



January 29, 2019

Executive Secretariat – FOIA Regulations
Department of the Interior
1849 C Street NW
Washington, DC 20240

RE: Docket No. DOI-2018-0017

Dear FOIA Officer:

Public Citizen and Public Citizen Foundation (together, Public Citizen) and the American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the ACLU) write to comment on the Department of the Interior's proposed revisions of its regulations implementing the Freedom of Information Act (FOIA), 83 Fed. Reg. 67,175 (Dec. 28, 2018).

Public Citizen is a nonprofit consumer advocacy organization founded in 1971. On behalf of its nationwide membership, Public Citizen works to educate the public and advocate before the courts, legislatures, and administrative agencies on issues concerning consumer product safety, corporate accountability, and openness in government decision making, among other topics. Since its founding, Public Citizen has regularly used FOIA to request records related to its research, education, and advocacy.

The ACLU is a nationwide, nonprofit, nonpartisan organization with more than two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Obtaining information about government activity, analyzing that information, and widely publishing and disseminating it to the press and public are critical and substantial components of the ACLU's work and are among its primary activities. The ACLU is a regular FOIA requester across the gamut of federal agencies and a frequent litigant in federal courts concerning the government's compliance with the FOIA.

Public Citizen and the ACLU have longstanding commitments to ensuring the public's access to government records under FOIA. Although Public Citizen and the ACLU appreciate the Department reviewing its existing FOIA procedures and attempting to revise them in order to comply with FOIA "efficiently, equitably, and completely," 83 Fed. Reg. at 67,176, many of the changes proposed by the Department will reduce public access to agency records and result in less transparency of government activities, thus undermining FOIA's purpose. Specifically, the following proposed changes should not be adopted: (1) imposing monthly limits on records processing, (2) recasting "time limits" as "time frames," (3) altering the standard for reasonably

described records, (4) eliminating certain obligations to forward FOIA requests within the Department, and (5) redefining what constitutes a “record.” Many of these proposed changes are unlawful, and all of them are unnecessary. Additionally, Public Citizen and the ACLU request that the Department revise its multitrack processing to comply with FOIA’s statutory deadlines. These points are discussed in more detail below.

I. The Department’s Proposal to Impose Monthly Limits on Records Processing Violates FOIA.

The Department proposes to adopt a regulation permitting it to “impose a monthly limit for processing records in response to your request in order to treat FOIA requesters equitably by responding to a greater number of FOIA requests each month.” 83 Fed. Reg. at 67,178. This proposal, if adopted, would violate the Department’s statutory obligations under FOIA. The statute does not provide for and cannot reasonably be construed to permit the Department unilaterally to impose monthly limits on the processing of records in response to FOIA requests.

To begin with, this proposal would permit the agency to violate its obligation to make records “promptly available” to the requester. 5 U.S.C. § 552(a)(3)(A). As the D.C. Circuit has explained, FOIA’s statutory framework contains a distinction between a “determination” and “subsequent production” of responsive records. *Citizens for Responsibility & Ethics in Wash. v. FEC (CREW)*, 711 F.3d 180, 188 (D.C. Cir. 2013) (Kavanaugh, J.). The agency must make a “determination” within 20 work days (or 30 work days, in unusual circumstances). 5 U.S.C. § 552(a)(6)(A)(i), (B)(i). “Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request.” *Id.* § 552(a)(6)(C)(i). FOIA’s requirement that the records be made “promptly available” means the production should occur “within days or a few weeks of a ‘determination,’ not months or years.” *CREW*, 711 F.3d at 188. In other words, FOIA requires records to be released within, at most, a few weeks after the 20 work-day deadline. Clearly, an administrative scheme that prospectively envisions delaying the production of non-exempt records for several months (or more) fails to comply with this requirement. Indeed, the D.C. Circuit concluded that an agency practice, even in the absence of a formal policy, resulting in “prolonged, unexplained delays” in the processing of FOIA requests would violate FOIA as it would “render[] FOIA’s mandate of ‘prompt’ response superfluous, *i.e.*, a dead letter,” *Judicial Watch, Inc. v. DHS*, 895 F.3d 770, 780 (D.C. Cir. 2018); the Department’s proposed change mandating prolonged delays would be similarly unlawful.

FOIA’s requirement of “prompt” production of records is important because, as courts have repeatedly recognized, “stale information is of little value.” *Id.* at 778 (quoting *Payne Enter., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988)). Thus, in addition to violating the terms of FOIA, the proposal would cause delays in processing requests that would “violate the intent and purpose of FOIA” by creating an administrative process that “use[s] the FOIA offensively to hinder the release of non-exempt documents.” *Long v. IRS*, 693 F.2d 907, 910 (9th Cir. 1982).

Further, the Department’s proposed monthly limits on processing records will not aid it in responding to FOIA requests either “efficiently” or “completely.” 83 Fed. Reg. at 67,176. Instead, FOIA requesters will wait months for piecemeal productions of records, and Department staff will be forced to constantly bounce from one request to another after meeting the monthly limit rather

than focusing on completing each request. To the extent the proposed change allows the Department to treat FOIA requesters “equitably,” it will only be by ensuring that all requesters receive unnecessarily and unlawfully delayed records.

In short, in addition to permitting the agency to violate the requirement of prompt production of records, the Department’s proposal will both undermine FOIA’s “basic purpose” of “ensur[ing] an informed citizenry” by relegating requesters to months-long delays for records, *Judicial Watch v. DHS*, 895 F.3d at 780, and not move the Department any closer to achieving its pronounced goals of improving its FOIA processing. Accordingly, the Department should not adopt this proposed change.

II. The “Time Frames” Proposal Is Inconsistent with FOIA’s Imposition of Statutory “Time Limits.”

The Department proposes changing references to “time limits” for responses to FOIA requests to “time frames” throughout its FOIA regulations. *See* 83 Fed. Reg. at 67,178–80. This proposal is inconsistent with FOIA’s provision of statutory time limits and should not be adopted.

Under FOIA, agencies “shall” make a determination in response to the receipt of a FOIA request within 20 work days. 5 U.S.C. § 552(a)(6)(A)(i). Similarly, agencies “shall” make a determination in response to the receipt of a FOIA administrative appeal within 20 work days. *Id.* § 552(a)(6)(A)(ii). In statutorily delineated “unusual circumstances,” agencies may extend these “time limits” but by no more than ten additional work days. *Id.* § 552(a)(6)(B).

Congress’s clear imposition of time limits was purposeful. As the D.C. Circuit recently observed:

Congress reinforced the importance of FOIA’s timetables and its overarching mandate of prompt availability when it amended FOIA in 1974. Responding to agencies’ concerns about the high volume of requests and lack of resources, Congress allowed agencies only ten additional days to respond where there were “unusual circumstances.”

Judicial Watch v. DHS, 895 F.3d at 781. The legislative history makes clear that “[t]he 1974 Amendments were deliberately drafted to *force increased expedition* in the handling of FOIA requests: “[E]xcessive delay by the agency in its response is often tantamount to denial. It is the intent of this bill that the affected agencies be required to respond to inquiries and administrative appeals within specific time limits.” *Id.* (second alteration in original) (quoting *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 617 (D.C. Cir. 1976) (Leventhal, J., concurring) (quoting H.R. Rep. No. 93-876 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6267, 6272)). “There is no doubt that Congress intended FOIA’s time limits to be mandatory.” *Id.* at 785 (Pillard, J., concurring).

The Department’s proposal to refer to the statutory “time limits” as “time frames” may suggest (incorrectly) that the time limits are not mandatory and would obscure the public’s

understanding of the Department’s obligations in responding to FOIA requests. Such changes would serve no legitimate purpose and should be rejected.

III. The Department’s Proposals Concerning What Constitutes a Reasonable Description of the Records Sought Are Unnecessary.

Three of the proposals concern regulations explaining to FOIA requesters how to describe the records they seek are problematic. First, the Department proposes a regulation stating that a reasonable description of requested records must “identify the discrete, identifiable agency activity, operation, or program in which [the requester is] interested.” 83 Fed. Reg. at 67,178. Second, the Department proposes to provide that “requests requiring research do not satisfy this requirement.” *Id.* Third, the Department proposes adding that the bureau within the Department receiving a FOIA request “will not honor a request that requires an unreasonably burdensome search or requires the bureau to locate, review, redact, or arrange for inspection a vast quantity of material.” *Id.* At least the first change is contrary to FOIA, and none of these proposed changes is necessary.

A. The Department’s first proposed change—“identify the discrete, identifiable agency activity, operation, or program in which [the requester is] interested”—would add an unnecessary and unlawful requirement for requesters.

FOIA requires that requesters “reasonably describe[.]” the records sought. 5 U.S.C. § 552(a)(3)(A). Currently, the Department defines a reasonable description as one which “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.” 43 C.F.R. § 2.5. This definition is nearly identical to the one adopted in case law, based on FOIA’s legislative history: A description is sufficient if it “enable[s] a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort.” *Yagman v. Pompeo*, 868 F.3d 1075, 1081 (9th Cir. 2017) (quoting H.R. Rep. No. 93-876 at 6 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6267, 6271); *see also* *Truitt v. Dep’t of State*, 897 F.2d 540, 545 n.36 (D.C. Cir. 1990) (same); *Pub. Emps. for Envtl. Responsibility v. EPA*, 314 F. Supp. 3d 68, 74 (D.D.C. 2018) (same). Moreover, the “linchpin inquiry is whether the agency is able to determine ‘precisely what records [are] being requested.’” *Yeager v. DEA*, 678 F.2d 315, 326 (D.C. Cir. 1982) (alteration in original) (quoting S. Rep. No. 93-854 at 10 (1974)).

Where a requester has provided a description that “enable[s] bureau personnel familiar with the subject matter to locate the records with a reasonable amount of effort,” 43 C.F.R. § 2.5, there is no need for additional information; the Department is able to determine precisely what records are being requested. Requiring FOIA requesters to do more is both contrary to FOIA and nonsensical: If the description enables the Department to locate the records sought, no legitimate purpose is served by requiring the requester to identify a specific agency activity. Moreover, to the extent that the proposal is intended to require requesters to describe their “interest” as opposed to describing the records requested, it seeks information irrelevant under FOIA (except possibly if the agency asserts a privacy exemption). The additional requirement would create unnecessary work for Department staff in determining whether this improper standard is met, and would allow the Department to unlawfully transform FOIA’s “reasonably describe” “requirement [into] a

loophole through which federal agencies can deny the public access to legitimate information.” *Yagman*, 868 F.3d at 1081.

B. As to the second proposed change—rejecting “requests requiring research”—the Department provides no explanation or definition of what it considers “research” for purposes of responding to a FOIA request. This omission is significant, because, unless the scope of “research” is properly cabined, the proposal would violate FOIA.

As a general matter, upon receipt of a request for records, agencies have an obligation to “conduct[] a search reasonably calculated to uncover all relevant documents.” *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007). Included within this obligation is determining which offices and “records systems[s]” within an agency are likely to “contain responsive documents” and searching those locations. *Schrecker v. DOJ*, 217 F. Supp. 2d 29, 34 (D.D.C. 2002) (citing *Campbell v. DOJ*, 164 F.3d 20, 28 (D.C. Cir. 1998)); *see also Defenders of Wildlife v. U.S. Dep’t of Interior*, 314 F. Supp. 2d 1, 10–14 (D.D.C. 2004). Although “FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters,” *Shapiro v. DOJ*, 37 F. Supp. 3d 7, 20 (D.D.C. 2014) (internal quotation marks omitted), even where agencies receive a request that “demands all agency records on a given subject ... the agency is obliged to pursue any ‘clear and certain’ lead it cannot in good faith ignore,” *Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir. 1999) (quoting *Kowalczyk v. DOJ*, 73 F.3d 386, 389 (D.C. Cir. 1996)); *see also Wallick v. Agric. Mktg. Serv.*, 281 F. Supp. 3d 56, 73 (D.D.C. 2017) (noting that agencies have “a duty to follow-up on any known leads” that emerge during its search).

Because the Department’s proposed change concerning “requests requiring research” contains no further explanation, it is unclear whether the Department considers work done by the agency to identify the likely locations of responsive records or to follow up on leads that emerge as impermissible “research.” To the extent it does, the Department’s proposed change is unlawful. Moreover, the potential confusion this language creates for requesters in understanding what level of detail they are obligated to include prior to submitting a FOIA request renders it both unhelpful and unnecessary.

C. The Department’s third proposed change—providing that the Department “will not honor a request that requires an unreasonably burdensome search or requires the bureau to locate, review, redact, or arrange for inspection a vast quantity of material”—likewise should not be included in the final rule.

The Department appears to have adopted this language from the D.C. Circuit’s decision in *American Federation of Government Employees, Local 2782 v. U.S. Department of Commerce (AFGE)*, 907 F.2d 203 (D.C. Cir. 1990), where the court concluded that “an agency need not honor a request that requires ‘an unreasonably burdensome search,’” and further determined the requests at issue would “impose an unreasonable burden upon the agency” because “[t]hey would require the agency to locate, review, redact, and arrange for inspection a vast quantity of material.” *Id.* at 209 (quoting *Goland v. CIA*, 607 F.2d 339, 353 (D.C. Cir. 1978)). Although both *AFGE* and *Goland* did not require an agency to undertake a burdensome search, several decisions make clear that the number of records requested appears “irrelevant” to the determination whether a FOIA request “reasonably describe[s]” requested records. *Yeager*, 678 F.2d at 326; *see also Yagman*,

868 F.3d at 1081 n.6 (same); *Shapiro v. CIA*, 170 F. Supp. 3d 147, 155 (D.D.C. 2016) (“The statute itself puts no restrictions on the quantity of records that may be sought.” (internal quotation marks omitted)). In other words, *AFGE* and related cases apply where the search required of the agency is so vague or unspecific as to require an unreasonably burdensome search; they do not apply where a clear search can be performed that would simply result in a large number of records. Therefore, the Department should make clear that it will not deny a FOIA request based on “[t]he sheer size or burdensomeness of a FOIA request.” *Tereschuk v. Bureau of Prisons*, 67 F. Supp. 3d 441, 455 (D.D.C. 2014) (quoting DOJ, FOIA Update Vol. IV, No. 3, at 5 (1983)).

Moreover, only extreme circumstances—such as requests that would require an agency to search “virtually every file contained in over 356 branch and division offices,” *AFGE*, 907 F.3d at 206, or “a page-by-page search through the 84,000 cubic feet of documents,” *Goland*, 607 F.2d at 353 (internal quotation marks omitted)—would permit an agency to conclude that a request requires an unreasonably burdensome search. For example, in *Public Citizen, Inc. v. Department of Education*, the court rejected an agency’s contention that the required search would be unduly burdensome, even though it required the agency to search 25,000 paper files and would be “costly and take many hours to complete.” 292 F. Supp. 2d 1, 6 (D.D.C. 2003). Similarly, in *Nation Magazine v. U.S. Customs Service*, the court concluded that requiring an agency to search an entire year’s worth of files that were “neither indexed nor cross indexed” for a single memorandum would not result in an undue burden. 937 F. Supp. 39, 44 (D.D.C. 1996). Indeed, as previously noted, even where agencies receive a request that “demands all agency records on a given subject ... the agency is obliged to pursue any ‘clear and certain’ lead it cannot in good faith ignore.” *Halpern*, 181 F.3d at 288 (quoting *Kowalczyk*, 73 F.3d at 389). In particular, both *AFGE* and *Goland* were decided before the era of electronic records, and the searches deemed unduly burdensome in those cases would have required hand-examination of voluminous paper files. With today’s technology, an electronic search of equivalently voluminous documents could often be performed by one person in a short period of time, making searches of a “vast quantity of material” reasonable. Thus, the inclusion of this language in the Department’s regulations is unnecessary and may deter requesters from submitting proper requests that involve a large quantity of material. For these reasons, the Department should not adopt this proposed change.

IV. The Department’s Proposal to Eliminate Forwarding FOIA Requests from One Component to Another Violates FOIA.

The Department’s current regulations provide for various scenarios in which a bureau of the Department or a component within a bureau will forward a FOIA request to other bureaus or other components within the Department. *See* 43 C.F.R. § 2.4. The Department proposes eliminating the following obligations for the Department with respect to forwarding FOIA requests: First, if a FOIA request “is received by a bureau that believes it is not the appropriate bureau to process the request,” that bureau will no longer contact the requester “to confirm that [the requester] deliberately sent [the] request to that bureau for processing,” and it will not “deem [the] request misdirected and route the misdirected request to the appropriate bureau to respond.” 43 C.F.R. § 2.4(e); *see* 83 Fed. Reg. at 67,177. Second, if a FOIA request “states that it seeks records from other unspecified bureaus,” that bureau will no longer “forward the request to those bureaus which [the receiving bureau] believes have or are likely to have responsive records.” 43 C.F.R. § 2.4(f); *see* 83 Fed. Reg. at 67,177. The Department further proposes to state explicitly

that FOIA requests received by a particular bureau or component of a bureau “will not be forwarded to another bureau or component.” 83 Fed. Reg. at 67,177. These proposed changes violate FOIA.

FOIA provides that the twenty work-day time limit for a response to a FOIA request “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 first received by *any component* of the agency that is designated in the agency’s regulations under this section to receive requests under this section.” 5 U.S.C. § 552(a)(6)(A)(ii) (emphasis added). This provision was added by the OPEN Government Act of 2007. *See* Pub. L. 110-175, § 6(a)(1), 121 Stat. 2524 (2007). As Senator Leahy—one of the bill’s sponsors—explained, this new provision “requir[es] that agency FOIA offices get FOIA requests to the appropriate agency component within 10 days of the receipt of such requests.” 153 Cong. Rec. S15,704 (daily ed. Dec. 14, 2007) (statement of Sen. Leahy). Following this amendment, DOJ’s Office of Information Policy (OIP) issued new guidance to agencies explaining that “agency FOIA offices [are] *required* to forward any misdirected FOIA requests received by them to the proper FOIA office within the agency, within ten working days.” DOJ, *New Requirement to Route Misdirected FOIA Requests* (Nov. 18, 2008) (emphasis added), <https://www.justice.gov/oip/blog/foia-post-2008-oip-guidance-new-requirement-route-misdirected-foia-requests>; *see also id.* (“The routing requirement is triggered by receipt of a request by a component of an agency that is designated by an agency’s regulations to receive requests.”). Indeed, current OIP guidance clearly provides that “if a requester mistakenly sends a FOIA request to an agency component that is designated to receive FOIA requests, but is not itself the proper component within the agency to process that request, that receiving component is *obligated* to route the misdirected request to the appropriate component within that agency within ten days of receiving the request.” DOJ, *Guide to the Freedom of Information Act: Procedural Requirements* at 33 (Sept. 4, 2013) (emphasis added), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/procedural-requirements.pdf>.

The Department’s proposed changes violate this statutory obligation. If the Department believes a requester has sent a FOIA request to the wrong bureau or component, 43 C.F.R. § 2.4(e), or that a requester has not included all appropriate bureaus or components, *id.* § 2.4(f), FOIA requires the Department to forward the FOIA request to the appropriate bureau or component within the Department, as the Department’s current regulations provide. Moreover, FOIA is clear that the Department has a statutory obligation to respond to the request, regardless of whether the receiving component properly forwards the request. 5 U.S.C. § 552(a)(6)(A)(ii). The adoption of a regulation that prevents the appropriate component of the Department from receiving the request and, therefore, from providing a response by the statutory deadline will only further burden both requesters and the Department by causing additional administrative proceedings and encouraging otherwise unnecessary litigation. In any event, the refusal to forward a FOIA request within the same agency can hardly be described as consistent with FOIA’s “general philosophy of full agency disclosure.” *Judicial Watch v. DHS*, 895 F.3d at 775 (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 352, 360–61 (1976)). Thus, the Department should reject these proposed changes.

V. The Department's Proposed Definition of "Record" Is Circular.

The Department currently defines "record" as "an agency record that is either created or obtained by an agency and is under agency possession and control at the time of the FOIA request, or is maintained by an entity under Government contract for purposes of record management." 43 C.F.R. § 2.70. The Department proposes changing this definition by eliminating "agency record" and to provide that a record "is any item, collection, or grouping of information that is already recorded" and that "is reasonably encompassed by your request." The latter part of this definition is circular and confusing. Whether a particular record is requested by a particular FOIA request has no bearing on whether it is a "record," only on whether it is a "*responsive* record." The Department should not adopt this proposed change.

VI. The Department Should Revise Its Multitrack Processing to Comply with FOIA's Statutory Time Limits.

As the Department through its proposal is reviewing its FOIA processing system, Public Citizen and the ACLU request that the Department consider revising its multitrack processing to comply with the time limits provided by FOIA. Specifically, the Department should not designate FOIA processing tracks that indicate the Department will exceed the statutory time limit for responding to a FOIA request.

FOIA permits agencies to utilize "multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests." *Id.* § 552(a)(6)(D)(i). The Department currently uses a four-track processing system. *See* 43 C.F.R. § 2.15(c) (providing for "Simple," "Normal," "Complex," and "Exceptional/Voluminous" tracks). The Department assigns requests to particular tracks based on "the estimated number of workdays needed to process the request." *Id.* § 2.15(a). The "estimated number workdays" associated with each track are as follows: (1) Simple: one to five work days; (2) Normal: six to twenty work days; (3) Complex: twenty-one to sixty work days; and (4) Exceptional/Voluminous: over sixty work days. *Id.* § 2.15(c). As previously explained, FOIA provides a mandatory twenty work-day time limit for responding to FOIA requests, subject only to a possible ten-work-day extension if certain statutorily delineated "unusual circumstances" are satisfied. 5 U.S.C. § 552(a)(6)(A)(i), (a)(6)(B). Accordingly, defining tracks that exceed the maximum statutory time limit for responding to FOIA requests is unlawful.

Instead, the Department should utilize tracks that require processing within the statutory time limits. The Department may retain its Simple and Normal tracks, but should modify the Complex track and eliminate the Exceptional/Voluminous track entirely. For the Complex track, the Department should clarify that requests will be processed within twenty-one to thirty work days and clarify that the Department will only assign requests to this track if the Department determines FOIA's "unusual circumstances" standard is satisfied. Moreover, "unusual circumstances" should be "unusual," not regularly occurring. Based on the Department's 2018 Chief FOIA Officer Report, only 7.5 percent of FOIA requests received by the Department in FY 2017 were classified as Simple, leaving 92.5 percent in one of the three remaining tracks. Department of the Interior, *2018 Chief FOIA Officer Report* at 14 (2018), https://www.doi.gov/sites/doi.gov/files/uploads/2018_doi_cfo_report.pdf. Additionally, data in the Department's

Freedom of Information Act 2017 Annual Report indicates that more than 2,200 requests that were placed in the non-Simple tracks (just under half of the total) did not receive a response within twenty work days. See Department of the Interior, *Freedom of Information Act 2017 Annual Report* at 26 (2018), https://www.doi.gov/sites/doi.gov/files/uploads/doi_fy17_final.pdf. Accordingly, the Department is regularly utilizing processing tracks that do not provide for, and are not intended to result in, responses within FOIA's statutory time limit.

For these reasons, the Department should revise its multitrack processing to reflect FOIA's statutory deadlines and work to ensure compliance with these statutory deadlines.

Thank you for considering these comments. Please feel free to contact Patrick Llewellyn at (202) 588-1000 or pllewellyn@citizen.org with any questions.

Sincerely,

/s/ Patrick D. Llewellyn
Patrick D. Llewellyn
Public Citizen & Public Citizen Foundation

/s/ Brett Max Kaufman
Brett Max Kaufman
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