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COMMENTS OF PUBLIC CITIZEN AND THE PROJECT ON GOVERNMENT OVERSIGHT ON THE FINANCIAL STABILITY OVERSIGHT COUNCIL'S PROPOSED RULE ON IMPLEMENTATION OF THE FREEDOM OF INFORMATION ACT RIN 4030-AA02

Public Citizen and the Project On Government Oversight (POGO) submit the following comments on the Financial Stability Oversight Council's proposed rule entitled Implementation of the Freedom of Information Act, RIN 4030-AA02.

Public Citizen is a national, nonprofit consumer advocacy organization founded in 1971. Public Citizen advocates in the courts, legislatures, and administrative fora for safer consumer products, corporate accountability, and openness in government decision making. Since its founding, Public Citizen has regularly used the Freedom of Information Act (FOIA) to request records related to its advocacy efforts and has represented FOIA requesters in approximately 300 lawsuits challenging government secrecy.

Founded in 1981, POGO is a nonpartisan independent watchdog that champions good government reforms. POGO's investigations into corruption, misconduct, and conflicts of interest achieve a more effective, accountable, open, and ethical federal government. Therefore, POGO has a keen interest in protecting the public's right to know and effective financial regulatory reform. POGO is a frequent FOIA requester and advocate.

Public Citizen and POGO have long-standing commitments to ensuring the public's access to government records under FOIA and laud the Council for taking the necessary steps to implement FOIA. However, we believe that some of the details of the Council's proposed rule violate FOIA and/or will place unnecessary burdens on FOIA requesters. These comments address eight topics covered in the proposed rule: 1) the method by which requests must be submitted; 2) the requirements for a request to be deemed "complete"; 3) the requirement that fee waivers be included in the request and the presumption that any request that does not seek a fee waiver constitutes an agreement to pay up to \$25; 4) the \$.20/per page copying charge; 5) the definition of frequently requested records; 6) the circumstances under which requests will be expedited; 7) the date on which the time to appeal begins to run; and 8) the categories of fee requesters for which duplication costs will be waived if the Council does not respond within the applicable time limits.

I. FOIA Requesters Should Be Able to Submit Requests by E-mail.

The proposed rule provides that FOIA requests must be in writing and specifies a physical address to which to send requests. *See* Proposed § 1301.5(b)(1)-(2). Accordingly, it appears that,

under the proposed rule, requests cannot be submitted by e-mail. In this day and age, however, in which so much communication occurs through electronic means, requesters should be able to submit FOIA requests electronically. According to the Department of Justice's (DOJ) Office of Information Policy (OIP), "Virtually all agencies already receive requests electronically, either by e-mail or through electronic request forms." DOJ, *OIP Guidance and Suggested Best Practices for Improving Transparency* 3 (Sept. 2010), available at <http://www.justice.gov/oip/docs/best-practices-guidance-sept-2010.pdf>; *see also id.* (recognizing that "this widespread use of technology . . . simplif[ies] the request-making process"). The Council's FOIA program should not, from its very first day, lag behind other agencies in use of current technology by requiring requests to be submitted in paper format.

II. The Requirements for a Request to Be Deemed "Complete" Are Overly Burdensome.

A. The Requirements Should Be Liberally Construed.

The proposed rule sets forth eight requirements for a request to be considered "complete," specifying that the agency will only deem itself to have received a request if the request meets all eight requirements. Proposed §§ 1301.5(b)-(c). FOIA, however, is supposed to be easily usable by ordinary citizens. Thus, for example, FOIA requests are supposed to be liberally construed. *LaCedra v. Executive Office for U.S. Attorneys*, 317 F.3d 345, 348 (D.C. Cir. 2003). The final rule should make clear that the requirements in Proposed § 1301.5(b) are not magic words that must be used for a request to be complete and that they should not be used as excuses not to respond to FOIA requests. The final rule should provide, instead, that the requirements should be insisted upon only when necessary for the agency to be able to respond to the request. For example, if an envelope in which a FOIA request is enclosed does not state that it contains a FOIA request, but the envelope is received by the FOIA office and is opened by FOIA staff who understand it to be a FOIA request, the Council should deem that request to be received, even though Proposed § 1301.5(b)(1) requires the envelope to state that it comprises a FOIA request. Similarly, requests should not be deemed incomplete if they lack a telephone number but contain an address to which correspondence, records, and bills can be sent. *See* Proposed § 1301.5(b)(4).

B. Requests that Fail to Specify a Fee Category or to State Whether the Requester Wants to Receive or Inspect the Records Should Not Be Considered Incomplete.

Requests should not be considered incomplete, and therefore be deemed not to have been received, if they do not specify into which fee category a requester falls. *See* Proposed § 1301.5(b)(6). FOIA specifies that the time to respond to requests can be tolled "if necessary to clarify with the requester issues regarding fee assessment." 5 U.S.C. § 552(a)(6)(A)(ii)(II). Thus, under the statute, the way to handle uncertainty over which fee category a requester falls in is not to consider the request unreceived, but rather to accept the request and toll the response time while clarifying the fee issue with the requester. Similarly, requests should not be deemed incomplete if they do not state whether the requester wishes to inspect the records or wants a copy made. *See* Proposed § 1301.5(b)(5). Instead, if there is actual uncertainty over this issue—because, for

example, the requester has requested a large volume of documents and lives near where the records are located—the agency should utilize 5 U.S.C. § 552(a)(6)(A)(ii)(I), which specifies that the FOIA response time can be tolled while the agency is reasonably requesting information from the requester. It is particularly important that requests not be considered incomplete if they lack fee category information or do not specify whether the requester wants to inspect or copy the records because agencies do not generally require fee category information or specifications as to inspection versus copying to deem a request received, *see, e.g.*, 28 C.F.R. § 16.3 (setting forth DOJ requirements for making a FOIA request) and, therefore, even sophisticated FOIA requesters would not necessarily know to include this information in their requests.

C. Requests Should Not Have to State How the Records Released Will Be Used.

We are particularly troubled by the requirement in Proposed § 1301.5(b)(6) that FOIA requests “state how the records released will be used.” It is a basic rule that, “when documents are within FOIA’s disclosure provisions, citizens should not be required to explain why they seek the information.” *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004); *see id.* (“A person requesting the information needs no preconceived idea of the uses the data might serve.”). Although the proposed rule specifies that the Council shall not use the reasons provided to determine the releasability of requested records, refusing to accept FOIA requests unless they specify how the records will be used flies in the face of this long- and well-settled rule. And requiring requesters to state the purpose for which they will use records may chill them from making requests in the first place, thus hindering them from conducting the government oversight that is the very purpose of FOIA. Moreover, requiring FOIA requesters to state the reasons for their requests might tempt agency officials to treat FOIA requests differently based on the purposes for which the information would be used, or, at the very least, might create the appearance that FOIA requests are being treated differently based on the requesters’ purposes. The final rule should not require FOIA requests to state how the requested records will be used. As stated above, if the agency has genuine questions about a requester’s fee category, it can contact the requester to clarify the issue.

D. The Agency Should Inform the Requester if It Deems a Request Not Received.

Proposed § 1301.5(c) states that “[i]f a request is deficient in any respect, then the Council may return it to the requester and advise the requester in what respect the request is deficient.” We understand the purpose of this provision to be to give agencies the discretion to process requests, even if they do not technically meet the requirements of § 1301.5(b). However, the final rule should make clear that if the agency does not accept and start processing a request, it *must* inform the requester that it does not deem itself to have received the request and give the requester the opportunity to resubmit the request. Otherwise, a requester may wait months or even years, believing she has submitted a complete request and assuming it is just taking the agency a long time to respond, only to learn that the agency deems itself never to have received her request in the first place.

III. Requesters Should Not Have to State Whether They Want a Fee Waiver in the Request and Should Not Be Deemed to Have Agreed to Pay \$25 if They Have Not.

Proposed § 1301.5(b)(7) states that “[i]f a requester seeks a waiver or reduction of fees associated with processing a request, then the request shall include a statement to that effect.” However, FOIA requesters should not have to include fee waiver requests in their request letter. Instead, they should be able to seek a fee waiver after filing their request, so long as the request is still open. *See, e.g.*, 76 Fed. Reg. 15236, 15243 (March 21, 2011) (DOJ proposed rule providing that a “requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal”). FOIA requesters might not realize when they are writing their requests that responding will take more than the 2 hours and 100 pages to which non-commercial requesters are automatically entitled, or they might not understand the differences between fee categories and fee waivers—a topic that can cause confusion even among FOIA officers who deal with FOIA on a daily basis. FOIA requesters should not be deemed to have bypassed their chance at a fee waiver just because they did not know to request it up front.

Proposed § 1301.5(b)(7) also provides that a request that does not seek a fee waiver or reduction will constitute an agreement by the requester to pay up to \$25. This limit, however, is above the amount many FOIA requests will cost. Some requesters whose fees would be less than \$25 may not be able to afford \$25 and may be chilled from filing a FOIA request out of fear that they will mistakenly end up liable for that amount. At the very least, the regulations should provide that if a FOIA requester informs the agency that it is not willing to incur any expense (for example, if the requester just wants the 2 free search hours and 100 free pages of duplication to which non-commercial requesters are entitled) or sets a fee limit lower than \$25, those specifications will be respected.

IV. Duplication Costs Should Be Set at \$.05 Per Page.

The Council’s proposed duplication rate of \$.20/page, Proposed § 1301.12(b)(1)(I), conflicts with FOIA’s requirement that “[f]ee schedules shall provide for the recovery of only the *direct costs* of . . . duplication.” 5 U.S.C. § 552(a)(4)(A)(iv) (emphasis added). Given current copying costs, it is unimaginable that it actually costs the Council \$.20/page to duplicate records. Public Citizen incurs less than \$.05 per page for in-house standard copying. The U.S. Court of Appeals for the District of Columbia Circuit permits a maximum charge of only \$.07 per page for photocopying when assessing court fees. *See* United States Court of Appeals Notice, [http://www.cadc.uscourts.gov/internet/home.nsf/content/VL+-+Forms+-+Bill+of+Costs/\\$FILE/billcos1.pdf](http://www.cadc.uscourts.gov/internet/home.nsf/content/VL+-+Forms+-+Bill+of+Costs/$FILE/billcos1.pdf). Even commercial photocopying services (which include not only the cost of copies and employees’ time, but also the facilities, advertising, and a profit margin) generally cost far less than \$.20/page for standard photocopying. In its current proposed rule regarding FOIA, DOJ proposed charging \$.05/page for photocopying. *See* 76 Fed. Reg. at 15237. The Council should similarly charge, at most, \$.05/page for non-electronic duplication.

V. The Final Rule Should Clarify that Frequently Requested Records Do Not Have to be of Interest to the Public at Large.

The proposed rule states that the Council will make available for public inspection and copying records that have been previously released and that the Council determines “have become or are likely to become the subject of subsequent requests for substantially the same records because they are clearly of interest to the public at large.” Proposed § 1301.4(a)(4). FOIA provides, however, that *all* previously requested records that, “because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records” should be made publicly available. 5 U.S.C. § 552(a)(2)(D). It does not matter whether they are frequently requested because they are of interest to the public at large or because they are of interest to a subset of the public. Accordingly, the final rule should clarify that previously released records that are likely to become the subject of subsequent requests should be made available under 5 U.S.C. § 552(a)(2)(D) whether or not they are “clearly of interest to the public at large.”

VI. The Circumstances Under Which Requests Will Be Expedited Should Be Expanded.

The proposed rule only provides for expedited processing when there is a “compelling need” for the records. Proposed § 1301.7(c)(2)(ii). However, FOIA provides for expedited circumstances both when there is a “compelling need” (as defined by the statute, 5 U.S.C. § 552(a)(6)(E)(v)) and in other cases determined by the agency. *Id.* § 552(a)(6)(E)(i). The Council should identify other instances, in addition to when there is a compelling need, for allowing expedited processing. For example, other agencies also allow for expedited processing when requests involve “the loss of substantial due process rights” or a “matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence.” 28 C.F.R. § 16.5(d) (DOJ regulations on expedited processing); *see also e.g.*, 5 C.F.R. § 1303.10(d) (OMB regulations on expedited processing). Particularly with a new agency, it is important that requesters be able to receive responses to their requests expeditiously when necessary for the public to hold the government accountable for its actions.

In addition, the final rule should remove the words “to and throughout the American general public” from the definition of an “urgency to inform.” Proposed § 1301.7(c)(2)(ii)(B). The term “urgency to inform” is in the definition of “compelling need” in FOIA. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II). Because the definition applies across the government, individual agencies should not “elaborate upon that definition.” *Al-Fayed v. CIA*, 254 F.3d 300, 307 (D.C. Cir. 2003). Issues can be of exigency to the American public and delaying a response can compromise a significant recognized interest, *see id.* at 309, even when that interest is not one that is “to and throughout the American general public.”

VII. The Time to File an Administrative Appeal Should Run From the Day the FOIA Requester Receives the Initial Determination or Records.

Section 1301.11(b) of the proposed rule provides that administrative appeals must be submitted within thirty-five days of the date of the initial determination or the date of the letter transmitting the last records released, whichever is later. The final rule should make clear that the pertinent date is the date the initial determination or last records are *received* by the requester (whichever is later), not the date stamped on the letter containing that determination or accompanying the released records. *See, e.g.*, 5 C.F.R. § 1303.10(e) (OMB regulation beginning time to appeal from date of “receipt of a denial”). We have seen too many instances in which agencies write denial letters, but then do not send those letters until days or weeks after the date stamped on them, thereby eating sharply into the requester’s time to appeal.

VIII. Duplication Fees Should Be Waived for Representatives of the News Media if the Council Fails to Comply with Applicable Time Limits.

The proposed rule provides that if the Council fails to comply with applicable time limits and no unusual or exceptional circumstances apply, the Council shall not assess duplication fees if the requester is an educational or noncommercial scientific institution. *See* Proposed § 1301.12(e)(4). Under FOIA, however, duplication fees must also be waived under such circumstances for representatives of the news media. *See* 5 U.S.C. § 552(a)(4)(A)(viii). Therefore, representatives of the news media should be added to Proposed § 1301.12(e)(4).

CONCLUSION

For the reasons stated above, Public Citizen and POGO urge the Council to incorporate our suggestions in the final FOIA implementation rule. The final rule should:

- (1) allow FOIA requesters to submit their requests by e-mail;
- (2) clarify that the requirements for a FOIA request to be considered complete will be construed liberally; require the Council to accept a FOIA request that does not specify a fee category, state whether the requester wants to inspect records or receive a copy of them, or state how the released records will be used, if the request is otherwise complete; and require the Council to inform requesters if it deems their requests incomplete;
- (3) allow FOIA requesters to request fee waivers after they have filed their requests, and not deem requesters to have agreed to pay up to \$25 if they have not actually done so;
- (4) set duplication rates at \$.05/page;
- (5) clarify that the agency will post frequently requested records online whether or not they are of interest to the public at large;
- (6) expand the circumstances under which expedited processing will be granted;
- (7) provide that the time to file a FOIA appeal runs from the date on which the denial or final production of records is received; and
- (8) explain that duplication fees should be waived for representatives of the news media if the Council fails to comply with applicable time limits.

Respectfully submitted,



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