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POLICY ISSUE (Notation Vote)

March 20, 2024

FOR: The Commissioners

SECY-24-0024

FROM: Raymond V. Furstenau
Acting Executive Director for Operations

SUBJECT: RULEMAKING PLAN FOR FREEDOM OF INFORMATION ACT
REGULATIONS, 10 CFR PART 9, SUBPART A

PURPOSE:

The purpose of this paper is to request Commission approval to initiate a rulemaking to revise the regulations in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 9, "Public Records," Subpart A, "Freedom of Information Act Regulations." (Subpart A). This rulemaking would address recommended revisions to Subpart A identified in the National Archives and Records Administration (NARA) Office of Government Information Services (OGIS) compliance assessment of the NRC Freedom of Information Act (FOIA) program and incorporate the U.S. Department of Justice (DOJ) template language for agency FOIA regulations, as appropriate.

SUMMARY:

Although the NRC's regulations in 10 CFR Part 9, Subpart A are in compliance with FOIA, there are opportunities for improvement. Specifically, in its 2020 compliance assessment of the NRC FOIA program, OGIS recommended that the NRC update its FOIA regulations "to ensure they are plainly written and reflect current processes and statutory requirements." The proposed revisions to Subpart A would improve the clarity of the existing requirements by using plain language, address DOJ recommendations to include provisions that further promote good FOIA customer service, improve the efficiency of responding to FOIA requests, update roles and responsibilities, and to formalize certain best practices recommended by DOJ for FOIA implementation.

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Enclosure 1 transmitted herewith contains Official Use Only – Sensitive Internal Information. When separated from Enclosure 1 this transmittal document is decontrolled.

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BACKGROUND:

In the staff requirements memorandum (SRM) for [SECY-15-0129](#), “Commission Involvement in Early Stages of Rulemaking,” dated February 3, 2016, the Commission approved institution of a requirement for a streamlined rulemaking plan in the form of a SECY paper that would request Commission approval to initiate all rulemakings not already explicitly delegated to the staff as a staff-delegated rulemaking (Accession No. [ML16034A441](#) in the NRC’s Agencywide Documents Access and Management System (ADAMS)). Accordingly, the staff requests approval to initiate a rulemaking to revise NRC FOIA implementing regulations in 10 CFR Part 9, Subpart A.

On September 16, 2020, NARA/OGIS published their compliance assessment of the NRC FOIA program (Enclosure 3). OGIS stated, in Finding 2 of the assessment, that “NRC’s regulations and official guidance for administering the FOIA are out-of-date and do not consistently or accurately reflect the agency’s practices for implementing the statute.” OGIS recommended that the NRC “update its FOIA regulations, FOIA Management Directive, and FOIA Desk Guide to ensure they are plainly written and reflect current processes and statutory requirements.”¹ OGIS also noted that the “NRC should reform its administrative appeals process to conform with DOJ guidance.” On December 2, 2022, the DOJ Office of Information Policy published a FOIA regulation template² that (1) contains guidelines addressing key elements to be addressed in each section of FOIA regulations, (2) is updated as needed by the Office of Information Policy to reflect changes in law and policy, and (3) provides sample language for agencies to use as they publish and update their regulations. The NRC last updated 10 CFR Part 9, Subpart A, in December 2018 to revise the fees charged for search and review of agency records (83 FR 65075, December 19, 2018). Before the 2018 revisions, the NRC last updated Subpart A in December 2016 to implement the FOIA Improvement Act of 2016 (81 FR 96344, December 30, 2016).

If the Commission approves this rulemaking plan, the staff will update Subpart A to incorporate plain language, address DOJ recommendations for inclusion of provisions to improve FOIA customer service, increase efficiency for responding to FOIA requests, update roles and responsibilities, and align the regulations with best practices for implementing the FOIA. This rulemaking would address OGIS’s recommendation that the NRC update its FOIA regulations, as well as provide the NRC the opportunity to incorporate DOJ’s model language for agency FOIA regulations, where appropriate.

DISCUSSION:

Title

Freedom of Information Act Regulations

Regulation

10 CFR Part 9, Subpart A.

¹ The Office of the Chief Information Officer is already in the process of updating official guidance apart from the regulations, such as the desk guide. Additionally, the Chair approved Management Directive 3.1, “Freedom of Information Act,” on February 26, 2021. This management directive defines responsibilities and authorities for the review and processing of FOIA and Privacy Act initial requests and appeals.

² The template for agency FOIA regulations can be found at <https://www.justice.gov/oip/template-agency-foia-regulations>.

Regulatory Issue

The NRC's regulations in 10 CFR Part 9, Subpart A are dated. Although they are consistent with FOIA, they are not plainly written and do not reflect Federal best practices. The proposed rulemaking would address these issues by revising Subpart A to incorporate the DOJ's model language for agency FOIA regulations, where appropriate. Making such clarifying and plain-language revisions to Subpart A will aid the oversight and management of the NRC FOIA program, improving its effectiveness. These revisions will also afford the public a better understanding of the NRC's FOIA process because they will be consistent with federal-wide best practices.

Existing Regulatory Framework

The NRC's regulations in 10 CFR Part 9, Subpart A implement the provisions of FOIA. Management Directive (MD) 3.1, FOIA Desk Guide, and "How to Respond to an Initial FOIA Request" (internal only) provide additional guidance on implementing FOIA. Specifically, MD 3.1 clarifies responsibilities and authorities for the review and processing of FOIA requests and appeals, consistent with the requirements and the time limits of the FOIA and 10 CFR Part 9, Subpart A. The FOIA Desk Guide provides specialized and administrative guidance on how to process agency requests for FOIA Coordinators, Subject Matter Experts, and FOIA Specialists.

Explanation of Why Rulemaking is the Preferred Solution

In its evaluation of the OGIS compliance assessment report, the staff considered conducting a rulemaking to address recommended revisions to NRC's FOIA regulations identified in the compliance assessment report. More specifically, the compliance assessment report found that the NRC's FOIA regulations are outdated, not well-organized, nor written in easy-to-understand language. Under the rulemaking option, the staff would revise the regulations in 10 CFR Part 9, Subpart A to improve the clarity of the existing requirements using plain language, address DOJ recommendations for inclusion of provisions that further promote good FOIA customer service, improve the efficiency of responding to FOIA requests, update roles and responsibilities, and align the regulations to formalize DOJ's recommended best practices for implementing FOIA. This rulemaking option will also afford the public a better understanding of the NRC's FOIA program, provide opportunities for public engagement, and promote consistency with other federal agencies by incorporating DOJ's template language for agency FOIA regulations, as appropriate. The staff considered several non-rulemaking options, such as revising guidance or taking no further action. The NRC staff is addressing other recommendations from OGIS by updating internal NRC guidance for implementing FOIA including, MD 3.1, FOIA Desk Guide, and "How to Respond to an Initial FOIA Request." Taking no further action would maintain the status quo and would not require any resources for implementation. Maintaining the status quo would not address OGIS's recommendation that the NRC update its FOIA regulations.

Description of Rulemaking: Scope

The staff's recommended rulemaking would amend 10 CFR Part 9, Subpart A to improve the clarity of the existing requirements by using plain language, update position titles, and align the regulations with current best practices for implementing the FOIA. This rulemaking would address OGIS's recommendation that the NRC update its FOIA regulations as well as provide the NRC the opportunity to incorporate DOJ's model language for agency FOIA regulations, as appropriate.

Description of Rulemaking: Preliminary Backfitting and Issue Finality Analysis

This rulemaking would not constitute a backfit as described in the backfit rule (10 CFR 50.109, “Backfitting”) and would not be inconsistent with any applicable issue finality provisions in 10 CFR Part 52, “Licenses, Certifications, and Approvals for Nuclear Power Plants.” The proposed amendments do not require the modification of, or addition to, the systems, structures, or components; the design of a facility; the design approval or manufacturing license for a facility; or the procedures or organization required to design, construct, or operate a facility.

Description of Rulemaking: Estimated Schedule

If the Commission approves the staff’s recommendation, the staff will develop a proposed rule, for the Commission’s review. If the Commission approves the proposed rule, the staff would publish the proposed rule in the Federal Register for public comment. After addressing any public comments, the NRC would submit the final rule to the Commission for approval. If approved, the final rule would be effective 30 days after publication in the *Federal Register*. The staff estimates the following timeframe for this rulemaking:

- Publish proposed rule—March 2025.
- Publish final rule—March 2026.

Description of Rulemaking: Preliminary Recommendation on Priority

Based on the Common Prioritization of Rulemaking prioritization methodology ([ML23018A148](#)), the preliminary priority for this rulemaking activity is low, with a score of 15 points (0, 5, 5, 5). The staff has established this preliminary priority based on the NRC’s “Strategic Plan Fiscal Years 2022–2026,” issued April 2022 ([ML22067A170](#)), for the following reasons:

- Factor A: This rulemaking does not contribute directly to the safety or security goals. FOIA regulations are an indirect contributor to promoting openness and transparency when releasing records to the public in reference to the safe and secure use of radioactive materials. Value: 0
- Factor B: This rulemaking activity is a high contributor toward multiple principles (openness, efficiency, and clarity). Value: 5
- Factor C: This rulemaking activity is a moderate contributor toward one or more considerations regarding government priority, most notably, aligning the regulations with current Federal best practices for implementing FOIA. Value: 5
- Factor D: This rulemaking activity is a moderate contributor toward stakeholder confidence. Since FOIA affects members of the public, the rulemaking process also affords members of the public the opportunity to comment on changes to the NRC’s FOIA process. The recommended rulemaking would also increase stakeholder confidence by increasing the clarity, transparency, and efficiency of the FOIA process. Value: 5

The priority for a rulemaking activity can change over time. Common reasons for a change in priority are changes in the rulemaking’s scope as it goes through the rulemaking process, and changes to the Strategic Plan.

Description of Rulemaking: Estimate of Resources

The proposed action is estimated to involve a low magnitude of costs by using existing resources. The proposed action is estimated to provide the following benefits and costs:

- Benefits— This action would improve the accuracy and efficiency in responding to FOIA requests.
- Costs— The staff expects this rulemaking would require minimal resources of approximately 0.50 full-time equivalents over the course of the rulemaking and \$0 in contractor support and travel (refer to Enclosure 1).

Cumulative Effects of Regulation

The staff's preliminary assessment of the cumulative effects of regulation concludes that no known activities or affected entities would be impacted significantly by implementing the proposed changes to 10 CFR Part 9, Subpart A. To ensure adequate identification of potential effects not currently foreseen, the staff plans to solicit stakeholder input on this issue during the proposed and final rule phases of this rulemaking if those phases are approved by the Commission.

Agreement State Considerations

The proposed amendments would not affect Agreement States.

Guidance

The staff will consider whether additional updates are needed to MD 3.1, the FOIA Desk Guide, "How to Respond to a FOIA Request," and FOIA resources on the NRC's public page.

Advisory Committee Review

The staff does not recommend a review by the Advisory Committee on Reactor Safeguards (ACRS), the Committee to Review Generic Requirements (CRGR), and the Advisory Committee on the Medical Use of Isotopes (ACMUI) because the proposed amendments would be outside the scope of the ACRS, CRGR, and ACMUI.

Analysis of Legal Matters

The Office of the General Counsel has reviewed this rulemaking plan and has not identified any issues necessitating a separate legal analysis at this time.

COMMITMENT:

If the Commission approves initiation of the rulemaking, in accordance with SECY-16-0042, "Recommended Improvements for Rulemaking Tracking and Reporting," dated April 4, 2016 ([ML16075A070](#)), the staff will add the rulemaking activity to the agency's rulemaking tracking tool.

RECOMMENDATION:

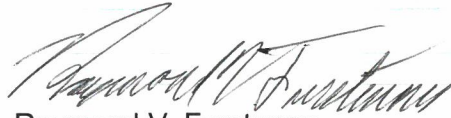
The NRC staff recommends that the Commission approve initiation of a rulemaking to revise NRC's FOIA regulations in 10 CFR Part 9, Subpart A to improve the clarity of the existing requirements by using plain language, promote good FOIA customer service, improve the efficiency of responding to FOIA requests, update roles and responsibilities, and align the regulations with current best practices for implementing the FOIA.

RESOURCES:

The enclosure includes an estimate of the resources needed to complete this rulemaking.

COORDINATION:

The Office of the General Counsel has no legal objection to this action. The Office of the Chief Financial Officer has reviewed this paper and has no concerns with the estimated resources in the enclosure.



Raymond V. Furstenau
Acting Executive Director
for Operations

Enclosures:

1. Resources for the FOIA
Regulations Rulemaking (nonpublic)
2. DOJ Office of Information Policy
Template for Agency FOIA Regulations
3. OGIS NRC Compliance Assessment

SUBJECT: RULEMAKING PLAN FOR FREEDOM OF INFORMATION ACT REGULATIONS,
10 CFR PART 9, SUBPART A DATED: March 20, 2024

ADAMS Accession Number: Pkg. ML24026A184;

***via email**

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