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LEGAL SERVICES CORPORATION

45 CFR Part 1602

Procedures for Disclosure of Information under the Freedom of Information Act

AGENCY: Legal Services Corporation

ACTION: Final Rule

SUMMARY: LSC is revising its regulation on procedures for disclosure of information under the Freedom of Information Act to implement changes in that law made by the OPEN Government Act of 2007. LSC is also designating the Office of Inspector General as a separate component for receiving requests for its records and making two technical amendments.

DATES: This Final Rule is effective as of December 31, 2008.

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SUPPLEMENTARY INFORMATION: LSC is subject to the Freedom of Information Act (FOIA) by the terms of the Legal Services Corporation Act. 42 U.S.C. 2996d(g).¹ LSC has implemented FOIA procedures through the adoption of regulations found at 45 CFR Part 1602.

On December 31, 2007, President Bush signed the Openness Promotes Effectiveness in our National Government Act of 2007 (“OPEN Government Act” or “Act”) into law. The OPEN Government Act amends FOIA in an effort to improve media and public access to government records. In order to bring LSC’s FOIA regulations into conformance with the changes to FOIA

¹ Absent this authority, LSC would not otherwise be subject to FOIA since LSC is not an agency, department or instrumentality of the Federal government. 42 U.S.C. 2996d(e)(1).

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made by the OPEN Government Act provisions, the LSC Board of Directors initiated a rulemaking on August 2, 2008 and LSC issued a Notice of Proposed Rulemaking (NPRM) on August 14, 2008, (73 Fed. Reg. 45764) proposing revisions to the regulation and seeking public comment. LSC received no comments on the NPRM and LSC adopts the revisions to the regulation as proposed. The changes to Part 1602 are discussed in greater detail below.

Section-by-Section Analysis

Definitions – 45 CFR §1602.2

§1602.2(g) – Records

Under LSC’s regulations, “records” are various materials “made or received by the Corporation in connection with the transaction of the Corporation’s business and preserved by the Corporation.” 45 CFR §1602.2(g). Section 9 of the OPEN Government Act expands the statutory definition of “record” to include any information that is maintained for an agency by an entity under Government contract, for the purposes of records management. LSC proposed to amend §1602.2(g) to conform the regulation with the expanded statutory definition by specifically referencing information maintained by LSC under contract for the purposes of records management. LSC adopts the revisions as proposed.²

§1602.2(h) – Representatives of News Media

FOIA provides that “representatives of the news media” may not be charged fees for search and review time associated with responding to their FOIA requests. 5 U.S.C. §552(a)(4)(A)(ii)(II). The term “representative of the news media” is not defined in FOIA, but LSC’s FOIA regulation at

² In accordance with Federal Register requirements, LSC is not including any specific regulatory text language in this preamble. Readers are referred to the regulatory text section *supra*.

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Part 1602 currently contains a definition based on a definition of that term appearing in guidance published by the Office of Management and Budget. *See*, 53 Fed. Reg. 6151 (March 1, 1988); 52 Fed. Reg. 10012 (March 27, 1987).

The OPEN Government Act of 2007 clarifies that “freelance” journalists and “alternative media” news sources (such as online news sources) are “representatives of the news media” for the purposes of the fee structure. Specifically, §3 of the OPEN Government Act defines “representative of the news media” as “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 an audience.” That section goes on to provide:

In this clause, 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 are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ‘news’) who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the 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 present a solid basis for such

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an expectation; the Government may also consider the past publication record of the requester in making such a determination.

Although LSC's existing definition of "representative of the news media" is not substantively inconsistent with or contrary to the newly clarified definition in the OPEN Government Act, LSC believes that it is prudent to amend its regulatory definition to reflect the revised statutory language. LSC believes that substituting the clarified definition for the existing one will ensure that LSC's regulation reflects the full intent of Congress. Accordingly, LSC proposed to amend §1602.2(h) to reflect the statutory language. LSC adopts the definition as proposed.

Requests for Records – 45 CFR §1602.8

Agencies are required to make determinations on whether to comply with FOIA requests within twenty (20) business days of receipt of a request. 5 U.S.C §552(a)(6)(A)(i). LSC has incorporated this requirement into its regulations at 45 CFR §1602.8(i). The OPEN Government Act provides additional instruction to clarify when the time limit begins to run. Specifically, §6 of the OPEN Government Act provides that:

The 20-day period under clause [5 U.S.C §552(a)(6)(A)(i)] shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. [sic] The 20-day period shall not be tolled by the agency except

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- (I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or
- (II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

Unlike some agencies subject to FOIA, LSC has had only one component designated to receive requests, the Office of Legal Affairs. The Office of Inspector General (OIG) is not a separate component designated to receive FOIA requests under LSC's regulations, although the General Counsel or designee forwards requests for records maintained by the OIG for processing and response. Under the current regulation, when FOIA requests are for OIG records and they are referred over to the OIG, the 20-day time limit for response only starts for the OIG when the OIG receives the request upon referral from the Office of Legal Affairs. However, under the new statutory requirements, the OIG's 20-day time limit will commence when the OIG receives the request from the Office of Legal Affairs, but in no event later than 10 working days from when the Office of Legal Affairs receives the request. Thus, if for some reason the referral is not made on a timely basis, the OIG could lose some or all of its response time before its response would be deemed late through no action or inaction on the part of the OIG.

Designating the OIG as a separate component authorized to receive requests directly would ameliorate, although not entirely eliminate, this potential problem. In addition, LSC notes that it is

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typical practice in other agencies with Inspectors General for those Offices of Inspector General to be separately designated components authorized to receive and process FOIA request directly. Accordingly, LSC proposed to revise 45 CFR Part 1602.8(i) to incorporate the provisions of the OPEN Government Act discussed above and to designate the Office of Inspector General as a component authorized to receive FOIA requests for its records. LSC adopts the revisions as proposed.

In addition, LSC proposed to redesignate paragraph (i)(2) as (i)(2)(i), amend that paragraph to read as provide for the mutual referral by the respective Offices of FOIA requests received for the others' documents. LSC also proposed add a new paragraph (i)(2)(ii) to clarify when the 20-day period under paragraph (i)(1) begins to run for each respective Office. LSC adopts the revisions as proposed.

Exemptions for Withholding Records – 45 CFR §1602.9

Under FOIA, entire documents or portions thereof may be withheld from disclosure if one or more specified exemptions apply. 5 U.S.C. §552(b). If a particular document contains information that can be withheld from disclosure which may reasonably be segregated from the material which must be released, the agency must (with limited exception) release the segregable portion of the record and indicate the amount of information which has been deleted. *Id.* Section 12 of the OPEN Government Act imposes a further requirement that the agency inform requesters of the exemption under which redacted information is being withheld. LSC proposes incorporating this new requirement into its regulations by amending §1602.9(b) to insert the words “and the exemption under which the deletion is made” after the words “amount of information deleted” where they appear in the second and third sentences of that paragraph. LSC adopts the revision as proposed.

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Officials Authorized to Grant or Deny Requests for Records – 45 CFR §1602.10

Under the current regulation, because the OIG is not separately designated to receive its own FOIA requests, the Counsel to the Inspector General or designee is required to consult with the Office of the General Counsel prior to granting or denying requests for records which have been referred to the OIG. 45 CFR §1602.10(b). With the change, discussed elsewhere herein, to designate the OIG as a unit authorized to receive FOIA requests directly, this requirement is obsolete. Accordingly, LSC is deleting this requirement from the regulation by deleting the last sentence of §1602.10(b).

In addition, under the current regulation, the Office of the General Counsel is required to consult with the OIG in cases in which a requester has requested a record which originated with the OIG but which is now maintained elsewhere within the Corporation. 45 CFR §1602.10(b). This ensures that the OIG has notice and an opportunity to participate in the potential release of OIG records by the Office of General Counsel. With the change, discussed elsewhere herein, to designate the OIG as a unit to receive FOIA requests directly, it is appropriate to adopt a parallel provision requiring the OIG to consult with the Office of the General Counsel prior to granting or denying a request for a record which originated in a component of the Corporation other than the OIG but which is being maintained by the OIG. Accordingly, LSC proposed to add a new last sentence of §1602.10(b) requiring such consultation. LSC adopts the revision as proposed.

Fees – 45 CFR §1602.13

FOIA provides for the assessment of fees on requesters associated with the processing of their FOIA requests. 5 U.S.C. §552(a)(4). Prior to the adoption of the OPEN Government Act, applicable fees could be assessed when authorized under FOIA, regardless of the timeliness of the

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response to the requester. Section 6 of the OPEN Government Act has changed that, providing now that, for FOIA requests received on or after December 31, 2008, an agency which fails to provide a timely response may not assess search fees on requesters, except in cases involving unusual or exceptional circumstances. In the case of requesters who are representatives of the news media, since they are already not subject to search charges, the OPEN Government Act provides that, for FOIA requests received on or after December 31, 2008, applicable duplication fees will not be charged when the agency provides an untimely response. LSC proposed to implement this statutory change by amending §1602.13, Fees, by redesignating paragraph (b) as a paragraph (b)(1) and adding a new paragraph (b)(2) to incorporate the statutory requirement. LSC adopts the revision with minor modifications to the text for clarity and to explicitly reference that the new provision applies only the requests received on or after the effective date of the revision.

Technical Changes – References to LSC’s Address

Although not required by the OPEN Government Act, LSC is taking this opportunity to make two technical changes to the regulation, both referencing addresses for the submission of FOIA requests.

§1602.5 – Public reading room

When the Corporation last amended Part 1602 in 2003, the Corporation was in the process of moving its offices from 750 First St. NE, Washington, DC to its current location at 3333 K St. NW, Washington, DC. Section 1602.5, which sets forth the address of LSC’s public reading room and is also the address referenced in the instructions for the submission of FOIA requests in §1602.8(b), was amended at that time to include both addresses. The reference to the First St. NE address is now obsolete. Accordingly, LSC proposed to delete the reference to that obsolete address and amend the

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first sentence of §1602.5(a) to reference LSC's current address. LSC adopts the revision as proposed.

§1602.8 – Requests for records

LSC proposed a technical change to §1602.8(b) to update the email address requesters are required to use to submit FOIA requests. The current regulation lists an email address of info@smtp.lsc.gov, which is a general information email address. LSC has since established a dedicated FOIA email address to ensure that FOIA requests are identified and processed separately from other general information requests submitted to the Corporation in order to improve handling and processing of FOIA requests. Accordingly, LSC proposed to amend paragraph (b) to delete the old email address, and substitute the correct dedicated FOIA email address: FOIA@lsc.gov in the third sentence of paragraph (b). LSC adopts the revision as proposed.

List of Subjects in 45 CFR Part 1602

Freedom of Information, Reporting and recordkeeping requirements

For reasons set forth above, LSC revises 45 CFR Part 1602 as follows:

PART 1602 – PROCEDURES FOR DISCLOSURE OF INFORMATION UNDER THE FREEDOM OF INFORMATION ACT

1. The authority citation continues to read as follows:

42 U.S.C. 2996d(g); 5 U.S.C. 552

2. Paragraphs (g) and (h) of section 1602.2, Definitions, are revised to read as follows:

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(g) Records means books, papers, maps, photographs, or other documentary materials, regardless of whether the format is physical or electronic, made or received by the Corporation in connection with the transaction of the Corporation's business and preserved by the Corporation (either directly or maintained by a third party under contract to the Corporation for records management purposes), as evidence of the organization, functions, policies, decisions procedures, operations, or other activities of the Corporation, or because of the informational value of data in them. The term does not include, inter alia, books, magazines, or other materials acquired solely for library purposes.

(h) Representative of the news media means 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 an audience. In this clause, 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 are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of 'news') who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the 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 present a solid basis for such an expectation; the Corporation may also consider the past publication record of the requester in making such a determination.

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3. Paragraph (a) of section 1602.5, Public reading room, is revised to read

(a) The Corporation will maintain a public reading room its office at 3333 K St. NW, Washington, DC, 20007. This room will be supervised and will be open to the public during the regular business hours of the Corporation for inspecting and copying records described in paragraph (b) of this section.

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4. Paragraph (b) and subparagraphs (1) and (2) of paragraph (i) of section 1602.8, Requests for records, are revised to read as follows:

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(b) Requests. Requests for records under this section shall be made in writing, with the envelope and the letter or e-mail request clearly marked Freedom of Information Act Request. All such requests shall be addressed to the Corporation's Office of Legal Affairs or, in the case of requests for records maintained by the Office of Inspector General, to the Office of Inspector General. Requests by letter shall use the address given in §1602.5(a). E-mail requests shall be addressed to FOIA@lsc.gov or, in the case of requests for records maintained by the Office of Inspector General, FOIA@oig.lsc.gov. Any request not marked and addressed as specified in this paragraph will be so marked by Corporation personnel as soon as it is properly identified, and will be forwarded immediately to the Office of Legal Affairs, or as appropriate, the Office of Inspector General. A request improperly addressed will only be deemed to have been received as in accordance with paragraph (i) of this section. Upon receipt of an improperly addressed request, the General Counsel

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or designee (or Counsel to the Inspector General or designee) shall notify the requester of the date on which the time period began.

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(i)(1)(i) The General Counsel or designee, upon request for any records made in accordance with this section, except in the case of a request for Office of Inspector General records, shall make an initial determination of whether to comply with or deny such request and dispatch such determination to the requester within 20 days (excepting Saturdays, Sundays and legal public holidays) after receipt of such request, except for unusual circumstances, in which case the time limit may be extended for up to 10 working days by written notice to the requester setting forth the reasons for such extension and the date on which a determination is expected to be dispatched.

(ii) In the case of a request for any Office of Inspector General records made in accordance with this section, the Counsel to the Inspector General or designee shall make an initial determination of whether to comply with or deny such request and dispatch such determination to the requester within 20 days (excepting Saturdays, Sundays and legal public holidays) after receipt of such request, except for unusual circumstances, in which case the time limit may be extended for up to 10 working days by written notice to the requester setting forth the reasons for such extension and the date on which a determination is expected to be dispatched.

(i)(2)(i) If the General Counsel or designee determines that a request or portion thereof is for the Office of Inspector General records, the General Counsel or designee shall promptly refer the request or portion thereof to the Office of Inspector General and send notice of such referral to the requester. If the Counsel to the Inspector General or designee determines that a request or portion thereof is for Corporation records not maintained by the Office of Inspector General, the Counsel to

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the Inspector General or designee shall promptly refer the request or portion thereof to the Office of Legal Affairs and send notice of such referral to the requester.

(ii) The 20-day period under paragraph (i)(1) shall commence on the date on which the request is first received by the appropriate Office (the Office of Legal Affairs or the Office of Inspector General), but in no event later than 10 working days after the request has been received by either the Office of Legal Affairs or the Office of Inspector General. The 20-day period shall not be tolled by the Office processing the request except that the processing Office may make one request to the requester for information pursuant to paragraph (c) of this section and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or, if necessary to clarify with the requester issues regarding fee assessment. In either case, the processing Office's receipt of the requester's response to such a request for information or clarification ends the tolling period.

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5. Paragraph (b) of section 1602.9, Exemptions for withholding records, is revised to read as follows:

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(b) In the event that one or more of the exemptions in paragraph (a) of this section apply, any reasonably segregable portion of a record shall be provided to the requester after deletion of the portions that are exempt. The amount of information deleted and the exemption under which the deletion is being made shall be indicated on the released portion of the record, unless doing so would harm the interest protected by the exemption under which the deletion is made. If technically

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feasible, the amount of information deleted and the exemption under which the deletion is being made shall be indicated at the place in the record where the deletion occurs.

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6. Paragraph (b) of section 1602.10, Officials authorized to grant or deny requests for records, is revised to read as follows:

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(b) The General Counsel or designee and the Counsel to the Inspector General or designee are authorized to grant or deny requests under this part. In the absence of a Counsel to the Inspector General, the Inspector General shall name a designee who will be authorized to grant or deny requests under this part and who will perform all other functions of the Counsel to the Inspector General under this part. The General Counsel or designee shall consult with the Office of the Counsel to the Inspector General or designee prior to granting or denying any request for records or portions of records which originated with the Office of Inspector General, or which contain information which originated Office of Inspector General, but which are maintained by other components of the Corporation. The Counsel to the Inspector General or designee shall consult with the Office of the General Counsel prior to granting or denying any request for records or portions of records which originated with any component of the Corporation other than the Office of Inspector General, or which contain information which originated with a component of the Corporation other than the Office of Inspector General, but which are maintained by the Office of Inspector General.

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7. Paragraph (b) of section 1602.13, fees, is amended by designating paragraph (b) as (b)(1) and adding a paragraph (b)(2) as follows:

* * * * *

(b) ***

(2) If no unusual circumstances, as set forth in §1602.8 apply, for requests received on or after December 31, 2008, if LSC has failed to comply with the time limits set forth in that section, otherwise applicable search fees will not be charged to a requester. In such cases, if the requester is a representative of the news media, otherwise applicable duplication fees will not be charged.

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Victor M. Fortuno

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