



January 28, 2019

Re: Docket No. DOI-2018-0017

Freedom of Information Act Regulations - Proposed rule

These comments are submitted on behalf of the Grand Canyon Trust. We are a nonprofit organization whose mission is to protect and restore the Colorado Plateau – its spectacular landscapes, flowing rivers, clean air, diversity of plants and animals, and areas of beauty and solitude. We appreciate the opportunity to provide comments on the proposed rule.

I. General Comments

A. **Comments on:**

I. Why We Are Publishing This Rule and What it Does

It appears from the proposed rule that Department of Interior’s primary motivation for the rulemaking is to address “the unprecedented surge in FOIA requests and litigation” (67176).¹ The proposed rule asserts that “the Department has determined the following changes are necessary to best serve our customers and comply with the FOIA as efficiently, equitably, and completely as possible” (67176). If in fact the motivation for changes is due to the surge in requests, the proposed rule neither identifies the potential causes behind the increase in requests nor attempts to address those causes (e.g., by increasing transparency at the project level). In short, the Department has not justified the premise that the proposed rule revisions are the best way to address the increase in requests.

Furthermore, the following proposed revisions do not “best serve” FOIA requesters, but are *opposed to* the best interest of the public: (1) disqualifying requests that require research or that involve a large amount of material (Section 2.5), (2) imposing a monthly limit on requests (Section 2.14), and (3) making value judgments about whether requested information is “important” enough to justify a fee waiver (Section 2.45). These proposed

¹ All parenthetical citations are references to the page number of the Federal Register dated Friday, December 28, 2018.

revisions are addressed in detail below (II. Specific Comments on Proposed Rule Revisions).

The proposed rule concludes its discussion of the increase in FOIA requests as follows: “The Department’s FOIA processing therefore must be more efficient if the Department is to meet its statutory obligations” (67176). This conclusion is not warranted. The Department could meet its statutory requirements in a host of ways that do not involve increased “efficiency” in responding to FOIA requests. For example, it could seek to reduce requests through increased project transparency. Or it could simply increase staffing to respond to FOIA requests. In its attempt to meet its statutory obligations through “increased efficiency” as part of this proposed rule, the Department fails to meet other statutory obligations to which it is bound (see next paragraph). Thus alternative approaches that would meet *all* of the Department’s statutory obligations should be analyzed and considered for adoption in place of the proposed rule.

When outlining the rationale for the proposed rule, the Department claims that it “is fully committed to an equitable FOIA program that ensures compliance with the statutory requirements of transparency, accountability, and prompt production” (67176). Given the proposed revisions listed above and discussed in detail below, the rulemaking fails to meet these statutory requirements. Those revisions all reduce transparency and accountability on the part of the Department. Thus, while the proposed rule may ensure prompt production for a selected subset of FOIA requesters, it precludes meeting the statutory requirements of transparency and accountability, and is fundamentally antithetical to FOIA.

B. Comments on:

II. Compliance with Laws and Executive Orders

1. Regulatory Planning and Review (Executive Orders 12866 and 13563)

Under this section, the proposed rule states: “[Executive Order 13563] directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. ... We have developed this rule in a manner consistent with these requirements” (67176).

The proposed rule is not consistent with the listed requirements. Various aspects of the proposed rule do not “maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives,” and in some cases flexibility and freedom of choice for the public is diminished. Specifically, disqualifying requests that require research or that involve a large amount of material (Section 2.5), imposing a monthly limit on requests (Section 2.14), and making value

judgments about whether requested information is “important” enough to warrant a fee waiver (Section 2.45) all not only do **not** maintain flexibility and freedom of choice for the public, but diminish them. The Department could use these rule changes to attempt to avoid providing information that is important to the public but deemed threatening by the Department. There is no indication that a rule that does not include these revisions (including the current rule) is not “relevant, feasible, and consistent with regulatory objectives.”

Additionally, Executive Order 13563 states: “To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days” [Section 2 (b)]. The proposed rule was listed in the Federal Register on December 28, 2018, and lists January 29, 2019 as the public comment deadline (32 days). This falls far short of the 60 day standard, and no justification is provided for a shortened comment period. Thus, the opportunity for the public to comment on this proposed rule should be extended to at least 60 days.

C. Comments on:

II. Compliance with Laws and Executive Orders

8. Consultation With American Indian Tribes (Executive Order 13175)

Under this section, the proposed rule states: “Under the criteria in E.O. 13175, we have evaluated this rule and determined that it has no potential effects on federally recognized Indian tribes. (67177).” Yet the rule is almost certain to affect federally recognized Indian tribes, and no justification is provided for the determination that there are no potential effects. Thus the Department should consult with federally recognized Indian tribes about the proposed rule in accordance with Executive Order 13175.

II. Specific Comments on Proposed Rule Revisions

A. Section 2.5

The proposed revision to Section 2.5 (d) reads: “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” (67177).

Under FOIA, federal agencies are required to promptly make available any records that are “reasonably describe[d]” in a FOIA request. 5 U.S.C. § 552(a)(3)(A). The Department’s proposed rule runs afoul of that statutory requirement by asserting that requests that are “extremely broad” or those “requiring research” are not reasonably described.

The Department has failed to provide a definition or any explanation of what it means by requests “requiring research.” If the Department construes the term “research” to include ministerial analysis that is routinely necessary to properly respond to FOIA requests, that interpretation would plainly contravene FOIA. It may be true, for example, that the Department is not required to perform primary research to create new records in response to a FOIA request, but the statute requires the Department to make reasonable inquiries to identify the records responsive to a FOIA request. Categorizing any request that requires any research at all as failing to meet the stated requirement is both unreasonable and antithetical to the Freedom of Information Act Statute.

In addition, there is no reason that an “extremely broad” request or one that requires production of a “vast quantity of material” would necessarily fail to reasonably describe the records sought, which is all that FOIA requires. No justification is provided for denying a request that “requires the bureau to locate, review, redact, or arrange for inspection of a vast quantity of material.” If a request involves a complex issue, it may necessarily involve a “vast quantity of material.” The amount of material relevant to understanding a Department decision is irrelevant to whether records must be produced under FOIA.

B. Section 2.14

The proposed revision to Section 2.14 adds the following sentence at the end: “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” (67178).

This proposed rule change is squarely at odds with FOIA and should not be adopted. If the Department is facing a large number of FOIA requests, the solution is to hire more staff to process those requests and to increase transparency elsewhere within the agency so that fewer requests need to be made in the first place. FOIA requires the Department to promptly make records available to the public, with a handful of exceptions laid out in the statute. Those exceptions do not allow for an arbitrary “monthly limit” to be imposed on individual requests.

And furthermore, imposing a monthly limit on individual requests will not necessarily allow for a response to a greater number of FOIA requests, which appears to be the goal of

the monthly limit. Interior could abuse this “monthly limit” rule by purposely understaffing its FOIA response efforts. In order to treat FOIA requesters equitably, requests should be processed in a first-in/first-out basis, as is currently done. Delaying a response to a request because an arbitrary limit has been reached is decidedly *not* equitable. The proposed monthly limit should not be adopted.

C. Section 2.29

The proposed revision to Section 2.29 includes adding a new paragraph (c), which reads: “The bureau has excised due diligence to notify the submitter, but its efforts were unsuccessful” (67179). We believe this paragraph contains a typo, and that “excised” should be replaced with “exercised”.

D. Section 2.45

The proposed revision to Section 2.45 includes removing paragraph (f), which reads: “The 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.”

No explanation or justification of any kind is provided for the removal of this paragraph. There is no reason why the Department, when assessing fee-waiver requests, should change its policy of not substituting its value judgments about the importance of the information for those of the public, or of not unilaterally determining the level of public interest in the requested information. This change in policy is not licensed by any of the relevant legislation, is unreasonable, and is antithetical to FOIA.

E. Section 2.70

The proposed revision to Section 2.70 regarding the definition of “Record” replaces “means an agency record,” with, “is any item, collection, or grouping of information that already is recorded, is reasonably encompassed by your request, and” (67180). The clause “is reasonably encompassed by your request” should be deleted from this definition. The qualification of information as a “Record” must not hinge on whether that information is encompassed by any particular request. Nothing prevents the agency of whom a request is being made from communicating with the requestor to inquire as to whether certain items technically encompassed by a particular request are really desired by the requestor. But it must not be up to the agency to determine what is “reasonably” encompassed by a request.

We are grateful for the opportunity to provide comments on the proposed rule. Please let us know if you have any questions about anything contained within this set of comments.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Popejoy".

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