



December 27, 2018

BY ELECTRONIC MAIL

Clarice Julka
FOIA Officer
U.S. Department of the Interior
Office of the Secretary
1849 C St., NW
Washington, D.C. 20240
osfoia@ios.doi.gov

Re: Freedom of Information Act Request and Request for Fee Waiver

Dear Ms. Julka:

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and Interior Department regulations promulgated at 43 C.F.R. § 2, WildEarth Guardians hereby requests the following records from the U.S. Department of the Interior’s Office of the Secretary:

1. Any and all records related in any way to the U.S. Department of the Interior’s proposed revisions to the Department’s Freedom of Information Act regulations. Notice of the Department’s proposal will be published in the Federal Register on December 28, 2018. A pre-publication version of this proposal is attached as Exhibit 1 to this request.

For purposes of this request, records include, but are not limited to, communication records (including, but not limited to, recorded voicemails, text messages, chat messages, e-mails, and printed letters), memoranda, facsimiles, reports, analyses, meeting notes, records of conversations, meeting sign-in sheets, images, video, and audio. We request that all responsive records be provided in a digital format that is readable and word-searchable using computer software commonly available to the public. For purposes of this request, we do not request any records that are already publicly available online on an Interior Department website that is not subject to alteration or elimination, whether temporarily or permanently. Below we detail our request for a fee waiver.

Request for Fee Waiver

WildEarth Guardians requests that you waive all fees in connection with this matter if this request is treated as a FOIA request. As shown below, we meet the two-pronged test under FOIA for a fee waiver, 5 U.S.C. § 552(a)(4)(A)(iii):

I. Disclosure of this information is in the public interest because it will significantly contribute to public understanding of the operations or activities of government.

In considering whether WildEarth Guardians meets this fee waiver criteria, it is imperative that the Department of the Interior remember FOIA, in general, carries a presumption of disclosure and that the fee waiver amendments of 1986 were designed specifically to allow non-profit, public interest groups such as WildEarth Guardians access to government documents without the payment of fees. As stated by one Senator, “[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . .” 132 Cong. Rec. S. 14298 (statement of Sen. Leahy). In interpreting this amendment, the 9th Circuit has stated:

The amended statute ‘is to be liberally construed in favor of waivers for noncommercial requesters.’ (citing Sen. Leahy). The amendment’s main purpose was ‘to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.’ (citing Sen. Leahy).

McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9th Cir. 1987). Thus, both Congress and the courts are clear in their interpretation that the main legislative purpose of the amendments is to facilitate access to agency records by watchdog organizations, such as environmental groups, which use FOIA to monitor and challenge government activities. As the D.C. Circuit Court has stated:

This waiver provision was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,’ in clear reference to requests from journalists, scholars, and, most importantly for our purposes, nonprofit public interest groups.

Better Gov’t Ass’n v. Department of State, 780 F.2d 86, 93-94 (D.C. Cir. 1986), quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984).

A. The subject of the request concerns “the operations and activities of the government.”

As this is a request for documents from an executive branch agency, Office of the Secretary of the U.S. Department of the Interior, it is clear that this request concerns the operations and activities of government. The information is directly related to the agency’s proposal to revise its FOIA regulations.

B. The disclosure is “likely to contribute” to a public understanding of government operations or activities (the informative value of the information to be disclosed and ability to disseminate).

The requested information will help provide background information related to the Department’s proposed revisions to its FOIA regulations. The requested information will

provide more background information as to why the Department has proposed revisions and how the proposed revisions were developed. The proposed regulatory changes claim that there is a need for the proposed revision. The requested information will shed light on that need.

WildEarth Guardians has specifically and consistently demonstrated its ability to disseminate information relative to the operations and activities of the Interior Department. We accomplish this information dissemination through printed media (both paid media and earned media), our email list, list-serves to which we post, printed publications we write and distribute via mail and the internet, articles and essays for other public interest organizations, and public meetings held or sponsored by us, other nonprofit public interest entities, or federal agencies. The Interior Department has consistently granted fee waivers for Guardians, acknowledging our ability to effectively disseminate information received under FOIA.

Other U.S. Interior Department agencies including the U.S. Office of Surface Mining Reclamation and Enforcement, U.S. Bureau of Land Management, U.S. Fish and Wildlife Service, and U.S. Bureau of Reclamation consistently grant our requests for fee waivers. Other federal agencies, including the U.S. Environmental Protection Agency, U.S. Department of Agriculture, and U.S. Forest Service also consistently grant our requests for fee waivers.

WildEarth Guardians is a non-profit organization that informs, educates, and empowers the public regarding environmental issues, policies, and laws. We have been involved in Interior Department operations for many years, particularly in relation to the agency's administration of FOIA. We regularly file FOIA requests with the Department and its agencies and regularly enforce FOIA in federal courts. WildEarth Guardians is well positioned to be able to interpret and communicate around the proposed FOIA rule revisions and is well-poised to effectively disseminate the requested information and greatly enhance public understanding of the reasons for the proposed rule.

Our organization plays an active role in informing the American public about the Interior Department's actions and activities. To this end, WildEarth Guardians qualifies as a representative of the news media pursuant to 43 C.F.R. § 2.70. We have regularly provided information to the public related to the Interior Department's management of public resources, including wildlife, minerals (including energy minerals), and lands, and are regularly interviewed and quoted by the news media with regards to Interior Department management decisions. With the requested information, we intend to continue to inform, educate, and empower the public regarding the operations of the Interior Department.

We have consistently displayed our ability to disseminate information granted to us through FOIA fee waivers. Recent newspaper articles have featured WildEarth Guardians and the information it has gathered under FOIA, particularly in relation to issues related to Department of the Interior operations and activities. We also independently disseminate information obtained under FOIA through our own public outreach, including through blog posts, mapping projects, social media, and other sources. Some recent examples of disseminating information obtained from the Interior Department and its agencies under FOIA include: sharing information obtained under FOIA regarding oil and gas leases in Nevada through an interactive online map, <https://arcg.is/0rfbr8>, sharing information obtained under FOIA regarding oil and

gas pipelines in New Mexico through another interactive online map, <https://arcg.is/1fbjL5>, and sharing information obtained under FOIA to members of the media.

We have also played a leading role in advocating for greater transparency and compliance with FOIA within the Interior Department. Earlier this year, we led a coalition calling on the Secretary of the Interior to prevent rollbacks of FOIA. *See* <https://wildearthguardians.org/brave-new-wild/climate-energy/coalition-demands-zinke-defend-transparency-democracy/>. We also regularly communicate around our FOIA advocacy and openly embrace our role as an agent of transparency within the United States of America. *See* <https://wildearthguardians.org/brave-new-wild/climate-energy/were-number-5/>.

In granting a fee waiver to WildEarth Guardians, it is important to recognize that (1) our requested information will contribute significantly to the public understanding of the operations or activities of the government, (2) our requested information will enhance the public's understanding to a greater degree than currently exists, (3) WildEarth Guardians possesses the expertise to explain the requested information to the public, (4) WildEarth Guardians possesses the ability to disseminate the requested information to the general public, (5) and that the news media recognizes that WildEarth Guardians is an established expert in the field of Interior Department activities and operations.

WildEarth Guardians staff and contractors responsible for interpreting, compiling and presenting this information to the public in an understandable manner possess the requisite experience, intelligence and expertise to carry out this task. WildEarth Guardians has consistently proven its ability to disseminate information obtained from the Interior Department.

C. The disclosure is likely to contribute “significantly” to public understanding of government operations or activities.

Public oversight and enhanced understanding of the Interior Department's proposed revisions to its FOIA regulations is necessary to understand the motivations behind the proposed rule, the people who were involved in the drafting the proposed rule, and the information relied on in the development of the proposed rule. The proposed rule appears to be aimed at stymieing public interest organizations like WildEarth Guardians from seeking and timely obtaining information from the Department of the Interior and its agencies. The disclosure of the requested records will contribute significantly to the public's understanding of the reasons the U.S. Department of the Interior would proposed changes to its FOIA regulations.

WildEarth Guardians' track record of active participation in oversight of issues related to Interior Department management of public lands and resources, and our contribution to the public's understanding of these issues compared to the level of public understanding prior to disclosure are well established.

In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is:

“whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.”

Carney v U.S. Dept. of Justice, 19 F.3d 807 (2nd Cir. 1994) (emphasis added).

The information requested in this FOIA request will be used to contribute to one or more of the following: petitions, local and national newsletters, public presentations, e-mail and postal mail publications, and local and national news stories contributed to or written by WildEarth Guardians and its members. The most likely sources of dissemination will be through the print media, although it may also be disseminated through other public advocacy channels and associated media work and mailed publications.

WildEarth Guardians will also disseminate the requested information via a publicly accessible “repository” website where Guardians’ Climate and Energy Program posts FOIA requests and responses from federal agencies. This website is available here, <https://climatewest.org/wildearth-guardians-climate-and-energy-program-foia-repository/>. Not only will we post responsive records online here, but we will also alert the public to the availability of responsive information via our blog site, <http://ClimateWest.org>.

1. The use of these records will add new and different information to the public understanding.

The information requested has not yet been fully analyzed, summarized, and disseminated by any member of the public, thus its use will add new and different information to public understanding.

2. Whether all or a portion of the broadscale records will be used to enlighten the public.

We do not consider this request to be broadscale, but a specific and focused request for records related to the Department of the Interior’s proposed revisions to its FOIA regulations. All the documents will be used, because all are necessary for gaining a true and complete understanding of the issues. The specific records will shed more complete light on the Interior Department’s actions, deliberations, coordination, and communications related to the development, submission, and publication of the proposed rule.

3. Whether any of the records consist of generic information that lacks substantial informative value.

It is our belief that there is no ‘generic’ information on this topic, due to the public’s limited perception of this subject.

4. Whether any of the requested information has already been publicly available either in a duplicative or a substantially identical form, or is readily available from another source.

To the best of our knowledge, very few to none of the documents requested in this FOIA have been released to the public. As we indicated earlier in this request, we do not request any responsive documents that are currently available online on an Interior Department website that is not subject to alteration or elimination, whether temporarily or permanently. If portions of the requested information have been released to the public and are readily available and accessible from another source, we request the Office of the Secretary please inform us of this situation.

II. Obtaining the information is of no commercial interest.

Access to government documents, disclosure forms, and similar materials through FOIA requests is essential to WildEarth Guardians' role of educating the general public. WildEarth Guardians, a non-profit organization, has no commercial interest and will realize no commercial benefit from the release of the requested information.

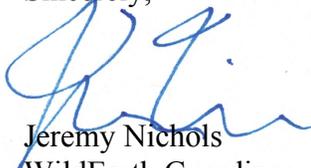
Should you decide not to waive fees, we request that you contact us prior to incurring any costs in excess of \$25. Please feel free to request additional information concerning our fee waiver request if you believe it is needed to make a final decision.

If you elect to withhold any documents responsive to this request under Exemption 5 of FOIA, please explain:

- 1) Why is each document predecisional?
 - a. To what decision are each of the documents leading toward?
 - b. Has this decision been finalized?
- 2) Why is each document deliberative?
 - a. To what extent does each make a recommendation on a legal or policy matter?
- 3) What policy recommendation qualifies this document for exemption?

We look forward to your reply within twenty working days as required by FOIA, 5 U.S.C. § 552(a)(6)(A)(i). If you have any questions, concerns, or would like to discuss this FOIA request in more detail, please contact me at the information below. Thank you.

Sincerely,



Jeremy Nichols
WildEarth Guardians
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Denver, CO 80205
(303) 437-7663
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Exhibit 1



[4310-10]

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 2

Docket No. DOI-2018-0017

RIN 1093-AA26

Freedom of Information Act Regulations

AGENCY: Office of the Secretary, Interior

ACTION: Proposed rule.

SUMMARY: This rule would revise the regulations that the Department of the Interior (Department) follows in processing records under the Freedom of Information Act. The revisions clarify and update procedures for requesting information from the Department and procedures that the Department follows in responding to requests from the public.

DATES: Comments on the rulemaking must be submitted on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments on the rulemaking by either of the methods listed below. Please use Docket No. DOI-2018-0017 in your message.

1. Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions on the website for submitting comments.
2. U.S. mail, courier, or hand delivery: Executive Secretariat – FOIA regulations, Department of the Interior, 1849 C Street NW, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Cindy Cafaro, Office of Executive Secretariat and Regulatory Affairs, 202-208-5342.

SUPPLEMENTARY INFORMATION:

I. Why we are publishing this rule and what it does.

In late 2012, the Department published a final rule updating and replacing the Department's previous Freedom of Information Act (FOIA) regulations. In early 2016, the Department updated that final rule, primarily to authorize the Office of Inspector General (OIG) to process its own FOIA appeals. In late 2016, the Department updated that final rule again, primarily in response to the mid-year enactment of the FOIA Improvement Act of 2016. The Department is fully committed to an equitable FOIA program that ensures compliance with the statutory requirements of transparency, accountability, and prompt production. In light of the unprecedented surge in FOIA requests and litigation (discussed further below), 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.

Exponential increases in requests and litigation have made updates to these regulations a priority. From Fiscal Year (FY) 2016 to FY 2018, incoming FOIA requests to the Department increased 30 percent (from 6,428 to over 8,350). Some bureaus and offices have been hit especially hard. The Office of the Secretary (OS) FOIA Office, for example, has received a 210 percent increase from FY 2016. The Department's attempts to respond accurately, completely, and in a timely manner to every request have been further hindered by the dramatic increase in litigation, particularly over agency non-response to initial FOIA requests. For example, at the close of FY 2018 the Department had 129 active FOIA cases in litigation (39 in OS alone) compared to just 6

cases in litigation in total at the close of FY 2015 and 30 cases in litigation in total at the end of FY 2016. The Department processed over 6,900 requests in FY 2018, compared to 6,437 in FY 2016. Despite the increased production, the Department's backlog of requests without at least a partial response has also increased. The Department's FOIA processing therefore must be more efficient if the Department is to meet its statutory obligations.

Because of this background, the structure of the Department's FOIA program and FOIA Public Liaison function is changing. Additionally, FOIA case law continues to evolve and the Department of Justice has recently issued guidance on *The Importance of Quality Requester Services: Roles and Responsibilities of FOIA Requester Service Centers and FOIA Public Liaisons*. In light of these factors, the Department is proposing to make the following changes to its FOIA regulations:

- Section 2.2 would be amended to reflect the changing structure of the Department's FOIA program.
- Section 2.3 would be amended to streamline the FOIA submission process in order to help the Department inform requesters and/or focus on meeting its statutory obligations.
- Section 2.3, 2.5, 2.19, 2.21, 2.37, 2.49, and 2.66 would be amended to reflect the changed structure of the Department's Public Liaison function and/or clarify the role of FOIA Requester Centers.
- Section 2.4 and 2.17 would be amended to eliminate the obligation to forward requests to another bureau or component in order to help the Department focus on meeting its statutory obligations. Instead, the bureau will respond to the request as

appropriate and inform the requester of the availability of the FOIA Requester Centers for further assistance.

- Section 2.5, and 2.70 would be amended to streamline and/or clarify what the requester may receive and how they may ask for it in order to help the Department inform requesters and/or focus on meeting its statutory obligations.
- Section 2.6, 2.45, 2.48, 2.49, 2.54, and 2.70 would be amended to streamline and/or clarify issues involving fees in order to help the Department inform requesters and/or focus on meeting its statutory obligations.
- Section 2.12 and 2.13 would be amended to streamline and/or clarify the Department's consultation and referral process in order to help the Department inform requesters and focus on meeting its statutory obligations.
- Section 2.14, 2.15, and 2.20 would be amended to streamline and/or clarify the Department's multitrack processing provisions in order to help the Department inform requesters and focus on meeting its statutory obligations. Section 2.27 and 2.29 would be amended to streamline and/or clarify the Department's submitter notification provisions in order to help the Department inform submitters and requesters and focus on meeting its statutory obligations.
- Section 2.16, 2.18, 2.19, 2.28, 2.37, 2.51, 2.57, 2.58, 2.59, and 2.62 would be amended to replace a single word.
- Section 2.18 and 2.47 would be amended for technical clarifications.
- Section 2.20, 2.23 and 2.24 would be amended to adjust the role of the Department's Office of the Solicitor in order to ensure legal input is required when it is most equitable and effective.

II. Compliance with laws and executive orders.

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

Executive Order (E.O) 12866 provides that the Office of Information and Regulatory Affairs will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order 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. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

2. Regulatory Flexibility Act.

The Department of the Interior certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

3. Small Business Regulatory Enforcement Fairness Act.

This is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

- a. Does not have an annual effect on the economy of \$100 million or more.
- b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.
- c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

4. Unfunded Mandates Reform Act.

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. This rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 et seq.) is not required.

5. Takings (E.O. 12630).

In accordance with E.O. 12630, this rule does not have significant takings implications. A takings implication assessment is not required.

6. Federalism (E.O. 13132).

In accordance with E.O. 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. It would not substantially and directly affect the relationship between the Federal and state governments. A federalism summary impact statement is not required.

7. Civil Justice Reform (E.O. 12988).

In accordance with E.O. 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

8. Consultation with Indian Tribes (E.O. 13175).

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. This rule does not have tribal implications that impose substantial direct compliance costs on Indian Tribal governments.

9. Paperwork Reduction Act.

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget under the Paperwork Reduction Act is not required.

10. National Environmental Policy Act.

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required. Pursuant to Department Manual 516 DM 2.3A(2), Section 1.10 of 516 DM 2, Appendix 1 excludes from documentation in an environmental assessment or impact statement “policies, directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature; or the environmental effects of which are too broad, speculative or conjectural to lend themselves to meaningful analysis and will be subject late to the NEPA process, either collectively or case-by-case.”

11. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required. This rule will not have a significant effect on the nation’s energy supply, distribution, or use.

12. Clarity of this regulation.

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the "ADDRESSES" section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

13. Public availability of comments.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment – including your personal identifying information – may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

List of Subjects in 43 CFR Part 2

Freedom of information

For the reasons stated in the preamble, the Department of the Interior proposes to amend part 2 of title 43 of the Code of Federal Regulations as follows:

PART 2—FREEDOM OF INFORMATION ACT; RECORDS AND TESTIMONY

1. The authority citation for part 2 continues to read as follows:

AUTHORITY: 5 U.S.C. 301, 552, 552a, 553; 31 U.S.C. 3717; 43 U.S.C. 1460, 1461.

Subpart A—INTRODUCTION

§ 2.2—[Amended]

2. In § 2.2, remove the words “Office of the Solicitor” and adding in its place “Deputy Chief FOIA Officer”.

Subpart B—HOW TO MAKE A REQUEST

§ 2.3—[Amended]

3. Amend § 2.3 by:

a. Adding in paragraph (b), to the end of the sentence the words: “by utilizing the electronic portals listed on the Department's FOIA Web site, *https://www.doi.gov/foia*, or utilizing physical addresses of the appropriate bureau FOIA Officer or other appropriate FOIA contact, located at *http://www.doi.gov/foia/contacts*”

b. Removing paragraph (c).

c. Redesignating paragraph (d), as paragraph (c), and removing the words “FOIA Public Liaison” and adding in its place “FOIA Requester Center”.

§ 2.4—[Amended]

4. Amend § 2.4 by:

a. In paragraph (a), after the words “a particular” adding the words “bureau or a particular”; after the words “that particular” adding the words “bureau or particular”. At the end of the paragraph adding the words “and will not be forwarded to another bureau or component”.

b. Removing paragraphs (e) and (f).

§ 2.5—[Amended]

5. In § 2.5:

- a. In paragraph (a), after the word “effort”, add the following phrase “and identify the discrete, identifiable agency activity, operation, or program in which you are interested”.
- b. In paragraph (c), remove the phrase “FOIA Public Liaison” and add in its place “FOIA Requester Center”.
- c. Revise paragraph (d).
- d. Add paragraph (e).

The revision and addition read as follows:

§ 2.5 How should you describe the records you seek?

* * * * *

(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.

(e) If the bureau determines that your request does not reasonably describe the records sought, the bureau will return the request to you; notify you that it will not be able to comply with your request unless you sufficiently clarify your request, in writing, within 20 workdays; notify you that you may appeal its determination that your request does not reasonably describe the records sought; and inform you, when practicable, what additional information you need to provide in order to reasonably describe the records that you seek so the requested records can be located with a reasonable amount of effort. If you receive this type of notification, you may wish to discuss it with the bureau's designated FOIA contact or FOIA Requester Center (see §2.66 of this part). If the bureau does not receive your written response containing the additional information within 20 workdays after the bureau has requested it, the bureau will presume that you are no longer interested in the records and will close the file on the request

§ 2.6—[Amended]

6. In § 2.6 paragraph (f) add the wording “or a different fee category placement” after “partial fee waiver”.

Subpart C—PROCESSING REQUESTS

§ 2.12—[Amended]

7. Revise § 2.12 paragraph (d) to read as follows:

(d) If a bureau receives a request for records in its possession that primarily concern another

bureau or a Federal Government agency that is subject to FOIA, it may undertake consultations and/or referrals as described in §2.13.

§ 2.13—[Amended]

8. Revise § 2.13 to read as follows:

§2.13 How do consultations and referrals work?

(a) When a bureau (other than the Office of Inspector General) locates responsive records that primarily concern another bureau or Federal Government agency that is subject to FOIA, the bureau will determine whether that bureau or agency would be better able to determine whether the record is exempt from disclosure.

(b) If the bureau processing the request believes that another bureau or agency would be better able to determine whether the record is exempt from disclosure, the bureau will contact that bureau or agency to determine whether it should refer the record to that bureau or agency or consult with that bureau or agency.

(1) If the bureau processing the request refers a record to another bureau or agency, that other bureau or agency will respond to you directly about that record. If the bureau processing the request consults with another bureau or agency, the bureau processing the request will respond to you directly.

(2) If the bureau receives a request for records that another agency has classified under any applicable executive order concerning record classification, it must refer the request to that agency for response.

(3) Whenever a bureau refers any part of the responsibility for responding to a request to another bureau or agency, it will document the referral; maintain a copy of the referred record; and notify you of the referral, including the name of the bureau or agency to which the record was referred and that bureau or agency's FOIA contact information.

(4) If the disclosure of the identity of the agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemption that protects ongoing law enforcement investigations, a referral would be inappropriate and the bureau will consult with the agency instead.

(c) When a bureau receives a referral, the bureau will assign the referral to the appropriate processing track (see § 2.15 of this part) and process it according to the date that the consulting or referring bureau or agency received your request (see §2.14 of this part).

(d) Bureaus may establish written agreements with other bureaus or agencies to eliminate the need for consultations or referrals for particular types of records.

Subpart D—TIMING OF RESPONSES TO REQUESTS

§ 2.14—[Amended]

9. In § 2.14, add 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.”

§ 2.15—[Amended]

10. In § 2.15 paragraph (c)(1), (2), (3), and (4) remove the word “will” adding in its place the words “would generally”; removing in paragraph (c)(4) the words “Exceptional/Voluminous” and adding in their place the word “Extraordinary”.

§ 2.16—[Amended]

11. In § 2.16:

a. Revise the section heading

b. In paragraph (b) remove the word “limit” and add in its place the word “frame”.

The revision reads as follows:

§2.16 What is the basic time frame for responding to a request?

§ 2.17—[Removed and Reserved]

12. Section 2.17 is [Removed and Reserved].

§ 2.18—[Amended]

13. In § 2.18:

a. Revise the section heading,

b. In paragraph (a) and (b) remove the word “limit” adding in its place the word “frame”.

c. In In paragraph (b) add the words “of this part” after the words “in § 2.16”.

The revision reads as follows:

§2.18 When can the bureau suspend the basic time frame?

§ 2.19—[Amended]

14. In § 2.19:

a. Revise the heading to read as set out below;

b In paragraph (a) and (c) remove the word “limit” and adding in its place “frame”.

c. In paragraph (b)(2), remove the wording “its FOIA Public Liaison”, adding in its place the wording “the FOIA Public Liaison”.

The revision reads as follows:

§2.19 When may the bureau extend the basic time limit?

§ 2.20—[Amended]

15. In § 2.20:

a. In paragraph, (a)(1) and (2), remove the word “Where” and capitalize “Failure” and “There”, respectively.

b. In § 2.20(a)(2)(iii), remove the wording “; this ordinarily refers to a breaking news story of general public interest”.

c. In § 2.20(b)(1), after the word “how”, add the wording “all elements and subcomponents of” and after the word “meets”, add the wording “each element of”.

d. In § 2.20(c), add a new second sentence between “request.” and “When” that reads as follows: “Bureaus will consult with the Office of the Solicitor before granting expedited processing requests and will include in its response to you the name and title of the Office of the Solicitor or Office of General Counsel attorney consulted.”

Subpart E—RESPONSES TO REQUESTS

§ 2.21—[Amended]

16. In § 2.21 paragraph (a), remove the wording “its FOIA Public Liaison” and adding in its place “the FOIA Public Liaison”.

§ 2.23—[Amended]

17. In § 2.23 paragraph (c), removing the word “record.” adding in its place the wording “record unless the Office of the Solicitor has expressly preapproved such a withholding”.

§ 2.24—[Amended]

18. In § 2.24 paragraph (b)(4), removing the wording “unless including” adding in its place the wording “unless the bureau notes that it does not have or could not locate responsive records or that including” in paragraph (b)(5), removing the word “record”, adding in its place the wording “record unless the Office of the Solicitor has expressly preapproved such a withholding”.

Subpart F—HANDLING CONFIDENTIAL INFORMATION

§ 2.27—[Amended]

19. In § 2.27 paragraph (a), adding the wording “exercise due diligence to” following the wording “must”.

§ 2.28—[Amended]

20. In § 2.28 paragraph (d), removing the wording “limit” adding in its place “frame”.

§ 2.29—[Amended]

21. In § 2.29:

- a. In paragraph (a), remove the second “or”.
- b. In paragraph (b), add the wording “or prohibited” after the word “required” and change the existing period to a semicolon and add the word “or” after the semicolon.
- c. Add a new paragraph (c).

The revision and addition read as follows:

§2.29 When will the bureau not notify a submitter of a request for their possibly confidential information?

* * * * *

(c) The bureau has excised due diligence to notify the submitter, but its efforts were unsuccessful.”

Subpart G—FEES

§ 2.37—[Amended]

22. In § 2.37 paragraph (f) and (f)(2)(i), removing the wording “limit” adding in its place “frame”; in paragraph (i), removing the wording “FOIA Public Liaison” adding in its place “FOIA Requester Center”.

§ 2.45—[Amended]

23. In § 2.45:
- a. In paragraph (a), removing the wording “based on all available information” adding in its place the wording “considering the information you have provided and verifying it as appropriate”.
 - b. Removing paragraph (f).

§ 2.47—[Amended]

24. In § 2.47 paragraph (d), removing the number “30” adding in its place the number “90”.

§ 2.48—[Amended]

25. In § 2.48:

a. Adding in paragraph (a)(1), the following as new sentence two “The subject of the request must concern discrete, identifiable agency activities, operations, or programs with a connection that is direct and clear, not remote or attenuated.”.

b. Adding in paragraph (a)(2), after the word “contribute”, the word “significantly”.

c. In paragraphs (a)(2)(i), after the word “informative”, add the wording “--the disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public’s understanding”.

d. In paragraphs (a)(2)(iv), removing the word “Your” adding in its place the word “Your expertise in the subject area as well as your”, replace the words “expertise regarding the requested information and information that explains how you” with the word “your”, and replace the wording “to your” with the wording “to furthering your”.

e. Removing paragraphs (a)(3), (a)(3)(i), (a)(3)(iii), and (a)(3)(iv) and redesignate current paragraphs (a)(3)(ii) as paragraph (a)(2)(vi) and adding the word “and” after the semicolon.

Redesignate current paragraphs (a)(4) to paragraphs (a)(2)(vii).

f. Adding a new second sentence to introductory paragraph (b) to read as follows, “To determine whether disclosure of the requested information is primarily in your commercial interest, the bureau will consider:”, and add new paragraphs (1) and (2) to read as set out below.

g. Redesignate paragraphs (b)(1), (2) and (3) as (3), (4), and (5).

h. Redesignated paragraph (b)(5)(ii), adding the word “ordinarily” before the word “presume” and add the following sentence to the end “Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.”

The revisions and additions read as follows:

§ 2.48 How will the bureau evaluate your fee waiver request?

* * * * *

(b) * * *

(1) Whether the requested disclosure would further any commercial interest of yours.

(2) If you have a commercial interest, the bureau must determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of paragraph (a) are satisfied and any commercial interest is not the primary interest furthered by the request. Bureaus ordinarily will presume that, when a news media requester has satisfied paragraph (a) above, the request is not primarily in the commercial interest of the requester.

* * * * *

§ 2.49—[Amended]

26. Amend § 2.49 by,

- a. Adding a new paragraph (a)(3) and redesignate paragraph (a)(3) as (4).
- b. In the newly redesignated (a)(4), replacing the word “previously” with “already”.
- c. In paragraph (e), replace the wording “FOIA Public Liaison” with the wording “FOIA Requester Center”.

The additions read as follows:

2.49 When will you be notified of anticipated fees?

(a)***

(3) Your request does not reasonably describe the records sought and/or does not resolve all issues regarding the payment of processing fees; or

§ 2.51—[Amended]

27. In § 2.51 paragraph (b), (b)(1), and (b)(3), removing the word “limit” adding in its place the word “frame”.

§ 2.54—[Amended]

28. In § 2.54 paragraph (a), removing the words “charge accordingly” adding in its place the words “charge fees accordingly” and removing the words “attempting to avoid fees by”.

Subpart H—ADMINISTRATIVE APPEALS

§ 2.57—[Amended]

29. In § 2.57 paragraph (a)(7) and paragraph (c), removing the word “limit” adding in its place the word “frames”.

§ 2.58—[Amended]

30. In § 2.58 paragraph (c), removing the word “limit” adding in its place “frame”.

§ 2.59—[Amended]

31. In § 2.59 paragraph (f), removing the word “limit” adding in its place “frames”.

§ 2.62—[Amended]

32. In § 2.62 paragraphs (a) and (b), removing the word “limit” adding in its place “frame”.

Subpart I—GENERAL INFORMATION

§ 2.66—[Amended]

33. Revise § 2.66 with the following:

§ 2.66 What are FOIA Requester Centers and the FOIA Public Liaison?

(a) Employees at FOIA Requester Centers typically serve as your first point of contact for questions about how the FOIA works. Even before you make a request, employees at FOIA Requester Centers can assist you by: identifying information that is already posted and available; informing you about the types of records maintained by the bureau; providing suggestions for formulating requests; describing the Department’s various processing tracks and the average processing times for the various tracks; and answering questions about expedited processing standards and the FOIA’s fee provisions. After you make a request, questions about its status can also be answered by employees at the applicable FOIA Requester Center.

(b) If you need further information or assistance after contacting the applicable FOIA Requester Center, the FOIA Public Liaison reports to the Department's Chief FOIA Officer and is responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and resolving disputes between the you and the agency (including notifying you of your right to seek dispute resolution services from OGIS).

(c) If you need further information or assistance after contacting the applicable FOIA Requester Center and the FOIA Public Liaison, you may wish to seek dispute resolution services from OGIS.

(d) Contact information for the FOIA Requester Centers and the FOIA Public Liaison is available at <https://www.doi.gov/foia/foiacenters>.

§ 2.70—[Amended]

34. In § 2.70:

a. In the definition of “Educational institution”, add the following sentence after the words “further scholarly research.” “Teachers (if they demonstrate how the requested records will further their teaching, scholarly research, or production of scholarly works) and students (if they demonstrate how the requested records will further their coursework or other school-sponsored activities) may also qualify as an educational institution for the purposes of this definition.”

b. In the definition of “Multitrack processing”: after “first-in/first-out basis” add the words “, but other factors, such as litigation, may affect the sequence and/or timing of processing”.

c. In the definition of “Record” remove “means an agency record” and add in its place “is any item, collection, or grouping of information that already is recorded, is reasonably encompassed by your request, and”.

d. In the definition of “Representative of the news media”, add the following new sentence two after the phrase “work to an audience.”: “Distributing copies of released records, electronically or otherwise, does not qualify as using editorial skills to turn the raw materials into a distinct work.”

Dated: December 14, 2018.

Daniel Jorjani

Principal Deputy Solicitor, Exercising the Authority of the Solicitor

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