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*Pedestrian changes made to the directive appear in blue ink.

FEDERAL DEPOSIT INSURANCE CORPORATION

DIRECTIVE SYSTEM

TYPE AND NUMBER

Circular 1023.1

CONTACT

Hugo A. Zia

TELEPHONE NUMBER

703-562-2671

DATE

April 18, 2006

DATE OF CANCELLATION (*Bulletins Only*)

TO: All Divisions and Offices

FROM: Richard J. Osterman, Jr.
Acting General Counsel and
Chief FOIA Officer

SUBJECT: Procedures for Processing Freedom of Information Act Requests

1. Purpose To update procedures for processing requests for FDIC records and associated administrative appeals pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 and FDIC Regulations found in 12 CFR, § 309.5.

2. Revision FDIC Circular 1023.1, Procedures for Processing Freedom of Information Act Requests, dated February 11, 1999, is hereby revised and superseded.

3. Scope The provisions of this circular apply to all divisions and offices involved in the processing of FOIA requests.

4. Background The FOIA, enacted in 1966, generally provides that any person has a right to obtain access to federal agency records except to the extent that such records (or portions of them) are protected from public disclosure by one of nine exemptions or by one of three special law enforcement records exclusions.

The Privacy Act of 1974 may also be used by certain individuals to obtain access to records maintained by their names or other personal identifier in an agency system of records. Requests for Privacy Act records shall be processed in accordance with the Privacy Act, FDIC Regulations at 12 CFR, § 310, and the procedures in FDIC Circular 1031.1, The Privacy Act of 1974: Employee Rights and Responsibilities.

Background (cont'd)

In 1996, Congress enacted the Electronic Freedom of Information Act Amendments (E-FOIA) requiring public access to information in an electronic format and for the establishment of electronic FOIA reading rooms through agency FOIA web sites. The FDIC's E-FOIA web site is available at www.fdic.gov/about/freedom/index.html where a variety of reference materials and links to component reading rooms of electronic records may be found.

In 2005, President Bush issued Executive Order 13392, Improving Agency Disclosure of Information, 70 FR 75373, dated December 14, 2005, directing agencies to ensure citizen-centered and results-oriented FOIA operations. In accordance with this Executive Order, the FDIC has designated the General Counsel as its Chief FOIA Officer with corporate-wide responsibility for efficient and appropriate compliance with the FOIA.

To ensure appropriate communication with FOIA requesters, a FOIA Requester Service Center has been established within the Legal Division to receive and respond to inquiries concerning the status of pending FOIA requests. The FOIA Requester Service Center may be contacted at www.fdic.gov/about/freedom/index.html. Additionally, the Office of the Ombudsman is the designated FOIA Public Liaison to whom a FOIA requester can raise concerns about the status of their FOIA request and FOIA-related inquiries. The FOIA Public Liaison can be contacted at Ombudsman@FDIC.Gov.

5. Policy

The FDIC is committed to full compliance with the Freedom of Information Act.

6. Responsibilities

The Legal Division FOIA/Privacy Act Group (FOIA-PA Group) in Washington, DC has been delegated responsibility for the day-to-day administration and operation of the FOIA program.

7. Procedures

a. Processing FOIA Requests

(1) **Receipt of Requests.** Under Section 309.5 of FDIC's Rules and Regulations, (12 C.F.R. 306.5) all requests for records shall be in writing and sent directly to the FOIA-PA Group. FDIC Divisions or Offices that receive FOIA requests directly must send the requests immediately to the FOIA-PA Group via fax or interoffice or electronic mail.

**Procedures
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(2) **Cataloging of Requests.** Upon receipt of a FOIA request, the FOIA-PA Group shall assign the request a FOIA Log Number, that shall be used by the Division or Office in all correspondence and communications regarding the request.

(3) **Referral of Requests.** The FDIC is required to respond to valid FOIA requests within 20-business days after receipt of these requests by the FOIA-PA Group. A valid FOIA request is one that has been made in compliance with the FOIA and the FDIC's published regulations.

(a) The FOIA-PA Group shall:

1. Date-and time-stamp valid requests upon receipt, thereby commencing the 20-business-day response period required under FOIA, unless the request is to be afforded expedited treatment; and

2. Promptly refer and deliver requests to the appropriate Divisions or Offices that would reasonably be expected to have custody of the requested records.

(c) The assigned Division or Office shall immediately notify the FOIA-PA Group upon determining that it does not have custody of the requested records. If the assigned Division or Office believes that another Division or Office may have responsive records, the assigned Division or Office should advise the FOIA-PA Group, who will then reassign the request to the appropriate Division or Office. No Division or Office shall directly refer a request to another Division or Office. Reassignment to a different Division or Office does not extend the 20-business-day response period except in unusual circumstances.

(4) Coordination with Divisions and Offices

(a) Each Division or Office shall notify the FOIA-PA Group, in writing, of the name and title of the point-of-contact:

1. Responsible for coordinating FOIA responses and to whom requests for Division or Office records may be delivered. The point-of-contact shall also be responsible for advising the FOIA-PA Group on the status of pending requests; and

2. Authorized to recommend the release or withholding of records in response to FOIA requests.

(5) **Time for Responding to Requests**

(a) The assigned Division or Office shall make a recommendation to the FOIA-PA Group as to whether the request should be granted or denied within 15-business days following receipt of the request from the FOIA-PA Group. The Division or Office shall also complete the steps set forth in subparagraphs 7.a.(6) through (9), below.

(b) The 15-business-day time period referred to in subparagraph 7.a.(5)(a), above, is not applicable if: (i) the requested records are located in facilities, such as field offices, separate from the FDIC Washington office; or (ii) the requested records are voluminous or are not in proximity to one another; or (iii) there is a need to consult with another agency or among FDIC components having a substantial interest in the determination.

1. Notification to the FOIA-PA Group. If any of the circumstances described in subparagraphs 7.a.(5)(b), above, are present and an extension of time is necessary for making a decision, the assigned Division or Office shall, prior to the expiration of the 15-business-day time period, notify the FOIA-PA Group, in writing, of the need for and approximate length of an extension of time to respond. The FOIA-PA Group shall then advise the requester of the need for an extension of time.

2. Maximum Additional Time Authorized. By law, if responding to the request involves unusual circumstances, as described in subparagraphs 7.a.(5)(b), above, the 20-business-day time period may be extended: (i) for a period of no more than 10-business days; (ii) by an alternative time period agreed on by the requester; or (iii) by an alternative time period, reasonably determined by FDIC, when the FDIC notifies the requester that the request cannot be processed within the specified time limit.

(c) **Extension of Time to Obtain Agreement to Pay.** When it appears that processing costs will exceed \$10 and the requester has not agreed to pay such costs, the Division or Office must prepare a cost estimate as described in subparagraph 7.b.(3), below. The 15-business-day processing period shall be suspended until the agreement to pay is received from the requester.

(d) **Failure to Respond Within Time Limitations.** A request for records not responded to within 15-business days following receipt from the FOIA-PA Group by either a recommendation to grant or deny the request or by a request for additional time due to unusual circumstances will be considered a "no records" response. The FOIA-PA Group will notify the non-responsive Division or Office in writing before proceeding with a "no records" response to the requester.

(6) **Searching for Records**

(a) **FDIC Records.** FDIC records are records that are either created or obtained by the FDIC; and under FDIC control at the time of the FOIA request.

(b) **Scope of Search.** The assigned Division or Office shall search all records that might reasonably contain the requested information. The term "search" means to review, manually or electronically, FDIC records for the purpose of locating records that are responsive to a request, including time spent requesting records from off-site storage. The term "search" does not include time spent duplicating records. Questions regarding the scope of any FOIA search for records should be directed to the FOIA-PA Group.

(c) **Documenting Scope of Search.** The Division or Office must be able to identify the specific files and databases searched in response to a FOIA request. Such documentation is necessary to facilitate the review of an administrative appeal challenging the adequacy and scope of the FDIC's search for responsive records, or challenging the FDIC's determination to withhold records. At a minimum, this documentation must include a completed form FDIC 1023/01, FDIC Control Record for FOIA and Privacy Act Requests, (shall be referred to as (FOIA Control Record)) and FOIA Records Search Checklist attached to each referral by the FOIA-PA Group. The assigned Division or Office may also continue to include with their response any supplemental search-related information or memoranda deemed appropriate.

(d) **Search Cut-off Date.** Under Section 309.5(d)(7) of FDIC's Rules and Regulations a search shall be conducted of records maintained by the FDIC "in existence on the date of receipt of the request." If a time period is not specified by the requester, please inform the FOIA-PA Group if a search cut-off date other than the date of the request's receipt is used.

**Procedures
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(e) **Defective FOIA Requests.** A defective FOIA request is one that does not comply with the FOIA or the FDIC Regulations. The FOIA-PA Group will review all requests prior to routing to identify defective requests. For any request that is routed to a Division or Office, the Division or Office shall promptly notify the FOIA-PA Group if the request does not describe the records in a way that allows for a reasonable search to be conducted. The FOIA-PA Group shall promptly notify the requester of the apparent deficiency of the request. The 15-business-day processing period shall then be suspended until the FOIA-PA Group obtains clarification from the requester. The FOIA-PA Group shall promptly advise the appropriate Division or Office upon receipt of clarification.

(7) **Granting Requests in Full.** When an assigned Division or Office recommends that a request be granted in full, the director of the Division or Office (or designee) shall notify the FOIA-PA Group, in writing, of the decision and promptly deliver to the FOIA-PA Group a copy of the records requested. A Division or Office may grant a request in full and respond directly to the requester only when authorized to do so in writing by the Legal Division, or in accordance with Section 309.6 of FDIC's Rules and Regulations and subparagraph 7.a.(10) Discretionary Release of Exempt Records, below.

(8) **Providing Records in the Form or Format Requested.** The Division or Office shall provide responsive records in the format requested if the records are readily reproducible by the FDIC in that format (for example, hardcopy, fax, or electronic format).

(9) **Denial of Requests in Full or in Part.** The General Counsel (or designee) is the only FDIC official with the authority to deny, either in whole or in part, requests for records under FOIA. The authority to make an initial denial, in whole or in part, of requests for records made under FOIA is exercised by the FOIA-PA Group. When an assigned Division or Office recommends denial of a request, either in whole or in part, the Division or Office shall furnish the FOIA-PA Group with a copy of the responsive records and advise the FOIA-PA Group of the reasons for each recommended denial. The FOIA-PA Group may take such action with respect to Division or Office recommendations for the denial of a request as it deems appropriate, including granting the request. The FOIA-PA Group shall promptly furnish the assigned Division or Office with a copy of the notification letter granting the request in whole or in part.

**Procedures
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(10) **Discretionary Release of Exempt Records.** A Division or Office having primary authority over exempt records or information of the FDIC may effectuate a discretionary release of exempt records but only in strict accordance with the conditions and requirements set forth in Section 309.6 of the FDIC's Rules and Regulations. Prior to any discretionary release pursuant to a FOIA request, the Division or Office shall send a written statement to the FOIA-PA Group explaining why the records should be released together with the name and title of the official responsible for authorizing the release.

(11) Referrals of Requests to Another Agency

(a) If the requested record or information originated with another agency or falls within the special expertise of another agency, the assigned Division or Office shall so inform the FOIA-PA Group. The FOIA-PA Group shall contact the agency for guidance with respect to disposition of the request and, if necessary, shall forward the request and any responsive records to the agency for response. When records are referred to the agency for processing, the FOIA-PA Group shall advise the requester of the referral.

(b) When it appears that a request has been misdirected to the FDIC, the FOIA-PA Group shall advise the requester and provide the requester with the address of the agency believed to have the responsive records.

(12) **Confidential Business Information.** Requests for information submitted by business entities (submitters) to the FDIC shall, when applicable, be treated as required by Executive Order 12,600, Pre-Disclosure Notification Procedures for Confidential Commercial Information, 52 FR 23781, dated June 23, 1987, except for information that is: (i) publicly available by regulation, lawful publication, or similar means; (ii) of a type the release of which is regularly ordered by Federal Courts; or, (iii) determined by the FOIA-PA Group to be confidential and withheld under an appropriate FOIA exemption. (See Attachment for Executive Order 12,600.)

b. Recording Processing Costs of FOIA Requests

(1) **Computation of FOIA Processing Time for Purposes of Calculating Costs.** The assigned Division or Office shall receive a FOIA Control Record that shall be attached to the copy of the requester's letter.

(a) The billing information portion (caption 4) of the FOIA Control Record shall be completed by each Division or

**Procedures
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Office to whom a request has been referred, regardless of whether the requester will be charged.

(b) In the case of a recommended denial, partial denial, or full grant, the completed FOIA Control Record shall be returned to the FOIA-PA Group together with the documents proposed to be withheld and those proposed to be released; and

(c) In the case of a request granted in whole with prior Legal Division authorization, the completed FOIA Control Record shall be returned to the FOIA-PA Group together with a copy of the reply letter from the assigned Division or Office.

(2) Fees

(a) Requesters may be assessed a fee according to one of the following categories as determined by the FOIA-PA Group:

1. Commercial requesters shall be charged for all search time, review time, and duplication costs.

2. News media, educational institutions, and non-commercial scientific institutions shall be charged only for duplication costs in excess of the first 100 pages.

3. All other requesters shall be charged only for search time in excess of two (2) hours and duplication costs in excess of 100 pages.

(b) The Billing Information portion of the FOIA Control Record (caption 4) divides time spent responding to FOIA requests into three categories: search hours, review hours, and other hours. All billable hours shall be calculated in quarter (1/4) hour increments. Corresponding time entries should be entered into the CHRIS Time and Attendance to support corporate accounting and cost management requirements.

1. Search Hours consist of time spent searching for the documents requested.

2. Review Hours consist of time spent processing the documents and preparing them for release. This activity would include, for example, determining whether any statutory exemptions are applicable, deleting exempt material from documents to be

**Procedures
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released, drafting and reviewing proposed responses, and reviewing the work of a subordinate. This activity would not include time spent resolving general legal or policy issues.

3. Other Hours consist of time spent preparing general legal or policy memoranda, time spent resolving general policy issues, time spent making photocopies, and similar general administrative overhead costs incurred in processing the request. Although the FDIC must absorb these charges as part of the cost of complying with the FOIA, it is important to record these Other Hours because they are included in the FDIC Annual FOIA Report to Congress and the public.

(c) The Billing Information portion of the FOIA Control Record also accommodates the reporting of Pages Duplicated and Other Costs. Pages Duplicated is divided into two categories:

1. The number of pages proposed for release shall be entered under "Released to Requester." The FOIA-PA Group shall compute the duplication costs at the published rate based on the number of pages released.

2. The number of pages copied as work copies will not be charged, but shall be recorded under "Otherwise Duplicated."

3. "Other Costs" covers costs relating to manuals, computer usage, and other incidental costs incurred in fulfilling a request. (Contact the FOIA-PA Group for assistance in completing this area.)

(3) **Cost Estimates.** If a requester does not specifically agree to pay the charges associated with the request, and if the assigned Division or Office determines that the cost of fulfilling a request will exceed \$10, the Division or Office shall prepare a written cost estimate. Upon receipt and approval of the cost estimate the FOIA-PA Group shall contact the requester to obtain the requester's written agreement to pay the estimated costs. When the estimated costs exceed \$250, the FOIA-PA Group shall obtain from the requester a deposit of 20 percent of the estimated charges, as well as a written agreement to pay the remaining costs. The FOIA-PA Group shall promptly notify the assigned Division or Office after obtaining the requester's agreement to pay. If a requester does not agree to pay the charges associated with the request, and if the assigned Division or Office determines that

**Procedures
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the cost of fulfilling a request will exceed \$10, the processing of the request will be suspended from the date the Division or Office forwards the cost estimate to the FOIA-PA Group until the date the requester's written agreement or deposit is received by the FOIA-PA Group.

(4) **Invoices.** Form FDIC 1023/02, Invoices, used for charges shall be prepared by the FOIA-PA Group based on the information provided on the FOIA Control Record. The only exception is when a certain Division or Office may have the authority to bill directly for certain manuals and copies.

(5) **Fee Waiver or Reduction.** In response to a request to waive or reduce fees, the Supervisory Counsel, FOIA-PA Group (or designee) shall decide whether it is in the public interest to grant such a request because the requested information is likely to contribute significantly to public understanding of the operations or activities of the government, and is not primarily in the commercial interest of the requester. All fee waiver responses shall be issued from the FOIA-PA Group.

c. Processing Administrative Appeals

(1) Under Section 309.5(h) of the FDIC's Rules and Regulations, appeals must be in writing and addressed to the FOIA-PA Group, Federal Deposit Insurance Corporation, Washington, DC 20429, for decision by the General Counsel (or designee). Requesters are permitted by law to file an appeal: (i) from the denial of expedited treatment, (ii) from the denial of a waiver of fees, (iii) from the denial of a request for records, (iv) from the implied denial of a request for records due to FDIC's failure to respond within the applicable time period, or (v) to challenge the scope and adequacy of the FDIC's search for responsive records.

(a) Appeals received by a Division or Office directly from a requester must be sent immediately to the FOIA-PA Group via fax or interoffice or electronic mail.

(b) Upon receipt of an appeal, the FOIA-PA Group shall date- and time-stamp the appeal, thereby commencing the time period allowed the FDIC for processing the appeal. The FOIA-PA Group shall assign a FOIA Appeal Log Number to each appeal. The FDIC is allowed by statute 20-business days for processing an appeal resulting from a partial or total denial of a request for records or from the denial of a fee waiver. The FDIC is allowed by statute 10-business days for processing an appeal resulting from the denial of expedited treatment. The FOIA Appeal Log Number shall be used in all

**Procedures
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correspondence or communications regarding the appeal. The FOIA-PA Group shall timely deliver the appeal to the General Counsel (or designee) for a decision whether the original decision was in accordance with the law.

(c) The FOIA-PA Group shall also promptly notify the Division or Office maintaining the records that an appeal has been filed. The Division or Office shall thereafter make available to the General Counsel (or designee) documentation identifying the specific records searched in response to the FOIA request. Such documentation is necessary to facilitate the General Counsel's (or designee's) review of an administrative appeal challenging the adequacy and scope of the FDIC's search for responsive records or challenging FDIC's determination to withhold records, and is required to be maintained by the responsible Division or Office pursuant to subparagraph 7.a.(6)(b), above.

(d) The General Counsel (or designee) shall notify the appellant, in writing, of the determination to grant or deny the appeal, and if denied, provide the reasons for denial and the right of the appellant to seek judicial review of the denial under FOIA. A copy of this determination shall promptly be provided to the FOIA-PA Group and the Division(s) or Office(s) which provided the responsive records.

(e) In cases where the General Counsel (or designee) decides the original withholding was proper, but a discretionary release of the record is in the best interest of FDIC, he or she will proceed under the FDIC's regulation at 12 C.F.R. § 309.6.

(f) Complete payment of any outstanding FOIA fees is required before an appeal will be processed.

(g) The General Counsel (or designee) may, of his or her own motion, refer an appeal to the Board of Directors for decision; and, the Board of Directors may, on its own motion, consider an appeal. Whenever the Board of Directors shall consider an appeal, the Legal Division shall prepare and submit a written recommendation regarding the appeal to the Board of Directors.

**8. Record Keeping
Requirements**

Each Division or Office shall retain administrative records of the action taken on FOIA requests. These records shall be retained in accordance with the provisions in FDIC Circular 1210.1, FDIC Records Retention and Disposition Schedule.

9. Effective Date

The provisions outlined in this circular are effective immediately.

Attachment

EXECUTIVE ORDER NO. 12,600

ISSUED JUNE 23, 1987

By the authority vesting in me as President by the Constitution and statutes of the United States of America, and in order to provide pre-disclosure notification procedures under the Freedom of Information Act concerning confidential commercial information, and to make existing agency notification provisions more uniform, it is hereby ordered as follows:

Section 1. The head of each Executive department and agency subject to the Freedom of Information Act shall, to the extent permitted by law, establish procedures to notify submitters of records containing confidential commercial information as described in Section 3 of this Order, when those records are requested under the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, if after reviewing the request, the responsive records, and any appeal by the requester, the department or agency determines that it may be required to disclose the records. Such notice requires that an agency use good-faith efforts to advise submitters of confidential commercial information of the procedures established under this Order. Further, where notification of a voluminous number of submitters is required, such notification may be accomplished by posting or publishing the notice in a place reasonably calculated to accomplish notification.

Section 2. For purposes of this Order, the following definitions apply:

(a) "Confidential commercial information" means records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

(b) "Submitter" means any person or entity who provides confidential commercial information to the government. The term "submitter" includes, but is not limited to, corporations, state governments, and foreign governments.

Section 3. (a) For confidential commercial information submitted prior to January 1, 1988, the head of each Executive department or agency shall, to the extent permitted by law, provide a submitter with notice pursuant to section 1 whenever:

(i) the records are less than 10 years old and the information has been designated by the submitter as confidential commercial information; or

(ii) the department or agency has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm.

(b) For confidential commercial information submitted on or after January 1, 1988, the head of each Executive department or agency shall, to the extent permitted by law, establish procedures to permit submitters of confidential commercial information to designate, at the time the information is submitted to the Federal government or a reasonable time thereafter, any information the disclosure of which the submitter claims could reasonably be expected to cause substantial competitive harm. Such agency procedures may provide for the expiration, after a specified period of time or changes in circumstances, of designations of competitive harm made

by submitters. Additionally, such procedures may permit the agency to designate specific classes of information that will be treated by the agency as if the information has been so designated by the submitter. The head of each Executive department or agency shall, to the extent permitted by law, provide the submitter notice in accordance with section 1 of this Order whenever the department or agency determines that it may be required to disclose records:

(i) designated pursuant to this subsection; or

(ii) the disclosure of which the department or agency has reason to believe could reasonably be expected to cause substantial competitive harm.

Section 4. When notification is made pursuant to Section 1, each agency's procedures shall, to the extent permitted by law, afford the submitter a reasonable period of time in which the submitter or its designee may object to the disclosure of any specified portion of the information and to state all grounds upon which disclosure is opposed.

Section 5. Each agency shall give careful consideration to all such specified grounds for nondisclosure prior to making an administrative determination of the issue. In all instances when the agency determines to disclose the requested records, its procedures shall provide that the agency give the submitter a written statement briefly explaining why the submitter's objections are not sustained. Such statement shall, to the extent permitted by law, be provided a reasonable number of days prior to a specified disclosure date.

Section 6. Whenever a FOIA requester brings suit seeking to compel disclosure of confidential commercial information, each agency's procedures shall require that the submitted be promptly notified.

Section 7. The designation and notification procedures required by this Order shall be established by regulations, after notice and public comment. If similar procedures or regulations already exist, they should be reviewed for conformity and revised where necessary. Existing procedures or regulations need not be modified if they are in compliance with this Order.

Section 8. The notice requirements of this Order need not be followed if:

(a) The agency determines that the information should not be disclosed;

(b) The information has been published or has been officially made available to the public;

(c) Disclosure of the information is required by law (other than 5 U.S.C. 552);

(d) The disclosure is required by an agency rule that (1) was adopted pursuant to notice and public comment, (2) specifies narrow classes or records submitted to the agency that are to be released under the Freedom of Information Act, and (3) provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submitted or a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm;

(e) The information requested is not designated by the submitter as exempt from disclosure in accordance with agency regulations promulgated pursuant to Section 7, when the submitter

had an opportunity to do so at the time of submission of the information or a reasonable time thereafter, unless the agency has substantial reason to believe that disclosure of the information would result in competitive harm; or

(f) The designation made by the submitter in accordance with agency regulations promulgated pursuant to Section 7 appears obviously frivolous; except that, in such case, the agency must provide the submitter with written notice of any final administrative disclosure determination within a reasonable number of days prior to the specified disclosure date.

Section 9. Whenever an agency notifies a submitter that it may be required to disclose information pursuant to Section 1 of this Order, the agency shall also notify the requester that notice and an opportunity to comment are being provided the submitter. Whenever an agency notifies a submitter of a final decision pursuant to Section 5 of this Order, the agency shall also notify the requester.

Section 10. This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.