

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER (EPIC)

to the

OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT

Freedom of Information Act Regulations

5 C.F.R. Part 1303

[Docket No. 2018-18061]

RIN 0348-AB42

Notice of Proposed Rulemaking

September 24, 2018

By notice published on August 23, 2018, the Office of Management and Budget (“OMB”) has proposed regulations regarding the Freedom of Information Act (“FOIA”).¹ In response to the notice, the Electronic Privacy Information Center submits these comments and recommendations to address the substantial risks to open government and agency accountability that the proposed regulatory changes raise.

I. EPIC’s Interest

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

¹ OMB Freedom of Information Act Regulations, 83 Fed. Reg. 42,610 (proposed Aug. 23, 2018) (to be codified at 5 C.F.R Part 1303).

² *About EPIC*, EPIC (2018), <https://epic.org/epic/about.html>.

encouraging federal agencies to uphold the FOIA, and has engaged in extensive Freedom of Information Act litigation with federal agencies.³ EPIC has published numerous instructive materials in open government litigation, including a leading guide for FOIA practitioners and requesters.⁴ EPIC, along with Citizens for Responsibility and Ethics in Washington (“CREW”), and the National Security Archive, developed the Model FOIA Regulations.⁵ The Model FOIA Regulations recommend a common set of practices to ensure agencies best enhance the public’s right to know.

II. Analysis of Proposed Changes to Agency Regulations

The agency proposes numerous changes to 5 C.F.R. Part 1303 to implement the FOIA. Some modifications are also proposed to “streamline” FOIA regulations by drawing from the structure of the Department of Justice’s FOIA regulations.⁶ There are certain proposed modifications that would undermine the FOIA, undercut open governance and agency accountability, and exceed the agency’s authority. EPIC urges OMB to amend the proposed regulations based on the suggestions provided here.

Proposed Section § 1303.21 “Requesters Making Requests About Themselves or Others”

OMB proposes to add a new section to the current regulation detailing a procedure for requests pertaining to individuals who authorize the release of information.

Under the proposed addition, § 1303.21:

A requester who is making a request for records about himself or herself pursuant to 5 U.S.C. 552(a) must comply with the verification of identity requirements as

³ See, e.g. *EPIC v. IRS*, No. 17-5225 (D.C. Cir. Sept. 13, 2018); *EPIC v. DOJ*, No. 18-1814 (D.D.C. filed August 1, 2018); *EPIC v. FTC*, No. 18-942 (D.D.C. filed April 20, 2018); *EPIC v. DHS*, No. 17-2047 (D.D.C. settled August 29, 2018); See also, *EPIC v. U.S. Dep’t. of Homeland Sec.*, 811 F. Supp. 2d 216 (D.D.C. 2011); *EPIC v. Dep’t of Justice*, 416 F. Supp. 2d 30 (D.D.C. 2006); *EPIC v. Dep’t of Def.*, 241 F. Supp. 2d 5 (D.D.C. 2003); *EPIC FOIA Cases*, EPIC (2015), <https://epic.org/foia/>.

⁴ EPIC, *Litigation Under the Federal Open Government Laws 2010* 138 (Harry A. Hammitt, Ginger McCall, Marc Rotenberg, John A. Verdi, & Mark S. Zaid, eds., 2010). See also, Rotenberg, McCall, & Horwitz, *The Open Government Clinic: Teaching the Basics of Lawyering*, 48 Indiana. L. Rev. 149 (2014).

⁵ Model Federal FOIA Regulations, <http://www.modelfoiaregs.org/2014/05/model-federal-foia-regulations.html>, EPIC (July 2014).

⁶ Department of Justice FOIA Regulations, codified at 28 C.F.R. pt. 16.

determined by OMB pursuant to OMB's Rules for Determining if an Individual Is the Subject of a Record in 5 C.F.R. §1302.1. Where a request for records pertains to another individual, a requester may receive greater access by submitting either a notarized authorization signed by that individual or a declaration made in compliance with the requirements set forth in 28 U.S.C. §1746 by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual is deceased (*e.g.*, a copy of a death certificate or an obituary). As an exercise of administrative discretion, OMB may require a requester to supply additional information if necessary in order to verify that a particular individual has consented to disclosure.

The proposal facilitates greater access to government records by removing the administrative hurdle of having requesters provide authorization and verification. At the same time, however, it is necessary for FOIA officers to protect individual privacy. To both facilitate open access to government records about government officials while still protecting personal privacy of the general public, OMB should amend the current regulation as follows:

If you are making a request for records about another individual who is not a public official, either a written authorization signed by that individual permitting disclosure of those records to you or proof that that individual is deceased (for example, a copy of a death certificate or an obituary) must be submitted.

This language would both protect personal privacy and facilitate access to information about government officials.

Proposed § 1303.22 Requirement for Providing Description of Records Sought

The proposed § 1303.22 includes favorable changes to existing provisions. For example, the second paragraph establishes a procedure for responding to requests that do not reasonably describe the records sought. Under this provision, “OMB will inform the requester what additional information is needed and why the request is otherwise insufficient.”⁷ This revised provision also outlines the resources available to help requesters describe the records sought, including the FOIA

⁷ 83 Fed. Reg. at 42613 (Proposed § 1303.22).

Officer and FOIA Public Liaison. EPIC supports this provision. Working with requesters to describe records effectively will facilitate the processing of requests.

However, this section would also require requesters to describe records to OMB in “sufficient detail,” which is not required by the statute.

Under the current regulations, 5 C.F.R. §1303.30(d):

The term “search” means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. OMB employees should ensure that searching for material is done in the most efficient and least expensive manner so as to minimize costs for both the agency and the requester. For example, employees should not engage in line-by-line search when merely duplicating an entire document would prove the less expensive and quicker method of complying with a request. Search should be distinguished, moreover, from review of material in order to determine whether the material is exempt from disclosure (see paragraph (f) of this section).

Under the proposed regulations, 5 C.F.R. § 1303.22:

Requesters must describe the records sought in sufficient detail to enable OMB personnel to locate them with a reasonable amount of effort. To the extent possible, requesters should include specific information that may help the agency identify the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number. Before submitting their requests, requesters may contact the FOIA Officer or FOIA Public Liaison to discuss the records they seek and to receive assistance in describing the records.

If, after receiving a request, OMB determines that the request does not reasonably describe the records sought, OMB will inform the requester what additional information is needed and why the request is otherwise insufficient. Requesters who are attempting to reformulate or modify such a request may discuss their request with the FOIA Officer or the FOIA Public Liaison. If a request does not reasonably describe the records sought, OMB’s response to the request may be delayed.

Whereas the current regulation requires OMB staff to process requests in the most “efficient” and “least expensive” manner, the proposed regulation places the burden on the requester to furnish “sufficient detail” so that OMB personnel can efficiently process the record, without actually describing what level of detail is required. The FOIA states that a request should “reasonably

describe[]” the records sought.⁸ Using a reasonableness standard facilitates the processing of FOIA requests and avoids the unnecessary delays introduced by a “sufficient detail” requirement.

EPIC recommends that the OMB eliminate the reference to “sufficient detail” and follow the standard set out in the statute. To ensure fairness to the requester and compliance with the FOIA, proposed §1303.22 should be revised as follows:

Requesters should reasonably describe the records they are seeking. To the extent possible, requesters should include specific information that may help the agency identify the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number. Before submitting their requests, requesters may contact the FOIA Officer or FOIA Public Liaison to discuss the records they seek and to receive assistance in describing the records.

If, after receiving a request, OMB determines that the request does not reasonably describe the records sought, OMB will inform the requester what additional information is needed and why the request is otherwise insufficient. Requesters who are attempting to reformulate or modify such a request may discuss their request with the FOIA Officer or the FOIA Public Liaison. If a request does not reasonably describe the records sought, OMB’s response to the request may be delayed.

§ 1303.30 Responsibility for Responding to Requests

OMB proposes an entirely new section, § 1303.30, that would curtail the processing of valid FOIA requests.

The proposed provision states:

- (a) Search cutoff date. In determining which records are responsive to a request, OMB ordinarily will include only records in its possession as of the date that it begins its search. If any other date is used, OMB will inform the requester of that date.
- (b) Transfer of Records to the National Archives and Records Administration (NARA). Permanent records of OMB which have been transferred to the control of NARA under the Federal Records Act are not in the control of OMB and are therefore not accessible by a FOIA request to OMB. Requests for such records should be directed to NARA.

⁸ 5 U.S.C. § 522(A)(3).

The proposed regulation does not delineate the search cutoff in its text. Instead, the text only indicates that OMB will process records that are “in its possession as of the date that it begins its search.”⁹ Section 1303.30(b) adds that “Permanent records of OMB which have been transferred to the control of NARA under the Federal Records Act are not in the control of OMB and are therefore not accessible by a FOIA request to OMB.”¹⁰

Still, there is no description of what records are within or outside OMB’s control. In OMB’s separate description of the proposed changes, the agency notes as an example that “all emails previously controlled by OMB which were created during the Obama Administration were transferred to the control of NARA ... and therefore cannot be accessed by FOIA requests to OMB.”¹¹ This cutoff notice is problematic for two reasons.

First, the proposed change is confusing to requestors because the text does not make explicit that recent records created under the Obama Administration are no longer within the OMB’s control for FOIA request purposes. Without clear notice, no one would have reason to assume that records created less than three years ago would no longer be accessible through OMB. As written, this lack of transparency in the proposed change burdens requestors by leading requestors to approach the OMB first with an Obama Administration-record request, only to discover by the end of OMB’s 20-day response period that they have to pursue a request through NARA instead.

A second problem is that OMB has not shown a rational basis for imposing this recent search cutoff. Although cutoff dates and subsequent record transfers to NARA are not unusual,¹² this particular cutoff that excludes recent records from the Obama Administration unnecessarily makes the request process more difficult, as described above. The agency cites two federal cases to support

⁹ § 1303.30(a).

¹⁰ 83 Fed. Reg. at 42,613.

¹¹ *Id.* at 42,610.

¹² *See* 44 U.S.C. § 2203(g). The OMB also cites the Federal Records Act. The Presidential and Federal Records Act Amendments of 2014, Pub. L. No. 113-187, partially amended § 2203.

the proposed search cutoff procedures: *Public Citizen v. Dep't of State*, 276 F.3d 634 (D.C. Cir. 2002) and *McGehee v. CIA*, 697 F.2d 1095 (D.D.C. 1983). However, it is unclear how these cases provide any support for OMB's proposal. In *McGehee*, the U.S. District Court for D.C. held that an agency must make "reasonable efforts" to satisfy a demand for information.¹³ The court determined that because this "reasonableness standard" is "equally applicable to test the legality of an agency rule establishing a temporal limit to its search effort," the "agency bears the burden of establishing that any limitations on the search it undertakes...comport with its obligation to conduct a reasonably thorough investigation."¹⁴ In *Public Citizen*, the D.C. Circuit followed *McGehee*, striking down a cutoff when the "net result is to increase processing time by forcing [the requester] to file multiple FOIA requests" that could have been easily retrieved had the agency used a later cutoff date.¹⁵ Notably, the *Public Citizen* court also emphasized that the agency made no showing to prove the cutoff was reasonable.¹⁶ Therefore, under both the *McGehee* and *Public Citizen* analyses, OMB's cutoff seems unreasonable because it does not justify why requesters must now file multiple FOIA requests in different locations for records that are less than three years old.

To prevent confusion and to adhere to case law on this issue, OMB should revise the proposed change by clearly specifying the search cutoff in the text. The search cutoff should accommodate recent records created under the Obama Administration in order to ease the burden on requesters. At the very least, OMB should clearly substantiate its reason for excluding Obama-era records in order to promote transparency and ensure that requestors are informed before beginning laborious FOIA requests.

EPIC opposes proposed § 1303.30.

¹³ *McGehee*, 697 F.2d at 1100 (citing *Founding Church of Scientology v. National Security Agency*, 610 F.2d 824 (D.C. Cir. 1979)).

¹⁴ *Id.* at 1101.

¹⁵ *Public Citizen*, 276 F.3d at 643.

¹⁶ *Id.*

§ 1303.93(c) and § 1303.40(d) - Aggregation of Requests

Under OMB's current regulation regarding "Miscellaneous Fee Provisions," § 1303.60(c), requester(s) may not coordinate multiple requests, but only to the extent that requests are aggregated for the purpose of avoiding processing fees:

A requester 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 OMB reasonably believes that a requester, or a group of requestors acting in concert, has submitted requests that constitute a single request, involving clearly related matters, OMB may aggregate those requests and charge accordingly. One element to be considered in determining whether a belief would be reasonable is the time period over which the requests have occurred.

Under the proposed regulation, the agency now plans to aggregate all requests by introducing two different aggregation provisions. First, the current §1303.60(c) regulation on aggregating requests under §1303.60 Miscellaneous Fee Provisions will become §1303.93(c) under §1303.93 Miscellaneous Fee Provisions. Second, an aggregation provision will now also appear under §1303.40 Timing of Responses to Requests as §1303.40(d). The proposed modifications encumber FOIA requests.

Aggregating Requests - Timing

Under proposed §1303.40(d):

Aggregating Requests. When OMB reasonably believes that a requester, or a group of requestors acting in concert, has submitted requests that constitute a single request, that would otherwise satisfy the unusual circumstances specified in this section, OMB may aggregate those requests for the purposes of this section. OMB will presume that multiple requests of this type made within a 45-day period can be aggregated for the purposes of this section. For requests separated by a longer period, OMB will aggregate them only where there is a reasonable basis for determining that the aggregation is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters will not be aggregated.

§1303.40(d) allows aggregation to extend OMB's FOIA response time from 20 days to 40 days, or longer.

OMB should not adopt proposed §1303.40(d) because it is contrary to the FOIA’s statutory requirement that an agency must determine whether to respond to a request within 20 days.¹⁷ Under the proposed §1303.40(d), the agency could violate the statutory deadlines for requests that the agency decides to aggregate. Since the proposed regulation indicates that “OMB will presume that multiple requests of this type made within a 45-day period can be aggregated,” OMB could delay response time for a request if OMB decides to aggregate it with another request made within the 20-day response period, thereby extending the response time for the earlier request beyond what is permissible under the FOIA. To ensure fairness to the requester and compliance with the FOIA, proposed §1303.40(d) should be revised as follows:

When OMB has determined that a requester, or a group of requestors acting in concert, has submitted requests that constitute a single request, that would otherwise satisfy the unusual circumstances specified in this section, OMB may aggregate those requests for the purposes of this section. Aggregating requests will not extend the 20-day initial response period for the earlier request. Multiple requests involving unrelated matters will not be aggregated.

Aggregating Requests - Fees

Under proposed § 1303.93(c):

Aggregating requests. A requester 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 OMB reasonably believes that a requester, or a group of requestors acting in concert, has submitted requests that constitute a single request, involving clearly related matters, OMB may aggregate those requests and charge fees accordingly. OMB will presume that multiple requests of this type made within a 45-day period have been made in order to avoid fees. For requests separated by a longer period, OMB will aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters shall not be aggregated.

The proposed section authorizes OMB to aggregate requests to collect additional fees, making the process more expensive for the requester. It allows OMB to charge fees for requests that

¹⁷ 5 U.S.C. § 522(a)(6)(A).

would not incur charges when processed alone by creating an ambiguous standard for aggregating requests OMB perceives to be related. The creation of a presumption that multiple, seemingly related requests have been submitted to avoid fees is inconsistent with the purpose of the FOIA. The statement that “OMB will presume that multiple requests of this type made within a 45-day period have been made in order to avoid fees” implies that OMB reads requests with an assumption of concerted action, which the requester must overcome to avoid having their request aggregated with others. The proposed section does not provide any guidelines for overcoming such a presumption, but even if it did, such requirements would be an unnecessary burden on a FOIA requester.

Further, the proposed section does not indicate what factors might establish a “reasonable belief” or “presumption” that multiple requests are designed to avoid fees, but says only that OMB will make such a decision based on “all circumstances involved.” There is no standard for how similar requests must be to trigger aggregation, how many requests would trigger aggregation, or how OMB will determine that different requesters are acting in concert. The original provision on fee aggregation, § 1303.60(c), provides only one such factor: “One element to be considered in determining whether a belief would be reasonable is the time period over which the requests have occurred.” Provisions that allow OMB to conclude under a presumption or reasonable belief that similar requests were coordinated do not account for the possibility that multiple requesters may have similar but distinct interests under their requests. The submission of similar requests at the same time could be based in part on news or public interest, rather than concerted fee avoidance.

Further, the proposed section would remove even the time period factor in the OMB’s determination, instead establishing the time period during which related requests may be aggregated as 45 days. OMB does not explain why the 45-day period is significant, nor how it will help the agency end fee avoidance. It is also not clear how the 45-day period will be calculated. For example, if Request 1 is received and 15 days later, Request 2 is received and the two are

aggregated, it is not clear at what point Request 1 is no longer subject to aggregation. Is that at the end of its original 45 days, or 45 days from when it was aggregated with Request 2? Without defining when such a period starts and ends for a group of requests, the proposed section creates the possibility that new 45-day periods could restart indefinitely as requests OMB considers related come in.

The 45-day fee aggregation period is also inconsistent with the FOIA. Under 5 USC § 552(4)(A)(iv), “Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review.” Charges for aggregated searches would necessarily impose upon the requester the indirect expense of other requests that the agency combined with their own. Further, a 45-day aggregation period would be inconsistent with OMB’s other fee provisions regarding notice.

Proposed § 1303.91(i) states:

If OMB estimates that the charges are likely to exceed \$25, it will notify the requester of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such notice shall offer a requester the opportunity to confer with agency personnel to meet the requester’s needs at a lower cost.

Proposed § 1303.93(c) prevents requesters from conferring with agency personnel to avoid fees exceeding \$25, and the provision is inconsistent with the FOIA’s requirement that agencies charge fees only for direct costs.

EPIC opposes the proposed changes, §1303.93(c) and §1303.40(d).

III. Conclusion

EPIC recommends that the Office of Management and Budget revise the proposed regulations, remove the new barriers to access government information, and incorporate new procedures that ease, not burden, the public’s efforts to learn about the activities of its government.

Respectfully submitted,

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