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**COMMENTS OF PUBLIC CITIZEN ON THE DEPARTMENT OF ENERGY'S
PROPOSED RULE REVISING FOIA REGULATIONS ON PHOTOCOPYING FEES
AND THE PUBLIC INTEREST BALANCING TEST**

Public Citizen submits the following comments on the Department of Energy's (DOE) proposed rule revising its Freedom of Information Act (FOIA) regulations to increase the photocopying fee and to eliminate the public interest balancing test, 73 Fed. Reg. 74658-01 (December 9, 2008).

Public Citizen, founded in 1971, is a national non-profit membership organization that advocates for safer consumer products, corporate accountability, and government transparency. To work effectively on those issues, Public Citizen regularly uses FOIA to request records related to its advocacy work. Moreover, Public Citizen Litigation Group has represented FOIA requesters in over 300 lawsuits challenging request denials.

Public Citizen has a longstanding commitment to ensuring the public's access to government records under FOIA and defending FOIA's "presumption of disclosure." *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 244 (1978). Accordingly, Public Citizen is concerned with both aspects of the proposed rule: quadrupling the photocopying charge per page and eliminating a policy of lawful disclosure of exempt documents when disclosure is in the public interest.

I. QUADRUPLING THE PHOTOCOPYING FEES

The existing DOE FOIA regulations prescribe a \$.05 per page charge for paper-to-paper copies and a \$.10 per page charge for microform-to-paper copies. 10 C.F.R. § 1004.9(a)(4). The proposed rule would mandate a \$.20 per page charge for both types of duplication. Proposed 10 C.F.R. § 1004.9(a)(4). There are several reasons why this \$.20 per page charge is excessive.

First, \$.20 per page is at the very highest end of the per page charge for standard paper-to-paper duplication among comparable cabinet-level agencies and is well above the average fee and the most common fee levied for these services. As a reference, we provide a complete list of the regulations prescribing the standard photocopy fee for each cabinet-level agency:

Department of Agriculture, 7 C.F.R. Pt. 1, Subpt. A, App. A (\$.20)

Department of Commerce, 15 C.F.R. § 4.11(c)(1) (\$.16)

Department of Defense, 32 C.F.R. § 286.29(c) (\$.15)

Department of Education, 34 C.F.R. § 5.60(a)(3) (\$.10)

Department of Health and Human Services, 45 C.F.R. § 5.43(c) (\$.10)

Department of Homeland Security, 6 C.F.R. § 5.11(c)(2) (\$.10)

Department of Housing and Urban Development, 24 C.F.R. § 15.110(c) (\$.18)

Department of the Interior, 43 C.F.R. Pt. 2, App. C (\$.13)
Department of Justice, 28 C.F.R. § 16.11(c)(2) (\$.10)
Department of Labor, 29 C.F.R. § 70.40(d)(2) (\$.15)
Department of State, 22 C.F.R. § 171.14(c) (\$.15)
Department of Transportation, 49 C.F.R. § 7.43(d)(1) (\$.10)
Department of the Treasury, 31 C.F.R. § 1.7 (g)(1)(i) (\$.20)
Department of Veterans Affairs, 38 C.F.R. § 1.555(e) (\$.15)

The most common per page fee for standard duplication among these cabinet-level agencies is \$.10, and the second most common fee is \$.15. Only two charge \$.20, which is the highest charge among the group. The average fee in this group for this type of duplication is \$.14. Although the DOE's current \$.05 charge for standard duplication is the lowest among this group, quadrupling the charge to \$.20 per page overshoots the average by a \$.06, and overshoots the most common fee by \$.10. This shift would move the DOE from the very lowest cost for standard duplication among this group of agencies to the very highest cost for duplication in one step. Therefore, the DOE's assertion in its proposed rule that, "DOE compared the rates of fellow Cabinet-level agencies and found that the rate of 20 cents a page is comparable to the fees charged throughout the executive branch," is simply not correct.

A four-fold increase in the fee for standard photocopying also places a substantial burden on requesters and may deter the public from exercising its rights to request documents under FOIA. Particularly for requesters who regularly seek documents from the DOE, an overnight quadrupling of the fee may cause disruption to their use of FOIA.

Finally, although DOE makes the general statement that this increase is "more reflective of current costs," it provides no evidence or assertion that standard photocopying actually costs the Department \$.20 per page. Indeed, that would be surprising. 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. United States Court of Appeals Notice, *available at* [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 \$.09 to \$.11 per page. (Information provided by Staples and Kinkos)

Thus, Public Citizen recommends that DOE keep its current \$.05 fee, which approximates the true cost of in-house non-commercial photocopying. Or, at the most, any fee increase implemented by the DOE should no more than double the current \$.05 per page cost, resulting in a standard photocopying fee of \$.10 per page. If any increase is actually necessary to cover DOE's costs, a \$.10 charge would bring the DOE in line with the most common charge levied by cabinet-level agencies and would reduce the impact on requesters of a sudden fee increase.

Moreover, the DOE does not provide any reason that it has decided to charge the same fee for standard photocopying and microform duplication when it previously charged a higher fee for microform (presumably because microform duplication is more costly for the agency). Requesters should only have to pay reasonable duplication costs. "[F]ees shall be limited to

reasonable standard charges. . .” and “[f]ee schedules shall provide for the recovery of only the direct costs of search, duplication, or review.” 5 U.S.C. 552(a)(4)(A)(ii), (iv). It is not reasonable to pay the same amount for two different duplication services that cost the agency different amounts.

The Departments of Commerce, Education, Health and Human Services, Homeland Security, Housing and Urban Development, Justice, Labor, State, Transportation, Treasury, and Veterans Affairs simply charge the actual cost of copies for nonstandard duplication, thereby allowing a higher charge for things such as microform if the cost of those duplication methods is higher. (See regulations cited in above listing) The Department of Defense differentiates between pre-printed material (\$.02), photocopy (\$.15) and a microfiche copy (\$.25). 32 C.F.R. § 286.29(c). The Department of Agriculture has a detailed fee structure for duplication of various types of documents it possesses in different forms. 7 C.F.R. Pt. 1, Subpt. A, App. A. The Department of the Interior likewise has a list of different fees, including large-sized page duplication, color copies, and photographs. 43 C.F.R. Pt. 2, App. C. Indeed, the DOE’s own rules provide that duplication of computer generated records is to be charged at cost. 10 C.F.R. § 1004.9(a)(4).

To be considered reasonable, different fees should be assessed depending on the cost to the agency of the duplication service that is provided. Public Citizen therefore recommends not only that standard duplication remain unchanged, or, at most, be raised to a rate of no more than \$.10 per page, but also that microform duplication simply be charged at cost.

II. ELIMINATING THE ‘PUBLIC INTEREST BALANCING TEST’

The existing DOE FOIA regulation provides: “To the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest.” 10 C.F.R. § 2004.1. The proposed regulation would eliminate this provision for two reasons: (1) it would streamline the agency review process by eliminating a step, and (2) the provision is ineffectual because the agency follows current DOJ guidance on FOIA which cancels out this provision. *See* Proposed 10 C.F.R. § 2004.1.

These justifications are mutually inconsistent. Either the agency engages in this “extra” step of balancing the public interest when disclosure is discretionary, or it does not. The first justification suggests that the agency does engage in this balancing, and thus that the agency would like to eliminate the step to become more streamlined in processing FOIA requests (in which case DOJ guidance must not nullify the provision). The second justification suggests that the agency doesn’t engage in this balancing test, and thus that it is superfluous and ineffectual (in which case there is no extra step which will be eliminated). The agency can’t have it both ways.

Moreover, even if we accept these reasons as plausible, neither justifies eliminating the provision. The first justification – the streamlining of FOIA request processing – although a laudable goal, should not be promoted at the expense of government transparency. It is hard to imagine that this weighing of the public interest takes a large amount of incremental time. Already, to process a request, the agency has to conduct a search for documents, determine on a document-by-document (or even word-by-word) basis whether exemptions apply, and respond to

the requester with justifications for any withholdings. During the course of such a careful review, one additional factor to consider would not add a huge burden. Moreover, any additional time required to weigh the public interest is justified by the benefit to the public that comes with disclosing documents in which the public has a strong interest.

The second justification – that the provision is not being implemented as a result of current DOJ guidance on FOIA – is incorrect. Attorney General Ashcroft’s October 12, 2001, memorandum (still in effect) regarding the Freedom of Information Act does not preclude the existing DOE rule or render that rule ineffectual. To the contrary, the Ashcroft memorandum recognizes agencies’ ability to release some exempt material at their discretion. The Ashcroft memorandum states that “[a]ny discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.” *See* Ashcroft Memorandum, *available at* <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>. The memorandum’s list of interests to be considered does not state that it is exhaustive. Simply because it does not require the agency to take account of the public interest does not mean that an agency is precluded from doing so, so long as the agency does take account of the mandated factors.

FOIA was enacted with the intent to favor disclosure. *See Dep’t of Air Force v. Rose*, 425 U.S. 352, 366 (1976); *see also Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004) (“The Supreme Court has long recognized that Congress’ intent in enacting FOIA was to implement ‘a general philosophy of full agency disclosure.’” (quoting *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754 (1989))). “FOIA was intended by Congress to balance the public’s need for access to official information with the Government’s need for confidentiality.” *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 144 (1981). DOE should be applauded for having regulations that fully effectuate FOIA’s central goals and are not in conflict with any policy announced by Attorney General Ashcroft. DOE’s FOIA regulations should maintain their public interest balancing test.

CONCLUSION

For the reasons stated above, Public Citizen urges the DOE to incorporate our suggestions into the final rule revising its FOIA regulations. The final rule should: (1) keep the current paper-to-paper duplication rate, or, at most, set a \$.10 rate; (2) charge at-cost for microform duplication; and (3) leave unchanged the provision calling for a weighing of the public interest in discretionary disclosures.

Respectfully submitted,

/s/

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December 18, 2008