site, (www.ferc.fed.us), and

the Bulletin Board Network. All public documents created or received by the Commission since November 1995 will be electronically available upon implementation of the Records and Information Management System (RIMS) on the Web. These may be accessed in person using a personal computer in the Public Reference Room, or by using a personal computer with a modem at a remote location.

(b) The public records of the Commission that are available for inspection and copying upon request in the Public Reference Room, or are otherwise available under paragraph (a)(2) of this section, include:

* * * * *

(19) Statements of policy and interpretations which have been adopted by the Commission and are not published in the **Federal Register**;

(20) Administrative staff manuals and instructions to staff that affect a member of the public;

(21)(i) Copies of all records released under § 388.108, which, because of their nature and subject, the Director of the Office of External Affairs has determined are likely to be requested again, and

(ii) An index of the records so designated;

(22) Reference materials and guides for requesting Commission records as required by 5 U.S.C. § 552(g), as amended; and

* * * * *

(c) * * *

(1) *Commission correspondence* includes written communications and enclosures, in hard copy or electronic format, received from others outside the staff and intended for the Commission or sent to others outside the staff and signed by the Chairman, a Commissioner, the Secretary, the Executive Director, or other authorized official, except those which are personal.

* * * * *

§ 388.107 [Amended]

3. In § 388.107(a)(1), remove the word "natural" and add, in its place, the word "national."

4. In § 388.108, paragraphs (a)(1) introductory text, (a)(1)(iii), and (a)(2) through (a)(4) are revised; new paragraph (a)(5) is added; paragraphs (b) and (c) are redesignated as (c) and (e) respectively and revised, and new paragraphs (b) and (d) are added, to read as follows:

⁵ 5 U.S.C. 601–602.

⁶ Order No. 486, 52 FR 47897 (Dec. 17, 1987); FERC Stats. & Regs. [Preambles 1986–90] ¶ 30,783 (Dec. 10, 1987) (*codified at 18 CFR Part 380*).

⁷ 18 CFR 380.4(a)(5).

⁸ 5 CFR Part 1320.

⁹ Pub. L. No. 104–121, 110 Stat. 847 (1996), *codified at 5 U.S.C. 801–808*.

¹⁰ 5 U.S.C. 804(3)(C).

§ 388.108 Requests for Commission records not available through the Public Reference Room (FOIA requests).

(a)(1) Except as provided in paragraph (a)(2) of this section, a person may request access to Commission records, including records maintained in electronic format, that are not available through the Public Reference Room, by using the following procedures:

* * * * *

(iii) The request must identify the fee category of the request, consistent with the provisions of § 388.109(b) (1) and (2).

(2) A request that fails to provide the identification required in paragraph (a)(1)(iii) of this section will not be processed until the Director, Office of External Affairs, can ascertain the requester's fee category.

(3) A request for records received by the Commission not addressed and marked as indicated in paragraph (a)(1)(i) of this section will be so addressed and marked by Commission personnel as soon as it is properly identified, and forwarded immediately to the Director, Office of External Affairs.

(4) Requests made pursuant to this section will be considered to be received upon actual receipt by the Director, Office of External Affairs, unless otherwise indicated in paragraph (a)(5) of this section.

(5) Except for the purpose of making a determination regarding expedited processing under paragraph (d)(3) of this section, no request will be deemed received while there is an unresolved fee waiver issue under § 388.109(b)(6), unless the requester has provided a written statement agreeing to pay some or all fees pending the outcome of the waiver question.

(b)(1) Multitrack processing. Upon receipt of a request, the Director, Office of External Affairs, will place the request in one of three tracks for processing:

(i) Track One—records that are readily identifiable and were previously cleared for release (including those subject to multiple requests and placed in the Public Reference Room);

(ii) Track Two—records that are readily identifiable, and require limited review; and

(iii) Track Three—complex and/or voluminous records requiring a significant search and/or review.

(2) Each track specified in paragraph (b)(1) of this section will be processed on a first in, first out basis, where practicable. A requester may modify a request to obtain processing on a faster track.

(c)(1) *Timing of response.* Except as provided in paragraphs (c)(4) and (d)(3) of this section, within 20 working days after receipt of the request for agency records, the Director, Office of External Affairs, will comply with the request or deny the request in whole or in part, and will notify the requester of the determination, of the reasons for a decision to withhold any part of a requested document, and of the right of the requester to appeal any adverse determination in writing to the General Counsel or General Counsel's designee.

(2) The Director, Office of External Affairs, will attempt to provide records in the form or format requested, where feasible, but will not provide more than one copy of any record to a requester.

(3) Any determination by the Director, Office of External Affairs, to withhold information will, where feasible, indicate the approximate volume of information withheld, and will indicate, for partially-released materials, where redactions have been made, unless to do so would harm an interest protected by a FOIA exemption.

(4) The time limit for the initial determination required by paragraph (c)(1) of this section may be extended as set forth in § 388.110(b).

(d)(1) *Expedited processing.* A requester may seek expedited processing on the basis of a compelling need. Expedited processing will be granted if the requester demonstrates that:

(i) Failure to obtain the records on an expedited basis can reasonably be expected to pose an imminent threat to the life or physical safety of an individual, or

(ii) In the case of a requester primarily engaged in the dissemination of information, there is an urgency to inform the public concerning Federal Government activity.

(2) A request for expedited processing under this section must be supported with detailed credible documentation, including a statement certified to be true and correct to the requester's best knowledge and belief.

(3) The Director, Office of External Affairs, will decide within 10 calendar days of receipt of the request whether it is eligible for expedited processing. The Director will notify the requester of the reasons for denial of expedited processing and of the right of the requester to appeal to the General Counsel or General Counsel's designee.

(e) The procedure for appeal of denial of a request for Commission records, or denial of a request for expedited processing, is set forth in § 388.110.

5. In § 388.109, the first sentence of paragraph (b)(2)(iii), and paragraphs

(b)(2)(iv), (b)(2)(vii), and (b)(5)(ii) are revised; paragraph (b)(5)(iii) is removed; paragraph (b)(6) is redesignated as paragraph (c) and revised, and paragraphs (b)(7) and (b)(8) (i) and (ii) are redesignated as (d) and (e) (1) and (2) respectively, to read as follows:

§ 388.109 Fees for records requests.

* * * * *

(b) * * *

(2) * * *

(iii) For a request not described in paragraphs (b)(2)(i) or (ii) of this section the Commission will charge the employee's hourly pay rate plus 16 percent for benefits for document search time and 15 cents per page for duplication. * * *

(iv) The Director, Office of External Affairs, will normally provide documents by regular mail, with postage prepaid by the Commission. However, the requester may authorize special delivery, such as express mail, at the requester's own expense.

* * * * *

(vii) Requesters may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When the Commission reasonably believes that a requester, or a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of evading assessment of fees, or otherwise reasonably believes that two or more requests constitute a single request, the Commission may aggregate any such requests and charge the requester accordingly. The Commission will not aggregate multiple requests on unrelated subjects from a requester. Aggregated requests may qualify for an extension of time under § 388.110(b).

* * * * *

(5) * * *

(ii) A requester has previously failed to pay a fee charged in a timely fashion. The Commission will require the requester to pay the full amount owed plus any applicable interest, and to make an advance payment of the full amount of the estimated fee before the Commission will begin to process a new request or a pending request from that requester. When the Commission requires advance payment or an agreement to pay under this paragraph, or under § 388.108(a)(5), the administrative time limits prescribed in this part will begin only after the Commission has received the required payments, or agreements.

(c) Fee reduction or waiver. (1) Any fee described in this section may be reduced or waived if the requester

demonstrates that disclosure of the information sought is:

(i) In the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and

(ii) Not primarily in the commercial interest of the requester.

(2) The Commission will consider the following criteria to determine the public interest standard:

(i) Whether the subject of the requested records concerns the operations or activities of the government;

(ii) Whether the disclosure is likely to contribute to an understanding of government operations or activities;

(iii) Whether disclosure of the requested information will contribute to public understanding; and

(iv) Whether the disclosure is likely to contribute significantly to public understanding of government operations or facilities.

(3) The Commission will consider the following criteria to determine the commercial interest of the requester:

(i) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

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

(4) This request for fee reduction or waiver must accompany the initial request for records and will be decided under the same procedures used for record requests.

* * * * *

6. In § 388.110, the section heading, the first sentence of paragraph (a)(1), paragraph (a)(2), and paragraph (b) are revised to read as follows:

§ 388.110 Procedure for appeal of denial of requests for Commission records not publicly available or not available through the Public Reference Room, denial of requests for fee waiver or reduction, and denial of requests for expedited processing.

(a)(1) A person whose request for records, request for fee waiver or reduction, or request for expedited processing is denied in whole or part may appeal that determination to the General Counsel or General Counsel's designee within 45 days of the determination. * * *

(2) The General Counsel or the General Counsel's designee will make a determination with respect to any appeal within 20 working days after the receipt of such appeal. An appeal of the

denial of expedited processing will be considered as expeditiously as possible within the 20 working day period. If, on appeal, the denial of the request for records, fee reduction, or expedited processing is upheld in whole or in part, the General Counsel or the General Counsel's designee will notify the person making the appeal of the provisions for judicial review of that determination.

(b)(1) *Extension of time.* In unusual circumstances, the time limits prescribed for making the initial determination pursuant to § 388.108 and for deciding an appeal pursuant to this section may be extended by up to 10 working days, by the Secretary, who will send written notice to the requester setting forth the reasons for such extension and the date on which a determination or appeal is expected to be dispatched.

(2) The extension permitted by paragraph (b)(1) of this section may be made longer than 10 working days when the Commission notifies the requester within the initial response time that the request cannot be processed in the specified time, and the requester is provided an opportunity to limit the scope of the request to allow processing within 20 working days; or to arrange with the Commission an alternative time frame.

(3) Two or more requests aggregated into a single request under § 388.109(b)(2)(vii) may qualify for an extension of time if the requests, as aggregated, otherwise satisfy the unusual circumstances specified in this section.

(4) *Unusual circumstances* means:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the requests;

(ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) The need for consultation, which will be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

§ 388.112 [Amended]

7. In § 388.112, paragraph(c)(1)(i)'s reference to "paragraph (b)(2)" is revised to read "paragraph (b)(1)(ii)," and paragraph (c)(1)(ii)'s reference to

"paragraph (b)(3)" is revised to read "paragraph (b)(1)(iii)."

[FR Doc. 98-2594 Filed 2-2-98; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CGD07 98-002]

RIN 2115-AE46

Special Local Regulations; Hillsborough Bay, Tampa, FL

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: Special local regulations are being adopted for the Gasparilla Marine Parade. This event will be held on Saturday, February 7, 1998, between 10 a.m. and 1:30 p.m. Eastern Standard Time (EST) on Hillsborough Bay. These regulations are needed to provide for the safety of life on navigable waters during the event.

DATES: These regulations become effective at 9 a.m. and terminate at 2:30 p.m. EST on February 7, 1998.

FOR FURTHER INFORMATION CONTACT: LTJG Bess Howard, Coast Guard Group, St. Petersburg, FL at (813) 824-7533.

SUPPLEMENTARY INFORMATION:

Background and Purpose

These regulations are needed to provide for the safety of life of spectators, to protect vessels participating in the parade, and to protect marine mammals during the Gasparilla Marine Parade on Hillsborough Bay on February 7, 1998. There will be approximately 750 participants in the marine parade. Also, 200-400 spectator craft are expected. The parade will begin at the mouth of the Seddon Channel and end at the mouth of the Hillsborough River. The resulting congestion of navigable channels creates an extra or unusual hazard in the navigable waters.

In accordance with 5 U.S.C. 553, a notice of proposed rulemaking has not been published for these regulations and good cause exists for making them effective in less than 30 days from the date of publication in the **Federal Register**. Following normal rulemaking procedures would have been impracticable. The application to hold the event was not received with sufficient time remaining to publish proposed rules in advance of the event or to provide for a delay effective date.