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January 28, 2019

Submitted via regulations.gov

Re: Proposed Revisions to the Department of Interior's Freedom of Information Act Regulations, RIN 1093-AA26/Docket No. DOI-2018-0017

To Whom It May Concern:

The Reporters Committee for Freedom of the Press (the “Reporters Committee” or “RCFP”), and the 39 newsmedia organizations identified below (collectively, the “News Media Coalition”) submit these comments on the proposed updates to the regulations of the Department of Interior (“Interior” or “Department”) implementing the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA” or the “Act”), which were published on December 28, 2018, 83 Fed. Reg. 67,175 (Dec. 28, 2018) (to be codified at 43 C.F.R. pt. 2) (hereinafter, the “Proposed Rule”).¹ As detailed herein, the News Media Coalition is gravely concerned about the Proposed Rule—many provisions of which are flatly inconsistent or incompatible with the Act, and would harm journalists’ ability to gather and report information to the public about the actions of the Department and its personnel.

The Proposed Rule comes at a time of heightened public interest in the Department. For instance, last year then-Department of Interior Secretary Ryan Zinke received widespread public attention when a variety of environmental restrictions were lifted by the Department under his leadership. *See, e.g.,* Lisa Friedman, *Trump Moves to Open Nearly All Offshore Waters to Drilling*, N.Y. TIMES (Jan 4, 2018), <https://perma.cc/Y84F-6MC3>; Valerie Volcovici, *New Interior Head Lifts Lead Ammunition Ban in Nod to Hunters*, REUTERS (Mar. 2, 2017), <https://perma.cc/L9F9-CBDS>. During his time in office, Secretary Zinke also reportedly made plans to combat sexual harassment after a Department-wide survey reported that 35% of Interior employees had experienced harassment or intimidation. *See, e.g.,* Louis Sahagun, *Interior Secretary Ryan Zinke Vows to End Culture of Harassment and Intimidation at National Park Service*, L.A. TIMES (Oct. 13, 2017, 2:10 PM), <https://perma.cc/VDL8-FPBS>; Press Release, Department of Interior, *Interior Continues Steps Toward Department-Wide Culture Change with Release of Work Environment Survey Results* (Dec. 14, 2017), <https://perma.cc/P3D2-N94U>. Congress has also made inquiries regarding

¹ The News Media Coalition takes no position on any portion of the Proposed Rule not specifically addressed herein.

the Department’s actions, such as deleting references to the human cause of climate change in a draft report from the National Park Service. *See* Elizabeth Shogren, *Zinke Grilled About Edited Science Report*, REVEAL (Apr. 12, 2018), <https://perma.cc/2KYB-RYCF>. And, more recently, questions have been raised about whether then-Secretary Zinke—who resigned from his post in December 2018—lied to the Department’s inspector general. *See, e.g.*, Matt Zapotosky et al., *Justice Dept. Investigating Whether Zinke Lied to Inspector General*, WASH. POST (Jan. 3, 2019), <https://perma.cc/7NVN-CFL6>. The Department’s inquiry, led by its public integrity section, concerns statements made by then-Secretary Zinke during the inspector general’s inquiries into his “real estate dealings in his home state of Montana and his involvement in reviewing a proposed casino project by Native American tribes in Connecticut.” *Id.*

The increased public interest in the activities of the Department and its former Secretary has, not surprisingly, led to an increase in FOIA requests submitted to the Department. According to the Proposed Rule, Interior has seen a “surge in FOIA requests and litigation.” 83 Fed. Reg. at 67,176. Increased public interest in the activities of the Department, however, should be welcomed and, in any event, is *not* license for the Department to impose unlawful restrictions and unnecessary, unwarranted burdens on FOIA requesters, as the Proposed Rule attempts to do.

As set forth below, the Proposed Rule impermissibly deviates in a number of ways from the express language of FOIA and caselaw interpreting it, and attempts to illegally limit the statutory rights of requesters, including members of the news media. The Proposed Rule should be modified as follows.

I. The Proposed Rule should not eliminate the public’s ability to submit FOIA requests via email.

The Proposed Rule amends Section 2.3 of the Department’s FOIA regulations by eliminating references to “email addresses of each bureau’s FOIA Officer” and instead referring requesters to “electronic portals listed on the Department’s FOIA website.” Fed. Reg. at 67,177. The elimination of email addresses as a means for the public to submit FOIA requests is unnecessary and imposes unwarranted burdens on requesters.

In 2009, then-Attorney General Eric Holder issued a memo to all agency heads encouraging the use of modern technology to improve the FOIA process and reminding them that “[u]nnecessary bureaucratic hurdles have no place in the ‘new era of open Government.’” Memorandum from Attorney General Eric Holder to Heads of Executive Departments and Agencies (Mar. 19, 2009), <https://perma.cc/CJ34-YQ3C>. The exclusive use of online portals to accept electronic FOIA requests imposes precisely the type of “bureaucratic hurdle[]” the Department has been instructed to avoid. History has shown FOIA portals to have numerous problems, including failing to allow requesters to submit necessary information and losing correspondence and records when they are updated, as in the case of the Department of Justice’s “eFOIA” portal and the Environmental Protection Agency’s “FOIAOnline” portal. *See, e.g.*, Comments of the Reporters Committee for Freedom of the Press (Mar. 6, 2017), <https://perma.cc/4KMX-667M>; Lauren Harper, *FOIAonline Still Broken Six Months After Disastrous Redesign*, UNREDACTED (Dec. 6, 2018), <https://perma.cc/S3RV-L7SQ>. Moreover, as

was illustrated by the recent government shutdown, many agencies, including Interior, shutter their FOIA websites during such events, inhibiting the ability of members of the press and the public to submit requests. *See Government Shutdowns*, FOIA WIKI (Jan. 25, 2019), <https://perma.cc/DLT4-V3MJ>.

In contrast, email provides a well-established, ubiquitous, and effective method of communication that creates a permanent, time-stamped, and accessible record for both the agency and the requester. Indeed, many reporters rely on email or other email-based FOIA request submission systems—such as iFOIA² and MuckRock³—to send FOIA requests to agencies.

Agency attempts to make online portals the exclusive means for submitting FOIA requests online create procedural hurdles and practical headaches for requesters, and in no way facilitates the public’s exercise of its statutory rights. The News Media Coalition recommends that the Department maintain its email addresses for submitting FOIA requests.

II. Section 2.5 of the Proposed Rule unlawfully places heightened burdens on FOIA requesters and purports to excuse the Department from its statutory duties, in contravention of the Act.

A. The Proposed Rule imposes unwarranted specificity requirements on requests.

Section 2.5(a) of the Proposed Rule requires requesters to “identify the discrete, identifiable agency activity, operation, or program in which you are interested.” 83 Fed. Reg. at 67,177. This language is found nowhere in FOIA, and impermissibly attempts to place obligations on requesters that go well beyond what the Act requires.

FOIA requires requesters to “reasonably describe[]” the records they seek. 5 U.S.C. § 552(a)(3)(A). The “linchpin inquiry” of whether a request meets that standard “is whether the agency is able to determine ‘precisely what records (are) being requested.’” *Yeager v. DEA*, 678 F.2d 315, 326 (D.C. Cir. 1982) (quoting S. Rep. No. 854, at 10 (1974)). Requests are sufficiently specific when “a professional employee of the agency who [is] familiar with the subject area of the request [can] locate the record with a reasonable amount of effort.” *Marks v. United States*, 578 F.2d 261, 263 (9th Cir. 1978) (citing H. Rep. No. 93-876, at 6 (1974)).

Congress has made explicitly clear that agencies are not permitted to hinder the public’s exercise of its statutory rights to obtain government records by imposing unwarranted specificity requirements. In 1974, Congress liberalized the specificity requirement in FOIA in response to agencies’ use of a narrow interpretation of the specificity requirement to claim that they could not find responsive records even though they knew which records requesters sought. *See* JOINT COMMITTEE PRINT, FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974, at 113 (P.L. 93-502) (1975).⁴ As the Senate Judiciary Committee Report explained:

² <https://www.ifoia.org>.

³ <https://www.muckrock.com>.

⁴ *Available at* <https://perma.cc/D4AP-LGJK>.

[T]he identification standard in the FOIA should not be used to obstruct public access to agency records. Agencies should continue to keep in mind, as specified in the *A.G. Memorandum* (p. 24), that “their superior knowledge of the contents of their files should be used to further the philosophy of the act by facilitating, rather than hindering, the handling of requests for records.”

Id. at 162 (citing S. Rep. No. 93-854 (1974)) (emphasis added).

The Proposed Rule’s requirement that requesters “identify the discrete, identifiable agency activity, operation, or program in which [they] are interested” far exceeds what is required under FOIA. 83 Fed. Reg. at 67,177. For example, it is perfectly permissible under the Act for a requester to ask for “all emails between Ryan Zinke and Bill Foley from May 1 to July 1, 2017.”⁵ Such a request enables the Department “to determine ‘precisely what records (are) being requested’” which is all that is required by the Act. *Yeager*, 678 F.2d at 326.

Because the Proposed Rule’s attempt to impose additional requirements on FOIA requesters is impermissible under FOIA, the additional language in Section 2.5(a) should be removed.

B. The Proposed Rule unlawfully attempts to relieve the Department of its duties to search for and produce records as required by the Act.

Section 2.5(d) of the Proposed Rule would add the following language to the Department’s regulations:

(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.

83 Fed. Reg. 67,177.

Proposed Section 2.5(d) unlawfully attempts to redefine the Department’s obligations under FOIA in several ways.

First, Proposed Section 2.5(d) states that the Department will not process FOIA requests “requiring research” That proposed limitation is both patently unlawful and contrary to common sense. Responding to *any* FOIA request requires “research.” No matter the request, the Act requires FOIA officers to *research* where potentially responsive files are located, *research* who in the agency might have knowledge of the requested records, *research* which search terms to use in conducting a search for records and, once potentially responsive files are located, *research* whether there are other locations that should also be searched. *See, e.g., Reporters*

⁵ *See* Drew Harwell & Lisa Rein, *Zinke Took \$12,000 Charter Flight Home in Oil Executive’s Plane, Documents Show*, WASH. POST (Sept. 28, 2017), <https://perma.cc/X3AY-FDXW>.

Comm. for Freedom of Press v. FBI, 877 F.3d 399, 407 (D.C. Cir. 2017) (holding that agency failed to adequately describe its searches for responsive records, and failed to follow leads in the record pointing to additional locations to search for responsive records that were “both clear and certain”); *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (agency “must show beyond material doubt [] that it has conducted a search reasonably calculated to uncover all relevant documents” (citing *Weisberg v. U.S. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983))); *Truitt v. Dep’t of State*, 897 F.2d 540, 544–45 (D.C. Cir. 1990) (agency must construe a FOIA request liberally); *Forsham v. Califano*, 587 F.2d 1128, 1141 n.1 (D.C. Cir. 1978) (request is sufficiently specific “if it enable[s] a professional employee of the agency who [is] familiar with the subject area of the request to locate the record with a reasonable amount of effort” (emphasis added) (citation omitted)), *aff’d sub nom. Forsham v. Harris*, 445 U.S. 169 (1980); *Conservation Force v. Ashe*, 979 F. Supp. 2d 90, 101–02 (D.D.C. 2013) (even though request was “not a model of clarity,” a liberal reading of it required the agency to conduct a search that “would likely yield the greatest number of responsive documents”); *Hemenway v. Hughes*, 601 F. Supp. 1002, 1005 (D.D.C. 1985) (finding agency’s narrow search to be inadequate, explaining that “the agency must be careful not to read the request so strictly that the requester is denied information the agency well knows exists in its files, albeit in a different form from that anticipated by the requester”). In sum, each step required to adequately respond to a FOIA request will require some “research” on the part of Interior. The Department’s proposed refusal to process any request that requires “research” is nonsensical, in addition to being plainly illegal under the Act.

Second, Proposed Section 2.5(d) states that the Department will not “honor” a request that “requires an unreasonably burdensome search.” While there are limited circumstances in which courts have held that agencies are not required to conduct an “unreasonably burdensome” search, the burden rests on the agency to demonstrate such unreasonableness with specific arguments and evidence. See *Tereshchuk v. Bureau of Prisons*, 67 F. Supp. 3d 441, 455 (D.D.C. 2014), *aff’d sub nom. Tereshchuk v. Bureau of Prisons, Dir.*, No. 14-5278, 2015 WL 4072055 (D.C. Cir. June 29, 2015). In so doing, the agency’s “burden of demonstrating overbreadth is substantial,” *id.*; courts “typically demand a detailed explanation by the agency regarding the time and expense of a proposed search in order to assess its reasonableness.” *Shapiro v. CIA*, 170 F. Supp. 3d 147, 156 (D.D.C. 2016). Courts have rejected, for example, agency arguments that a request for “any and all records” that mention an individual was “unreasonably burdensome,” *id.*, or that searching 25,000 paper files was “unduly burdensome,” *Pub. Citizen, Inc. v. Dep’t of Educ.*, 292 F. Supp. 2d 1, 6 (D.D.C. 2003). Only in the most extreme cases have courts determined that agencies have met their burden to show that conducting a search in response to a request would be unreasonably burdensome. See, e.g., *Int’l Counsel Bureau v. U.S. Dep’t of Defense*, 723 F. Supp. 2d 54, 59 (D.D.C. 2010) (agreeing that “enlisting a full-time staff of twelve for a year to review hundreds of thousands of unsorted images would impose such an undue burden”). There is no need for the Department to address such an extreme, rare situation in its Proposed Rule. And, even if it chooses to do so, it is not permissible for the Department to simply state that it will not “honor” requests it believes would require an “unreasonably burdensome search”; the agency must, in each such case, meet its “substantial” burden to demonstrate why a search would be “unreasonably burdensome.”

Third, Proposed Section 2.5(d) states that the Department will not “honor” a request that requires it “to locate, review, redact, or arrange for inspection of a vast quantity of material.”

There is no basis, whatsoever, in the Act for an agency to refuse to “honor” a request simply because it involves a large amount of material. As the U.S. District Court for the District of Columbia has stated, FOIA “puts no restrictions on the quantity of records that may be sought.” *Tereshchuk*, 67 F. Supp. 3d at 455. Indeed, quite the opposite—the statute expressly contemplates requests for a “voluminous” amount of records, and gives agencies more time to respond to such requests. *See* 5 U.S.C. § 552(a)(6)(B)(i)–(iii) (an agency’s time limit for responding to a request may be extended given “the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request”); *see also Tereshchuk*, 67 F. Supp. 3d at 455 (“FOIA anticipates that requests for records may be so voluminous as to require an agency to carry an unusual workload.”).

Because the language in Section 2.5(d) of the Proposed Rule is contrary to FOIA and the Department’s obligations under the Act, it should be removed.

III. The Proposed Rule unlawfully attempts to implement a “monthly limit” on the processing of records.

Section 2.14 of the Proposed Rule states that Interior “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.” It provides no explanation as to the legal authority for imposing such a limit, how it will determine the limit, or what happens to requests that exceed this purported limit.

There is no basis for Interior to “impose a monthly limit for processing records” in response to a FOIA request. The Act permits anyone to file as many FOIA requests as they like, and requires agencies upon receipt of a request to “make the records promptly available.” 5 U.S.C. § 552(a)(3)(A). Specifically, following receipt of a request and barring any “unusual circumstances,” the agency “shall” within 20 days (not including weekends or public holidays) provide the requester with a “determination.” *Id.* at § 552(a)(6)(A). As the U.S. Court of Appeals for the D.C. Circuit has held, that means the agency must—at minimum—“(i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the ‘determination’ is adverse.” *Citizens for Responsibility and Ethics in Wash. v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013).

The Department has *no authority* to impose a “monthly limit” on how many records it will process in response to a FOIA request. *See* 5 U.S.C. §§ 552(a)(3)(A), (6)(A) (requiring agencies to respond to any and all requests within specific time limits). To the extent Interior is having difficulty responding to all the requests it receives within the time limits set forth by Congress it should (1) proactively make more information available, *see id.* at § 552(a)(2)(D)(ii), and/or (2) apportion additional resources to meet its statutory obligations. Interior cannot override Congress’s mandates through promulgation of the Proposed Rule. *See* 5 U.S.C. § 706(2) (courts shall “hold unlawful and set aside agency action” that is, *inter alia*, “not in accordance with law,” and “in excess of statutory jurisdiction authority, or limitations, or short of statutory right”). The proposed “monthly limit” referred to in Section 2.14 of the Proposed Rule must, accordingly, be removed.

IV. The Proposed Rule’s provisions for expedited processing impermissibly place additional requirements on requesters not found in FOIA.

Section 2.20(b)(1) of the Proposed Rule adds requirements for requesters seeking expedited processing, specifically that they must detail how “all elements and subcomponents of” a request meet “each element of” the test for demonstrating a compelling need for expedited processing.

This additional requirement to obtain expedited processing is found nowhere in the Act. FOIA states that requests for expedited processing shall be granted “(I) in cases in which the person requesting the records demonstrates a compelling need; and (II) in other cases determined by the agency.” 5 U.S.C. § 552(a)(6)(E)(i) (defining compelling need at § 552(a)(6)(E)(v)). Compelling need, in turn, means (in part) “with respect to a request made by a person primarily engaged in disseminating information, *urgency* to inform the public concerning actual or alleged Federal Government activity.” *Id.* at § 552(a)(6)(e)(v)(II) (emphasis added). The Act imposes no requirement on a requester to show how “all elements and subcomponents of” a request meet “each element of” demonstrating a compelling need. The proposed addition to Section 2.20(b)(1) of the Proposed Rule imposes unnecessary, impermissible burdens on requesters and should, accordingly, be removed.

V. The Proposed Rule allows the Department to deny the requester the name of the reviewer, contrary to the Act.

Section 2.24(b)(5) of the Proposed Rule states that when denying a request the name and title of a consulted attorney in the Office of the Solicitor does not need to be disclosed if “the Office of the Solicitor has expressly preapproved such a withholding.” 83 Fed. Reg. at 67,179.

FOIA explicitly requires that the names and titles of *all persons* responsible for denying *any* request be disclosed: “Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.” 5 U.S.C. 552(a)(6)(C)(i) (emphasis added). The Department has no authority to create an exemption to FOIA’s requirement that each agency employee responsible for denying a request be identified in the determination letter and doing so would violate the Act. This language in Section 2.24(5) of the Proposed Rule should be removed.

VI. The Proposed Rule imposes impermissible and unwarranted requirements for requesters seeking fee waivers.

Section 2.48(a)(1) of the Proposed Rule, which concerns fee waivers, states that a requester must identify “[h]ow the records concern the operations or activities of the Federal government.” The Proposed Rule then goes on to add the following new language: “The subject of the request must concern discrete, identifiable agency activities, operations, or programs with a connection that is direct and clear, not remote and attenuated.” 83 Fed. Reg. at 67,179.

FOIA’s fee waiver provision only requires that requesters seeking such a waiver demonstrate that release of the requested records “is likely to contribute significantly to public understanding of the operations or activities of the government” and is not primarily in their commercial interest. 5 U.S.C. § 552(a)(4)(A)(iii). There is no requirement that a requester demonstrate a “direct and clear” connection between the requested records and government operations and activities. *All* that is required under the Act is that the requester show that the requested records are “likely” to contribute significantly to public understanding. *Id.* Indeed, the disclosure of public records can “contribute significantly to public understanding” of government operations or activities even if, at the time the request is made, the connection to agency activities, operations, or programs may seem remote and attenuated. In *Forest Guardians v. U.S. Dep’t of Interior*, for example, the U.S. Court of Appeals for the Tenth Circuit held that that a request for copies of *private* lienholder agreements on file with Bureau of Land Management (“BLM”) concerned “operations and activities” of Interior given that the “large financial stake that lending institutions have in the value of grazing permits may create substantial economic and political pressure on *the BLM* to maintain high levels of grazing.” 416 F.3d 1173, 1178 (10th Cir. 2005) (emphasis added). The Court therefore held that Interior had wrongfully denied the fee waiver request. *Id.*

Because agencies cannot impose additional requirements on FOIA requesters seeking fee waivers, *see Cause of Action*, 799 F.3d 1108, 1115 (D.C. Cir. 2015), the additional language in Section 2.48(a)(1), referenced above, must be removed.

VII. The substitution of “time frame” for “time limit” throughout the Proposed Rule is improper and unwarranted.

The Proposed Rule replaces all references to “time limit” with “time frame,” a stark deviation from FOIA’s requirements. The Act’s “time limits” are not suggestions. They are clearly delineated periods of time for agency action set forth by Congress. *See, e.g.*, 5 U.S.C. § 552(a)(6)(A) (agencies “shall” make determinations on requests and appeals within 20 days (excluding weekends and public holidays)); *id.* at § 552(a)(4)(A)(viii) (agencies may not assess search fees if they fail to comply with “any time limit under paragraph (6)”); *id.* at § 552(a)(6)(B) (defining circumstances and procedure for extending “time limits” for requests and appeals in unusual circumstances); *id.* at § 552(a)(6)(C)(i) (requester is deemed to have exhausted their administrative remedies if agency “fails to comply with the applicable time limit provisions of this paragraph”).

The Proposed Rule’s replacement of “time limit” with “time frame” may mislead requesters and agency FOIA officers alike by suggesting that FOIA’s deadlines are not, in fact, deadlines. Such a change is entirely unnecessary and improper. The Proposed Rule should revert all modifications changing “time limit” to “time frame.”

VIII. The Proposed Rule unlawfully modifies definitions of terms in FOIA.

- A. The Proposed Rule’s new definition of “representative of the news media” is deceptively narrow and contrary to the Act.

Section 2.70 of the Proposed Rule alters the Act’s definition of “representative of the news media” for purposes of FOIA’s fee provisions by adding a sentence stating: “Distributing copies of released records, electronically or otherwise, does not qualify as using editorial skills to turn the raw materials into a distinct work.” 83 Fed. Reg. at 67,180. In contrast, FOIA itself defines a “representative of the news media,” in part, as “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).

There is no basis for the Department to deviate from the definition of “representative of the news media” set forth in the Act. Any divergence from the statutory definition needlessly introduces ambiguity and invites confusion in the Department’s implementation of FOIA. Moreover, the Department’s addition to the statutory definition does not comport with federal case law. In *Cause of Action v. Federal Trade Commission* the U.S. Court of Appeals for the D.C. Circuit explained that a requester qualifies for a fee waiver as a representative of the news media if they “(1) gather information of potential interest (2) to a segment of the public; (3) use [their] editorial skills to turn the raw materials into a distinct work; and (4) distribute that work (5) to an audience.” 799 F.3d at 1120 (citing 5 U.S.C. § 552(a)(4)(A)(ii)). The court explained that a “substantive press release or editorial comment” can satisfy the “editorial skills” prong of the test. *Id.* at 1122. Further, almost 30 years ago the same court determined that the National Security Archive was a “representative of the news media” because it exercised editorial skills in the publishing “document sets” culled from government records. *Nat’l Sec. Archive v. U.S. Dep’t of Def.*, 880 F.2d 1381, 1386 (D.C. Cir. 1989). Thus, the Proposed Rule’s statement that “[d]istributing copies of released records . . . does not qualify as using editorial skills” is patently incorrect. Editorial skill is clearly evidenced by the publication of released records, either with comment or a press release, or through the selection and compilation of certain records. *See id.*; *Cause of Action*, 799 F.3d at 1120. The Proposed Rule should be modified so that its definition of “representative of the news media” complies with the Act.

B. The Proposed Rule redefines “record,” conflicting with FOIA’s definition.

Section 2.70 of the Proposed Rule defines “record” as:

[A]ny 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.

83 Fed. Reg. at 67,180.

FOIA, however, defines “record” as follows:

“[R]ecord” and any other term used in this section in reference to information includes—

- (A) 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; and
- (B) Any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

5 U.S.C. § 552(f)(2).

Again, there is no reason for the Department to redefine terms in its regulations that are already clearly defined in the Act. By doing so, the Proposed Rule injects unnecessary and invites Interior employees to use the wrong standard for determining what is a “record” subject to the Act. The definition of “record” in the Proposed Rule should be conformed to the definition found in FOIA.

IX. Conclusion

The News Media Coalition urges the Department to incorporate the aforementioned comments to the Proposed Rule.

Sincerely,

The Reporters Committee for Freedom of
the Press
American Society of News Editors
The Associated Press
Associated Press Media Editors
Association of Alternative Newsmedia
BuzzFeed
The Center for Public Integrity
Dow Jones & Company, Inc.
The E.W. Scripps Company
First Look Media Works, Inc.
Gannett Co., Inc.
Inter American Press Association
International Documentary Assn.
Investigative Reporting Program
Investigative Reporting Workshop at
American University
The McClatchy Company
The Media Institute
MPA – The Association of Magazine Media
National Freedom of Information Coalition
National Newspaper Association

The National Press Club
National Press Club Journalism Institute
National Press Photographers Association
National Public Radio, Inc.
New England First Amendment Coalition
The New York Times Company
Newsday LLC
Online News Association
PEN America
ProPublica
Radio Television Digital News Association
Reporters Without Borders
Reveal from The Center for Investigative
Reporting
The Seattle Times Company
Society of Environmental Journalists
Society of Professional Journalists
Tribune Publishing Company
Tully Center for Free Speech
Verizon Media
VICE Media