

CAUSE of ACTION

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January 3, 2019

VIA REGULATIONS.GOV

U.S. Department of the Interior
Office of Executive Secretariat & Regulatory Affairs
ATTN: Cindy Cafaro, Departmental FOIA Officer
1849 C Street, N.W.
Washington, D.C. 20240

Re: Freedom of Information Act Regulations, 83 Fed. Reg. 67,175 (Dec. 28, 2018)
(to be codified at 43 C.F.R. pt. 2) (RIN 1093-AA26) (Docket # DOI-2018-0017)

Dear Ms. Cafaro,

We write on behalf of Cause of Action Institute (“CoA Institute”)¹ to comment on the Department of the Interior’s (“DOI”) proposed rule to revise its Freedom of Information Act (“FOIA”) regulations.² DOI’s rulemaking has received critical media attention,³ particularly given concerns that, if finalized without amendment, it would violate clear statutory requirements set forth in the FOIA. CoA Institute respectfully submits the following comments and requests that DOI revise its proposed rule accordingly.

I. Comments

a. Proposed 43 C.F.R. § 2.2

DOI intends to remove the words “Office of the Solicitor,” and replace them with a reference to the “Deputy Chief FOIA Officer.” Although this change is not, by itself, problematic, DOI should briefly explain the duties of the Deputy Chief FOIA Officer, either in this section or another. DOI should at least (1) identify the Solicitor as the agency’s Chief FOIA Officer and (2) explain that day-to-day administration of the agency FOIA program has been delegated to the Deputy Chief FOIA Officer, pursuant to departmental order.⁴ These minimal revisions would assure the public that DOI has complied with the requirements of 5 U.S.C. § 552(j)(1).

¹ CoA Institute is a 501(c)(3) oversight group advocating for economic freedom and individual opportunity advanced by honest, accountable, and limited government. In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public on how government transparency and accountability protect economic opportunity for American taxpayers. CoA Institute routinely requests records under the FOIA, engages in extensive FOIA litigation, and its staff has specific expertise with respect to the history, purpose, and application of the FOIA. See CAUSE OF ACTION INST., *About*, <http://www.causeofaction.org/about> (last visited Jan. 3, 2019).

² Freedom of Information Act Regulations, 83 Fed. Reg. 67,175 (Dec. 28, 2018) (to be codified at 43 C.F.R. pt. 2).

³ See, e.g., Miranda Green, *New Interior FOIA rule could make it harder to get public documents*, THE HILL (Dec. 31, 2018), <http://bit.ly/2CL9av2>.

⁴ See Dep’t of the Interior, Secretarial Order No. 3371 (Nov. 20, 2018), *available at* <http://bit.ly/2s1oU6W>.

b. Proposed 43 C.F.R. § 2.3

DOI proposes revised language that would direct potential requesters to submit their requests through the “electronic portals” available at the DOI website. CoA Institute approves of this change but recommends that DOI also inform requesters of the possibility of submitting requests online at FOIA.gov, the centralized portal maintained by the Department of Justice’s Office of Information Policy (“OIP”).

c. Proposed 43 C.F.R. § 2.4

DOI seeks to eliminate intra-agency forwarding of misdirected requests. This proposal must be rejected. Although an agency may refuse to forward a misdirected request to another *agency*, there is no such discretion with incoming requests that need to be rerouted between agency components or bureaus, whether at the time of submission, during an agency’s initial review, or during the search process.⁵ The FOIA is explicit, in this regard: The twenty working-day response period “commence[s] on the date on which [a] 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 . . . to receive requests[.]”⁶ This routing requirement was introduced with the OPEN Government Act of 2007, and OIP has consistently interpreted it as forbidding agencies from attempting to avoid their FOIA obligations by refusing to perfect—or by administratively closing—requests that have been sent to the proper agency but the wrong component or office.⁷

From an administrative perspective, and notwithstanding the legal deficiency discussed above, there are two additional problems with the proposed change to intra-agency forwarding. *First*, the change places an unjustified burden on requesters, who may be uncertain where responsive records are located within DOI, or who seek records created and exchanged between multiple bureaus or components. *Second*, the change may create an incentive for requesters to submit nearly-identical requests to multiple bureaus, if only to avoid administrative closure or the rejection of a “misdirected” request. This could end up creating new or unforeseen inefficiencies in DOI’s FOIA program—the exact opposite result intended by the proposed rule. DOI FOIA officers are already obligated to review incoming requests; the minimal extra task of forwarding those requests to the appropriate component is unlikely to require significant additional resources or effort.

DOI should revise the proposed rule to maintain the current version of 43 C.F.R. § 2.4. DOI also should retain the current language in 43 C.F.R. § 2.17, which sets forth the basic time limit for misdirected requests.

⁵ Indeed, the law requires an agency to search all locations where responsive records are likely to be found. An agency may not limit its search to exclude record systems, custodians, or component offices, if they may maintain responsive records. See *Oglesby v. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 327 (D.D.C. 1999); see also *Amnesty Int’l v. Cent. Intelligence Agency*, 728 F. Supp. 2d 479, 492 (S.D.N.Y. 2010); cf. *Callaway v. Dep’t of the Treasury*, No. 08-5480, 2009 WL 10184495 at *2 (D.C. Cir. June 2, 2009).

⁶ 5 U.S.C. § 552(a)(6)(A)(ii) (emphasis added).

⁷ Office of Info. Pol’y, Dep’t of Justice, OIP Guidance: New Requirement to Route Misdirected FOIA Requests (Nov. 18, 2018), available at <http://bit.ly/2F4iQmD> (“Beginning . . . December 31, 2008, agency FOIA offices will be required to route any misdirected FOIA requests to the proper FOIA office within their agency, within ten working days.”).

d. Proposed 43 C.F.R. § 2.5

DOI proposes several changes to how it expects requesters to describe the records they seek. In subsection (a), DOI would add a new requirement that a requester “identify the discrete, identifiable agency activity, operation, or program in which you are interested.” This language is too ambiguous because it is unclear what a “discrete” or “identifiable” program or activity may be. The language also places a new and unjustified burden on requesters. The FOIA only requires that a requester “reasonably describe[]” the records he or she seeks,⁸ and courts have consistently ruled that this requirement is satisfied whenever the requester provides information sufficient to enable an agency employee to locate responsive material with a “reasonable amount of effort.”⁹ Given the recognized “asymmetrical distribution of knowledge” between a requester and an agency, it is not always possible for a requester to provide exacting detail in a request.¹⁰ The law thus obliges an agency to conduct some “reasonable effort” to locate records, even if that includes a limited inquiry (*i.e.*, “research”) into potential records custodians or amongst knowledgeable agency employees.¹¹ Further, it is CoA Institute’s experience that many of DOI’s concerns in this area are alleviated through discussions between the requester and an agency regarding the scope of a request.

The proposed language for subsection (d) is similarly problematic for three reasons. *First*, there is a clear disconnect between DOI’s recognition that a “professional employee familiar with the subject” of a request may be obliged to undertake “reasonable effort” to locate responsive records, and the proposed level of “discrete” detail required by subsection (a). *Second*, the first sentence of subsection (d) repeats language that is already found at subsection (a) and implied by subsection (b). It is unclear what this repetition achieves. *Third*, DOI proposes a restriction on any “broad” request that would entail the processing of a “vast quantity” of responsive material. Contrary to DOI’s position, requests cannot be deemed imperfect merely because they are broad or wide-reaching.¹² As OIP has explained:

The 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). That provision was intended to ensure that a request description ‘be sufficient [to enable] a professional employee of the agency who was familiar with the subject area of the request to locate the records with a reasonable amount of effort.’¹³

⁸ 5 U.S.C. § 552 (a)(3)(A)(i).

⁹ H.R. Rep. No. 93-876, at 6 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6271; see also *Truitt v. Dep’t of State*, 897 F.2d 540, 544–45 (D.C. Cir. 1990); *Yeagar v. Drug Enf’t Admin.*, 678 F.2d 315, 322 (D.C. Cir. 1982) (“The linchpin inquiry is whether the agency is able to determine ‘precisely what records (are) being requested.’”) (citation omitted).

¹⁰ *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 146 (D.C. Cir. 2006) (citation omitted).

¹¹ Relatedly, an agency also has a duty to construe a FOIA request liberally. *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (citing *Truitt*, 897 F.2d at 544–45). This may require the agency to search for records in locations unidentified by the requester.

¹² See, e.g., *Ruotolo v. Dep’t of Justice*, 53 F.3d 4, 9–10 (2d Cir. 1995); see also *Pub. Citizen Health Research Group v. Food & Drug Admin.*, No. 90-0018, slip op. at 1–2 (D.D.C. Feb. 9, 1996).

¹³ Office of Info. Pol’y, Dep’t of Justice, FOIA Update: FOIA Counselor: Questions & Answers, vol. IV, no. 3 (Jan. 1, 1983), available at <http://bit.ly/29hZ6N3> (citation omitted).

DOI should revise the proposed rule to eliminate the changes to 43 C.F.R. § 2.5(a) and (d), and to remove entirely proposed subsections (d) and (e).

e. Proposed 43 C.F.R. § 2.14

DOI proposes to add language that would permit any bureau to “impose a monthly limit for processing records in response to [a] request in order to treat FOIA requesters equitably by responding to a greater number of FOIA requests each month.” DOI should provide greater detail about how such a “monthly limit” would be designed and implemented, and the conditions under which normal FOIA processing would resume. As it stands, the ambiguity of the language could open the door to politicization and abuse of the FOIA process. For example, it is unclear how DOI would select the (presumably, complex or voluminous) requests that would be subject to limited processing. It is further unclear how many responsive records would be processed for any given request before the “monthly limit” is met. DOI also should explain how this proposal would promote the equitable treatment of requesters; DOI already maintains different processing tracks for simple, normal, complex, and exceptional/voluminous requests, and it is not clear that limiting the processing of potentially responsive records would result in a greater number of FOIA requests receiving final determinations each month.

f. Proposed 43 C.F.R. § 2.70

DOI proposes to change its regulatory definition of a “record.” This proposed revision unlawfully deviates from the FOIA statute and provides DOI with improper leeway to segment a record, as that term is properly understood, into multiple smaller “records” to withhold information from requesters. DOI’s current regulatory definition of a record is:

Record means 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 the purposes of records management.¹⁴

However, in its proposed rule, DOI strikes the term “agency record” and improperly imports the Privacy Act’s definition of a record, which includes “any item, collection, or grouping of information[.]”¹⁵ DOI’s full proposed definition of a record would be:

Record is any item, collection, or grouping of information that already is recorded, is reasonably encompassed by your request, and 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 the purposes of records management.

This proposed definition suffers from two principal infirmities.

¹⁴ 43 C.F.R. § 2.70.

¹⁵ *Compare* 83 Fed. Reg. at 67,180 *with* 5 U.S.C. § 552a(a)(4).

First, DOI makes no attempt to reconcile the proposed regulatory definition with the FOIA's statutory definition. Subparagraph (A) of the statutory definition provides that the term "record" includes "any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format."¹⁶ Although DOI ignores this portion of the statutory definition, it does incorporate subparagraph (B), which includes "any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management."¹⁷ DOI cannot give effect to subparagraph (B) of the statutory definition while ignoring subparagraph (A) and instead adopting the Privacy Act's construction of "any item, collection, or grouping of information." The FOIA covers "any information that would be an agency record . . . when maintain by an agency in any format." DOI must give effect to that definition in its regulations.

Second, DOI's proposed definition of a record includes items that are "reasonably encompassed by [a] request." This phrase seems to contemplate that there is some relationship between the FOIA's definition of a record and a requester's request. This cannot be. A record does not come into being when a requester makes a request or when an agency interprets a request. Instead, a record preexists any given request and has its own independent definition as it resides in the agency's possession or under its control. This must be the case because a requester can only request records that already exist at the time of the request.¹⁸ If DOI's phrasing were correct, then a requester could never request any records because those records would not have come into being until the agency determined what it believed was "reasonably encompassed" by the request. DOI's use of "reasonably encompassed" also lacks an objective standard and unnecessarily requires subjective interpretations that will vary with each request and FOIA officer. A better approach, which eliminates these issues, is to recognize that the scope of a request has no bearing on the definition of a record. Instead, a FOIA "record" is any information that is an agency record in the form and format that it is maintained by the agency at the time the agency receives a request. DOI is bound to process a request and produce responsive records accordingly.

CoA Institute recommends that DOI abandon the proposed change to its regulatory definition of a record and instead retain the current regulatory definition.

¹⁶ 5 U.S.C. § 552(f)(2)(A).

¹⁷ *Id.* § 552(f)(2)(B).

¹⁸ See *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152 (1980) (The FOIA "does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained."); *Goland v. Cent. Intelligence Agency*, 607 F.2d 339, 353 (D.C. Cir. 1978) (An "agency is not required to reorganize its files in response to a plaintiff's request[.]") (quotation marks, alterations, and citation omitted). *But see Schladetsch v. Dep't of Housing & Urban Dev.*, No. 99-0175, 2000 WL 33372125, at *3 (D.D.C. Apr. 4, 2000) ("Because HUD has conceded that it possesses in its databases the discrete pieces of information which Mr. Schladetsch seeks, extracting and compiling that data does not amount to the creation of a new record.").

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II. Conclusion

Thank you for your consideration of the foregoing comments and proposed changes. If you have any questions, please do not hesitate to contact us at ryan.mulvey@causeofaction.org or james.valvo@causeofaction.org.

Sincerely,



RYAN P. MULVEY
COUNSEL



R. JAMES VALVO, III
COUNSEL & SENIOR POLICY ADVISOR