Comments on the Department of Justice's Revision of FOIA And Privacy Act Regulations

COMMENTS OF PUBLIC CITIZEN, INC. ANDTHE FREEDOM OF INFORMATION CLEARINGHOUSE ON THE DEPARTMENT OF JUSTICE'S REVISION OF FREEDOM OF INFORMATION ACT AND PRIVACY ACT REGULATIONS

Public Citizen and the Freedom of Information Clearinghouse submit these comments regarding the Department of Justice's revision of Freedom of Information Act ("FOIA") and Privacy Act regulations and the implementation of the Electronic Freedom of Information Act Amendments of 1996, 62 Fed. Reg. 45184 (Aug. 26, 1997). The Department of Justice -- in its dual capacity as the agency that receives more FOIA requests than any other and as the agency responsible for policy guidance and FOIA compliance by all agencies -- has a tremendous impact on how well FOIA and the Electronic FOIA Amendments work for the American public. In these comments, we focus or five areas in which the proposed revisions contravene Congress's intent to make government records readily accessible to the American public.

Interests of Public Citizen and the Clearinghouse

Both Public Citizen and the Freedom of Information Clearinghouse have had extensive experience, both as requesters and as counsel for requesters, with agencies' implementation of FOIA. Public Citizen, founded by Ralph Nader in 1972, is a non-profit consumer advocacy organization with over 120,000 active supporters nationwide. From its founding, 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 secrec 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 wh seek access to information held by government agencies.

Public Citizen and the Clearinghouse have a longstanding commitment to enhanced public access to government-held information under the FOIA. We submit these comments to ensure that DOJ's regulations correspond to Congress's intent to open up government action to public scrutiny.

Comments on Proposed Regulations

As explained in detail below, the Justice Department should make the following five changes in the proposed regulations: (1) provide for guides to assist the public in requesting access under FOIA; (2) state that components shall make reading room records created after November 1, 1996 -- whether by the Department or by any other entity -- available electronically; (3) provide for expedited processing wher the Department receives several requests for substantially the same records; (4) amend the regulations on referrals to ensure that referrals are limited to those records for which referral is necessary and for which referral does not significantly increase the amount of time before the records are released; and (5) recognize the statutory twenty day time limit for responding to requests.

1. Guides for Locating Records

We commend the Justice Department's efforts to make the FOIA and Privacy Act regulations more "user friendly." The regulations are easier to read and understand and will serve as a good model for other agencies as they revise their regulations. Section 16.3 contains an extensive (and helpful) discussion of where individuals should look for information on where to send their requests, but makes no mention a key requirement of the EFOIA Amendments designed to assist the public in using FOIA -- the reference material or guide for requesting records from the Department required by 5 U.S.C. 552(g).

In enacting the EFOIA Amendments, Congress was particularly concerned about assisting requesters in identifying and requesting agency records, and thus, required agencies to prepare guides for the public that include (1) an index for all major information systems of the agency; (2) a description of major information and record locator systems maintained by the agency; and (3) a handbook for obtaining various types and categories of public information from the agency. The statute requires that agencies make these finding aids available to the public by March 31, 1997. In reporting the Amendments, the House Committee on Government Reform and Oversight specifically state that the guide "is intended to supplement other information locator systems, like the Government Information Locator System (GILS) called for in the Paperwork Reduction Act of 1995." H. Rep. No. 795, 104th Cong., 2d Sess. 30 (1996).

The Justice Department has not complied with the EFOIA Amendments or the Paperwork Reduction Act in this regard. The Department ha not provided GILS Core locator records as directed by the Office of Management and Budget more than nineteen months ago, much less the more comprehensive index required by 5 U.S.C. ? 552(g).[(1)](pcdojcom.htm#N_1_) And, when a Public Citizen researcher contacted the Department for a copy of the handbook required by ? 552(g)(3), the Department sent the pamphlet, Your Right to Federal Records: Questions and Answers on the Freedom of Information Act and the Privacy Act published in December 1996, which makes no mention of the EFOIA Amendments and contains no description of the Department's information systems.

As the agency responsible for overseeing agencies' compliance with FOIA, the Justice Department should take the lead in responding to Congress's mandate to provide these aids for the public. The Department should require each component to prepare and provide indices describing all of their information systems and locator systems, and to prepare a handbook on how a member of the public can use the FOIA to access records from the component. The final regulations should set forth each component's obligation to prepare these materials and notify readers of the existence of these finding aids.

We suggest that the Department add the following paragraph (d) to ? 16.2 stating that components shall provide the public with handbooks and indices:

(d) Components shall also prepare a guide for the use of the public in obtaining information from their organization. This guide shall include an index and description of all major information systems of the component, and a handbook for obtaining various types and categories of public information from the component. This handbook should be a short, simple explanation to the public of what the FOIA is designed to do, and how a member of the public can use it to access government records. Each component's handbook shall explain the types of records that can be obtained through FOIA requests, why some records cannot, by law, be made available, and how the component determines whether the record can be released. The handbook shall also explain how to make a FOIA request, how long the requester car expect to wait for a reply, and explain the right to appeal. The handbook shall also explain the requester's rights under the law to appeal to the courts to rectify agency action, and shall give a brief history of recent litigation it has been involved in and the resolution of those cases The guide should supplement other information locator systems, such as the Government Information Locator Service (GILS), and explain how a requester can obtain more information about those systems. The guide should be available on paper and through electronic means, and identify how a requester can access the Department's Freedom of Information Act Annual Reports. Similarly, the Department's Freedo of Information Act Annual Reports should refer to the guides and how to obtain them.

See 32 CFR 286.2(c) (Department of Defense's FOIA rule concerning handbook requirement); H. Rep. No. 795, 104th Cong., 2d Sess. 29-30 (1996) (legislative history on what guide should include).

In addition, the Department should amend ? 16.3 to notify the public that components are required to have such material. We suggest inserting the following sentence immediately before the sentence beginning "[a]s a general rule":

You may want to refer to the guide described in section 16.2(d) for assistance in describing the records you seek and for further informatior on filing a FOIA request.

2. Records Created On Or After November 1, 1996

The EFOIA Amendments provide that, by November 1, 1997, each agency shall make available by computer telecommunications copies o records that are likely to become the subject of subsequent requests if the records were "created on or after November 1, 1996." 552 U.S. ?552(a)(2). The Department's proposed regulations construe the language "created on or after November 1, 1996," as not merely a temporal limitation, but an implied limitation on who created the records, stating that "[c]omponents shall also make reading room records created by the Department on or after November 1, 1996, available electronically." ?16.2(c) (emphasis added). The Department also announced this construction of the statute in its guidance to other agencies in the Office of Information and Privacy's FOIA UPDATE. FOIA UPDATE at 5 (Winter 1997).

The limitation in the Department's regulation is unauthorized and contrary to law. The statute itself certainly does not limit the provision to

records created by the agency, nor does the legislative history suggest that Congress contemplated such a limitation. The only authority the Department has cited for this construction is the passage in United States Dep't of Justice v. Tax Analysts in which the Supreme Court states that an agency must either create or obtain a record for it to become subject to the FOIA. 492 U.S. 136, 144 (1989). But this decision cuts against the Department's interpretation; Congress was aware that FOIA applies equally to records created or obtained by an agency, but did not indicate any intention to limit this particular provision to those records created by the agency. Cf. United States Dep't of Justice v Landano, 508 U.S. 165, 178 (1993) (had Congress intended to create a rule allowing the FBI to treat all sources as confidential under the FOIA, it should have done so more clearly).

The statute should be applied as written. If records are likely to become subject to multiple requests, agencies should take the necessary steps to make the records available on-line, including converting paper records to electronic form -- regardless of whether the records were generated inside or outside the agency. After all, Congress explicitly mandated that when an agency is presented with a single request for records in electronic format, the agency is required to convert the records to electronic form if the records are readily reproducible in that format, even if the records were generated outside the agency. 5 U.S.C. ? 552(a)(3)(B). Moreover, even under the Department's interpretation, components are required to convert to an electronic form those records that were generated by the agency but were never, c are no longer, available to the agency in electronic form if the records are likely to become subject to multiple requests.

The Department should delete the phrase "by the Department" in ? 16.2(c) from its final regulations and rescind its erroneous interpretation of the EFOIA Amendments' "created on or after November 1, 1996" provision.

3. Expedited Processing for Records Subject to Multiple Requests

In the EFOIA Amendments, Congress authorized agencies to add their own categories of requests that should be expedited. 5 U.S.C. ? 552(6)(E)(i)(II). We commend the Department for exercising this power by adopting the expedited treatment regulations for threats to "due process" and for matters of widespread and exceptional media interest. ? 16.5(d)(iii) & (iv); see also Aguilera v. FBI, 941 F.Supp. 144, 149 (D.D.C. 1996). The Department 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 FBI records on a particular current event, and the FBI 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 years because the FBI currently has a backlog of requests o two to ten years. Thus, if DOJ components 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.

To address this problem, we suggest that the Department of Justice establish procedures for responding quickly to multiple FOIA requests on a popular topic.

Accordingly, the Department 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. We suggest adding the following provision to ? 16.5(d):

(5) When a component receives five or more requests for substantially the same records, it shall expedite processing of the requests. Upon completion of processing, the records shall be made available in the component's public reading room and, if created on or after November 1, 1996, shall be available electronically through the Department's World Wide Web site (http://www.usdoj.gov (http://www.usdoj.gov)).

4. Consultations and Referrals

Section 16.4(c) of the proposed rule states that when a component determines that another component or agency is better able to process record, the receiving component may either respond to the request after consultation or may "[r]efer the responsibility for responding to the request regarding that record to the component best able to determine whether to disclose it, or to another agency that originated the record." ? 16.4(c)(1) & (2). The proposed rule does not set forth what procedures the Department will use to determine which requests will be responded to after consultation and which requests will be referred to the originating agency, but appears to leave the choice to the discretion of the receiving component. We object to this provision because we are concerned that it allows too many referrals -- a process that undoubtedly adds delay to the FOIA process. The provision should be amended to state that records will be referred only when referra

is necessary because the originating agency has a substantial interest in the record and when the referral is not likely to substantially delay the release or otherwise place unreasonable burdens on the requester.

The FOIA itself does not expressly allow for referral to the originating agency. Instead, the only procedure expressly set forth in the Act involves "consultation" with another agency if the other agency has "a substantial interest in the determination of the request." Clearly concerned about the resultant delay, Congress required that the consultation "be conducted with all practicable speed." 5 U.S.C. ?552(a)(6)(B)(iii).

The courts have stated that "when an agency receives a FOIA request for 'agency records' in its possession it must take responsibility for processing the request. It cannot simply refuse to act on the ground that the documents originated elsewhere." McGehee v. CIA, 697 F.2d a 1110, accord Paisley v. CIA, 712 F.2d 686, 691 (D.C. Cir. 1983), vacated in part, mot. to intervene granted, reh'g granted, 724 F.2d 201 (D.C Cir. 1984). While the McGehee court recognized that, under some circumstances, it may be proper for the agency to refer the request to th originating agency for direct response to the requester, the court held that the agency must provide a "reasonable explanation" for its procedure, including a showing that the procedure "significantly improves" the process for determining whether records are to be released or withheld. 697 F.2d at 1110.

Because proposed Section 16.4(c) does not set forth the standard components will use to decide whether to refer a request, it is impossible to determine whether the procedure improves processing or whether it simply imposes large burdens on requesters. A policy that allows routine referral of records originating in other components or agencies necessarily imposes unreasonable burdens. As the McGehee court recognized, referrals to other agencies create serious hardships including "the inconvenience to requesters of being compelled to assert their rights in two or more independent administrative fora and the long delays resulting from the superimposition of two or more processing sequences." 697 F.2d at 112. Indeed, in order to mitigate these hardships, the McGehee court envisioned a system in which an agency processes a substantial percentage of the "other agency" records in their possession and rapidly refers the remainder. 697 F.2d at 1112.

Section 16.4(c) should be amended to ensure that DOJ's referral policy is limited to those records for which referral is necessary, that the policy does not significantly increase the amount of time before the records are released, and that the policy does not significantly impair th requester's ability to obtain the records.

We support proposed section 16.4(g) which provides that "consultations and referrals will be handled according to the date the FOIA request initially was received by the first component or agency." This provision should prevent some of the delay that occurs through the referral process when a request is referred to another DOJ component. However, if the request is referred to another agency that is not bound by DOJ's regulations, the requester can wind up standing in line several times because some agencies do not process referrals based on the date the request was initially received, but on the date it received the request. Thus, in determining whether to consult with ar agency or refer a request to that agency, components should consider which option would result in a quicker response for the requester. One consideration would be the agency's policy on when a referred request would be processed. If the originating agency's policy on processing referrals will delay the response, the component should not refer, but should make the determination on disclosure after consultation.

Moreover, the regulations should also set forth the standard the components will use to determine when to refer requests, so that referrals are limited as much as possible. The McGehee court set forth a model for a referral system that comports with the general principles embodied in the FOIA. 697 F.2d at 1111. We suggest that the Department of Justice adopt the McGehee model as its procedure for processing records originating with other agencies, and suggest adding the following language to the provision:

A request may be referred to the originating agency for processing if and only if the originating agency intended to retain the authority to decide if and when materials are released to the public. An intention on the part of the originating agency that it retain control is made evident either by explicit indications to that effect on the face of each record or by the circumstances surrounding the creation and transfer the records.

In deciding whether to (1) respond to the request after consultation or (2) refer the record, the receiving component will consider the resulting delay and will attempt to minimize any delay or additional burdens on the requester.

5. Twenty Day Agency Response Time

One of Congress's key concerns in enacting the EFOIA Amendments was addressing the delays in responding to FOIA requests. Accordingly, Congress doubled the time limit for an agency to respond to FOIA requests from ten to twenty days in order to help agencies i reducing their backlog. Yet, nowhere in the proposed rules does the Department set forth this statutory time limit. We urge the Department to amend ? 16.5(a) to notify the public of the agency's responsibility to respond within twenty days, as follows:

(a) *In general*. Components shall respond to requests within twenty days (excepting Saturdays, Sundays, and legal public holidays), excep in the unusual circumstances described in paragraph (c) below. Components ordinarily shall respond to requests according to their order o receipt.

In addition, the Department should notify requesters of their right under 5 U.S.C. ? 552(a)(6)(C) to immediately seek review by a court whe the agency fails to respond within twenty days. We suggest amending ? 16.9 by adding the following sentence to the end of paragraph (c):

However, if the Department fails to respond to your initial FOIA request within twenty days, you may seek review by a court without appealing first.

Conclusion

For the reasons stated above, Public Citizen and the Freedom of Information Clearinghouse urge the Department of Justice to incorporate our suggestions in the final FOIA and Privacy Act regulations. The final regulations should: (1) provide for guides to assist the public in requesting access under FOIA; (2) state that reading room records created after November 1, 1996 -- whether by the Department or by an other entity -- are available electronically; (3) provide for expedited processing when the Department receives several requests for substantially the same records; (4) ensure that referrals are limited to those records for which referral is necessary and that referrals do no significantly increase the amount of time before the records are released; and (5) recognize the statutory twenty day time limit for responding to requests.

Respectfully submitted,

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1. The Department's single GILS entry does not identify locators or automated information systems.