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Executive Office of the President
Office of the Intellectual Property Enforcement Coordinator
Eisenhower Executive Office Building, Room 296
Washington DC 20503

October 14, 2022

Submitted via regulations.gov

Re: Proposed Revisions to the Office of the Intellectual Property Enforcement Coordinator's Freedom of Information Act Regulations, RIN 0355-AA00 / Docket IPEC-2022-0001

To Whom It May Concern:

The Reporters Committee for Freedom of the Press (the "Reporters Committee" or "RCFP") submits these comments on the proposed rule of the Office of the Intellectual Property Enforcement Coordinator ("IPEC") implementing the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA" or the "Act"), which were published on September 22, 2022, 87 Fed. Reg. 57,840 (Sept. 22, 2022) (to be codified at 5 C.F.R. pt. 10400) (hereinafter "Proposed Rule"[1]).

I. The Proposed Rule should not limit the public's ability to submit FOIA requests via email attachments.

The Proposed Rule unduly limits the ability of the public, including members of the press, to submit FOIA requests electronically via email attachments. Section 6 provides "[e]mail requests are strongly preferred," Proposed Rule § 6(e), but also that "IPEC reserves the right to not open attachments to emailed requests." *Id.* at § 6(h). The Proposed Rule contains a near-identical restriction pertaining to Privacy Act requests. *Id.* at § 21(b)(2). This is an unnecessary restriction on a common and convenient method of submitting FOIA requests and supporting materials.

Earlier this year, Attorney General Merrick Garland issued a memo advising agency heads to "continue their efforts to remove barriers to requesting and accessing government records" under FOIA. Memorandum from Attorney General Merrick Garland to Heads of Executive Departments and Agencies (Mar. 12, 2022) at 2, https://perma.cc/TRW3-EPXS (the "Garland Memo"). The Attorney General also advised agencies to "communicate electronically with FOIA requesters to the greatest extent possible, including by accepting FOIA requests and subsequent administrative correspondence electronically." *Id.* at 3.

[1] The Reporters Committee takes no position on any portion of the Proposed Rule not specifically addressed herein.

The Reporters Committee strongly supports IPEC's preference for accepting FOIA requests by email. Email is a well-established, ubiquitous, and effective method that creates a permanent, time-stamped, and accessible record for both the agency and the requester. Many reporters rely on email or other email-based FOIA request submission systems—such as iFOIA[2] and MuckRock[3]—to send FOIA requests to agencies.

However, limiting FOIA submissions to the email body significantly undercuts email's utility. Many requesters, including reporters and the Reporters Committee itself, submit FOIA requests via email attachments. This is a particularly common practice for submitting FOIA requests that include supporting documents, such as exhibits referenced in the request, third-party privacy waivers, and materials to support categorization as a representative of the news media for purpose of fee categorization, fee waivers, and/or expedited processing. Under the Proposed Rule, for example, freelance reporters may wish to send IPEC their "past publication record," Proposed Rule § 3, as email attachments. Similarly, reporters seeking expedited processing may wish to include "articles published on a given subject," *id.* at § 8(a)(2), as attachments. In short, attachments are central to the utility and flexibility of submitting FOIA requests via email, both generally and under the Proposed Rule itself. Leveraging email's potential "to the greatest extent possible," Garland Memo at 3, requires accepting FOIA requests submitted as email attachments.

The Proposed Rule indicates this limitation on email attachments is meant to "protect [IPEC's] computer systems." Proposed Rule §§ 6(h), 21(b)(2). But there are other ways to protect IPEC's computer systems, such as by scanning email attachments.

In light of the above, RCFP recommends that Sections 6(h) and 21(b)(2) of the Proposed Rule be removed.

II. The Proposed Rule should be revised to follow FOIA regarding the foreseeable harm standard, response deadlines, responsive record formats, and fee provisions.

Several sections of the Proposed Rules deviate impermissibly from the Act and current Justice Department FOIA guidelines. Since IPEC's implementing regulations must follow the statute itself, these sections should be revised.

A. Section 7 of the Proposed Rule should be revised to require denial letters to address foreseeable harm.

In the event of a FOIA denial, Section 7 instructs IPEC FOIA officers to include a "brief statement of the reasons for the denial, including any FOIA exemption applied by the agency in denying the request." Proposed Rule § 7(d). However, in light of the FOIA Improvement Act of 2016 and the Garland Memo, this is an incomplete enumeration of what FOIA denials must include because it does not require that such denials address the foreseeable harm standard.

[2] https://www.ifoia.org.
[3] https://www.muckrock.com.

As amended by the FOIA Improvement Act of 2016, P.L. No. 114-185, FOIA provides that an agency is permitted to withhold records or portions thereof only if there is an applicable exemption, 5 U.S.C. § 552(b), and if "the agency reasonably foresees that disclosure would harm an interest protected by an exemption" or disclosure is "prohibited by law[.]" *Id.* at § 552(a)(8)(A)(I). As the U.S. Court of Appeals for the D.C. Circuit has explained, "Congress added the distinct foreseeable harm requirement to foreclose the withholding of material unless the agency can 'articulate both the nature of the harm [from release] and the link between the specified harm and specific information contained in the material withheld.'" *Reps. Comm. for Freedom of the Press v. Fed. Bureau of Investigation*, 3 F.4th 350, 369 (D.C. Cir. 2021) (quoting H.R. REP. No. 391 at 9). "[T]he foreseeable harm requirement 'impose[s] an independent and meaningful burden on agencies.'" *Id.* (quoting *Ctr. for Investigative Reporting v. U.S. Customs & Border Prot.*, 436 F. Supp. 3d 90, 106 (D.D.C. 2019)).

Thus, as the Attorney General recently reiterated, "[i]nformation that might technically fall within an exemption should not be withheld from a FOIA requester unless the agency can identify a foreseeable harm or legal bar to disclosure." Garland Memo at 1.[4] Accordingly, the Garland Memo instructs agencies to "confirm in response letters to FOIA requesters that they have considered the foreseeable harm standard when reviewing records and applying FOIA exemptions" to "help ensure proper application of the foreseeable harm standard." *Id.*

The Proposed Rule would require FOIA officers to address potentially applicable exemptions in denial letters but not the foreseeable harm standard. Proposed Rule § 7(d).[5] This omission should be resolved so that the Proposed Rule corresponds to the statute and Justice Department guidelines.

B. <u>The Proposed Rule should be revised to follow statutory requirements regarding determination deadlines</u>.

1. The Proposed Rule's definition of a "working day" contradicts the plain text of FOIA.

Section 3 of the Proposed Rule defines a "working day" as "a regular Federal working day between the hours of 9:00 a.m. and 5:00 p.m. It does not include Saturdays, Sundays, or

[4] Although the Garland Memo uses the word "should," the plain text of the foreseeable harm provision makes clear that compliance is mandatory. 5 U.S.C. § 552(a)(8)(A).

[5] Notably, within the same section, the Proposed Rule addresses the foreseeable harm standard as it relates to FOIA officers' option to omit an estimate of the volume of withheld records from a denial letter "if the volume is otherwise indicated by deletions marked on records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption. Proposed Rule § 7(d)(3). Two other Proposed Rule sections address the foreseeable harm standard, namely sections addressing: (1) coordination with other agencies when "the standard referral procedure is not appropriate," *id.* at § 5(b)(3); and (2) marking documents with partial redactions. *Id.* at § 17.

legal Federal holidays." Proposed Rule § 3.[6] This definition is relevant to numerous other sections addressing FOIA request determination deadlines, *id.* at § 7(a)(2); assigning tracking numbers to FOIA requests, *id.* at § 7(b); extensions of FOIA request determination deadlines due to "unusual circumstances," *id.* at §9(c); FOIA appeal determination deadlines, *id.* at §10(b); and Privacy Act request determination deadlines, *id.* at §22(a). This provision deviates impermissibly from FOIA's statutory language in several ways.

FOIA does not calculate deadlines according to "regular Federal working day[s,]" much less limit calculations to "the hours of 9:00 a.m. and 5:00 p.m." Rather, FOIA establishes specific deadlines denominated in "days." *See, e.g.*, 5 U.S.C. § 552(a)(6)(A)(i) (agency shall "determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request"); *id.* at § 552(a)(6)(A)(ii) (in the event of an appeal, agency shall "make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal"). These calculations are not limited to "regular" working days, let alone to specific hours of the day.

The contrary language in the Proposed Rule risks confusing IPEC FOIA officers and requesters alike. There are "days" that must be counted for the purposes of FOIA's deadlines even if government employees are not working due to "irregular" circumstances such as inclement weather or a government shutdown. *See* Department of Justice Handbook for Agency Annual Freedom of Information Act Reports (Oct. 7, 2021) at 5, https://perma.cc/5Q3H-KBP7 ("[A]gencies must include ***all days*** other than Saturdays, Sundays, and legal public holidays" in such calculations, "even where an entire agency FOIA office is closed due to weather conditions, furloughed employees, or other circumstances." (emphasis added)). For example, as the COVID-19 pandemic forced agencies to shift employees to remote telework, the Justice Department reiterated that "[a]ll of the FOIA's statutory response timeframes continue to apply." U.S. Dep't of Justice, *Guidance for Agency FOIA Administration in Light of COVID-19 Impacts* (May 28, 2020), https://perma.cc/D5BX-R3T4; *see also* U.S. Dep't of Justice, *Calculating FOIA Response Times After the Government Shutdown* (Oct. 29, 2013), https://perma.cc/JC5U-MECP. The Proposed Rule's confusing language about a "regular Federal working day" and specific hours should be removed.

The Proposed Rule's definition of "working day" also impermissibly deviates from FOIA because it proposes an alternate method of calculating the date of receipt. Under Section 3, "Any requests received after 5:00 p.m. on any given working day will be considered received on the next working day." Proposed Rule § 3. This contradicts the plain text of FOIA, which calculates statutory deadlines based on the actual date of receipt, regardless of the time of day: "The 20-day period under [the FOIA request determination deadline clause] shall commence on ***the date*** on

[6] The Proposed Rule does not identify a time zone for the "hours" specified, which further compounds the potential for confusion.

which the request is first received by the appropriate component of the agency[.]" 5 U.S.C. § 552(a)(6)(A)(ii) (emphasis added). For that reason, too, the Proposed Rule should be modified.

In short, the Proposed Rule should be amended to ensure it comports with the timing requirements set forth in FOIA. Any divergence from the statutory definition would invite confusion with respect to IPEC's implementation of FOIA.

2. The Proposed Rule impermissibly suggests IPEC has discretion regarding compliance with FOIA's statutory response timelines.

Two provisions of the Proposed Rule incorrectly suggest IPEC has discretion regarding compliance with FOIA's mandatory timelines regarding issuing initial determinations.

First, Section 7 indicates IPEC "*will exercise all reasonable efforts* to make an initial determination acknowledging and granting, partially granting, or denying a request for records within 20 working days after IPEC receives a FOIA request." Proposed Rule § 7(a)(2) (emphasis added). This proposed language regarding "all reasonable efforts" contradicts the Act's plain language setting forth a mandatory determination deadline. Under FOIA:

> Each agency, upon any request for records . . . *shall* —
>
> > (i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of—
> >
> > > (I) such determination and the reasons therefor[.]

5 U.S.C. § 552(a)(6)(A) (emphasis added). As written, however, the Proposed Rule suggests IPEC need only "exercise all reasonable efforts" to meet this statutory deadline. This is not true, and the Proposed Rule should be amended accordingly.

Second, Section 9, which addresses extensions of deadlines due to "unusual circumstances," suggests IPEC has discretion over the length of such extensions. Proposed Rule § 9(a)–(c). The corresponding statutory provisions, however, restrict such extensions to a maximum of ten days (with narrow exceptions). *See* 5 U.S.C. § 552(a)(6)(B)(i) ("No such notice shall specify a date that would result in an extension for more than ten working days[.]"). The Proposed Rule should be revised to include this mandatory restriction on IPEC's ability to extend determination deadlines beyond twenty days.

C. The Proposed Rule impermissibly suggests IPEC has discretion with respect to providing records in the requested format.

Section 6 of the Proposed Rule suggests IPEC has discretion when it comes to accommodating requests for records in a particular format. Specifically, it states that if a requester specifies a "preferred form or format (including electronic formats) for the records they

seek," then "IPEC will try to accommodate formatting requests if the record is readily reproducible in that form or format." Proposed Rule § 6(c). This is inconsistent with the Act, which makes the provision of records in a requested format mandatory "if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B). The Proposed Rule should be amended to conform with FOIA.[7]

D. The Proposed Rule impermissibly suggests IPEC FOIA officers have discretion to determine whether it is "appropriate" to grant a given FOIA request.

Section 7 provides that an IPEC FOIA officer will "determine whether it is appropriate to grant the request." Proposed Rule § 7(a)(2). This confusing provision suggests a level of discretion agencies simply do not have. Under FOIA, agencies are obligated to provide all responsive records and portions thereof unless there is an applicable exemption and the foreseeable harm standard is satisfied. 5 U.S.C. § 552(a)(8)(A)(I). Whether it is "appropriate" to grant the request has no place in this analysis, and this language should be removed from the Proposed Rule.

E. The Proposed Rule inappropriately omits news media requesters from certain fee provisions.

Section 14 of the Proposed Rule imposes restrictions on fees under certain circumstances. Two provisions therein deviate impermissibly from FOIA by omitting news media requesters.

First, Section 14 states, "If IPEC fails to comply with the FOIA's time limits in which to respond to a request, it may not charge search fees, or, in the instances of requests from requesters described in § 10400.13(b)(2), may not charge duplication fees," with narrow exceptions. Proposed Rule § 14(b). The corresponding statutory provisions apply the restriction regarding duplication fees to requests from news media and from an "educational or noncommercial scientific institution, whose purpose is scholarly or scientific research." *See* 5 U.S.C. § 552(a)(4)(A)(viii)(I) (citing 5 U.S.C. § 552(a)(4)(A)(ii)(II)). However, the Proposed Rule limits this restriction to "requesters described in § 10400.13(b)(2)," i.e., "Educational and non-commercial scientific institution requests." Proposed Rule § 13(b)(2). Section 13 addresses news media requesters in a separate provision. *See* Proposed Rule § 13(b)(3). Accordingly, the Proposed Rule should be amended to reflect the requirements of FOIA and include news media requesters in Section 14(b).

Similarly, Section 14(d) of the Proposed Rule also omits representatives of the news media when addressing restrictions on fees that may be assessed in cases where "IPEC determines that unusual circumstances as defined by the FOIA apply, and more than 5,000 pages are necessary to respond to the request." Proposed Rule § 14(d). This, too, contradicts the corresponding provision of FOIA, *see* 5 U.S.C. §§ 552(a)(4)(A)(viii)(II), and should be amended.

[7] Potential replacement language can be found in the Proposed Rule's section on general fee provisions: "IPEC will honor a requester's preference for receiving a record in a particular format if IPEC can readily reproduce it in the form or format requested." Proposed Rule § 11(c).

F. Miscellaneous drafting errors.

1. For consistency, "duplication" should be used throughout Section 13, rather than "reproduction."

In Section 13, which addresses fees to be charged to various categories of requesters, the term "reproduction" appears several times. Proposed Rule § 13(b)(3). This is the only portion of the Proposed Rule which uses "reproduction," which the Proposed Rule does not define. The term "duplication," however, is defined. *See* Proposed Rule § 3 ("Duplicate and duplication mean the process of making a copy of a document. Such copies may take the form of paper, microform, audio-visual materials, or machine-readable documentation."). Similarly, the term "duplication" appears throughout FOIA, including in the Act's corresponding fees section. *See* 5 U.S.C. § 552(4)(A)(ii). For consistency with FOIA as well as the rest of the Proposed Rule, Section 13 should be amended to substitute the word "duplication" wherever the word "reproduction" currently appears.

2. Section 22 is seemingly missing words regarding IPEC's response deadline under the Privacy Act.

Section 22 reads, in part, "The FOIA Officer will respond to you in writing within 20 after we receive your request and/or within 10 working days after we receive your request for an amendment, if it meets the requirements of this subpart." Proposed Rule § 22. It seems one or more words are missing after the word "20" in this provision.

III. Conclusion

The Reporters Committee urges IPEC to incorporate the aforementioned comments to the Proposed Rule. If you have questions concerning these comments, please contact Adam A. Marshall at amarshall@rcfp.org.

Sincerely,

The Reporters Committee for Freedom of
the Press