

January 29, 2019

***Via Federal eRulemaking Portal***

Office of the Secretary  
Department of the Interior  
1849 C Street, NW  
Washington, DC 20240

Re: Comments in Response to Proposed Rule Regarding Freedom of Information Act Requests—Docket No. DOI-2018-0017, RIN 1093-AA26

Dear Sir or Madam,

The undersigned, a group of non-profit organizations dedicated to promoting transparency and accountability in government, submit the following comments in response to the Department of Interior's ("Interior") proposed rule revising the agency's Freedom of Information Act ("FOIA") regulations, 83 Fed. Reg. 67,175 (published Dec. 28, 2018) (the "Proposed Rule").

Interior is entrusted with the critical mission of conserving and managing the nation's public lands, natural resources, and cultural heritage, for the benefit and enjoyment of the American people. Under the Trump Administration, however, Interior has taken aggressive action directly at odds with its mission, including opening public lands to drilling and mining, repealing key environmental regulations, and taking other measures that appear calculated to benefit the energy industry rather than the public good. The agency has also been rife with ethics scandals. Indeed, in his short two-year tenure as Interior Secretary, Ryan Zinke amassed no fewer than 18 federal investigations into his conduct—investigations that ultimately led to his resignation.

Against this backdrop, it should come as no surprise that Interior has experienced an uptick in FOIA requests and litigation over the past two years. The Proposed Rule cites this increase as grounds for revising Interior's FOIA regulations, claiming that the "changes are necessary to best serve our customers and comply with the FOIA as efficiently, equitably, and completely as possible."<sup>1</sup>

It is troubling that Interior's apparent solution for handling the recent influx of FOIA requests is not to reallocate agency resources to ensure that it can better fulfill its statutory obligations, but rather to change its FOIA rules to make it harder for the public to obtain records. Setting aside the policy implications of this approach, some of the Proposed Rule's provisions are plainly in tension with FOIA—specifically the proposed revisions regarding how FOIA requesters must describe the records sought, the changes to the agency's fee waiver rules, and the authorization of monthly processing limits. Given the "basic tenet that 'regulations, in order to be valid, must be consistent with the statute under which they are promulgated,'"<sup>2</sup> the

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<sup>1</sup> 83 Fed. Reg. at 67,176.

<sup>2</sup> *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 609 (2013).

undersigned organizations urge Interior to omit these proposed revisions from the final rule.

### **Commenters' Interests in the Rulemaking**

Citizens for Responsibility and Ethics in Washington (“CREW”) is a non-profit, non-partisan organization organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the rights of citizens to be informed about the activities of government officials and agencies, and to ensuring the integrity of government officials and agencies. CREW seeks to empower citizens to have an influential voice in government decisions and in the government decision-making process through the dissemination of information about public officials and their actions. To advance its mission, CREW uses a combination of research, litigation, and advocacy. As part of its research efforts, CREW routinely submits FOIA requests to agencies, including Interior, and relies on records obtained through those requests in disseminating information to the public.

Demand Progress Education Fund is a fiscally-sponsored project of New Venture Fund, a 501(c)(3) charitable organization. Along with its two million members, Demand Progress Education Fund seeks to protect the democratic character of the internet—and wield it to make government accountable and contest concentrated corporate power. Public access to information is a fundamental aspect of making sure the government works properly, and Demand Progress Education Fund believes the Proposed Rule undermines that basic right.

Founded in 1977, Government Accountability Project is a nonprofit and nonpartisan advocacy organization based in Washington, D.C. Government Accountability Project is the nation’s leading whistleblower protection organization. Through litigating whistleblower cases, publicizing concerns and developing legal reforms, they advance their mission to protect the public interest by promoting government and corporate accountability. FOIA requests are fundamental to the organization’s work ensuring transparency and exposing government wrongdoing. Government Accountability Project currently has well over 300 pending requests that they are actively pursuing through administrative appeals or active litigation.

Government Information Watch is focused on open and accountable government. Its mission is to monitor access to information about government policy, process, and practice and to ensure and preserve open, accountable government through advocacy.

National Security Archive is an independent non-governmental research institute and library. The Archive was established in 1985 to promote research and public education about the U.S. governmental and national security decision-making process. It collects, analyzes, and publishes documents acquired through FOIA in order to promote and encourage openness and government accountability.

Open the Government (“OTG”) is an inclusive, nonpartisan coalition that works to strengthen our democracy and empower the public by advancing policies that create a more open, accountable, and responsive government. As the coordinating hub of a coalition of more than 100 public interest organizations, OTG leads efforts to pass critically needed reforms to the FOIA, and defends against efforts to weaken and violate the law. OTG works with coalition

members to file FOIA requests for records on government decision-making, and believes that ensuring public access to information is essential to hold our public officials accountable at all levels of government.

The Project On Government Oversight (“POGO”) is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. Founded in 1981, POGO champions reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles. POGO has a longstanding interest in FOIA and the proactive disclosure of government records.

### **The Proposed Rule’s New Requirements Concerning the Content and Scope of FOIA Requests Do Not Comport With the Statute**

Interior’s proposed revisions to § 2.5 of the agency’s FOIA regulations—which addresses how FOIA requesters must describe the records they seek—are incompatible with the statute in several respects and thus should not be adopted.

FOIA provides that every government agency, “upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.”<sup>3</sup> The statute “was enacted to facilitate public access to Government documents” and “was designed to ‘pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.’”<sup>4</sup> To achieve its “goal of broad disclosure,” Congress sought “to insulate its product from judicial tampering and to preserve the emphasis on disclosure by admonishing that the ‘availability of records to the public’ is not limited, ‘*except as specifically stated.*’”<sup>5</sup>

A request satisfies the “reasonably describes” requirement of § 552(a)(3)(a) “‘if it enable[s] a professional employee of the agency who [i]s familiar with the subject area of the request to locate the record with a reasonable amount of effort.’”<sup>6</sup> “The linchpin inquiry is whether the agency is able to determine ‘precisely what records (are) being requested.’”<sup>7</sup> Of particular pertinence here, “the number of records requested appears to be irrelevant to the determination whether they have been ‘reasonably described.’”<sup>8</sup> Indeed, “the Act puts no restrictions on the quantity of records that may be sought” and instead “anticipates that requests

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<sup>3</sup> 5 U.S.C. § 552(a)(3)(A).

<sup>4</sup> *CREW v. DOJ*, 746 F.3d 1082, 1088 (D.C. Cir. 2014).

<sup>5</sup> *DOJ v. Tax Analysts*, 492 U.S. 136, 150 (1989) (emphasis added).

<sup>6</sup> *Tereshchuk v. Bureau of Prisons*, 67 F. Supp. 3d 441, 454 (D.D.C. 2014), *aff’d*, 2015 WL 4072055 (D.C. Cir. June 29, 2015).

<sup>7</sup> *Yeager v. DEA*, 678 F.2d 315, 326 (D.C. Cir. 1982).

<sup>8</sup> *Id.* (holding that request to search over a million records “reasonably described” the records sought, since the agency “knew ‘precisely’ which of its records had been requested and the nature of the information sought from those records”).

for records may be so voluminous as to require an agency to carry an unusual workload.”<sup>9</sup>

In specific and limited circumstances, an agency may avoid complying with a FOIA request where it shows that the request would require an “unreasonably burdensome search.” But the agency’s “burden of demonstrating overbreadth is substantial.”<sup>10</sup> “Courts typically demand ‘a detailed explanation by the agency regarding the time and expense of a proposed search in order to assess its reasonableness.’”<sup>11</sup>

**Changes to § 2.5(a).** In the Proposed Rule, Interior proposes revising § 2.5(a) of its FOIA regulations by adding the bolded language:

§2.5 How should you describe the records you seek?

(a) You must reasonably describe the records sought. A reasonable description 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 **and identify the discrete, identifiable agency activity, operation, or program in which you are interested.**<sup>12</sup>

The problem with this language is that neither FOIA nor the case law requires requesters “to identify the discrete, identifiable agency activity, operation, or program in which [they] are interested.” Rather, a FOIA request satisfies the statute’s “reasonably describes” requirement so long as it “enable[s] a professional employee of the agency who [i]s familiar with the subject area of the request to locate the record with a reasonable amount of effort.”<sup>13</sup> By seeking to impose the extra-statutory requirement that requesters identify the “discrete” agency actions in which they are interested, the Proposed Rule runs afoul of the well-established FOIA principle that the “‘availability of records to the public’ is not limited, ‘*except as specifically stated*’” in the statute.<sup>14</sup> An agency may not unilaterally impose additional substantive criteria governing FOIA requests that are not enumerated in the statute.

FOIA’s legislative history reinforces that the “reasonably describes” requirement should be liberally construed in favor of requesters. Congress added the phrase “requests for records which . . . reasonably describes such records” in 1974, in place of the phrase “request for identifiable records.”<sup>15</sup> The Senate Judiciary Committee Report accompanying this amendment explained that “the identification standard in the FOIA should not be used to obstruct public access to agency records” and the amendment “makes explicit the liberal standard for

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<sup>9</sup> *Tereshchuk*, 67 F. Supp. 3d at 455; *accord Shapiro v. CIA*, 170 F. Supp. 3d 147, 155 (D.D.C. 2016); *ACLU v. DOJ*, 2014 WL 4954121, at \*8 (N.D. Cal. Sept. 30, 2014).

<sup>10</sup> *Tereshchuk*, 67 F. Supp. 3d at 455.

<sup>11</sup> *Shapiro*, 170 F. Supp. 3d at 155

<sup>12</sup> 83 Fed. Reg. at 67,177.

<sup>13</sup> *Tereshchuk*, 67 F. Supp. 3d at 454.

<sup>14</sup> *Tax Analysts*, 492 U.S. at 150 (emphasis added).

<sup>15</sup> Pub. L. No. 93-502, § 1(b)(1), 88 Stat. 1561, 1561 (1974).

identification that Congress intended.”<sup>16</sup> Far from reflecting a liberal construction, § 2.5(a) of the Proposed Rule creates additional hurdles for FOIA requesters that have no basis in the statute or case law.

If adopted, Interior’s proposed standard would potentially preclude a variety of legitimate, garden variety FOIA requests. To take one example, it would seemingly preclude a request that seeks agency records mentioning the requester by name from a specific component of an agency within a narrow date range, but does not specify any “discrete, identifiable agency activity, operation, or program.” Although such a request would describe the records sought with particularity and not necessitate an unreasonably broad search, it could be deemed facially invalid under Interior’s proposed standard. This result cannot be squared with FOIA.

**Changes to § 2.5(d).** Equally flawed are Interior’s proposed revisions to § 2.5(d), which provide as follows:

(d) You must describe the records you seek sufficiently to enable a professional employee familiar with the subject to locate the documents with a reasonable effort. Extremely broad or vague requests or requests requiring research do not satisfy this requirement. The bureau will not honor a request that requires an unreasonably burdensome search *or requires the bureau to locate, review, redact, or arrange for inspection of a vast quantity of material.*<sup>17</sup>

There is no legal basis for an agency to “not honor a request” solely because it would require the agency “to locate, review, redact, or arrange for inspection of a vast quantity of material.” To the contrary, as noted above, FOIA “puts no restrictions on the quantity of records that may be sought” and instead “anticipates that requests for records may be so voluminous as to require an agency to carry an unusual workload.”<sup>18</sup> Thus, “[t]he sheer size or burdensomeness of a FOIA request, in and of itself, does not entitle an agency to deny that request on the ground that it does not ‘reasonably describe’ records within the meaning of 5 U.S.C. § 552(a)(3)(A).”<sup>19</sup>

Proposed § 2.5(d) appears to be based on a misreading of *American Federation of Government Employees (“AFGE”) v. U.S. Department of Commerce*, 907 F.2d 203 (D.C. Cir. 1990). There, the requests would have required the agency to locate “every chronological office file and correspondent file, internal and external, for every branch office, [and] staff office.”<sup>20</sup> The D.C. Circuit held that the requests were “so broad as to 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,” **and** this was “largely unnecessary to the [requesters’] purpose.”<sup>21</sup> The court thus did not establish a categorical rule that a request may be deemed

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<sup>16</sup> S. Rep. No. 93-854, at 10 (1974); *see also Nat’l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 274 (D.D.C. 2012) (discussing legislative history).

<sup>17</sup> 83 Fed. Reg. at 67,177 (emphasis added).

<sup>18</sup> *Tereshchuk*, 67 F. Supp. 3d at 455; *see also Yeager*, 678 F.2d at 326; *Shapiro*, 170 F. Supp. 3d at 155; *ACLU*, 2014 WL 4954121, at \*8.

<sup>19</sup> *Tereshchuk*, 67 F. Supp. 3d at 455.

<sup>20</sup> *AFGE*, 907 F.2d at 208.

<sup>21</sup> *Id.*

facially invalid simply because it seeks a vast amount of records. Rather, it recognized that a request may pose an unreasonable burden where it indiscriminately seeks a vast amount of records that are unnecessary to fulfill the purposes of the request. The sheer volume of the requested records was not, by itself, the dispositive factor.<sup>22</sup>

In addition to being legally unsupported, § 2.5(d)'s "vast quantity of material" standard is so open ended that it invites abuse. The Proposed Rule does not define "vast quantity of material" or provide any criteria for making that determination. It instead appears to give agency officials carte blanche to deny requests they subjectively deem excessive. That is flatly inconsistent with FOIA's goals of "broad disclosure," and of "curb[ing] th[e] apparently unbridled discretion" that agency officials had under FOIA's predecessor statute.<sup>23</sup>

Because the proposed revisions to § 2.5 described above are incompatible with FOIA, they should not be adopted in the final rule.

### **The Proposed Rule's Revisions to Interior's Fee Waiver Regulations Are Problematic**

FOIA provides that fees should be waived or reduced "if disclosure of the information 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."<sup>24</sup> Congress intended that this provision "be 'liberally construed in favor of waiver for noncommercial requesters.'"<sup>25</sup>

The Proposed Rule includes several changes to Interior's fee waiver regulations, the most problematic of which is the proposed deletion of § 2.45(f), which provides that "[t]he bureau must not make value judgments about whether the information at issue is 'important' enough to be made public; it is not the bureau's role to attempt to determine the level of public interest in requested information."<sup>26</sup> The Proposed Rule does not explain the reasoning for this change, nor does it propose replacing the provision with any comparable language.

This proposal has troubling implications. The language that Interior suggests deleting closely tracks longstanding Department of Justice policy established over 30 years ago, which instructs agencies that the "public interest" determination "must be an objective one; agencies are not permitted to make separate value judgments as to whether any information that would in fact contribute significantly to public understanding of government operations or activities is

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<sup>22</sup> See *Nat'l Ass'n of Criminal Def. Lawyers v. Chicago Police Dep't*, 924 N.E.2d 564, 577 (Ill. Ct. App. 2010) (summarizing *AFGE*'s holding as follows: "A request that is overly broad and requires the public body to locate, review, redact and arrange for inspection a vast quantity of material *that is largely unnecessary to the [requester's] purpose* constitutes an undue burden.") (emphasis added).

<sup>23</sup> *Tax Analysts*, 492 U.S. at 150-51.

<sup>24</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>25</sup> *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003).

<sup>26</sup> 83 Fed. Reg. at 67,179.

‘important’ enough to be made public.”<sup>27</sup> By removing this provision, Interior appears to be inviting agency officials to inject their own subjective views about what information is “important” enough to warrant a fee waiver. This is precisely the sort of discretionary and arbitrary decision-making that FOIA is designed to prevent. It also increases the risk that the agency’s public interest determinations will be skewed by its overarching political agenda, which is plainly improper. Given these concerns, Interior should leave § 2.45(f) untouched in the final rule.

### **The Proposed Rule’s Allowance of Monthly Processing Limits is Not Authorized by FOIA**

Equally concerning is the following language that Interior proposes adding to § 2.14:

The bureau may 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.<sup>28</sup>

Nothing in FOIA authorizes an agency to unilaterally impose a monthly limit on processing records in response to a FOIA request. The statute instead requires agencies to make requested records “promptly available.”<sup>29</sup> As the D.C. Circuit has explained,

FOIA requires that the agency make the records “promptly available,” which depending on the circumstances typically would mean within days or a few weeks of a “determination,” not months or years. 5 U.S.C. § 552(a)(3)(A), (a)(6)(C)(i). So, within 20 working days (or 30 working days in “unusual circumstances”), an agency must process a FOIA request and make a “determination.” At that point, the agency may still need some additional time to physically redact, duplicate, or assemble for production the documents that it has already gathered and decided to produce. The agency must do so and then produce the records “promptly.”<sup>30</sup>

Thus, while FOIA contemplates that agencies may require time to “redact, duplicate, and assemble” responsive records for production, it does not allow agencies to impose monthly processing limits. The Proposed Rule therefore confers authority on Interior that the statute does not provide.

The proposed standard is also ill-defined. It includes no criteria for how monthly limits would be implemented, or what would trigger the imposition of such limits. As with the other proposed changes described above, this could lead to arbitrary or biased decision-making with respect to how Interior prioritizes pending FOIA requests.

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<sup>27</sup> U.S. Dep’t of Justice, *FOIA Guide, Fee Waivers*, at 36 & n.149 (updated Aug. 23, 2013), available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/fees-feewaivers.pdf#p22> (citing, among others, U.S. Dep’t of Justice, *FOIA Update: New Fee Waiver Policy Guidance*, Vol. VIII, No. 1, at 8 (Jan. 1, 1987), available at <https://www.justice.gov/oip/blog/foia-update-new-fee-waiver-policy-guidance>)).

<sup>28</sup> 83 Fed. Reg. at 67,177.

<sup>29</sup> 5 U.S.C. § 552(a)(3)(A), (a)(6)(C)(i).

<sup>30</sup> *CREW v. FEC*, 711 F.3d 180, 188-89 (D.C. Cir. 2013).

Congress is fully aware of the burdens FOIA requests can impose on agencies. Yet, through its repeated amendments to the statute, it has maintained strict and explicit deadlines. “If the Executive Branch does not like it or disagrees with Congress’s judgment, it may so inform Congress and seek new legislation.”<sup>31</sup> Accordingly, the proposed addition to § 2.14 should not be adopted in the final rule.

### **The Proposed Rule is Out of Step with Congress’s Most Recent FOIA Amendments**

The Proposed Rule is also at odds with the intent underlying Congress’s most recent amendments to FOIA, the FOIA Improvement Act of 2016.<sup>32</sup> These amendments were designed to *increase* public access to agency records—an intent reflected in the provisions establishing a “presumption of openness,” whereby information may only be withheld if it harms an interest protected by a statutory exemption or if disclosure is prohibited by law;<sup>33</sup> as well as the provisions requiring greater proactive disclosure by agencies.<sup>34</sup> The Act thus reaffirmed the broad goal of disclosure FOIA that has long embodied. Since the Proposed Rule includes provisions expressly *limiting* public access to agency records, it is firmly out of step with Congress’s intent

### **Conclusion**

Because the provisions of the Proposed Rule discussed above are in tension—and in some cases, incompatible—with FOIA’s text, purpose, and case law, they should not be included in the final rule.

Thank you for considering these comments. If you have any questions or require additional informational, please contact Nikhel Sus of CREW at [nsus@citizensforethics.org](mailto:nsus@citizensforethics.org) or 202-408-5565.

Sincerely,

Citizens for Responsibility and Ethics in Washington  
Demand Progress Education Fund  
Government Accountability Project  
Government Information Watch  
National Security Archive  
Open the Government  
Project On Government Oversight

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<sup>31</sup> *Id.* at 190.

<sup>32</sup> *See* Pub. L. No. 114-185, 130 Stat. 538 (2016).

<sup>33</sup> *See* 5 U.S.C. § 552(a)(8)(A).

<sup>34</sup> *See* 5 U.S.C. § 552(a)(2)(D).