Comments on Proposed Department of the Interior EFOIA regulations

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COMMENTS OF PUBLIC CITIZEN AND THE FREEDOM OF INFORMATION CLEARINGHOUSE ON THE DEPARTMENT OF THE INTERIOR'S REVISION OF FREEDOM OF INFORMATION ACT REGULATIONS

Public Citizen and the Freedom of Information Clearinghouse submit these comments regarding the Department of the Interior's ("DOI") revision of its Freedom of Information Act ("FOIA") regulations and the implementation of the Electronic Freedom of Information Act amendments of 1996, 66 Fed. Reg. 36966-36989 (July 16, 2001). In these comments, we focus on eight areas in which the proposed revisions contravene Congress's intent to increase governmental transparency and bolster the public's faith in government by making records readily accessible to the American people.

Interests of Public Citizen and the Clearinghouse

Both Public Citizen and the Freedom of Information Clearinghouse have had extensive experience, as requesters and as counsel for requesters, with agencies' implementations of FOIA. Public Citizen, founded by Ralph Nader in 1971, is a non-profit consumer advocacy organization with over 150,000 active supporters nationwide. Public Citizen has regularly used the FOIA to request records related to its advocacy efforts and has represented FOIA requesters in approximately 300 lawsuits challenging government secrecy. The Freedom of Information Clearinghouse is a project of Ralph Nader's Center for Study of Responsive Law, directed by a Public Citizen lawyer. The Clearinghouse has provided technical and legal assistance since 1972 to individuals, public interest groups, and the media who seek access to information held by government agencies.

Public Citizen and the Clearinghouse have a long-standing commitment to enhance public access to government-held information under th FOIA. We submit these comments to ensure that the agency's regulations correspond to Congress's intent to open government records to public scrutiny.

Comments on Proposed Regulations

As explained in detail below, the DOI should make the following eight changes to the proposed regulations: (1) Provide that electronic reading rooms include not just those records that have already been repeatedly requested, but also those that the Department believes wil be requested in the future; (2) Allow expedited processing for non-news media requesters who have an urgent need to inform the public about Federal Government activity; (3) Allow expedited processing for records subject to multiple requests; (4) Apply the same rules to requests that are referred to other federal agencies as those used for requests that are referred within the DOI; (5) Enunciate more clearly the requester's right to sue without first appealing if their request is not answered within the statutory time limits; (6) Better describe circumstances where multi-track processing will be used, and allow for public comment before multi-track standards are implemented; (7) Create a central location where all DOI FOIA requests can be sent if the requester is not certain which bureau has their records; (8) Provid that the statutory time limit begin running when a FOIA officer receives an electronic FOIA request, not when they open it.

1. Prospectively Making Available Records the Agency Believes Will Be Subject To Requests in the Future

EFOIA requires that certain records created on or after November 1, 1996 be made available in electronic reading rooms as quickly as practicable. Among others, these records should include "copies of all records, regardless of form or format, which.because of the nature o

their subject matter, the agency determines have become *or are likely to become* the subject of subsequent requests for substantially the same records." 5 U.S.C. § 552(a)(2)(D) (emphasis added).

Section 2.4(c)(iv) of the Proposed Rule contains an incomplete description of the records that should be in DOI's electronic reading rooms. That provision states that reading rooms include "copies of records frequently requested under the FOIA and an index of those documents. 43 C.F.R. § 2.4(c)(iv). This definition covers only those records that have already been frequently requested, not those that the agency, in it judgment, believes are likely to be requested again in the future. Also, FOIA does not use the term 'frequently requested.' Instead, it contemplates that even if a group of records has been requested once, if the DOI believes that there will be requests for substantially the same records in the future, the records should be placed in the electronic reading room after the first request.

We recommend changing the language of § 2.4(c)(iv) to the following: "Copies of records already requested under the FOIA which the DOI believes have become or are likely to become the subject of subsequent requests for substantially the same records and an index of those documents."

2. Expedited Processing for Non-Media Requesters

We commend the agency for proposing regulations that recognize its responsibility to expedite requests in circumstances where: a) Lack o expedited treatment could pose an imminent threat to the life or physical safety of an individual; b) There is an urgency to inform the public about an activity of the Federal Government. Both of these circumstances are set forth in the EFOIA statute at 5 U.S.C. § 552(a)(6)(E)(v). The Department has taken its own initiative to add one circumstance where it will expedite requests: If the request involves the loss of substantial due process rights.

We urge the DOI to broaden the provision for expediting requests concerning matters of urgent public interest. Under the Proposed Rule, the DOI will only expedite a request that involves informing the public about Federal Government activity if the request comes from one whose primary business is disseminating information. §2.14(a)(2). The example given is a member of the news media covering a "breaking news story." Id. However, there are many entities that inform the public about Federal Government activity as an adjunct to educational or advocacy activities. Urgent FOIA requests from such organizations should not be denied expedited processing because the dissemination of information is not the organization's "primary business." The DOI should revise the criteria covering who can make a request for expedited materials to include organizations whose business includes disseminating information, even if it is not their primary business.

3. Expediting Requests For Records Subject to Multiple Requests

The DOI should also adopt an additional provision expediting the processing of records that are subject to multiple pending requests. Congress recognized that certain records are subject to multiple FOIA requests and that these records (once processed and released) should be treated as (a)(2) materials, in order to speed up access for requesters and to divert potential requests for previously-released records from FOIA-processing altogether. But Congress did not address how to treat multiple FOIA requests for the same records before th records are processed and made available to the public in the reading rooms. Thus, if there is widespread interest in DOI records on a particular current event, and the DOI receives fifty FOIA requests for release of the records this month, all fifty of these requesters (and any that ask for the records in the succeeding months) may be required to wait for months as the requests move through the DOI's backlog of requests Thus, if agencies with significant backlogs do not expedite processing of records that are subject to numerous requests, the purpose of the Reading Room requirement will be frustrated because, due to the backlog, public access to the records will be denied for years, even if there is widespread interest in the records. Accordingly, the agency should adopt regulations that would expedite processing in such cases to reduce backlogs and respond to widespread demand for records that should be in their Reading Rooms. *See,* Mark H. Grunewald, *E-FOIA and the 'Mother of All Complaints': Information Delivery and Delay Reduction*, 50 Admin. L. Rev. 345, 369 (1998) (recommending that agencies use their multi-track authority to expedite requests that are likely to be the subject of multiple requests).

The Treasury Department has recognized this concern, and added the following language to their regulations: "When a bureau receives fiv or more requests for substantially the same records, it shall place those requests in front of an existing request backlog that the responsible official may have. Upon completion of processing, the released records shall be made available in the bureau's public reading room, and if created on or after November 1, 1996, shall be made available in the electronic reading room of the bureau's web site." 65 Fed. Reg. 4050 (June 30, 2000). We recommend that the DOI include similar language in its regulations.

4. Reducing the Number of Referrals

The DOI has broken down its referral procedures into those that require consultation or referral within the DOI, and those that require consultation or referral with other agencies. For those records that require consultation within different bureaus of the DOI, the Proposed Rule states that if a bureau receives a request for materials not within its possession, but likely to be in the possession of another bureau, i will refer the request to that bureau. We commend the DOI both for this automatic referral and for notifying the requester of the referral in

writing and providing the name of a contact in the other bureau.

With regard to those documents that originated in another federal agency, we commend the DOI for limiting referrals to documents that originated with another federal agency, and for including a list of factors it will follow when deciding whether to refer the request to the originating agency or decide on the request itself. However, we have three recommendations.

First, if the DOI decides to refer the request to another agency, the requesting party should be sent written notice of the referral, just as the DOI has proposed to do with intra-DOI requests. We believe that the DOI cannot refer a request to another agency without a direct respons to the requester. In McGehee v. Central Intelligence Agency, 697 F. 2d 1095 (D.C. Cir. 1983), the District of Colombia Circuit held that "*all records in an agency's possession, whether created by the agency itself or by other bodies covered by the [Freedom of Information] Act, constitute 'agency records.*'" McGehee, 697 F. 2d at 1109 (emphasis in original). Therefore, an agency can never simply wash its hands of responsibility for any FOIA request it receives if it is in possession of the documents in question. "When an agency receives a FOIA reques for "agency records" in its possession, it must take responsibility for processing the request. It cannot simply refuse to act on the ground tha the documents originated elsewhere." McGehee, 697 F. 2d at 1110.

Second, the DOI should amend its Rule to take into account the effect of a referral of documents to another agency. If the DOI receives a FOIA request for a document originating with another agency, or with which another agency is substantially concerned, the DOI should consider the possibility for substantial delay in response to the requester as a factor in determining whether to refer the record. If the DOI knows or has reason to believe that referral will result in substantial delay, the DOI should not refer the request, but rather should consult with the other agency.

One consideration in making the determination is whether the agency to which the request might be referred has a backlog, and whether it will process the request based on the date DOI received the request, or the date that it received a referral. If the originating agency's policy on processing referrals will delay the response, the agency should not refer, but should make the determination on disclosure after consultation.

Thus, we recommend adding the following language to 43 C.F.R. § 2.22(b)(2)(ii): "DOI is in a better position than the originating agency to assess whether the record is exempt from disclosure if referring the document the originating agency is likely to result in a significant delay in a response to the requester."

Third, the DOI should amend its regulations to provide that consultations and referrals will be handled according to the date the FOIA request initially is received, as other agencies have done. Such a provision would prevent some of the delay that occurs through the referra process when a request is referred to another agency.

5. Notifying Requesters of Their Right To Sue

FOIA provides that once a person makes a request and the government agency does not comply with the applicable time limits for responding to the request, the requester "shall be deemed to have exhausted his administrative remedies with respect to such request." 5 U.S.C. § 552(a)(6)(C). In other words, the requester can then sue the agency demanding that the agency release the files in question.

The availability of immediate judicial relief, without taking an appeal, should be clearly stated by the DOI's proposed rule. It is not, and this constitutes a serious problem with the rule as proposed. The availability of immediate suit, without filing an appeal, is mentioned only once, at the end of a sentence in 43 C.F.R. § 2.12(a). The section reads, "if you have not received a response within 20 workdays, or 30 workday if an extension has been taken, you may contact the bureau to ask about the delay. You also have the right to consider any non-response within these time limits as a denial of records and file a formal appeal (see § 2.27(a)(5)) or lawsuit."

Sections 2.27, 2.28, 2.29, 2.30, and 2.31 all deal with appeals from a denial or non-response to a FOIA request. § 2.27(b) describes the process for communicating informally with the Department's FOIA contact when the Department has not responded to the request within th statutory time limit. However, this section does not mention the requester's right to sue without such informal communication or, indeed, without filing an appeal. The right to sue should be stated more explicitly. We recommend adding the following language to 43 C.F.R. § 2.27(b): "Additionally, if a determination has not been made on your request within the time limits provided in § 2.12, you may file a lawsuit immediately without filing an appeal."

Section 2.28 deals with the amount of time a requester has to file an appeal, and, with respect to appeals covered by § 2.27(a)(5) (those made when a determination has not been made by the statutory time limit) Section 2.28(b) says "you may file an appeal any time after the time limit for responding to your request has passed." This is the entirety of the subsection _ nowhere is it mentioned that the requester ma sue after exhausting his or her administrative remedies. We recommend adding the following language to § 2.28(b): "You may also file a

lawsuit immediately, without first filing an appeal, with respect to requests in which a determination has not been made within the time limits described in § 2.12."

We applaud the agency for including the right to sue in § 2.30(4), which apprises requesters of their rights when the DOI does not respond to a FOIA request within 20 workdays. However, we recommend that the text be changed from "the FOIA Appeals Officer will close your FOIA appeal and advise you that you may treat the lack of a response by the bureau as a denial of your appeal and seek judicial review" to ".as a denial of your appeal and file a lawsuit against the Department."

6. The Standards For Multi-track Processing Must Be Better Delineated

Although the proposed regulation states that DOI allows bureaus to use multi-track processing, it does not set forth any standards for such procedures. 43 C.F.R. § 2.25, which deals with multi-track, states only "a bureau may use two or more processing tracks to distinguish between simple and complex requests based on the amount of work and/or time needed to process the request." This does not provide enough information to allow for meaningful comments by the public, and is therefore contrary to the intent of FOIA. *See* 5 U.S.C. § 552(a)(6)(D)(i) (multi-track processing regulations may be promulgated *pursuant to notice and receipt of public comment*). Additionally, the description is too vague to allow requesters to know whether a given request will qualify for the fastest track.

While bureaus should be allowed to develop their own standards, these standards, once formulated, should be made available for public comment prior to implementation. These standards should be articulated with sufficient clarity so that requesters will know how to draft their requests so that they will qualify for a faster track. The standard also should be clearly stated so that requesters may determine that the bureaus are not acting arbitrarily in placing requests on faster or slower tracks. We urge the Department to add the following sentence at the end of § 2.25(a): If a bureau decides to implement multi-track processing, it will publish its standards for dividing requests into tracks pursuant o notice and receipt of public comment."

7. The DOI Should Have Central Locations To Receive FOIA Requests If The Requester Is Unsure Where To Send Their Request

If a requester desires documents from the DOI, it is natural that they would send that request to the DOI's FOIA officer. But the way that FOIA requests are proposed to be handled, this may actually delay the processing of the request. This is because "DOI does not have a central location where you may submit your FOIA request nor does it maintain a central index or database of documents in its possession." 43 C.F.R. § 2.10.

The agency recommends that "for quickest possible handling, you should address a separate copy of your request to each bureau FOIA Contact where you believe the records are maintained." 43 C.F.R. § 2.8(d)(4). However, it would be a better policy to have a centralized location to which all FOIA requests could be sent if the requester is unsure which bureau has the records they want. If requesters are unclear where their requests should be sent, they will have to contact the Departmental FOIA officer anyway _ so why shouldn't these requests be sent to a central Departmental FOIA office in the first place?

The second problem with the Rule as currently written involves intra-, rather than inter- bureau requests. Currently, if a request is sent to a single bureau, the DOI presumes that the request seeks only records from the office to which it is addressed - a bureau headquarters office or field office. § 2.10(b). Only if a request to a bureau office specifies that it seeks records located at other offices will the office refer the request to other offices. In contrast, § 2.22(a)(1) states that if a bureau gets a request for records that are not in its possession, but are likely to be in the possession of another bureau within the DOI, it will refer the request to the other bureau for a response. Consequently, the proposed regulations contemplate less cooperation within one bureau than between two different bureaus for responding to FOIA requests

We recommend that the DOI change the Rule in two ways. First, with respect to the DOI as a whole, we recommend that the DOI provide a central location to which requests may be sent if the requester cannot identify the bureau that has custody of the records he or she seeks. This office would then be responsible for identifying the bureau or bureaus that should receive the request. Other Departments in which FOIA processing is handled independently by the Department's sub- components have adopted this approach. See 28 C.F.R. § 16.3(a) (Department of Justice FOIA Referral Unit).

Second, we recommend that if a request is sent to a single bureau, the bureau's first communication with the requester should include a statement that the bureau will only search the records at the office the request was sent to, and that if the requester wants the bureau to search other offices, requests must be sent to the other offices, or the requester must explicitly request a search of all offices.

8. The Time Period For an Electronic Request Should Begin When The Request Is Received, Not When It Is Opened

For regular mail, the time period for a FOIA request begins when it is received by the agency. However, this standard differs when the request is made via e-mail. For e-mailed requests, "the receipt date is the date the e-mail message is opened by the FOIA contact at the bureau office responsible for the information." 43 C.F.R. § 2.12(b). The standard for starting the statutory time limits should be the same for regular mail and e-mailed requests. A requester has no control over when the FOIA contact will open their e-mail.

The aim of creating amendments pertaining to electronic media is surely to speed up communication by harnessing the possibilities of such media _ *not* to slow down such communication. But the Rule as proposed would do just that: instead of assuring a faster response to a request, by allowing the time for reply to begin only when an e-mail is opened, the Proposed Rule would allow the FOIA contact to delay responding to a request indefinitely, through no fault of the requester. We recommend changing the Rule so that the statutory time period fo responding to a request begins running when an e-mailed request is received by the DOI, not when the DOI opens the request.

Similarly, with respect to appeals that are submitted electronically, "the receipt date is the date the e-mail message is opened by the FOIA Appeals Officer." 43 C.F.R. § 2.29(a). For similar reasons as with requests, the time period for appeals should start running when the e-mailed appeal is received by the Agency, not when it is opened. For FOIA requests and appeals, responses delayed are responses denied. The purpose of EFOIA regulations are to increase, not decrease, the speed with which responses are made.

Conclusion

For the reasons stated above, Public Citizen and the Freedom of Information Clearinghouse urge the DOI to incorporate our suggestions ir the final FOIA regulations. The final regulations should: (1) provide that electronic reading rooms contain not only records that have already been "frequently requested," but also those which have been requested once and the agency believes will be subject to requests for substantially similar records; (2) Allow non-news media requesters expedited processing when those entities have an urgent need to report on government activity; (3) Provide for expedited processing of often-requested records not already in reading rooms; (4) Allow the same notice to requesters whose requests have been referred to other federal agencies as those whose requests are referred to other DOI bureaus; (5) More thoroughly notify requesters of their right to sue; (6) Allow for public comment before bureaus' multi-track processing procedures are implemented; (7) Create a central location to receive FOIA requests when the requester is unsure which bureau holds their records; (8) Change when the statutory time limit begins running for electronic requests.

Respectfully Submitted,

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Footnote: 1

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