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COMMENTS OF PUBLIC CITIZEN ON THE DEPARTMENT OF JUSTICE'S REVISED FREEDOM OF INFORMATION ACT REGULATION

Public Citizen submits the following comments on the Department of Justice's proposed rule titled Freedom of Information Act Regulations, Docket No. OAG 140; AG Order No. 3259-2011, 76 Fed. Reg. 15236 (March 21, 2011).

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.

In at least four ways, the proposed rule is in tension with FOIA or misses opportunities to create a more efficient and requester-friendly regime.

1. The agency should make fee-waiver determinations before incurring search costs (§ 16.10(k)(2)).

An agency must grant a fee waiver when disclosure is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). Section 16.10(k)(2) of the proposed rule provides factors to identify requests that qualify for a fee waiver. Some of these factors suggest that the fee-waiver determination may be made after the search for responsive records, rather than at the outset based on the face of the request. In this way, the proposed rule is inconsistent with the purpose of FOIA's fee-waiver provision and cases construing it.

Under its current fee-waiver provisions, the Department of Justice sometimes defers the decision of whether to grant a fee waiver until after a search for responsive records. The reason provided for deferring the fee-waiver determination is that whether disclosure is in the public interest depends on the nature of the responsive records, rather than simply the nature of the request for records. The factors in the proposed rule seem to continue this practice. Most explicit is the second factor, which states that “[t]he disclosable portions of the requested records must be meaningfully informative about government operations or activities.”

Courts construing FOIA's fee-waiver provision, however, routinely base the fee-waiver determination on the face of the record request. *See, e.g., Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312-13 (D.C. Cir. 2003) (examining the nature of the request and concluding that a

fee waiver should have been granted); *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987) (“To satisfy [the fee-waiver standard], the best evidence requesters can point to is their first letter seeking a waiver of fees.”). Indeed, the U.S. District Court for the District of Columbia recently rejected the argument that a requester’s eligibility for a fee waiver depends on the nature of the responsive records. Rather, it held that “[f]ee-waiver requests are evaluated based on the face of the request, not on the possibility of eventual exemption from disclosure.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Justice*, 602 F. Supp. 2d 121, 125 (D.D.C. 2009).

The proposed rule also undermines the purpose of the Act’s fee-waiver provision. Waiving fees for requests in the public’s interest provides an incentive for those requests. A not-for-profit organization like Public Citizen, for example, will request information under FOIA that it believes to be of significant interest to its members and the public generally. But if the agency defers the fee-waiver determination until *after* it has conducted a search for responsive records, Public Citizen may be held responsible for the search costs. For individuals and organizations who, like Public Citizen, are unable to afford costly searches, this uncertainty is unacceptable. As a result, the agency’s policy chills requests for information that is in the public interest.

Moreover, it is the requester’s burden to show entitlement to a fee waiver. *See Brunsilius v. U.S. Dep’t of Energy*, 514 F. Supp. 2d 30, 35 (D.D.C. 2007) (“Plaintiff, as the requesting party, bears the burden of showing that disclosure of the requested records is likely to make a significant contribution to the public’s understanding of identifiable operations or activities of the federal government.”). If the fee waiver inquiry depended on the nature of the responsive records, as opposed to the nature of the requested records, requesters would never be able to satisfy this burden.

Consistent with caselaw and the policy underlying the Act’s fee-waiver provision, the agency’s rule should explicitly state that fee-waiver determinations will be made at the outset, based on the face of the request, and will not be deferred until after search costs are incurred.

2. A requester should be guaranteed a reasonable period of time after receiving the denial letter in which to file an administrative appeal (§ 16.8(a)).

Subsection 16.8(a) requires that a timely administrative appeal be sent within 45 days of the date on the agency denial letter. In Public Citizen’s experience, agency denial letters are frequently dated significantly before they are mailed. For example, in a Public Citizen request before a different agency, a denial letter was postmarked more than 30 days after the date on the letter. Under these circumstances, the proposed rule would not afford the requester a reasonable period of time in which to consider and prepare an appeal.

The date the requester receives the denial letter, not the date the letter was written, should mark the beginning of the time window in which to file an administrative appeal. At the very least, the proposed rule should give requesters *either* 45 days from the date on the agency denial letter *or*, for example, 30 days from the date on which the requester receives the letter, whichever is later. The denial letter should clearly state these time periods.

3. The rule should explicitly require the original classifying component to determine whether requested classified material should be declassified.

The agency's current rule, at section 16.7, states that "[i]n processing a request for information that is classified under Executive Order 12958 . . . or any other executive order, the originating component shall review the information to determine whether it should remain classified." The proposed rule omits this section. Although section 16.4(d) requires that components of the agency "ensure compliance with part 17 of this title," it is not clear whether this requirement—which also exists in the current rule—renders the current section 16.7 superfluous. The rule should include a section specifically requiring that in response to a request for classified information, the original classifying component review the information to determine whether it should be declassified.

4. The definition of "representative of the news media" should be consistent with the statutory definition (§ 16.10(b)(6)).

FOIA defines a "representative of the news media" to mean "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii)(III). Section 16.10(b)(6) of the proposed rule, however, expands on this statutory definition to require that the "person or entity" be "organized and operated to publish or broadcast news." It is unclear whether this definition is different from the statutory definition. But if the two definitions are identical, the additional language in the proposed rule is superfluous; and if the definition in the proposed rule is different from the statutory definition, it is not authorized by the statute. The proposed rule's definition of "representative of the news media" should mirror the statutory definition.

CONCLUSION

Public Citizen urges the Department of Justice to incorporate these suggestions into the revised Freedom of Information Act Regulations.

Respectfully submitted,

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