

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

To

THE DEPARTMENT OF THE INTERIOR

RIN 1093-AA15

Freedom of Information Act Regulations

November 13, 2012

By notice published on September 13, 2012, the Department of the Interior (“DOI” or “Department”) has proposed to revise the agency regulations that implement the Freedom of Information Act (“FOIA”).¹ Pursuant to the notice, the Electronic Privacy Information Center (“EPIC”) submits these comments and recommendations to address the substantial risks to open government and agency accountability that the proposed regulatory changes raise.

EPIC is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values. EPIC engages in extensive Freedom of Information Act litigation.² EPIC also publishes *Litigation Under Federal Open Government Laws Guide*, a leading guide for FOIA practitioners and requesters, and has specific expertise with respect to the history and purpose of the FOIA.³

¹ Freedom of Information Act Regulations, 77 Fed. Reg. 56592 (proposed Sept. 13, 2012) (to be codified at 43 C.F.R. pt. 2) [hereinafter “Proposed Rule”].

² See, e.g., *Elec. Privacy Info. Ctr. v. U.S. Dept. of Homeland Sec.*, 811 F. Supp. 2d 216 (D.D.C. 2011); *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30 (D.D.C. 2006); *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5 (D.D.C. 2003); *Litigation Docket*, EPIC, <http://epic.org/privacy/litigation/>.

³ EPIC, *Litigation Under the Federal Open Government Laws* 2010, 138 (Harry A. Hammitt, Ginger McCall, Marc Rotenberg, John A. Verdi, and Mark S. Zaid, eds., 2010).

The Scope of the Changes

The DOI proposes to both revise and adopt certain provisions within Part A of 43 C.F.R. §2, which governs the DOI's Freedom of Information Act regulations. The proposed revisions and adoptions will impact various DOI FOIA procedures, including: Requirements for making requests (proposed sections 2.3 and 2.5); Processing fees (proposed sections 2.6, 2.8, 2.50, and 2.54); and Agency consultations and referrals (proposed section 2.13).

EPIC objects to several of the proposed changes as indicated below. These changes and adoptions would undermine the FOIA, are contrary to law, and exceed the authority of the agency.

Proposed Subpart A—Introduction

Proposed Section 2.1: What should you know up front?

Generally, the proposed introductory language is clearly written. Subsection (a), however, should be slightly revised to include the statutory citation for the FOIA. Under the proposed regulation, the agency does not explicitly state the statutory provision governing the FOIA:

Subparts A through I of this part contain the rules that the Department follows in processing records under the Freedom of Information Act ("FOIA").⁴

The current regulation reads:

The regulations implement the Freedom of Information Act (FOIA), 5 U.S.C. 552, and contain the procedures by which the public may inspect and obtain copies of the Department of the Interior (DOI or Department) records through the FOIA or by other means.⁵

Slightly revising the proposed regulations to include a citation to the FOIA statute would benefit requesters because it would enable requesters to research and reference specific FOIA provisions for their requests and appeals. Including the citation is also consistent with other language in this

⁴ Proposed Rule, 77 Fed. Reg. at 56593.

⁵ 43 C.F.R. §2.1(a) (2011).

subsection (*i.e.*, subsection (e)'s discussion of the Privacy Act of 1974 includes a statutory citation).

Therefore, proposed section 2.1 (a) should be revised as:

Subparts A through I of this part contain the rules that the Department follows in processing records under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

Proposed Subpart B—How to Make a Request

Proposed Section 2.3 (b): Where should you send a FOIA request?

The DOI proposes to mandate FOIA requesters send their request to specific bureaus that the requester believes maintains records. The revised regulation states:

To make a request for Department records, you *must* write directly to the bureau that you believe maintains those records.⁶ (emphasis added)

This proposal is an unreasonable requirement that frustrates the purpose of the FOIA because it creates unnecessary burdens for requesters. The DOI is comprised of "nine technical bureaus" and other offices including the Office of the Secretary, the Office of the Inspector General, and the Office of the Solicitor.⁷ With such a broad listing of agency bureaus and subcomponents, it is unlikely that a FOIA requester will be able to provide much specificity beyond the appropriate federal agency when requesting documents in possession of the agency. In fact, agency personnel are themselves unsure as to which agency subcomponent is in possession of the records. The proposed regulations even acknowledge various scenarios in which DOI Bureau FOIA officers are uncertain and forward requests to bureau components that the officer "*believes* has or [is] likely to have responsive records."⁸ (emphasis added). If identifying specific bureaus that maintain certain records presents challenges to agency personnel familiar with the Department's

⁶ Proposed Rule, 77 Fed. Reg. at 56594.

⁷ *Bureaus & Offices*, U.S. DEP'T. OF THE INTERIOR, <http://www.doi.gov/bureaus/index.cfm> (last visited Nov. 9, 2012).

⁸ Proposed Rule, 77 Fed. Reg. at 56594, Sections 2.4 (b), (d), (f).

inner workings, it is unclear why the agency would place this burden on individuals outside of the agency.

The agency should revise this part of the proposed regulations and should make clear that the need to direct a request to the appropriate bureau is encouraged but not mandatory. Section 2.3(b) should be revised to:

(1) To make a request for Department records, you should write directly to the bureau that you believe maintains those records. A requester may also send a FOIA request to the DOIA FOIA Policy Headquarters. Upon receiving your FOIA request, the Departmental FOIA Officer will forward your request to the appropriate bureau for processing. The statutory clock will begin to run as soon as the appropriate bureau receives your request, but in any event, the statutory clock begins no later than 10 workdays after the date is first received by the Departmental FOIA Officer.

Additionally, the agency may want to include language from its current regulations that underscores, whenever possible, the importance of sending FOIA requests to specific bureaus.⁹ Together these changes accomplish the agency goal of encouraging requesters to direct requests to the appropriate bureau without creating any additional obstacles to FOIA requesters. If, however, the agency chooses to adopt the regulatory language it proposes it would establish new barriers to access, contrary to the federal statute and case law, and outside of the agency's rulemaking authority.

Proposed Section 2.5: How should you describe the records you seek?

The proposed regulations state:

- (a) You must reasonably describe the records sought. A reasonable description contains sufficient detail to enable bureau personnel familiar with the subject matter of the request to locate the records with a reasonable amount of effort.
- (b) You should include as much detail as possible about the specific records or types of records that you are seeking. This will assist the bureau in identifying the requested records (for example, time frames involved or specific personnel who may have the requested records). The bureau's FOIA Public Liaison can assist you in formulating or reformulating a request in an effort to better identify the records you seek.¹⁰

⁹ 43 C.F.R. §2.11.

¹⁰ Proposed Rule, 77 Fed. Reg. at 56594.

The current regulations state:

(a) Description of records.

(1) You must describe the requested records in enough detail to enable an employee familiar with the subject area of the request to locate the record(s) with a reasonable amount of effort. Be as specific as possible in describing the records you are seeking. For example, whenever possible:

(i) Identify the date, title or name, author, recipient, and the subject of the record; the office that created it, the present custodian of the record and the geographical location (*e.g.*, headquarters or a regional/field office); the timeframe for which you are seeking records; and any other information that will assist the bureau in locating the material.

(ii) If the request involves a matter in litigation, state the case name and docket number as well as the court in which the case was filed.¹¹

The proposed regulations should: (1) clarify how requesters can “reasonably describe the records sought”; and (2) give FOIA requesters additional time to revise FOIA requests as necessary.

The Department can clarify how requesters can “reasonably describe the records sought” by using the current regulatory language, which is better than the proposed language, because it provides concrete examples of the types of records to request.¹² By providing examples, the DOI sufficiently informs requesters how to best “reasonably describe” records sought. Therefore, Section 2.5(b) should be revised to:

You should include as much detail as possible about the specific records or types of records that you are seeking. For example, whenever possible, identify the date, title or name, author, recipient, and the subject of the record; the office that created it; the timeframe for which you are seeking records; and any other information that will assist the bureau in locating the material.

Providing concrete examples of FOIA records will assist FOIA requesters to perfect their requests, and also reduce the agency’s burden of contacting requesters to perfect their requests. Furthermore, the DOI should not adopt its current regulation that permits the agency to prematurely terminate FOIA requests. The proposed regulation states:

(c) If the request does not reasonably describe the records sought, the bureau will inform you what additional information is needed. It will also notify you that it

¹¹ 43 C.F.R. § 2.8 (a)(1)(i)-(ii).

¹² *Id.*

will not be able to comply with your FOIA request unless you provide the additional information requested within 20 workdays. If you receive this sort of response, you may wish to discuss it with the bureau's designated FOIA contact or its FOIA Public Liaison (see § 2.66). If the bureau does not hear from you within 20 workdays after asking for additional information, it will presume that you are no longer interested in the records and will close the file on the request.¹³

This language is ambiguous and frustrates the purpose of the FOIA. The language stating that “[i]f the bureau does not hear from [requesters] within 20 workdays after asking for additional information . . .” is ambiguous because it does not specify if this requires requesters amend their FOIA request within 20 workdays, or simply discuss the agency’s initial response with the bureau’s designated FOIA contact or its FOIA public liaison. And this language contravenes the purpose of the FOIA because it places an unreasonable deadline of 20 workdays for requesters to clarify their initial requests. EPIC understands that the DOI expends numerous resources to produce documents pursuant to the FOIA, and that the agency has an interest in resolving FOIA matters in an organized and timely fashion. The FOIA, however, was created for oversight, transparency, and accountability in government functions. By imposing unreasonable and arbitrary deadlines on requesters, the DOI violates the FOIA by curtailing the public’s opportunity to receive information on government functions. This 20 workday arbitrary deadline is not supported in case law or the FOIA, and simply works to hinder requesters’ ability to obtain documents. At a minimum, a more reasonable timeframe for requesters to amend their request is 30 workdays. These 10 additional workdays can permit requesters to contact the DOI, conduct further research, or even narrow their requests as they see fit. And the agency should not close the file prematurely if requesters do not amend their requests within this timeframe, but instead can relegate the request to a lower processing track. Moreover, this timeframe is reasonable because both the current and proposed regulations allot 30 workdays for requesters to appeal FOIA request denials—denials which can occur when the bureau “informs . . . that [a] request has not

¹³ Proposed Rule, 77 Fed. Reg. at 56594. See 43 C.F.R. § 2.8(a)(3).

adequately described the records sought.”¹⁴ If requesters are granted 30 workdays to appeal decisions that their requests does not adequately describe records, surely the agency can grant the same amount of time for requesters to amend original requests. This additional time in the initial stages of the FOIA process may even prevent the agency from having to process an appeal (or litigating) a FOIA request that does not adequately describe records.

Therefore, to both remove any ambiguity, and to give requesters sufficient time to amend FOIA requests, contact DOI FOIA contacts, and conduct additional research on their request as necessary, the language in section 2.5(c) should be revised as follows:

(c) If the request does not reasonably describe the records sought, the bureau will inform you what additional information is needed. If you receive this sort of response, you may wish to discuss it with the bureau's designated FOIA contact or its FOIA Public Liaison (see § 2.66). If the bureau does not receive your amended FOIA request within 30 workdays after asking for additional information, your request may lose priority in the agency’s processing track.

Proposed Section 2.6: How will fee information affect the processing of your request?

This proposed section is generally favorable for FOIA requesters; however proposed section 2.6(c) suffers the same defects as 2.5(c) because it curtails FOIA requesters’ access to information by imposing unreasonable time for requesters to agree to pay anticipated fees. The proposed language, which closely models the current regulation at 43 C.F.R. §2.8(b)(1), reads:

- (a) Your request must explicitly state that you will pay all fees associated with processing the request, that you will pay fees up to a specified amount, and/or that you are seeking a fee waiver.
- (b) If the bureau anticipates that the fees for processing the request will exceed the amount you have agreed to pay, the bureau will notify you that it:
 - (1) Needs either an assurance that you will pay the anticipated fees or an advance payment (see § 2.50); and
 - (2) Will not be able to fully comply with your FOIA request unless you provide the assurance or advance payment requested.
- (c) If the bureau does not hear from you within 20 workdays after requesting the information in paragraph (b) of this section, it will presume that you are no longer interested in the records and will close the file on the request.¹⁵

¹⁴ 43 C.F.R. § 2.28(a)(2); Proposed Rule, 77 Fed. Reg. at 56602 §2.57(a)(2).

¹⁵ Proposed Rule, 77 Fed. Reg. at 56594.

This is insufficient time for requesters to assess their financial ability to gain fees associated with processing the request. As with EPIC’s previous recommendation to extend FOIA requesters’ response time to at least 30 workdays, EPIC recommends that requesters be given at least 30 workdays to provide assurance of advance payment requested. The revised regulation should read

(c) If the bureau does not received assurance of advance payment within 30 workdays after requesting the information in paragraph (b) of this section, your request may lose priority in the agency’s processing track.

Proposed Section 2.8(b): Can you ask for records to be disclosed in a particular form or format?

The proposed regulations mirror the current regulations because they state that the DOI “may charge [requesters] the direct costs involved in converting records to the requested format if the bureau does not normally maintain the records in that format.”¹⁶

The regulations should be slightly revised to notify requesters in advance should the bureau charge direct costs to convert records to the requested format:

The bureau may charge [requesters] the direct costs involved in converting records to the requested format if the bureau does not normally maintain the records in that format. The bureau will inform you in advance if it intends to charge any direct costs to convert the records to the requested format.

Subpart C—Processing Requests

Proposed Section 2.13: How do consultations and referrals work?

Many of the proposed regulations concerning consultations and referrals are ambiguous and have no legal basis. For example, the agency proposes the following revision to its FOIA request referral regulations:

(e): If the bureau refers records to another agency, it will document the referral and maintain a copy of the records that it refers; notify you of the referral in writing, unless that identification will itself disclose a sensitive, exempt fact; and provide the name of a contact at the other agency. You may treat such a response as a denial of records and file an appeal, in accordance with the procedures in § 2.59.¹⁷

¹⁶ Proposed Rule, 77 Fed. Reg. at 56595; *see* 43 C.F.R. §2.9.

¹⁷ Proposed Rule, 77 Fed. Reg. at 56595.

The current regulations do not permit the agency to withhold the identity of outside agencies to which the DOI refers FOIA requests:

If the bureau refers the documents to another agency, it will notify you of the referral in writing and provide the name of a contact at the other agency. You may treat such a response as a denial of records and file an appeal.¹⁸

At present, there is no precedent for an agency to withhold information concerning the identity of other agencies to which a request is referred. If the Department adopts this regulation, requesters could never appeal nonresponses from the clandestine agency because requesters would not know to which agency the DOI referred the FOIA request. And if requesters cannot exhaust their administrative remedies, they cannot challenge an agency's decision in court. In essence, this provision would permit certain agencies to evade judicial and administrative review. Because the proposed change would frustrate requesters' ability to meaningfully pursue requests, to seek administrative remedies, and to obtain judicial review as discussed above, the proposed changes to the current regulation should be removed.

Additionally, if the DOI "locates records that originated with another Federal agency while responding to a request, the bureau will make the release determination itself" under a enumerated circumstances, including if:

(f)(2): The Department is in a better position than the originating agency to assess whether the record is exempt from disclosure; [and] . . . (4) It is more efficient or practical depending on the circumstances.¹⁹

The DOI should provide concrete examples of the aforementioned scenarios to support its withholding determinations. Subsection (f)(1) explains that the bureau will make a release determination itself if "[t]he record is of primary interest to the Department," and then provides a detailed explanation of a "primary interest" record (*i.e.*, "a record may be of primary interest to the Department if it was developed or prepared according to the Department regulations or

¹⁸ 43 C.F.R. § 2.22(b)(2).

¹⁹ Proposed Rule, 77 Fed. Reg. at 56595.

directives, or in response to a Department request”). The proposed (f)(2) and (f)(4) provide little guidance to requesters seeking to challenge denials under this provision because it is unclear why the DOI has authority to make the release determination instead of the originating agency. Moreover, these subsections’ nebulous language provides poor guidance for agency officials charged with releasing information. Because the language does not clearly define the DOI’s authority to release or withhold records, the DOI may erroneously release or withhold information. Therefore, the agency must particularly describe when it would be “in a better position than the originating agency to assess whether the record is exempt from disclosure” and when it is “more efficient or practical depending on the circumstances.” Absent any concrete examples, the DOI should not withhold documents under this unspecified authority.

Proposed Subpart E—Responses to Requests

Proposed Section 2.24 (b)(2): How will the bureau deny requests?

The proposed regulations detail the DOI’s process for denying FOIA requests. A DOI FOIA request denial must be in writing and include certain information, including:

- (2) A brief statement of the reasons for the denial, including a reference to any FOIA exemptions(s) applied by the bureau to withhold records in full or in part.

This provision is deficient under the FOIA and well-established case law. When an agency withholds responsive records pursuant to an exemption, “the burden is on the agency to sustain its action.” 5 U.S.C. § 552(a)(4)(B); Executive Order No. 13526. The agency can discharge its burden by providing a “relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.” *Putnam v. U.S. Dept. of Justice*, 873 F. Supp. 705, 709 (D.D.C. 1995) (quoting *Mead Data Central, Inc. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 251 (D.C.Cir.1977)). See also *PHE, Inc. v. Dep’t of Justice*, 983 F.2d 248, 250 (D.C. Cir. 1993); *King v. U.S. Dept. of Justice*, 772 F. Supp. 2d 14, 18-19 (D.D.C. 2010) ; *Voinche v. F.B.I.*, 412 F. Supp. 2d 60, 70

(D.D.C. 2006).

By solely providing “a brief statement of the reasons for the denial, [and] a reference to any FOIA exemption(s),” the agency will fail to meet its burden because it will not provide the required “detailed justification” that specifies the reasons for denial and correlate “those claims with the particular part of the withheld document to which it applies.” This subsection should therefore be revised to require:

A detailed justification for the denial, including a precise reference to any FOIA exemptions(s) applied by the bureau specifically linked to the records withheld in full or in part.

Proposed Subpart G—Fees

Proposed Section 2.50(e): When will the bureau require advance payment?

The DOI proposed to adopt its current advance payment regulation, which places an unreasonable time limit for requesters to pay substantial advance fees. According to the proposed rule:

(e) If the bureau requires advance payment, it will start further work only after receiving the advance payment. It will also notify you that it will not be able to comply with your FOIA request unless you provide the advance payment. Unless you pay the advance payment within 20 workdays after the date of the bureau's fee letter, the bureau will presume that you are no longer interested and will close the file on the request.

In the event that a requester is required to pay an advanced fee estimated to be over \$250, the DOI gives requesters a mere 20 workdays to pay the advance fee or else the bureau will “presume that [the requester is] no longer interested and will close the file on the request.”²⁰ This presumption is premature. As with other fee provisions in the proposed and current regulations, the agency should grant requesters a minimum of 30 workdays more time to gather funds for their requests. Moreover, the DOI should collaborate with FOIA requesters to establish a payment schedule that would permit requesters to pay in installments instead of closing out the requests. On a case-by-case basis, the DOI should consult requesters who have FOIA fees estimated to be

²⁰ Proposed Rule, 77 Fed. Reg. at 56601.

over \$250, and negotiate a mutually beneficial schedule whereby requesters can pay fees within a negotiated reasonable time period. After receiving the full FOIA fee, the Department can release documents. This process benefits both parties because the agency receives its fees, and the requesters receive documents.

Proposed Section 2.54: When will the bureau combine or aggregate requests?

The DOI should clearly articulate its rationale for combining or aggregating requests. The proposed regulation removes some of the current requirements for aggregating requests. Under the proposed regulations:

- (a) The bureau may aggregate requests and charge accordingly when it reasonably believes that you, or a group of requesters acting in concert with you, are attempting to avoid fees by dividing a single request into a series of requests on a single subject or related subjects.
- (b) The bureau may presume that multiple requests of this type made within a 30-day period have been made to avoid fees.
- (c) The bureau will aggregate requests separated by a longer period only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved.
- (d) The bureau will not aggregate multiple requests involving unrelated matters.²¹

The current regulations require a “reasonable basis” to aggregate request made within a 30 day-period, and a “solid basis for determining that aggregation is warranted” over a longer period.²²

The proposed regulations grant the agency unbridled discretion in aggregating similar FOIA requests within a 30-day period and only require a “reasonable basis” for requests over a 30 period. The proposed regulations should adopt the current regulations’ reasonable and solid basis justifications, and improve on these standards by requiring proof to substantiate the Department’s rationale. It is not uncommon that numerous, unrelated individuals or organizations request similar information concerning breaking news on government activity. Therefore, the agency should be required to justify its decision to aggregate requests and charge FOIA fees based on its decision.

²¹ *Id.*

²² 43 C.F.R. §2.16(b)(2).

Many of the Proposed Changes in the DOI FOIA Regulations Are Contrary Not Only to Law But Also the Express Statements of the President and the Attorney General

Many of the agency's proposed changes directly contravene the Obama Administration's stated commitment to transparency. On January 21, 2009, President Obama issued a memorandum on the Freedom of Information Act, transparency and open government, and announced his intention to make the federal government more transparent.²³

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.²⁴

The President stated the central importance of transparency under his new Administration, "We will achieve our goal of making this administration the most open and transparent administration in history not only by opening the doors of the White House to more Americans, but by shining a light on the business conducted inside it."²⁵

On March 19, 2009, Attorney General Eric Holder issued new guidelines that establish a "presumption of openness" governing federal records.²⁶ On September 30, 2009, Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, stated that the Committee "will continue to do its part to advance freedom of information, so that the right to know is preserved for future generations."²⁷

²³ President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies re: Freedom of Information Act, Jan. 21, 2009, http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/; President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies re: Transparency and Open Government, Jan. 21, 2009, http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Attorney General Eric Holder, Memorandum for the Heads of Executive Departments and Agencies re: Transparency and Open Government, Mar. 19, 2009, <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>.

²⁷ Statement Of Senator Patrick Leahy, Committee On The Judiciary, Hearing On "Advancing Freedom Of Information In The New Era Of Responsibility," Sept.30, 2009, <http://leahy.senate.gov/press/200909/093009b.html>.

Conclusion

As stated above, EPIC recommends that the Department of Interior revise the proposed regulations, remove the new barriers to access to government information, and incorporate new procedures that ease, not burden, the public's efforts to learn about the activities of its government. Proper regulation of the FOIA would, at a minimum: (1) not place an unreasonable burden on the requester to locate the correct "bureau" within the agency; (2) not terminate the processing of a FOIA request because it does not reasonably describe records the requester seeks; (3) not terminate a FOIA request when requesters need additional time to resolve FOIA fee issues; (4) provide legal justification for withholding documents that originate in another agency; (5) identify agencies to which FOIA requests are referred; (6) provide detailed justifications for denying FOIA requests; and (7) not erroneously aggregate FOIA requests.

The DOI's proposed FOIA regulations are contrary to law, exceed the scope of the agency's rulemaking authority, and should be revised as indicated.

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