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January 29, 2019

**VIA www.regulations.gov and U.S. Mail**

Executive Secretariat-FOIA Regulations
Department of the Interior
1849 C Street NW
Washington, DC 20240
www.regulations.gov

**Re: Comments on Docket No. DOI-2018-0017**

Dear Executive Secretariat:

Thank you for the opportunity to comment on the Department of Interior's ("DOI" or "the Department") Proposed Freedom of Information Act Regulations, 83 Fed. Reg. 67,175 (Dec. 28, 2018) (to be codified at 43 C.F.R. pt. 2) [hereinafter "Proposed Rule"]. The Southern Environmental Law Center, The Wilderness Society, Public Employees for Environmental Responsibility, Center for Biological Diversity, Defenders of Wildlife, Earthjustice, Environmental Defense Fund, National Wildlife Federation, Animal Welfare Institute, the Center for Urban and Environmental Reform, and the Sierra Club submit these comments on their own behalf and on behalf of the undersigned 135 groups (hereinafter "Commenters").

The Freedom of Information Act ("FOIA") is "a means for citizens to know what their Government is up to.' This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy." *National Archives & Records Administration v. Favish*, 541 U.S. 157, 172-73 (2004) (internal citation omitted). FOIA's "basic objective" is "the fuller and faster release of information." *Oglesby v. Department of Army*, 920 F.2d 57, 64 n.8 (D.C. Cir. 1990). With strict time limits, FOIA is a "tough statute," but Congress understood what it was requiring of federal agencies when it made its "legislative choice," and agencies are not at liberty to repeal any of its provisions by construction or application. *See Fiduccia v. Department of Justice*, 185 F.3d 1035, 1041 (9th Cir. 1999).

On December 28, 2018, DOI proposed significant, expansive, and novel revisions to its FOIA regulations. 83 Fed. Reg. 67,175 (Dec. 28, 2018). As discussed throughout these

comments, the Proposed Rule, if adopted, would severely undermine government transparency, violate FOIA, and limit important public rights guaranteed by statute. The draft rule is also inseparable from broader changes to Departmental policy that are inconsistent with both the spirit and letter of FOIA. Further, and especially galling given the serious impacts of this proposal to the public's ability to understand and participate in DOI decisionmaking, the Department's public process for the rulemaking has been woefully inadequate to facilitate meaningful public participation and engagement.

## I. The Department Must Ensure a Transparent Rulemaking Process and Meaningful Public Engagement.

As an initial matter, a 30-day public comment period on a Proposed Rule of this scope and complexity is inadequate. Under similar circumstances, DOI has generally provided at least its "usual 60 days" for comments, and regularly grants requests for extensions of time.[1] Furthermore, a 30-day public comment period initiated in between the Christmas and New Year holidays (when many stakeholders are not working or tracking the Federal Register) and during a partial government shutdown (when the public assumes that furloughed DOI staff are not initiating significant rulemakings) is not adequate to ensure meaningful public participation.

Publication of the Proposed Rule and initiation of the comment period during the partial government shutdown that began at midnight on December 21, 2018 was improper. Office of the Federal Register procedures designed to ensure compliance with the Anti-deficiencies Act, 31 U.S.C. § 1341 *et seq*., during a government shutdown provide that only "documents directly related to the performance of governmental functions necessary to address imminent threats to the safety of human life or protection of property" may be published.[2] Under no circumstances can the Proposed Rule be considered directly related to the performance of such necessary governmental functions. Indeed, the Department has acknowledged as much by refusing to accept new FOIA requests during all but the last few days of the shutdown or process its

[1] *See, e.g., Application and Permit Information Requirements; Permit Eligibility; Definitions of Ownership and Control; the Applicant/Violator System; Alternative Enforcement Actions*, 63 Fed. Reg. 70,580 (Mar. 21, 1998) (providing the "usual 60 days"). Indeed, in its 2016 revision of the FOIA regulations, the Department provided 60 days for comment. *Freedom of Information Act Regulations*, 81 Fed. Reg. 11,124 (Mar. 3 2016); *see also Resource Management Planning*, 81 Fed. Reg. 89,580-01 (Dec. 12, 2016) (90 day formal comment period); *Waste Prevention, Production Subject to Royalties, and Resource Conservation*, 81 Fed. Reg. 19,110 (Apr. 4, 2016) (60 days); *Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements*, 83 Fed. Reg. 49,184 (Sept. 28, 2018) (60 days).

[2] Office of the Federal Register, Publication Procedures for Federal Register Documents During a Funding Hiatus, 83 Fed. Reg. 63,540 (Dec. 10, 2018).

significant backlog of pending requests. WildEarth Guardians submitted a FOIA request to the Department for records related to the draft rule on December 27, 2018 (shortly after the pre-publication version of the draft rule became available) and received an automatic response stating that "no FOIA requests can be accepted or processed" during the shutdown.[3] Similarly, DOI has moved to stay FOIA litigation pending in federal courts.[4] Thus, the comment period was improperly initiated and should be re-noticed and extended for a minimum of 60 days following the reopening of the government.

More broadly, the fact that the government has been partially shutdown during almost the entirety of the public comment period has significantly frustrated public involvement for a variety of reasons including:

- **Agency staff being unavailable to answer questions, provide information, and assist the public during the comment period.** The Federal Register notice directs the public to contact Ms. Cindy Cafaro with the Office of Executive Secretariat and Regulatory Affairs for further information. However, Ms. Cafaro and other DOI staff who may be able to assist the public with questions about the draft rule or the public comment process have been furloughed and unavailable.[5]

- **Public confusion about the impact of the shutdown.** It is likely that many members of the public would assume that, due to the shutdown, most government functions are unavailable, including the initiation and implementation of a public comment period. It is likely, therefore, that many members of the public who would otherwise be interested in this process are unaware of the draft rule and the January 29, 2019 deadline.

- **Government malfunction in receiving and reviewing comments.** Given the significant number of federal workers that have been furloughed, we are concerned that comments received via mail and stockpiled during the shutdown may be misplaced. Moreover, the comment portal on Regulations.gov has suffered at least one outage during the public comment period[6] meaning that any person visiting the portal during an outage could assume that rulemaking was on hold.

- **Unavailability of other federal agencies to review and comment.** It is unclear from the Proposed Rule if the Department has consulted with other federal agencies with special expertise or interest in its rulemaking. For instance, the National Archives and Records

[3] *See* FOIA request and email chain, attached as Exhibit 1.
[4] *See* Motions for Stay, attached as Exhibit 2.
[5] *See* Out-of-office response from Ms. Cafaro, attached as Exhibit 3.
[6] *See, e.g.*, Screenshot about service being temporarily unavailable on January 17th, attached as Exhibit 4.

Administration ("NARA") is charged with preserving and documenting government and historical records under the Federal Records Act and in close conjunction with FOIA requirements. NARA staff have also been furloughed and are unavailable to review and comment on the Proposed Rule. In addition, the draft changes to §§ 2.12 and 2.13 would "streamline" the Department's referrals and consultations with other federal agencies, and those agencies must therefore be given an opportunity to comment on whether the Department's procedures are compatible with their own procedures and obligations.

For these reasons, on January 14, 2019, several of the undersigned groups submitted a request to extend the public comment period by 120 days, beginning when the shutdown is resolved.[7] The Department has not responded to this request, but on January 25, 2019, one business day before the initial deadline, issued an extension of a single day due to a "technical glitch" with the online portal.[8]

## II. The Proposed Rule is the Latest Step in Illegal FOIA Rollbacks at DOI

The Proposed Rule is merely the latest step in a broader effort to enforce a culture of secrecy at DOI. Many of the changes proposed in this rulemaking would add regulatory mortar to previously developed policies that are already undermining FOIA's transparency mandate. Among other things, those policies facilitate political interference with the Department's FOIA program, increase bottlenecks and delays, and willfully obstruct Congressional direction to make transparency the default answer to FOIA requests. The Department cannot proceed with the proposed changes because they are inseparable from underlying policies that are arbitrary, capricious, and contrary to law. The Proposed Rule's consolidation of FOIA authority in a political appointee is unlawful.

### A. Consolidation of Authority to a Political Appointee

Several sections of the Proposed Rule would lithify the Department's unprecedented, dangerous, and unlawful decision to consolidate authority over the FOIA program and particular FOIA requests in a political appointee. *See*, *e.g.*, §§ 2.2, 2.20, 2.23, and 2.24 (proposed).[9] In November 2018, the Department announced that FOIA oversight would be taken away from the Chief Information Officer—an apolitical, professional position—and shifted to the Solicitor. Because the President has not appointed a Solicitor for Senate

[7] *See* Request and automatic response, attached as Exhibit 5.
[8] Notice of the extension was not published in the Federal Register until January 28, 2019. 84 Fed. Reg. 409-10 (Jan. 28, 2019).
[9] These changes are discussed more below in Section IV.

confirmation, FOIA responsibility is currently vested in Principal Deputy Solicitor Daniel Jorjani, an unconfirmed political appointee who, incidentally, purports to authorize this rulemaking.

This change is more than a mere formality. The Department has created new protocols, positions, and structures to ensure that the Solicitor can effectuate control over any and all aspects of the FOIA program. First, the Department has instituted a new procedure by which all politically sensitive FOIA requests will receive additional scrutiny, both from political appointees and the Solicitor's office.[10] Under this new procedure, all FOIA responses must be searched for the names of appointees.[11] If any such names or email addresses are identified, the "full set of responsive records" must be provided to the appointee, and the Solicitor's office must be notified.[12] The appointee and the Solicitor's office then have at least 72 hours to review the records.[13] Second, the Department has added a new position to increase the capacity of the Solicitor's office to oversee this incredibly searching political review.[14] Pursuant to Secretarial Order 3371, the Deputy Chief FOIA Officer ("DCFO") will "assume control over any aspect of any FOIA request in the Department," and specifically any request that implicates "Department-level interests."[15] And, third, the Department has created the FOIA Assistance Coordination Team ("FACT"), which is the structure by which the Solicitor's office can exercise control over requests and responses.[16]

These changes would not, as the Department implausibly suggests, take advantage of the Solicitor's "expertise" in FOIA.[17] To the contrary, they would ignore existing bureau-level expertise and, over time, allow that expertise to evaporate, as experience within the bureaus is lost. Career staff within the bureaus have specialized experience with FOIA that spans presidents and political regimes. Bureau-level staff are also on the front lines of issues that impact wildlife and public lands and, thus, have more intimate knowledge about agency

[10] May 24, 2018 Memo from Cindy Cafaro, Departmental FOIA Officer, attached as Exhibit 6 (hereinafter "Awareness Process Memorandum").
[11] *Id.* (requiring FOIA staff to search "for the names and email addresses of current Department employees who are Presidentially Appointed, Senate Confirmed (PAS), Non-Career Senior Executive (NCSE), and/or Schedule C employees").
[12] *Id.*
[13] *Id.*
[14] Secretarial Order 3371 at § 5.
[15] *Id.* §§ 2, 5. This authority excludes only requests submitted to the Office of the Inspector General.
[16] *Id.* § 5.
[17] *See id*.

records related to the issues. That institutional memory would not be replaced effectively in the Solicitor's office, where there is frequent political turnover.[18]

If FOIA officers are required to report to the Solicitor's office rather than in-bureau experts, then withholdings will be made with a far shallower understanding of the relevant facts. This will result in flawed and unsupported withholdings, and it invites unchecked political interference. Under the Solicitor, the DCFO's management enables political operatives to prevent important scientific information from reaching the American people.

This politically driven policy cannot be squared with FOIA. FOIA forbids the withholding of information merely because it is embarrassing or shows that the agency acted in bad faith. *E.g.*, *National Day Laborer Organizing Network v. Immigrations and Customs Enforcement Agency*, 811 F. Supp. 2d 713, 749 (S.D.N.Y. 2011) (embarrassment "not a relevant consideration under FOIA"); *Pamlico-Tar River Found. v. U.S. Army Corps of Engineers*, 329 F. Supp. 2d 600, 606 (E.D.N.C. 2004) (deliberative process privilege may not be invoked to shield documents showing bad faith). By giving unchecked authority over FOIA to the Solicitor's office, however, the Department attempts to throttle the flow of information that might reveal unpopular or unlawful proposals affecting our public lands and wildlife.

In fact, the Department has already been identifying politically sensitive decisions and improperly withholding public records to those decisions. In a confidential U.S. Fish and Wildlife ("USFWS") memo dated September 6, 2018, the Department listed several specific decisions for which "more limited" administrative records were being prepared and instructed FOIA staff to "process FOIA requests in a manner most likely to preserve the consistency of information released under FOIA" with the information that would be included in those administrative records. The information included in these "more limited" administrative records, however, is itself legally inadequate based on an overbroad and unlawful misapplication of the deliberative process privilege. For example, the National Park Service's record for one of the listed decisions—authorization of the Atlantic Coast Pipeline—omitted large quantities of nonprivileged information, such as instructions from superiors to subordinates and communications with non-governmental parties. If FOIA responses are expected to be "consistent" with this Departmental practice, they too will be incomplete and unlawful.

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[18] By contrast, in December 2017 the Department acknowledged the value of developing in-bureau expertise, instructing FOIA staff to coordinate with subject matter experts under most circumstances, rather than the Solicitor's office. Letter from Cindy Cafaro, Departmental FOIA Officer, DOI, to Bureau/Office Freedom of Information Act (FOIA) Officers, at 2-3 (Dec. 29, 2017) (hereafter, "Foreseeable Harm" Memorandum).

Not only does the policy encourage political interference with particular requests, but it also empowers the Solicitor's office to micromanage the quality and content of FOIA decisions at a programmatic level. Specifically, the policy allows the Solicitor to oversee FOIA work planning, progress reviews, and rate the performance of FOIA staff based on undisclosed and unguided metrics.[19] The Department's related policies, such as the application of the "foreseeable harm" standard discussed below, strongly suggest that these performance goals and metrics will be used to encourage secrecy, unlawfully frustrating FOIA's disclosure mandate.

### B. DOI's Restrictive Interpretation of the Foreseeable Harm Standard

The Proposed Rule's politicization of FOIA is part and parcel of a broader Departmental policy to withhold or delay documents whenever possible. Most visibly, the Department has issued guidance documents advancing an extremely restrictive and unlawful interpretation of the "foreseeable harm" standard.[20] While FOIA, and particularly the FOIA Improvement Act of 2016, directs agencies to disclose of agency records whenever there is room for agency discretion,[21] DOI has implemented a policy blatantly disregarding this Congressional mandate.

FOIA has a "strong presumption in favor of disclosure," *U.S. Department of State v. Ray*, 502 U.S. 164, 173 (1991) and requires agencies to make properly requested records "promptly available to any person," 5 U.S.C. § 552(a)(3)(A), unless the records fall within one of nine narrowly construed exemptions, *id.* § 552(b); *Rosenberg v. U.S. Department of Defense*, 2018 WL 4637363 *1 (D.D.C. Sep. 27, 2018). Courts have long recognized that these limited exemptions "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *National Security Counselors v. Central Intelligence Agency*, 320 F. Supp. 3d 200, 208-09 (D.D.C. 2018) (quoting *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976)). Moreover, even when an exception applies, the agency is obligated to disclose "any reasonably segregable portion of the record" after removing the exempt material, and must note the "amount of information deleted, and the exemption under which the deletion is made." 5 U.S.C. § 552(b); *Bartko v. U.S. Department of Justice*, 898 F.3d 51, 62 (D.C. Cir. 2018).

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[19] Secretarial Order 3371 at § 5 ("The DCFO shall … approv[e] the annual performance plan, provid[e] input into the progress review and rating narrative, and approv[e] the final rating.").
[20] Memorandum from Cindy Cafaro to Bureau/Office FOIA Officers re Foreseeable Harm (Dec. 29, 2017) (hereinafter "Foreseeable Harm Memorandum"); Confidential Memorandum entitled "Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on Administrative Records (Sep. 6, 2018) (hereinafter "September 6, 2018 Memorandum").
[21] *See* P.L. 114-185 (2016).

Although some FOIA exemptions flatly prohibit disclosure of records, others have been interpreted to leave discretion to the agency. Of particular importance in this respect is Exemption 5, which incorporates, among other litigation privileges, the deliberative process privilege.[22] Early cases applying this exemption allowed its use as a cloak to cover the entire deliberative process, regardless of the benefits or harms of disclosing any particular deliberative record. S*ee, e.g., N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 n.16 (1975). This changed, however, in 2016 when Congress passed the FOIA Improvement Act of 2016. P.L. 114-185 (2016).[23] In taking this step Congress expressly codified a 2009 policy by the U.S. Department of Justice ("DOJ") in which it announced that it would no longer defend an agency's discretionary withholding unless the "agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions"[24]—a major departure from prior DOJ policy to defend discretionary withholdings "unless they lack a sound legal basis."[25] This new standard changed the substantive requirements for discretionary withholdings and imposed an evidentiary burden to support all withholdings. *Ecological Rights Found. v. FEMA*, No. 16-5254, 2017; WL 5972702, *6 (N.D. Cal. Nov. 30, 2017); *Rosenberg v. Department of Defense*, 2018 WL 4637363 at *7-8. Accordingly, agencies can no longer withhold all material that may, "as a technical matter, … fall within the scope of a FOIA exemption."[26] Instead, agencies must undertake a record-by-record review and release all records that will not cause foreseeable harm. They must also be able to justify the decision for each record.

Under current law, disclosure can reasonably be expected to cause cognizable harm to the interests protected by the deliberative process privilege only if it would discourage frank and open communication between a subordinate and a superior; prematurely disclose proposed policies before they are actually adopted; or confuse the public by disclosing reasons and rationales that were not in fact the grounds for the decision. *See*, *e.g.*, *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). By contrast, an agency may not withhold (1) records it fears may lead to embarrassment,[27] (2) records documenting the

[22] While we focus in these comments on Exemption 5, we are similarly concerned that the foreseeable harm analysis for other exemptions will be overbroad as well.
[23] *See also* H.R. Rep. No. 114-391, at 9; S. Rep. No. 114-4, at 3, 7.
[24] Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 51879 (Oct. 8, 2009) (hereinafter "Holder Memorandum").
[25] *Id.*
[26] Holder Memorandum at 1.
[27] *E.g., Nat'l Day Laborer Organizing Network v. Immigrations and Customs Enforcement Agency*, 811 F. Supp. 2d 713, 749 (S.D.N.Y. 2011) (embarrassment "not a relevant consideration under FOIA"); Presidential

process or reasoning that led to the agency's final decision,[28] even if they also demonstrate legal error or process failures,[29] (3) records that involve only peripheral or uncontroversial decisions,[30] or (4) records showing that the agency considered impermissible factors or acted out of favoritism or animus.[31]

DOI's new policy is inconsistent with these legal obligations. As expressed in a confidential memorandum, it is now DOI policy to "take great care" to withhold records that would have been released in the past.[32] To accomplish this goal, FOIA officers are instructed to "process FOIA requests in a manner most likely to preserve the consistency of information released under FOIA with information that could subsequently be included in an AR [administrative record] pursuant to Administrative Procedure Act (APA) litigation."[33] At the same time, the Department's policy with respect to administrative records is to exclude *all* deliberative documents, categorically, without a particularized assessment of whether they might cause foreseeable harm to an interest protected by the deliberative process privilege.[34] By

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Memorandum at 1 ("Government should not keep information confidential merely because public officials might be embarrassed by disclosure ….").

[28] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975) ("The probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, *if adopted*, will become public is slight.").

[29] *See* Presidential Memorandum at 1 ("Government should not keep information confidential merely because … errors and failures might be revealed ….").

[30] Such records categorically cannot be said to harm an interest protected by Exemption 5. They are not significant enough to cause embarrassment and inhibit frank discussions; they cannot prematurely expose policies because they do not go to the heart of the issues to be resolved by the policy decision; nor, for the same reasons, can they cause confusion about why a policy was or was not adopted. Yet these sorts of documents may nonetheless have substantial value to requesters—for example, by filling in the gaps in an agency's decisionmaking timeline.

[31] An agency cannot invoke the deliberative process privilege to protect records showing that the agency acted in bad faith either in making the decision or in cherry picking the record to support a decision after the fact. *See Pamlico-Tar River Found. v. U.S. Army Corps of Eng'rs*, 329 F. Supp. 2d 600, 606 (E.D.N.C. 2004); *Krichbaum v. U.S. Forest Serv.*, 973 F. Supp. 585 (W.D. Va. 1997).

[32] Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on Administrative Records (Sep. 6, 2018) (hereinafter September 6, 2018 Memorandum).

[33] *Id*.

[34] The executive branch currently takes the position that "deliberative documents are *not* properly considered part of the administrative record" and need not even be listed in a privilege log. Memorandum from Jeffery H. Wood, Acting Assistant Attorney General, to Selected Agency Counsel, re: Administrative Record Compilation in light of *in re Thomas E. Price*, Ninth Cir. No. 17-71121 (Oct. 20, 2017) (hereinafter Wood Memorandum). According to the DOJ, "inquiry into the agency's internal deliberations," as a categorical matter, "would chill free and frank agency deliberation." *Id.*

instructing FOIA staff to conform their withholdings to this restrictive and categorical interpretation, the Department betrays its intent to ignore Congress' instructions and to refuse to disclose deliberative records under most or all circumstances.[35] The policy is unlawful.

Furthermore, while paying lip service to the requirement that each document be assessed on its own merits, the Department has provided a written roadmap to finding foreseeable harm in nearly every circumstance. Whenever FOIA officers believe that disclosure would be harmless, the Foreseeable Harm Memorandum requires them to consult again with other staff to find facts supporting the possibility of harm.[36] In a confidential companion memorandum, the Department also smuggles in "harms" that are not cognizable under FOIA—such as avoiding discovery and "protecting decisions" in APA litigation.[37] Of course, APA discovery is available only in very limited circumstances, such as when there is a showing of agency bad faith, and agency decisions are vulnerable only when they are arbitrary, capricious, or contrary to law. *E.g. Esch v. Yeutter*, 876 F.2d 976, 991–92 (D.C. Cir. 1989) (enumerating exceptions when extra-record evidence may be appropriate); *Public Power Council v. Johnson*, 674 F.2d 791, 793–94 (9th Cir. 1982) (recognizing "there may be circumstances to justify expanding the record or permitting discovery. . . . [such as] when necessary to explain agency action."). The Department is therefore implicitly acknowledging that it intends to conceal records that show its own bad faith and unlawful conduct, which FOIA does not permit.

## III. The Department's Revisions to its FOIA Regulations are not Needed or Justified.

In the Federal Register notice announcing its proposed rulemaking, DOI claims that the proposed revisions to its FOIA regulations are necessary to address "the unprecedented surge in FOIA requests and litigation" and "to best serve our customers and comply with the FOIA as efficiently, equitably, and completely as possible." 83 Fed. Reg. at 67,176. The Department notes that incoming FOIA requests have increased 30 percent from fiscal year 2016 to 2018, and cases in litigation have increased from 30 to 129 during that same time period. *Id.* In actuality, the proposed revisions are not justified by these statistics and will not lead to a reduction in delays or litigation. Nor will they lead to compliance with the FOIA or good public service, as described in Section IV, below. Ultimately, DOI makes no serious attempt to justify this

[35] The Foreseeable Harm Memorandum acknowledges, in theory, that some circumstances may permit disclosure, but it sets the bar unreasonably high: "for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute."

[36] Foreseeable Harm Memorandum.

[37] September 6, 2018 Memorandum at 4.

rulemaking. The Proposed Rule would affect major changes to the Department's FOIA procedures and alter more than thirty sections of the Code of Federal Regulations, yet DOI's explanation of "Why We Are Publishing This Rule And What It Does" garners roughly two-thirds of one page in the Federal Register.[38]

And indeed, this rulemaking simply cannot be seen as a serious attempt to address delays and backlogs. The proposal attempts to weaken expectations for timely compliance (time "limits" become time "frames"). It also explicitly anticipates that compliance with statutory time limits will require judicial oversight, adding to the definition of multi-track processing that "litigation … may affect the sequence and/or timing of processing." Even proposed changes that on the surface appear aimed at quicker processing (e.g., preapproving withholdings, declining to forward requests to the appropriate component, rejection of "burdensome" requests, etc.) will ultimately increase delays. The unlawful provisions in the Proposed Rule invite or require unlawful action, and they will necessitate time- and resource-consuming litigation in order to correct.

**A. <u>Any Increase in FOIA Requests and Litigation is the Result of the Department's Actions</u>.**

The increased volume of requests, the challenges faced by DOI in responding to them, and the increased volume of litigation noted in the preamble to the Proposed Rule are all attributable to DOI's own actions and policies.

Tracking by the Center for Western Priorities highlights this administration's lack of responsiveness. As of December 3, 2018, there are 1,720 "open" DOI FOIA requests for calendar years 2017-2018. DOI has filled just 503 FOIA requests for that same timeframe. In other words, the DOI FOIA office has filled less than one-quarter of the FOIA requests filed during this administration. Further, the median time it takes to fill the requests that have been completed has increased from 10-15 days at the end of the Obama Administration to 53 days in 2018, although the actual number will ultimately be far greater, since the 785 open requests from 2017 have been waiting for more than 500 days, and the 935 open requests from 2018 have been waiting for more than 235 days, and those numbers continue to rise.

[38] 83 Fed. Reg. at 67,175-76.

***i) DOI's lack of transparency and improper implementation of FOIA have led to increased requests and litigation***

The current administration at DOI has made it more difficult than any other administration to obtain documents that should be publicly available. As noted above, guidance and internal memoranda have made the review process more complicated and political. And other steps have similarly decreased transparency such that:

- Requesters have to submit FOIA requests to obtain documents that should be made publicly available in the first place;
- The Department classifies a high volume of requests as complex or exceptional/voluminous, regardless of how simple the request may be;
- The Department aggressively applies exceptions to production, such as those subject to the deliberative process privilege for documents that would not be available to parties in litigation with an agency pursuant to 5 U.S.C. § 552(b)(5);
- The Department relies upon and unlawfully expands inapplicable provisions of the existing FOIA regulations to unilaterally close FOIA requests that the FOIA officer subjectively deems voluminous or burdensome, even though the scope of the requested documents was clear;
- Requesters are forced to follow up repeatedly to receive any type of response; and
- Requesters are ultimately forced to appeal and litigate before the Department will agree to any type of meaningful production.

For example:

- The Wilderness Society requested a copy of the single report that the Bureau of Land Management ("BLM") was directed to submit to the Assistant Secretary for Land and Minerals within 21 days of issuance of Secretarial Order 3349 explaining whether BLM's Waste Prevention, Production Subject to Royalties, and Resource Conservation rule was consistent with a policy set forth in Section 1 of Executive Order No. 13,783 (Mar. 28, 2017). The FOIA request was received on April 25, 2017. Despite the fact that this request asked for a single document, it was inexplicably classified as "exceptional/voluminous." Further, despite numerous follow-up requests, The Wilderness Society has yet to receive a response after 20 months. This document, a report required under a secretarial order reporting on another agency policy in relation to a flagship policy of this administration should have been made public as part of this initiative; there was no reason to require FOIA requests for production in the first place, let alone to classify this as exceptional voluminous or to continue to delay production.[39]

[39] *See* FOIA request and follow-up, attached as Exhibit 7.

- The Southern Environmental Law Center submitted a request for records related to the Atlantic Coast Pipeline from the National Park Service on December 14, 2017. As noted above, approval of the Pipeline was a decision that the Department identified as needing a "more limited" administrative record, and FOIA staff were instructed to withhold records in order to "protect" the decision and avoid discovery.[40] Although the Pipeline is an extraordinarily time-sensitive project of significant public concern, the Department has yet to produce even a single responsive record, now 13 months later.[41]

- Groups inquiring into the status of their overdue requests have also been informed that responsive documents have been identified but cannot be produced because they are being reviewed by high-level Department officials and the Solicitor's Office prior to release. This has resulted in significant delays of production, as well. These delays have likely been exacerbated by the Department's "Awareness Process" for FOIA productions, issued in May 2018, which, as discussed above, requires that any FOIA productions that reference the names of Presidential Appointed, Non-Career Senior Executive and Schedule C employees provide for an additional review by the affected employees and the Solicitor's Office.[42]

- Western Watersheds Project requested a BLM presentation on recommendations to Secretary of the Interior Ryan Zinke concerning "proposed changes to BLM coordination with local and state governments, as well as proposed changes to BLM implementation of several laws, including NEPA, the Endangered Species Act ("ESA"), the Federal Land Policy and Management Act, FOIA, and Equal Access to Justice Act. The request was submitted on September 27, 2017, and resubmitted October 11, 2017. Despite numerous follow-up requests, Western Watersheds Project received no response and ultimately filed a lawsuit on November 14, 2018.[43]

- The Center for Biological Diversity submitted a request for documents generated in connection with the Protection and Enhancement Plan, ESA Section 7 consultation, ESA Section 9 take, and coal mining activities related to the 1996 biological opinion for the Big Sandy Crayfish and Guyandotte River Crayfish on September 19, 2017. The Center was ultimately forced to bring legal action to force document production. [44]

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[40] September 6, 2018 Memorandum.
[41] *See* December 14, 2017 FOIA request to NPS and email follow-up, attached as Exhibit 8.
[42] *See* May 24, 2018 Memo from Cindy Cafaro, Departmental FOIA Officer, attached as Exhibit 6.
[43] *See* FOIA request and follow-up, attached as Exhibit 9.
[44] *See also,* examples at Exhibit 10.

- The Center submitted FOIA requests for the calendars and travel schedules of Deputy Secretary David Bernhardt and his chief of staff. A request submitted September 5, 2017 was appealed on April 10, 2018 based on the improper use of Exemption 5 (for deliberative process). Similarly, a request submitted March 15, 2018 was appealed on September 5, 2018 based on the improper use of Exemption 5 (for deliberative process).

- A number of environmental groups submitted repeated requests related to the Department's consideration of revoking national monuments; five requests in all were submitted in the timeframe surrounding the issuance of Executive Order 13792 directing the secretarial review of national monuments. Despite the obvious public interest in this issue, such as the 2.5 million comments submitted during the review process, the Department refused to provide any documents or respond to the requests until a lawsuit was filed, six months later.

- Sierra Club has submitted repeated requests for communications between specifically-named employees of the Office of the Secretary and any entities outside the federal government, including companies and lobbyists associated with the extraction of coal, oil and gas, and other resources from public lands. Despite the public's interest in these communications, and despite acknowledging that the Department understood the scope of the request, the Department unilaterally "closed" a request under an inapplicable fee provision, 43 U.S.C. § 2.51(c), when Sierra Club declined to narrow the request.[45]

- In reviewing BLM's proposed amendment to its Greater sage-grouse conservation plan for Oregon, the Oregon Natural Desert Association ("ONDA") commented on Aug. 2, 2018 that the agency's draft environmental impact statement lacked important, yet readily available, information on livestock grazing with regard to animal unit months ("AUMs"). ONDA explained that it had asked BLM for this missing information via FOIA months earlier, by letter dated May 10, 2018. BLM responded on June 8, 2018 that it would not meet the statutory response deadline and did not anticipate providing ONDA with this important information until August 3, 2018—the day after the public comment period was set to close for the sage-grouse plan amendment. ONDA asked why a request for basic grazing authorizations and use statements for a couple dozen allotments qualified as a "complex" request, and asked BLM if there was any way to get the needed information in a time frame that would allow ONDA to review and include that information in its August comment letter on the draft EIS. Another month later, on July 6, 2018, BLM denied that request.

[45] *See* Sierra Club FOIA request and response, attached as Exhibit 11.

The problems have been exacerbated by inadequate staffing. As of June 2018, the Department's Office of the Secretary ("OS") had six FOIA staff processors. Of these six, three of the OS FOIA staff processors worked exclusively on requests that are the subject of litigation, referred to as the "litigation track."[46] By our estimation, OS FOIA is facing about 1200 pending requests and about 20 pending lawsuits that encompass less than 100 of those requests. Thus, a considerable proportion of OS FOIA's resources are allocated to a small proportion of the pending requests and remaining requests are less likely to get processed unless and until they too are litigated.

Consequently, the problems that the Department cites as justification for changes contained in the Proposed Rule are problems of its own making. By refusing to make available documents that should be public, the Department has left organizations like the undersigned who seek to inform the public about the activities of the federal government with no choice but to submit FOIA requests for those documents. By classifying so many requests as complex or exceptional/voluminous, then being non-responsive by applying exemptions to production in an overly expansive manner or not responding at all, the Department has compelled requesters to repeatedly submit follow-up letters, then file appeals and/or litigate. By failing to provide sufficient staffing, the Department has compounded these challenges thus further undermining the validity of the stated justifications for the Proposed Rule.

The Department can and should address some of the current responsiveness issues by first disclosing information about its decisions and initiatives without waiting on requests, and then by providing sufficient resources to its FOIA response efforts in terms of both staffing and technology. This would be a more constructive solution than finding more ways to deprive the public of access to information about the Department's activities.

**B. <u>Recent Policy Changes Serve to Increase FOIA Delays</u>**

As noted above, the Proposed Rule must be understood in the larger context of other policy changes being implemented at DOI. Several of these also serve to increase FOIA delays. For example, the proposed changes "centralizing" FOIA operations with political oversight will complicate the FOIA system and add to backlogs. The Department's new Awareness Process would require each and every FOIA response to be searched for the names and email addresses of PAS, NCSE, and Schedule C employees—at least dozens and perhaps upwards of 100 individuals—and give them at least 72 hours to review any records containing their names or

[46] *See* Joint Case Management Conference Statement (filed June 29, 2018), *Sierra Club v. United States Department of Interior*, p. 14, attached as Exhibit 12.

email addresses, with even more time upon request.[47] Secretarial Order 3371 justifies the Department's changes to FOIA policy on the basis that the Solicitor's office has developed strong expertise in the FOIA. As explained above, however, the Solicitor's office lacks the background and context in the relevant facts needed to comply with FOIA. In the past, the Solicitor's office has been available as a resource and as a check on FOIA officers who were too eager to withhold records. This was both appropriate and efficient. The ongoing changes, however, not only decrease efficiency, but also sacrifice accountability. The Department's new policy, which raises the stakes for politically sensitive requests, encourages increased withholdings, and makes the Solicitor's office a bottleneck for politically motivated review of withholdings, "foreseeable harm" determinations, and requests for expedited processing.

### C. The Proposed Rule will not Reduce the Volume of Requests or Litigation.

Not only does the Proposed Rule fail to address the reasons behind the increases in FOIA request and litigation, but it includes a number of provisions likely to **increase** the delay in processing FOIA requests and cause a proliferation, rather than a reduction in litigation. As discussed in more detail below, a number of changes will add additional layers of bureaucracy, increase rather than decrease processing times, complicate the fee waiver process and, through the countless changes that conflict with statutory requirements and established federal case law, lead to an increase in legal challenges.

### D. The Proposed Rule will Weaken the Department's Trust Responsibility to Tribal Members.

The proposed rule would also weaken the Department's federal trust responsibility to the individual tribal enrolled members who are the owners of trust surface and trust mineral acres on federal Indian reservations. These tribal members would be greatly negatively impacted if they are not able to access agency records regarding individual minerals and lands that are held in trust through the Allotment Act, as well as tribal lands and minerals, because of the proposed changes.

## IV. The Proposed Revisions to DOI's FOIA Regulations Violate FOIA, the APA, and are Bad Public Policy

The Proposed Rule is *ultra vires*; it strays broadly from the language and intent of the statute, as repeatedly upheld by the courts. The Department lacks the interpretive power to avoid FOIA's commands through construction or application. Consequently, the specific

[47] May 24, 2018 Awareness Process Memorandum.

proposals in the draft rule are unlawful. The Proposed Rule violates the APA in several key respects: it is arbitrary and capricious and not in accordance with law, it is in excess of statutory jurisdiction and authority, and it is unsupported by substantial evidence. 5 U.S.C § 706 (2)(A),(C) (E).

### A. The Proposed Rule Exceeds DOI's Limited Authority to Interpret and Implement FOIA

The Proposed Rule exceeds DOI's limited grant of authority to implement FOIA. While FOIA instructs agencies to formulate regulations to enact FOIA's mandate, 5 U.S.C. § 552, no single agency is given discretion to interpret the statute's terms. "A basic policy of FOIA is to ensure that Congress and not administrative agencies … determines what information is confidential." *Lessner v. U.S. Department of Commerce*, 827 F.2d 1333, 1335 (9th Cir. 1987). This is because FOIA differs from most other federal statutes in one important respect: it "applies to all government agencies, and thus no one executive branch entity is entrusted with its primary interpretation." *Reporters Committee for Freedom of the Press v. U.S. Department of Justice*, 816 F.2d 730 (D.C. Ct. App. 1987) *rev'd on other grounds*, 489 U.S. 749 (1989). *See also Tax Analysts v. Internal Revenue Service*, 117 F.3d 607, 613 (D.C. Ct. App. 1997) ("we will not defer to an agency's view of FOIA's meaning" because "[n]o one federal agency administers FOIA" and [o]ne agency's interpretation of FOIA is therefore no more deserving of judicial respect than the interpretation of any other agency"); *Al-Fayed v. Central Intelligence Agency*, 254 F.3d 300, 307 (D.C. Ct. App. 2001) ("because FOIA's terms apply government-wide … we generally decline to accord deference to agency interpretations of the statute, as we would otherwise do under *Chevron*."); *Public Citizen Health Research Group v. Food and Drug Administration*, 704 F.2d 1280, 1287 (D.C. Cir. 1983) ("Congress has made clear both that the federal courts, and not the administrative agencies, are ultimately responsible for construing the language of the FOIA …."); *see United States v. Haggar Apparel Company*, 526 U.S 380, 392 (noting that agencies interpret statutes when creating regulations).

Courts do not defer to agency interpretations of FOIA because of the very tension on display in this rulemaking:

> [T]he statute's purpose[—]disclosure of certain information held by the government[—]creates tension with the understandable reluctance of government agencies to part with that information[.] Congress intended that the primary interpretive responsibilities rest on the judiciary, whose institutional interests are not in conflict with that statutory purpose.

*Id.* at 734.

FOIA's basic purpose is "to open agency action to the light of public scrutiny." *Department of Air Force v. Rose*, 425 U.S. at 361; *see U.S. Department of Justice v. Tax Analysts*, 492 U.S. 136, 150 ("In enacting FOIA, Congress intended to 'curb [agencies'] apparently unbridled discretion' by 'closing the loopholes which allow agencies to deny legitimate information to the public.'"). DOI's authority to promulgate rules interpreting FOIA is therefore limited to enacting the statute's transparency-oriented mandate. DOI lacks authority to add new requirements to FOIA in the form of more restrictive interpretation of the statute. *Public Citizen Health Research Group*, 704 F.2d at 1287 ("agencies cannot alter the dictates of [FOIA]."). Moreover, the head of an Executive Department does not have authority to "authorize withholding information from the public or limit[] the availability of records to the public." 5 U.S.C. § 301.

The Proposed Rule dramatically exceeds the Department's limited authority to implement FOIA. Instead of promulgating regulations that facilitate agency compliance with FOIA, DOI has proposed regulations that systematically restrict public access to agency records in ways that directly contradict FOIA's mandate. As discussed in greater detail below, DOI's proposed revisions compromise FOIA's most basic purpose. DOI lacks authority to issue these regulations, which, if finalized, would receive no deference and would be, instead, "mere nullities." *See United States v. Larionoff*, 431 U.S. 864, 873 n. 12 (1977) (quoting *Manhattan General Equipment Company v. Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1936)). The rulemaking is therefore arbitrary, capricious, and in excess of statutory authority. 5 U.S.C § 706 (2)(a),(c).

### B. The Elimination of Email as a Medium to Perform FOIA Requests Reduces Access to DOI Records and Potentially Complicates FOIA Appeals Processes by Obscuring FOIA Request Submission and Response Dates.

The Department may promulgate rules "stating the time, place, fees (if any), and procedures to be followed" for the submission of a request. 5 U.S.C. 552(a)(3)(A). The Department lacks the discretion, however, to adopt time and place regulations that are not in harmony with FOIA's statutory scheme, including its purpose to "close the loopholes which allow agencies to deny legitimate information to the public." *See Gonzalez and Gonzalez Bonds and Insurance Agency v. U.S. Department of Homeland Security*, 913 F. Supp. 2d 865 (N.D. Cal. 2012). Restrictions that would frustrate the public's ability to submit requests or prevent a

requester from knowing when a response is due, therefore, are outside of the Department's authority.

The proposed revisions to § 2.3 of DOI's FOIA regulations are precisely of that sort. The revisions would eliminate the public's ability to submit FOIA requests via email,[48] a common and convenient way to send a FOIA request. This step would significantly decrease public accesses to DOI's public records and would force FOIA requesters to use conventional mail or a portal to deliver FOIA requests. Both of these options reduce access to DOI records and slow down the FOIA process. Taking away email FOIA options also makes it harder for requesters to track requests.

DOI's proposal to allow online FOIA requests through a portal does nothing to assuage the Commenters' concerns about the loss of e-mail. FOIA portals are notoriously clunky and restrictive. Portals have hampered FOIA programs in other agencies. For instance, the FBI FOIA portal is riddled with access issues. The FBI's portal forces requesters to cram requests into limited fields on an automated form, arbitrarily limiting requests to 3,000 words and capping the size of attachments.[49] The portal also limits FOIA requests to records about "events, organizations, first party requests (Privacy Act requests) and deceased individuals."[50] These types of restrictions contravene the law, as FOIA does not limit requests by size or content.

Finally, by prohibiting FOIA requesters from using their email accounts to send FOIA requests, DOI makes it impossible to send time-stamped FOIA requests to the agency. Without time and date-stamped FOIA requests, requesters cannot do the important work of tracking FOIA requests—a requirement of the FOIA appeals process with its date requirements and deadlines. DOI may be incapable or unwilling to meet FOIA's time limits, but requesters are nonetheless entitled to the information they need to enforce them. For all these reasons, the proposed revision is unreasonable and inconsistent with FOIA's basic statutory scheme.

### C. Proposed Changes Regarding "Misdirected" Requests and Forwarding of Requests Violate FOIA.

Proposed revisions to § 2.4 and § 2.17 of DOI's FOIA regulations would discontinue the current common-sense and legally compliant requirement that bureaus forward requests to

[48] If it was not DOI's intention to eliminate email submissions, this should be explicitly acknowledged by amending § 2.3 (b) to state "…or utilizing physical **and email** addresses of the appropriate FOIA officer…"

[49] Federal Bureau of Investigation, FOIA Portal, https://efoia.fbi.gov/#home (*last visited* Jan. 28 2019).

[50] *Id*.

other appropriate bureaus when a) a request has been mistakenly sent to the wrong bureau; or b) it is believed that other bureaus may have responsive information.

***i) Misdirected Requests***

Currently, DOI's FOIA regulations provide for the notice and forwarding of FOIA requests received by a bureau if the bureau believes that it is not the appropriate bureau to process that request. 43 C.F.R. § 2.4(e). Under the current provision, if the recipient bureau believes that the request has been misdirected, the bureau would attempt to contact the requester by telephone or email to confirm that the requester deliberately sent the request to that bureau for processing. *Id.* But if the requester does not make this confirmation, the bureau will deem the request misdirected and route the misdirected request to appropriate bureaus, who would then respond to the request. *Id.* The statutory period for the request to be processed begins to run no later than ten workdays after the request is received by any bureau or component of DOI. *Id.* at § 2.17.

The Proposed Rule would eliminate this provision, but provide no replacement language. Nowhere in the Proposed Rule does DOI outline how its bureaus would handle requests that are mistakenly sent to them. The explicit erasure of the provision thus appears to suggest that any requests deemed to be "misdirected" will be simply disregarded without any apparent process for notifying the requester of this decision or the basis for the decision.

The failure to provide for notice and forwarding of misdirected requests in the proposed rule is contrary to the statutory text of FOIA. FOIA requires that each agency, "upon *any* request for records" must "determine . . . whether to comply with such request and shall immediately notify the person . . . such determination and reasons therefore . . . ." 5 U.S.C. § 552(a)(6)(A)(i)(I) (emphasis added). The statute requires notice for "any" request for records, which includes misdirected requests. DOI's lack of provisions for notice of misdirected requests thus violates FOIA's statutory provisions.

The statute also compels retention of the current maximum 10-day tolling period for forwarding requests. 5 U.S.C. § 552(a)(6)(A)(ii). Relatedly, the failure to provide for notice and forwarding of misdirected requests is contrary to longstanding policies and guidance.[51]

[51] As the Supreme Court noted recently, when changing a policy, "an agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (*citing FCC v. Fox Television Stations Inc.*, 556 U.S. 502, 515 (2009)). "In explaining its changed position, an agency must also be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Id.* (citation

Pursuant to the OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, and the guidance issued by the DOJ Office of Information Policy in accordance with the Act, agency FOIA offices are required "to forward any misdirected FOIA requests received by them to the proper FOIA office within the agency, within ten working days."[52] *See id.* § 6(b)(2). Furthermore, the DOJ guide on FOIA's procedural requirements notes that "FOIA does impose a duty to route misdirected requests to the proper FOIA component within an agency."[53] The guide specifies that "if a requester mistakenly sends a FOIA request to an agency component that is designated to receive FOIA requests, but is not itself the proper component within the agency to process that request, that receiving component is *obligated* to 'route' the 'misdirected' request to the appropriate component within that agency."[54]

This law and policy make sense, and they are needed to preserve consistency between the Department's rules and the statute's text. The bureaucracy of DOI is complex and changing. It should not be incumbent on an individual member of the public to know with certainty where her request should best be addressed. Officers in the different bureaus are far better placed to make that determination.

Indeed, the elimination of notice and forwarding will only serve to cause confusion and delay in a way that detracts from the purpose of FOIA—to ensure government transparency. There are two scenarios for misdirected requests that may occur if the rule were to be finalized as currently written. One possibility is that a requester who *intentionally* (albeit incorrectly) sends a request to a bureau that DOI then deems to be misdirected, would not be informed of the bureau's belief that the request is misdirected, and the bureau would simply take no action to process the request or to forward it to other bureaus that might have the requested records. After receiving no response, the requester would have to contact the recipient bureau to either jumpstart the bureau's process or decide to send the request to another bureau instead. The

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omitted). "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations*, 556 U.S. at 515–16. "It follows that an '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Encino Motorcars*, 136 S. Ct. at 2126 (*citing Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

[52] Dep't of Justice, OIP Guidance: New Requirement to Route Misdirected FOIA Requests (updated Aug. 22, 2014), https://www.justice.gov/oip/blog/foia-post-2008-oip-guidance-new-requirement-route-misdirected-foia-requests.

[53] Dep't of Justice, Guide to the Freedom of Information Act: Procedural Requirements at 65 (updated Sept. 4, 2013), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/procedural-requirements.pdf (emphasis added).

[54] *Id.* at 33.

other possibility is that a requester who *mistakenly* sends a request to a bureau that was not the intended recipient would not even know which bureau had received the request because the recipient bureau would not attempt to contact the requester. In this case, the FOIA request would simply vanish into the abyss.

Both scenarios necessarily increase the amount of time it would take for the appropriate bureau to begin processing the FOIA requests that are deemed misdirected by the original recipient bureau, because the recipient bureau would not proactively notify the requester of the misdirected request, forward the request to the appropriate bureau, or process the request itself. The requester would not find out that its requests had been deemed misdirected unless she contacted the bureau to check on the status of the requests. Because her requests may have been deemed misdirected without the her knowledge, the requester's only recourse would be to call the bureau to which she directed her original request and inquire about the status of each request, rather than trusting that no news is good news. More bureau resources would then have to be directed towards answering the requester's inquiries, and away from actually processing the FOIA requests.

As such, the deletion of §§ 2.4(e) and 2.17 is inconsistent with the statute and the well-reasoned policies that implement it. The deletion would undermine transparency, cause additional delay, and would not resolve the workload efficiency issues that DOI purports to mitigate with the Proposed Rule. The deletion is therefore arbitrary and capricious and not in accordance with law, in excess of statutory jurisdiction and authority and not supported by relevant facts. *Id*. § 706 (2)(A),(C), (E).

**ii)** ***Lack of Forwarding to Other Appropriate Bureaus***

Currently, DOI regulations require recipient bureaus to forward requests to other bureaus if the requests state that they seek records from other unspecified bureaus and if the recipient bureau's FOIA officer believes that other bureaus have or are likely to have responsive records. 43 C.F.R. § 2.4(f). If the bureau forwards the request, it will notify the requester in writing and provide the name of a contact in the other bureaus. *Id.* If it does not forward the request, the bureau will return the request to the requester and advise the requester to submit the request directly to other bureaus. *Id.* The Proposed Rule would eliminate this provision entirely and, in addition, would add language stating that a request sent to a particular bureau or its component "will *not* be forwarded to another bureau or component."[55]

[55] 83 Fed. Reg. at 67,177 (emphasis added) ("Removing paragraph[] . . . (f).")

The proposal to prohibit bureaus from forwarding requests to other bureaus or components violates established law. Courts have ruled that the reasonableness of an agency's search depends on whether the agency properly determined where responsive records are likely to be found, and searched those locations. *See, e.g.*, *Performance Coal Company v. U.S. Department of Labor*, 847 F. Supp. 2d 6, 12-13 (D.D.C. 2012) (finding agency's search "reasonably tailored" when it identified two of the eighteen regional offices most likely to maintain responsive records and searched those office's paper, electronic, and archived files). Because a DOI bureau's discharge of its duty to adequately search for records is based on where the bureau has reason to believe those records are located, that bureau should forward the request to other components of DOI that may possess the records. Indeed, courts have struck down searches by DOI as inadequate specifically after finding the agency had evidence that documents existed in another office, but did not forward the request to that office. *Friends of Blackwater v. U.S. Department of the Interior*, 391 F. Supp. 2d 115, 121 (D.D.C. 2005); *see Wilderness Society v. U.S. Department of the Interior*, 344 F. Supp. 2d 1, 21 (D.D.C. 2004) (concluding that search was inadequate because agency failed to search solicitor's office in response to request for lawsuit and settlement records); *cf. Natural Resources Defense Council, Inc. v. Department of Defense*, 388 F. Supp. 2d 1086, 1100-03 (C.D. Cal. 2005) (ordering new search where agency searched only one office and did not forward request to another office that agency knew to be lead office in subject area).

Practically, the proposal to prohibit forwarding would obstruct the public's right to obtain records. As noted above, it can be difficult for a member of the public to pinpoint which bureau or component of DOI serves as the custodian of particular records. Under the new scheme, a requester would need to send duplicative requests to every conceivable bureau to ensure that it receives the records it is seeking, thus increasing the number of distinct requests received by DOI and its bureaus and further bogging down the system. It would be much more efficient for DOI to retain its current regime of forwarding requests to other relevant bureaus or components—particularly given the stated purpose to centralize the Departments' FOIA processing. If the Department truly wants a more centralized system it is wholly illogical to place this unnecessary burden on requesters.

### D. Proposed Revisions Heightening the Specificity Requirements of Requests Violate FOIA

Proposed revisions to § 2.5(a) of DOI's regulations would assert that a FOIA request must "identify the discrete, identifiable agency activity, operation, or program in which you are

interested."[56] This revision would violate the provision in the organic statute that a request need only "reasonably describe" the records being sought. 5 U.S.C. § 552(a)(3)(A).

Congress intended the term "reasonably describe" to allow requesters considerable leeway. A Senate Committee Report from when FOIA was initially drafted noted that a request must only include as much information as would "enable[] the Government employee to locate the requested records."[57] Congress echoed this sentiment in 1974 when it revised the Act to incorporate the current language contained in the FOIA statute that a proper request "reasonably describes" the records sought. A House Report at the time of this revision emphasized that "[a] 'description' of a requested document would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort."[58] Additionally, a concurrent Senate Report noted that this amendment was to "make[] explicit the liberal standard for identification that Congress intended and that courts have adopted."[59] DOI's proposal that FOIA requests must identify a discrete identifiable agency activity, operation, or program impermissibly limits the circumstances under which members of the public can place FOIA requests and is inconsistent with this more relaxed standard. Moreover, the proposal impermissibly places the burden of identification and specificity on the public, rather than the government staff, as Congress intended.

The proposed revision to § 2.5(a) are also at odds with how Congress intended FOIA to be implemented, because the revision would create new circumstances under which the agency may withhold documents. When Congress initially drafted FOIA, one Senate Report asserted that the Act's requirement for the contents of a request was "not to be used as a method of withholding records."[60] After this admonishment, Congress later determined that the Act's original text which required requests to encompass "identifiable records" had led to agencies "requiring of requesters a specificity of identification of desired information…" enabling them "… all too often, to successfully circumvent a multitude of the public's requests."[61] Congress then amended FOIA's requirements, so that the contents of a request need only "reasonably

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[56] 83 Fed. Reg. at 67,177.
[57] S. REP. NO. 89-813, at 43 (1965).
[58] H.R. REP. NO. 93-876, at 125-26 (1974).
[59] S. REP. NO. 93-854 at 162 (1974); *see also* 119 CONG. REC. 13,686 (1973) (extended remarks of Hon. John E. Moss) ("any request describing the material to a manner that a government official familiar with the area could understand is sufficient criteria for identification purposes.").
[60] S. REP. NO. 89-813, at 43 (1965).
[61] 120 CONG. REC. 6817 (1974) (remarks of Sen. Michael Harrington).

describe[]" the records being sought. In so doing, Congress intended to prevent agencies from "evad[ing] disclosure of public information."[62]

Further, when the Act was amended to require a FOIA request to contain only a reasonable description, a Senate Committee Report asserted that agencies' "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."[63] It was also noted that revising FOIA to require only a reasonable description would allow agencies to "directly aid citizens in obtaining government documents."[64]

Building from this congressional intent, courts have repeatedly made clear that agencies must facilitate the FOIA request process by liberally construing requests. *See, e.g., LaCedra v. Executive Office for U.S. Attorneys*, 317 F.3d 345, 348 (D.C. Cir. 2003) (citations omitted) (stating that the DOJ must "construe a FOIA liberally" in spite of the fact that the request was "not a model of clarity"). The proposed revision of § 2.5(a) violates expectations under FOIA because it could relieve the agency of its obligation to broadly interpret their requests.

Moreover, the proposed revision to § 2.5(a) runs counter to the purpose of FOIA because it would perpetuate the secrecy of matters that have not been disclosed to the public. If members of the public can only request records by identifying an agency activity, operation, or program related to those records, then there is no way for them to place a request for many of the records related to agency activities, operations, or programs that DOI has not publicized. FOIA's reasonable description requirement was designed by Congress to "[e]ase[] the technical burden on the public…" after some agencies improperly interpreted FOIA as requiring requesters to identify the specific records they wanted produced.[65] DOJ has acknowledged that if members of the public seek records related to matters that are not publicly known, it is understandable for them to lack specificity in their requests:

> FOIA requesters seeking records on a certain subject often phrase their requests in very broad and all-encompassing terms, with the primary purpose of including any and all records pertaining to the subject or subjects in which they are interested. *It is only natural* for FOIA requesters to be concerned that records of interest to them might not be included by an agency as responsive to their FOIA requests. *Especially when they are operating "in the dark," FOIA requesters tend*

[62] 120 CONG. REC. 17016 (1974) (remarks of Sen. Ted Kennedy).
[63] S. REP. NO. 93-854 at 162 (1974) (internal quotation omitted).
[64] 120 CONG. REC. 6817 (1974) (remarks of Sen. Frank Horton).
[65] *Id.* (remarks of Sen. William Moorhead).

> *to sweep broadly in their requests for fear that doing otherwise might unintentionally limit their requests and exclude something that they actually to seek to obtain.*[66]

Thus, if the revisions to § 2.5(a) are implemented, it will be even more difficult for the public to bring to light matters at DOI that have been shrouded in secrecy.

The proposed revisions to § 2.5(a) are also concerning because DOI could implement them in a manner where, even if the Department does publicly discuss general information regarding the activities, operations, and programs related to records being sought, members of the public would nevertheless be unable to submit effective records requests. First, the proposed language is extremely vague and runs the risk of the agency applying an overly narrow interpretation of what constitutes an "activity," "operation," or "program." This could result in a request yielding only a limited set of responsive records or in a request being denied altogether for failing to identify anything with the level of specificity sought by the agency. Furthermore, not every record requested necessarily relates to a discrete activity, operation, or program. For example, a member of the public may want to request all communications between the agency and an identified special interest group over the course of a month to determine whether the group is influencing agency decisions. Although it is clear what specific information is being sought, such information does not relate to any discrete activity, operation, or program.

A further concern is that the language employed in the proposed revision appears to conflate the Act's requirements for submitting a FOIA request with the factors to be considered under the Act when requesting a fee waiver. Pursuant to FOIA, an agency will only grant a fee waiver to a requester if she can demonstrate that "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the *operations* or *activities* of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii) (emphasis added). Unlike FOIA's fee waiver provision, however, the Act's requirements for the content of a FOIA request only mandates a discussion of "records," *see Id*. § 552(a)(3)(A), rather than "operations or activities." Had Congress intended for FOIA requests to identify "operations or activities," it would have explicitly stated so, as it did with the Act's fee waiver provision.

The proposed revision is also wholly unnecessary. First, § 2.5(b) already requires requesters to "include *as much detail as possible* about the specific records or types of records that [they] are seeking," 43 C.F.R. § 2.5(b) (emphasis added), and provides several examples of what

[66] Dep't of Justice, Office of Info. Privacy, *FOIA Update*, *Vol. XVI, No. 3* (1995).

types of information may be included, *id.* § 2.5(b)(1)-(4). Thus, even if a submitted FOIA request is unclear, the Act allows agencies to ask for follow-up information from the individual that placed the request. 5 U.S.C. § 552(a)(6)(A)(ii)(I). Rather than entirely prohibiting requesters from submitting certain requests because specific information regarding an activity, operation, or program is not known to them or does not apply, DOI should continue to address any issues of clarity by contacting requesters after their requests have been submitted.

Finally, DOI would undermine agency efficiency were it to implement the proposed revision. The level of specificity necessary for requesters to place a successful request will incentivize them to call and email staff agency-wide to request information about what activities, operations, and programs should be included in their FOIA requests, leaving employees with less time to devote to other issues. The proposed revisions would also likely result in members of the public submitting the same requests repeatedly because they failed to name all appropriate activities, operations, and programs in their prior FOIAs, resulting in them not receiving all of records they had in mind. Thus, the revision could lead to an increase in FOIA requests, thereby detracting from efficiency rather than adding to it.

### E. The Proposal to not Honor "Broad" or "Vague" Requests Violates FOIA

Proposed revisions to § 2.15(d) of DOI's regulations would state that "[e]xtremely broad or vague requests, or requests requiring research do not satisfy th[e] requirement . . . [to] describe the records you seek sufficiently to enable a professional employee familiar with the subject to locate the documents with a reasonable effort."[67] Moreover, DOI proposes that it 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." *Id.*

This proposal conflates two distinct requirements: (1) the requester's obligation to "reasonably describe[]" the records sought, 5 U.S.C. § 552(a)(3)(A), which pertains to whether a FOIA request has been properly submitted, and (2) the agency's obligation to perform a search "reasonably calculated to uncover all relevant documents." *Weisberg v. Department of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). The existence of a high volume of responsive documents does not relieve an agency of its obligation to comply with a properly submitted FOIA request, and DOI's regulations must not suggest otherwise. Indeed, the Proposed Rule appears to suggest that the more involved the agency has been with a particular project or issue, (and thus the more varied and numerous its responsive records), the less likely it is that DOI would be required to satisfy the request. This perverse result is not consistent with FOIA.

[67] 83 Fed. Reg. at 67,177 (proposed § 2.15(d)).

Contrary to the proposed rule, courts have made clear that "the number of records requested appears to be irrelevant to the determination whether they have been 'reasonably described' . . . . Rather, the linchpin inquiry is whether the agency is able to determine 'precisely what records (are) being requested.'" *Yeager v. Drug Enforcement Administration*, 678 F.2d 315, 326 (D.C. Cir. 1982) (quoting S. Rep. No. 854, 93d Cong., 2d Sess. 10 (1974)). This holding is echoed in guidance from DOJ which notes that "[t]he sheer size or burdensomeness of a FOIA request, in and of itself, does not entitle an agency to deny that request on the ground that it does not 'reasonably describe' records within the meaning of 5 U.S.C. § 552(a)(3)(A)."[68] Even if an agency believes a search to be unreasonably burdensome, that does not privilege the agency to deny the request outright. *See Ruotolo v. Department of Justice*, 53 F.3d 4, 9 (2d Cir. 1995) (questioning an agency's apparent "position that no search at all is necessary where it appears that the search will be unduly burdensome").

***i) The FOIA statute mandates that agencies comply with requests yielding voluminous responsive records, and the Proposed Rule is arbitrary and capricious.***

DOI's Proposed Rule wrongly suggests that requests yielding voluminous records fall outside the scope of FOIA. However, in the organic FOIA statute, Congress expressly contemplated such requests and delineated a process for agencies to manage them. *See Tereshchuk v. Bureau of Prisons*, 67 F. Supp. 3d 441, 455 (D.D.C. 2014) ("[FOIA] puts no restrictions on the quantity of records that may be sought. In fact, the statute anticipates requests for voluminous records."). Specifically, Congress envisioned that a request might involve "unusual circumstances," the definition of which includes "the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request . . . to the extent reasonably necessary to the proper processing of the particular requests." 5 U.S.C. § 552(a)(6)(B)(iii)(II). In the event of unusual circumstances, an agency may extend the deadline for its determination by up to ten working days by written notice to the requester." *Id.* § 552(a)(6)(B)(i). If a request "cannot be processed" by that extended deadline, an agency must inform the requester of the anticipated date for its determination and provide the requester an opportunity to limit the scope of the request or agree to an alternative time frame for processing. *Id.* § 552(a)(6)(B)(i)-(ii). The statute further incentivizes timely responses to noncommercial requesters by forbidding the agency from charging search fees for late responses, but it makes an exception for particularly large requests in order to encourage requesters to narrow the scope of their requests. *Id.* § 552(a)(4)(A)(viii)(II).

[68] DOJ FOIA Update, Vol. IV, No. 3 (Jan. 1, 1983).

The statute thus has a carefully balanced scheme already in place, indeed, the Second Circuit has called this procedure "the statutory provision that deals with the problem" of the burdensome collection of reasonably described, identifiable records. *Ruotolo*, 53 F.3d at 10. Since Congress has already dealt with the problem, DOI has no authority to propose alternative solutions.

Similarly, if a requester files suit over a missed deadline, an agency has the opportunity to "show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request." *Id.* § 552(a)(6)(C)(i). Upon a satisfactory showing of "exceptional circumstances" and "due diligence," "the court may retain jurisdiction and allow the agency additional time to complete its review of the records." *Id.* § 552(a)(6)(C)(i). Where *unusual* circumstances exist, the statute provides that a requester's "[r]efusal . . . to reasonably modify the request or arrange . . . an alternative time frame shall be considered as a factor in determining whether *exceptional* circumstances exist." *Id.* § 552(a)(6)(B)(ii) (emphasis added). The provision for exceptional causes thereby directly accounts for a "need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records" and other unusual circumstances. *Id.* § 552(a)(6)(B)(iii)(II). Notably, even when exceptional circumstances are present, Congress specified that an agency must "exercise[e] due diligence in responding to the request," not deny the request outright as DOI proposes.

In addition, the statute allows an agency to "promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests." *Id.* § 552(a)(6)(D)(i). DOI has promulgated such regulations at 43 C.F.R. § 2.15. DOI's tracks range from "Simple," for requests that "will take between one to five workdays to process," to "exceptional/voluminous"—which DOI now proposes to rename "extraordinary"—for requests "involv[ing] very complex processing challenges, which may include a large number of potentially responsive records and will take over sixty workdays to process." *Id.* § 2.15(c). While we do not endorse DOI's categorical approach to requests that may not be answerable within the statutory time limit (and, instead, would refer DOI to the statutory provision requiring negotiation between the requester and the agency regarding the scope and time limit for the response), it nonetheless provides additional evidence that the existing statutory and regulatory provisions of FOIA are fully equipped to handle requests yielding voluminous records. There exists no track under which an agency may deny a FOIA request on the basis of the number of responsive records. To the contrary, the statute expressly warns that multitrack processing "shall not be considered to affect the requirement . . . to exercise due diligence" in responding to FOIA requests. 5 U.S.C. § 552(a)(6)(D)(iii).

As shown in section 552(a)(6)(B)-(D), Congress not only squarely contemplated that some FOIA requests would yield a large number of records, but also mandated a particular resolution: extending the time for an agency to issue its determination, pursuant to statutorily delineated constraints. DOI's proposal to "not honor" such requests directly conflicts with the language of the statute and is unlawful. As the Second Circuit stated when describing the "unusual circumstances" provision, "An extension of time to obtain records . . . is one thing. A refusal to make some effort to obtain them is quite another." *Ruotolo*, 53 F.3d at 10. DOI may not ignore or replace Congress's elegant and carefully balanced solution to the problem of burdensome requests. Accordingly, the Proposed Rule is arbitrary and capricious and not in accordance with law and in excess of statutory jurisdiction and authority. *Id*. § 706(2)(A),(C).

***ii) The Proposed Rule contravenes established case law***

DOI offers no legal authority for its proposal to exclude requests requiring an "unreasonably burdensome search" from the realm of valid FOIA requests, and any effort to do so would be futile. While courts have occasionally declined to require agencies to conduct searches that the courts deem "unreasonably burdensome," these are uncommon rulings that follow a typical pattern: usually, the requester was insisting, or circumstances otherwise would have required, that an agency search thousands or millions of essentially random records for any document that might incidentally be responsive. Although a requester's failure to "reasonably describe" records might be a factor in a search becoming "unreasonably burdensome," a large number of responsive records does not, on its own, mean that the records are not "reasonably described" or otherwise render the request invalid.

The proposed refusal to honor FOIA requests requiring a "bureau to locate, review, redact or arrange for inspection of a vast quantity of material" apparently borrows language from *American Federation of Government Employees v. U.S. Department of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990) [hereinafter *AFGE*], although it does not expressly cite it.

It is no wonder that DOI's proposal omits this citation, as even a cursory review of the case betrays its misapplication. *AFGE* considered three FOIA requests, one of which included a request by the plaintiff to inspect "*every* chronological office file and correspondence file, internal and external, for every branch office, staff office, assistant division chief office, division chief office, assistant director's office, associate director's office, deputy director's office, and director's office; [and] . . . *every* division or staff administrative office file in the Bureau which records, catalogues, or stores SF-52's or stores promotion recommendation memos, or both . . . ." 907 F.2d at 205 (emphases in original).

The *AFGE* court ruled those requests "would impose an unreasonable burden upon the agency." *Id.* at 209. The court was concerned not only that the agency would need to "locate, review, redact, and arrange for inspection a vast quantity of material," *id.*, but also that the burden on the agency would be "largely unnecessary to the [requester's] purpose" and "in no way tied to their expressed concern," and "entails inspection of the entirety of every file in which any [relevant] material can be found, rather than merely a copy of the relevant documents." *Id.* In other words, the court objected to the **means** by which the requester demanded that the agency perform the search, not the **volume** of responsive records. The court also observed that the requests did not "'reasonably describe'" documents subject to disclosure." *Id.* at 209 (quoting 5 U.S.C. § 552(a)(3)(A)). Although the court noted that the records were technically identifiable, simply requesting to inspect vast swaths of an agency's files, without regard to subject matter or other parameters, did not identify "a class of documents subject to disclosure." *Id.* But the court did not find—as DOI's proposal would allow—that the **number** of relevant documents would have invalidated the FOIA request, had the records been reasonably described.

*AFGE* cites to *Goland v. Central Intelligence Agency*, 607 F.2d 339 (D.C. Cir. 1978), the progenitor of the limitation on "unreasonably burdensome search[es]." 607 F.2d at 353. Like *AFGE*, this case provides no support for—and actually undermines—DOI's proposal. In *Goland*, an agency had provided responsive documents to a request, submitted affidavits concerning its searches for records, and explained to the court's satisfaction that any additional responsive documents, "if they exist, could be found only by 'a page-by-page search' through the '84,000 cubic feet of documents in the [agency's] Records Center.'" *Id.* (quoting an affidavit). The plaintiff in *Goland* was seeking discovery based on a thinly supported belief that additional records "must exist." *Id.* (quotations omitted). Crucially, the contested issue was whether the agency had performed an adequate, good-faith search for documents, and whether any additional search efforts were required. The issue was *not* whether the agency must honor the underlying FOIA request. Indeed, the agency had provided many responsive documents. The volume of responsive documents was not the reason the FOIA request was deemed "unreasonably burdensome."

Similarly, D.C. Circuit cases citing *AFGE* and *Goland* on relevant grounds address the adequacy of a search for responsive records, not whether an agency must "honor" or—to use the statute's terminology—"make reasonable efforts" to comply with a FOIA request. 5 U.S.C. § 552 (a)(3)(B)-(C). In most of these cases, as in *AFGE* and *Goland*, the court declined to mandate essentially random, extremely burdensome searches that offered little probability of successfully finding responsive records. In no instance was an agency excused from complying

with an otherwise valid FOIA request solely on the basis that it sought a large number of responsive documents.

In *Church of Scientology v. Internal Revenue Service.*, for example, the court acknowledged that an agency need not individually search through every file in its possession for references to a particular topic, while nonetheless finding the search the agency performed to be inadequate. 792 F.2d 146, 151 (D.C. Cir. 1986) (citing *Goland*). In *Nation Magazine v. U.S. Customs Service*, the court found that requiring an agency "to search through 23 years of unindexed files for records pertaining to" a particular person "would impose an unreasonable burden on the agency." 71 F.3d 885, 891-92 (D.C. Cir. 1995) (citing *AFGE*). In *Schrecker v. U.S. Department of Justice*, the court did not require that an agency search for records using social security numbers that the agency had no clear means to access. 349 F.3d 657, 663-64 (D.C. Cir. 2003) (citing *AFGE*). In *Dixon v. U.S. Department of Justice*, the court declined to require an agency to cross-reference documents from prosecutors' offices nationwide with the investigative and litigation history of each criminal matter discussed therein to determine which records were responsive. 2018 U.S. App. LEXIS 25645, at *2 (D.C. Cir. 2018) (citing *AFGE*). In none of these cases was an agency excused from complying with an otherwise valid FOIA request solely on the basis of a large number of responsive documents.

***iii) DOI is not permitted to deny a request based on a purported need to make redactions.***

The proposal to "not honor a request that requires . . . [a] bureau to . . . redact . . . a vast quantity of material" suffers from additional legal deficiencies. The FOIA statute squarely places the burden on an agency to justify any redactions. 5 U.S.C. § 552(a)(4)(B). It also requires that an agency provide information about a redaction, including the specific statutory exemption upon which the agency relied to justify redaction, *id.* § 552(b), ensure that redactions are made only when the agency foresees that disclosure would foreseeably harm an interest protected by that exemption, *id.* § 552(a)(8)(A)(i)(I), and "take reasonable steps necessary to segregate and release nonexempt information." *Id.* § 552(a)(8)(A)(ii); *see also Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973) ("[A]n entire document is not exempt merely because an isolated portion need not be disclosed. Thus the agency may not sweep a document under a general allegation of exemption, even if that general allegation is correct with regard to part of the information."); *Election Frontier Foundation. v. Department of Justice*, 739 F.3d 1, 12 (D.C. Cir. 2014) ("It is undisputed that under FOIA non-exempt information that is 'reasonably segregable' from exempt information must be disclosed.") (quoting 5 U.S.C. § 552(b)).

DOI's proposal would subvert these statutory mandates by enabling the Department to deny a FOIA request outright on the basis that responding would require it to redact "a vast quantity of material." Under its proposal, DOI would fail to indicate the specific statutory exemptions upon which it relied, to complete the required, fact-bound and particularized foreseeable harm analysis, and to segregate and release nonexempt information. By denying the request outright, the agency would illegally withhold entire records on the basis of partial redactions, and might even withhold some records that would garner no redactions at all.

DOI's proposal would also infringe on a FOIA requester's statutory right to appeal adverse determinations, which include redactions. *See* 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa). A requester cannot exercise this right if DOI refuses to indicate which information has been redacted and instead denies a request outright. Instead of attempting to meet its burden to justify redactions, the Department would ask requesters to accept on faith that it would have been "require[d] . . . to . . . redact . . . a vast quantity of material." In order to challenge the Department's position, a requester would first be routed through the extra-statutory process of appealing the denial of the request as a whole. If a requester prevailed on that appeal, either administratively or in litigation (which is almost a certainty given the patent unlawfulness of DOI's proposal), DOI would then release the responsive records with redactions. Only after that arduous process would a requester see the redactions and have the opportunity to challenge them in their own right. The entire ordeal would be extraordinarily time-consuming, place massive hurdles between FOIA requesters and their statutory rights, lead to easily avoidable litigation, and generally drain the resources of all parties involved.

This proposed revision is also flawed because, while DOI's proposal refers to redactions that a request "requires," an agency is usually not *required* to redact information; agencies have significant discretion over when to redact material that falls under a lawful exemption. *See CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1133 n.1 (D.C. Cir. 1987) ("The agency's decision to release the data normally will be grounded either in its view that none of the FOIA exemptions applies, and thus that disclosure is mandatory, or in its belief that release is justified in the exercise of its discretion, even though the data fall within one or more of the statutory exemptions.").[69]

DOI assumes that it will redact all information for which an exemption may technically apply. The 2016 FOIA amendments, however, prohibit the categorical application of

[69] *See also* U.S. Attorney General, *Memorandum for Heads of Executive Departments and Agencies*, 74 Fed. Reg. 51,878, 51,879 (Oct. 8, 2009) ("An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.")

exemptions. To comply DOI would have to first determine whether the material is technically exempt, then and whether each redaction would cause foreseeable harm. Only then could DOI determine whether the withholdable material is "vast" enough to justify outright rejection of the request. Having undertaken those assessments, the hard work would already be done, and there would be no substantial incremental administrative burden of releasing the records in redacted form. *See, e.g., Electronic Frontier Foundation v. Department of Justice*, 739 F.3d at 12, *supra*; *Stolt-Nielsen Transportation Group v. United States*, 543 F.3d 728, (D.C. Cir. 2008) ("'[A]n agency cannot justify withholding an entire document simply by showing that it contains some exempt material.' . . . This [is] the established rule for FOIA withholding of redacted versions of possibly segregable material.") (quoting *Mead Data Central v. U.S. Department of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977)).

The Proposed Rule is therefore arbitrary and capricious and not in accordance with law, in excess of statutory jurisdiction and authority and not supported by relevant facts. *Id*. § 706 (2)(A),(C), (E).

***iv) DOI is not permitted to close a request based on its subjective interpretation of a request and without making an appealable "determination."***

The proposed revision is also illegal because it would allow FOIA officers to ignore a request that, in their opinion, does not reasonably describe the records sought without providing the reasons for that determination. Specifically, if the FOIA officer determines the request does not "reasonably describe" the records sought, the bureau will:

> 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 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.***[70]

As drafted, this proposal is unlawful, for at least three reasons. First, the organic statute requires that, within the relevant time period, an agency must "determine" whether to comply

[70] 83 Fed. Reg. at 67,177-78 (emphasis added).

with a request. 5 U.S.C. § 552(a)(6)(A)(i) (emphasis added). It is not enough that the agency simply tell the requester that it might decide to later presume that the requester no longer wants the documents and close the request.[71] Applying this principle as a D.C. Circuit Judge, now–Justice Kavanaugh held that within the relevant time period, the agency must provide a substantive "determination" under the statute, and inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency will not produce.[72] As drafted, the Department's rule revision allows a FOIA officer to respond to a request by saying that the department will not produce *any* records, even though many or all of the records sought would be identifiable and disclosable under FOIA. This is a critical omission because without a formal determination explaining the agency's reasons the agency is effectively "immune from suit."[73]

Second, and relatedly, the statute requires the agency, upon making a "determination" whether to comply with a FOIA request, to immediately "notify the person making such request of such determination *and the reasons therefore*." 5 U.S.C. § 552(a)(6)(A)(i) (emphasis added). As now-Justice Kavanuagh has explained, this requires the agency to provide a "particularized" explanation for "determination." Contrary to the Department's suggested revision, the statute does not grant the agencies discretion to provide reasons for a determination simply "*when practicable*." 83 Fed. Reg. at 67,178 (emphasis added). This language would allow requests to be disregarded without giving the requester the information needed to appeal the agency's determination. The opportunity to "clarify" the request would be a hollow right, because the requester would only be able to bargain against herself. Instead, the plain language of FOIA requires the agency, in every case, to articulate the "reasons" for closing a FOIA request or refusing to produce documents. The Department must strike the provision "when practicable" from § 2.5, and make clear that every adverse determination requires a formal decision, in writing, notifying the requester of the reasons for closing the FOIA request in a manner that facilitates appeal or clarification, and providing a notice of the requester's appeal rights under FOIA.[74]

And as now-Justice Kavanaugh has further observed, the statute makes clear that a FOIA requester is entitled to a formal and immediate "determination" under 5 U.S.C. § 552(a)(6)(A)(i), which must be more than just an initial statement that the agency needs

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[71] *Citizens for Responsibility and Ethics in Washington v. Federal Election Com'n*, 711 F.3d 180, 186, (D.C. Cir. 2013).
[72] *Id*.
[73] *Id*.
[74] *Id*. at 186.

additional information and might close a request if the requester does not respond in writing.[75] Rather, in order to make a "determination" and thereby trigger the administrative exhaustion requirement, the agency must determine whether to comply with the request, immediately communicate to the requester the particularized reasons for declining to produce any documents, and inform the requester how and by when it can appeal whatever portion of the "determination" is adverse.[76] As currently drafted, the Department's proposal unlawfully fails to require FOIA officers to make a particularized determination and communicate the reasons for, and appeal rights associated with, that final determination. The proposed rule is contrary to the statute because it purports to communicate a determination to the requester, but in reality is a failure to make a determination as required by FOIA. This creates ambiguity with respect to the requester's right to appeal and the timing of any such appeal. As such, it is therefore arbitrary and capricious and not in accordance with law and in excess of statutory jurisdiction. *Id*. § 706 (2)(A),(C).

***v) The proposed revision is bad public policy***

Aside from its unlawfulness, this element of the Proposed Rule would be unworkable in practice. The revision provides no information on how DOI would assess whether a search would be "unreasonably burdensome," or whether the "quantity of material" that the Department must "locate, review, redact, or arrange for inspection" is sufficiently "vast" to invalidate a request. Although the Proposed Rule is framed as placing the responsibility on the FOIA requester, the requester is left to guess at how to satisfy the Department's demands. This ambiguity would inevitably introduce uncertainty and delay into the FOIA process. Rather than following the statute's clear answer to the problem of voluminous requests—namely, strictly bounded negotiations over fees, scope, and production dates—it would leave requesters at the mercy of an agency that holds all the cards. It also raises the serious specter that the Department, either deliberately or inadvertently, might not apply this requirement in an impartial and equitable manner across all FOIA requests. The vagueness and absence of any objective standards in the proposed language would make fair implementation nearly impossible, even with the best of intentions. In addition to being a policy concern, this could expose the Department to legal risk.

In another indication of the dubious legal grounds and policy rationale for this proposed revision, it would make the Department an outlier among federal agencies. Although the

[75] *Id.*

[76] *Citizens for Responsibility and Ethics in Washington v. Federal Election Com'n*, 711 F.3d 180, 188, 404 U.S. App. D.C. 275, 283 (C.A.D.C. 2013)

Department vaguely asserts that its proposal is necessary "[i]n light of the unprecedented surge in FOIA requests and litigation," 83 Fed. Reg. at 67,176, the proposed language defining the validity of a FOIA request by whether it would require an "unreasonably burdensome search" or require the Department "to locate, review, redact, or arrange for inspection of a vast quantity of material" does not appear in the regulations of agencies that receive far more FOIA requests than DOI. For example, it does not appear in the regulations of the Department of Homeland Security, 6 C.F.R. § 5.3(b), which received 366,036 FOIA requests in fiscal year 2017 (compared to the 8,005 requests received by DOI in fiscal year 2017).[77] It does not appear in the regulations of the DOJ, 28 C.F.R. § 16.3(b), which received 82,088 FOIA requests in fiscal year 2017.[78] It does not appear in the regulations of the Department of Defense, 32 C.F.R. § 286.5, which received 55,198 FOIA requests in fiscal year 2017.[79] Consequently, there is no justification for DOI to adopt these exceptionally onerous, unlawful regulations.

### F. The Proposal to Impose Monthly Response Limits for Requests is Vague, Overbroad and Unlawful.

Although supposedly intended "to streamline and/or clarify the Department's multitrack processing provisions," the proposed revision to § 2.14 is excessively vague and confusing. It states only that "[t]he 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.''[80] The Department's broadly worded attempt to grant itself free rein to limit responses raises several key questions:

- Under what circumstances may the agency limit responses?
- What is the lowest limit for processing requests it may set?
- Will the Department inform requesters that their responses have been limited, and will requesters have an opportunity to challenge that limit?
- Will multiple small requests be treated differently from one large request?
- Can the Department limit responses based on the identity of the requester? Based on the subject matter of the request?
- What office or official within the agency will determine whether and how much to limit responses?

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[77] *Compare* Dep't of Homeland Security, *2017 Freedom of Information Act Report to the Attorney General of the United States and the Director of the Office of Government Information Services*, at ii (Feb. 2018) *with* DOI, *Freedom of Information Act 2017 Annual Report*, at 11.
[78] *See* U.S. DOJ, *Annual Freedom of Information Act Report: Fiscal Year 2017*, at 24.
[79] *See* Dep't of Defense, *Freedom of Information Act (FOIA) Annual Report for Fiscal Year 2017*, at 16.
[80] Fed. Reg. at 67,178.

The single sentence in the proposed revision sets up an opportunity for serious confusion and attempts to grant the agency far more power than Congress gave it in FOIA.

The Department's bare-bones amendment makes it impossible to know how the agency would implement such a policy—but any conceivable understanding of this policy would violate FOIA in several ways.

As noted above, the agency lacks discretion to interpret FOIA in a way that would impose new burdens on requesters. The statute itself tells agencies how to process FOIA requests and what to do if it receives large requests or multiple requests. Agencies may not erect other procedural hurdles that Congress did not authorize.

If the draft rule is intended to allow the agency to cap the number of pages or documents produced per month in response to a given request, it violates FOIA's clear mandate. "Each agency, upon *any* request for records made," must make a determination within 20 working days. 5 U.S.C. § 552(a)(6)(A) (emphasis added). Twenty working days is a month. By stating that responsive records may be capped per month, the proposal assumes that the Department will always be in violation of FOIA's time limits—that it will always be trying to catch up. If the Department were able to stay on pace with its requests, then there is absolutely no valid reason that a request could be ignored or delayed. A rule allowing the Department to exceed the statutory time limit rests on an assumption that the Department will **always** be triaging its requests. While the Department may be behind now, it cannot enshrine that unlawful expectation into its regulations. If the Department needs more time for a particularly difficult request, it can explain the unusual circumstances, work with the requester to narrow the scope of the request, and take up to an extra 10 working days. *Id.* § 552 (4)(A)(viii)(II)(aa). That is what FOIA allows, and DOI cannot make up its own process to deal with backlogs.

To the extent that the proposal would throttle responses to a particular requester or requesters, the rule is even more problematic. Congress anticipated that agencies might receive large volumes of FOIA requests or multiple requests from a single requester, and Congress made a choice to provide agencies particular tools for administering the statute under those circumstances. Agencies may make rules aggregating requests by the same requester or a group of requesters, if certain criteria are met. 5 U.S.C. § 552(a)(6)(B)(iv). And agencies may make rules providing for multitrack processing of requests, as the Department has done. *Id.* § 552(a)(6)(D); 40 C.F.R. § 2.15. They may also work with requesters to narrow the scope, and under unusual circumstances, take advantage of a 10-day extension. But nowhere does Congress authorize agencies to use rulemaking to limit FOIA responses to certain

requests. Congress made a deliberate decision to provide these regulatory tools, and not others. The Department lacks the discretion to throttle responses to FOIA requests based on arbitrary considerations. Agencies "shall make the records promptly available to any person" who asks for them. 5 U.S.C. § 552(a)(3)(A) (emphasis added). If it cannot do so, DOI must allocate additional resources to its FOIA program.

**G. The Proposal to Remove Mandatory Time Limits Violates FOIA.**

Proposed revisions to §§ 2.16, 2.18., 2.19, 2.37 and 2.51 of DOI's FOIA regulations would serve to change the phrase "time limit" to "time frame."[81] This attempt to shift a statutory requirement from a mandatory "time limit" to a permissive "time frame" is a clear violation of FOIA.

FOIA clearly defines the phrase "time limit." 5 U.S.C. 552 (a)(6)(A)(i) and (ii). 5 U.S.C. § 552 (a)(6)(B)(i) states that "in unusual circumstances… **the time limits prescribed** in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice." (*emphasis added).* The limits prescribed in clause (i) or (ii) of subparagraph (A) apply to the 20 days an agency has to (1) determine, and notify the requester whether the agency intends to respond to a request or (2) make a determination with respect to any appeal. *See id.* 552 § (a)(6)(B)(i). Despite the clear use of "time limit" in the statute, the proposed revision would alter DOI regulations such that the phrase "time frame" rather than "time limit" is used to describe the 20 day period.[82] Not only is the Proposed Rule contrary to the plain meaning of the statute, but it appears to be an attempt to change the statutory language and is, therefore, not in accordance with the law in violation of the APA. *See* 5 U.S.C. § 706(2)(A).

DOI's proposed change of the phrase is further invalidated by the fact that the FOIA clearly differentiates the phrase "time limit" and "time frame," with the latter applying only in "unusual circumstances." 5 U.S.C. (a)(6)(B)(ii) states "with respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A) the agency shall notify the person making the request if the request cannot be processed within the **time limit** specified…and shall provide the person…an opportunity to arrange with the agency an alternative **time frame**." (*emphases added).* Here, "time frame" refers to a period of time determined between the agency and the requester. It is thus a period of time that affords more flexibility to the agency than the prescribed 20 days. DOI does not have the

[81] *See* 83 Fed. Reg. 67,175 at 67,179.

[82] For example, DOI is proposing to change the wording in 43 C.F.R. § 2.16 from "What is the basic time limit responding to a request" to "What is the basic time frame for responding to a request" 83 Fed. Reg. 67175 at 67179, changes to 43 C.F.R. § 2.16.

authority to apply this more flexible wording to a statutorily prescribed 20 day **time limit**. As the statute makes clear, arranging a separate "time frame" is only permitted under "unusual circumstances" as specifically defined by the statute at 5 U.S.C. § 552 (a)(6)(B)(iii).[83]

### H. Review of Expedited Requests by Office of the Solicitor Is Inefficient and Unnecessary.

Proposed revisions to § 2.20(c) of DOI's regulations would mandate review of expedited requests by the Office of the Solicitor. This proposed revision would delay the decision on whether to grant expedited processing, totally obviating the statutory guarantee of processing for qualifying requests. *See* 5 U.S.C. § 552(a)(6)(E). And that is not the only reason the revision is ill-advised. The change would do nothing to improve efficiency, would remove authority from the staff that have relevant expertise, and would impose an unnecessary burden on the Solicitor's Office.

FOIA requires each agency to promulgate regulations to expedite processing of requests in instances in which the requester demonstrates a "compelling need," as defined by FOIA, or in any other circumstances set forth in an agency's regulations. 5 U.S.C. § 552(a)(6)(E). FOIA requires that these regulatory provisions "ensure that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request." *Id.* § 552 (a)(6)(E)(ii). Agency regulations must also ensure "expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing." *Id.*

The purported justification for shifting this responsibility to the Office of the Solicitor is that it would "ensure legal input is required when it is most equitable and effective." 83 Fed. Reg. at 67,176. Rather than improve efficiency, however, the requirement would at best add another layer of bureaucracy to DOI's FOIA process, involving a final decisionmaker who has little familiarity with the underlying project or facts, thereby likely inflating the time required to respond to an expedited review

[83] As used in this subparagraph, "unusual circumstances" means, only to the extent reasonably necessary to the proper processing of the particular requests—(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request; (II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or (III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

request and undercutting FOIA's requirements unnecessarily. At worst it would create delay solely for the sake of politically motivated review, which would not add any benefit to the purposes FOIA serves.

Contrary to DOI's proffered rationale, this aspect of the proposal is far from equitable: it would require bureaus to "consult with the Office of the Solicitor before *granting*," but not *denying*, requests for expedited processing. 43 C.F.R. § 2.20(c) (proposed) (emphasis added). This change would give bureaus at least two new incentives to deny such requests. First, granting a request for expedited processing would trigger an administrative burden to coordinate with the Office of the Solicitor, while denying the request would not. And second, granting a request for expedited processing would subject a bureau to additional scrutiny by the Office of the Solicitor, while denying the request would not. Even when bureau staff strive to be fair and impartial, these signals would be difficult to ignore. While denials of expedited processing are potentially subject to additional review upon appeal, that process is time-consuming, which would negate the very benefit that the requester sought.

The proposed treatment of expedited processing requests also deviates from how DOI handles other requests for procedural benefits. The Department's regulations require a bureau to "consult with the Office of the Solicitor before it denies a fee waiver request," 43 C.F.R. § 2.23(c), but not before granting one. This framework reasonably acknowledges that certain safeguards are appropriate before the Department denies a benefit to the public. The Proposal, however, takes the wrong-headed opposite approach: instituting hurdles before granting a benefit, but not before denying one.

Moreover, the proposal would remove review authority from agency staff who have developed expertise over decades of reviewing expedited requests. Agency staff are the most knowledgeable not only about the content of agency records, but also about the identity of their customers, such as media outlets and public interest organizations, many of whom routinely submit FOIA requests. In-bureau FOIA staff are therefore the most qualified to determine whether a request for expedited review is appropriate based on the criteria set forth in DOI's regulations.

The proposal would place additional burdens on the Solicitor's Office by increasing employees' workload and requiring commitment of other resources. This new oversight duty would impose an opportunity cost that would impinge upon employees' existing workload and responsibilities. With all the other proposed changes making the Solicitor's office a bottleneck,

it would not be surprising in the least if requests for expedited processing were answered long after the 10-day limit, or even after 20 days, leaving requesters who asked for expedited processing waiting longer than requesters who did not.

It is worth noting that a review of FOIA regulations promulgated by other federal departments and independent agencies indicates that none of them have adopted the model of Solicitor review that DOI has proposed. This raises significant questions about the efficacy of this untested scheme. *See, e.g.*, 6 C.F.R. § 5.5(e) (Department of Homeland Security expedited processing regulations); 7 C.F.R. § 1.9(a) (Department of Agriculture expedited processing regulations); 49 C.F.R. § 7.31(c) (Department of Transportation expedited processing regulations); 15 C.F.R. § 4.6(f) (Department of Commerce expedited processing regulations); 31 C.F.R. § 1.5(e) (Department of Treasury expedited processing regulations); 29 C.F.R. § 70.25(e) (Department of Labor expedited processing regulations); 24 C.F.R. § 15.105(b) (Department of Housing and Urban Development expedited processing regulations); 34 C.F.R. § 5.21(e) (Department of Education expedited processing regulations); 45 C.F.R. § 5.27 (Department of Health and Human Services expedited processing regulations); 40 C.F.R. § 2.104(e) (Environmental Protection Agency expedited processing regulations); 41 C.F.R. § 105-60.402-2(c) (General Services Administration expedited processing regulations); 29 C.F.R. § 102.117(c)(2)(ii) (National Labor Relations Board expedited processing regulations). This ill-advised experiment should be abandoned.

Finally, in its description of "the type of information which has particular value that will be lost if not disseminated quickly," 43 C.F.R. § 2.20(a)(2)(iii), DOI proposes to remove the clarification that "this ordinarily refers to a breaking news story of general public interest." This specific revision is ambiguous and troubling. Urgent requests frequently relate to breaking news reports about impending Department actions. Media frequently report on developments in DOI's policymaking and administration, reflecting the critical role of the Department in our nation's government, society, and environmental stewardship. This regulatory revision implies that the Department is seeking greater authority to deny requests for expedited processing of FOIA requests related to breaking news stories; it eliminates DOI's recognition that such requests may qualify for expedited processing. The Department must not finalize this revision without first providing additional information about the intended impact. Commenters cannot offer informed input on—and FOIA requesters must not be subject to the consequences of—such a cryptic deletion. Without more, the deletion seems geared toward shielding DOI from expedited FOIA requests on issues where it may be embarrassed in the press—which is not a legal justification for withholding, or delaying the release of information under FOIA. *See, e.g.*,

*National Day Laborer Organizing Network v. Immigrations and Customs Enforcement Agency*, 811 F. Supp. 2d 713, 749 (S.D.N.Y. 2011) (embarrassment "not a relevant consideration under FOIA").

## I. Blanket Pre-Approval of Record Withholding Violates FOIA

Proposed changes to § 2.23 and 2.24 of DOI's FOIA regulations purport to allow the Solicitor's office to issue blanket preapproval to withhold certain records. This proposed preapproval mechanism is not clearly explained, invites inappropriate political influence, cannot be reconciled with FOIA's purpose, and violates FOIA's transparency-promoting scheme of default disclosure and limited exemptions.

The Department has inserted this broad and illegal expansion of the Solicitor's authority in a single clause at the end of two provisions, giving no detail or explanation about what preapproval would look like. The proposed amendments place no limits or structure on a preapproval process, giving unfettered and unlawful authority to the Solicitor's office. But no matter how the Department intends to carry out this new regulation, it cannot do so.

The cryptic justification that these changes "ensure legal input is required when it is most equitable and effective,"[84] is unconvincing: allowing the Solicitor to preapprove records for withholding undermines FOIA, and harms anyone interested in those records and denies them the right to the legally required individual determination. 5 U.S.C. § 552(a)(6)(A)(i)(I). Records cannot be withheld under FOIA until someone asks for them, and then only in accordance with the procedures prescribed in the statute. 5 U.S.C. § 552(d) ("This section does not authorize withholding of information … except as specifically stated in this section."). There is no authority to make a freestanding finding that a record can be withheld, nor is there any reason for doing so. Despite the suggestion to the contrary, there is no "efficiency" gained by basing a future withholding on a present unlawful action. If records are denied using this preapproval authority, such withholding will be null and void, requiring the agency to start over with a fresh determination of whether the record will be disclosed when the withholding is inevitably overturned. That is a peculiarly inefficient process.

First, the preapproval policy injects political influence and inefficiency into the FOIA process. FOIA envisions that agencies evaluate and respond to requests as they come in—identifying and reviewing records in response to requests. The statute provides the sole authority for withholding records. 5 U.S.C. § 552(d). A request triggers the responsibility to make a determination, *id.* § 552(a)(6), and a determination to withhold records requires a

[84] 83 Fed. Reg. 67179.

finding that an exemption applies and, in many cases, that foreseeable harm would occur, *id.* § 552(a)(8), (b). Under the Department's existing regulations, consistent with the statute, the Solicitor can act as a check on overbroad withholding of information, because the Solicitor must approve any withholding. In contrast, allowing "preapproved" withholding turns this role on its head, and puts the focus not on the particular facts related to the request, but instead on the agency's priorities and desire for secrecy. Under this amendment, the Solicitor's office could identify documents they wish to keep secret at any time depending on their political priorities. The Department could then attempt to use this preapproval to avoid explaining their withholding until a specific challenge from a requester—giving the agency a chance to concoct a justification after the fact.

"The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold governors accountable to the governed." *National Labor Relations Board v. Robbins Tire & Rubber Company*, 437 U.S. 214, 242 (1978). As noted above, the Department's attempt to vest such significant power with the Solicitor, a political appointee, undermines FOIA's goal of holding "governors accountable to the governed." *Id.*

Second, the scheme appears set to violate the delicate balance between transparency and confidentiality established by Congress. *United Technologies Corporation v. U.S. Department of Defense*, 601 F.3d 557, 559 (D.D.C. 2010) ("In enacting FOIA, the Congress sought to balance the public's interest in government transparency against legitimate governmental and private interests [that] could be harmed by release of certain types of information.") (internal quotations omitted). Congress was aware of the difficulty of balancing these opposing interests, and deliberated extensively on the costs and benefits of disclosure. *Federal Bureau of Investigation v. Abramson*, 456 U.S. 615, 642-43 (1982). The Senate Committee specifically stated that, "It is not an easy task to balance the opposing interests, but it is not an impossible one either… Success lies in providing a workable formula which encompasses, balances, and protects all interest, yet places emphasis on the fullest possible disclosure."[85]

This preapproval idea violates FOIA because it upsets the careful balance Congress struck—and the clear choices it made to favor transparency over secrecy. FOIA provides for proactive disclosure, 5 U.S.C. § 552(a)(2), but not proactive withholding. Indeed, it limits withholdings even when exemptions technically apply. *Id*. § 552(a)(8)(A)(i)(I). The Department's proposed change, however, would upend the clear default Congress established

[85] S. Rep. No. 813 at 3 (1965).

in favor of agency disclosure. If the Solicitor identifies certain records as preapproved for withholding, then agency FOIA staff will be unable to meet their statutory obligations.

No provision in the statute authorizes a process that so clearly repudiates the basic structure and purpose of FOIA. Rather, as explained above, Congress carefully circumscribed agencies' authority to enact procedural rules to administer FOIA. Nowhere did Congress mention anything like the preapproval process the Department has invented from whole cloth. Indeed, Congress stated precisely the opposite, requiring a process where agencies can and must proactively disclose documents or must objectively review records to respond to FOIA requests.

A preapproved withholding process makes adherence to FOIA's limited exemptions from disclosure impossible. Determining whether an exemption can apply requires consideration of particular facts about, and context around, the information. For most records, no withholding can be made unless the Department first finds, based on all the relevant facts at that time, that disclosure would cause foreseeable harm to an interest protected by the claimed exemption. 5 U.S.C. § 552(a)(8)(A)(i)(I). Particular exemptions require similar fact-based determinations. The applicability of the deliberative process privilege under Exemption 5 depends on whether and how a document is used in decisionmaking—circumstances that will be impossible to predict and that will change over time. If a deliberative document is adopted or incorporated into a decision, it can no longer be withheld. *National Labor Relations Board v. Robbins*, 421 U.S. at 161. Along the same lines, a document may fall within an exemption one year and not be exempt the next. Exemption 5 expressly ties application of the exemption to the time of the request—documents may not be withheld as deliberative if more than 25 years have passed between the creation of the record and the request. 5 U.S.C. 552(b)(5). As another example, Exemption 7 requires not only consideration of the information itself but specific consideration of the effects disclosure would have on law enforcement proceedings or adjudication, which may change over time as investigations conclude. Other exemptions may become inapt over time, too: for example, if national security concerns disappear and documents are declassified, Exemption 1 would no longer apply. Further, many exemptions—such as records protected by attorney-client privilege (under Exemption 5), trade secrets (under Exemption 4), disclosure of a confidential source (under Exemption 7)—depend on whether a document is somehow privileged or confidential. If a document has been shared with a third party, breaking the confidentiality, the agency can no longer withhold it.

An agency can only determine if these limited exemptions apply when a requester seeks the information. Even when an exemption applies, the agency must also determine whether

disclosure is nonetheless appropriate under the foreseeable harm standard—another context- and time-specific inquiry. Preapproved withholding makes a mockery of Congress's careful exemption scheme. Simply put, the facts relating to the propriety of a withholding are varied and change over time. The Solicitor cannot lawfully decide in a vacuum to withhold documents. Yet FOIA staff nonetheless will be prohibited from complying with the law and disclosing public records because of blanket preapprovals.

This proposal is all the more egregious because it has no time limit or other restraints on preapproval, and so documents could be withheld under "preapproval" long after any claim of exemption is obsolete. But even if it did impose such limits, the preapproval provision would still unlawfully obstruct the fact-specific, objective application of exemptions that FOIA requires.

### J. Proposed Changes to the Administration of Fee Waivers Violate FOIA

Proposed changes to §§ 2.37- 2.54 of DOI's FOIA regulations would create a number of modifications to the way that fee waivers are awarded and administered. The changes violate FOIA, invite abuse, and are bad public policy.

#### *i) The elimination of the prohibition on "value judgements" undermines FOIA and is bad public policy*

The proposal to remove § 2.45 (f) of DOI's FOIA regulations, which prohibits the Department from making "value judgments," is misguided. The current provision provides valuable guidance by clarifying existing law, and removal could lead to confusion and inefficiency. FOIA requires agencies to waive fees "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552 (4)(A)(iiii). To clarify FOIA's requirements, the law directed the Office of Management and Budget ("OMB") to establish uniform fee waiver guidelines for all agencies. 5 U.S.C. § 552(a)(4)(A)(i). OMB issued these guidelines in 1987, but declined to provide guidance on when to issue fee waivers.[86]

[86] The Freedom of Information Reform Act of 1986; Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10,012-01, 10,016 (March 27, 1987).

In order to carry out its statutory responsibility to ensure that agencies comply with FOIA,[87] the DOJ issued fee waiver policy guidance to all federal agencies.[88] The DOJ guidance is largely constructed from case law existing in 1987, and subsequent courts reviewing fee-waiver denials have further confirmed the DOJ's analysis. [89]

By DOJ's analysis, disclosure must be likely to contribute "significantly" to public understanding of government operations or activities.[90] This analysis involves comparing the likely impact of the disclosure on the public's understanding of the subject in question, as compared to the level of public understanding of that subject existing prior to the disclosure.[91] "The agency's decision properly turns on whether the disclosure is likely to lead to a significant contribution to public understanding. This does not permit a separate value judgment by the agency as to whether the information, even though it in fact would contribute significantly to public understanding of the operations or activities of the government, is 'important' enough to be made public."[92]

Like DOJ, many agencies have included a prohibition on making "value judgments" about the importance of the records in their FOIA regulations. *E.g.*, 40 C.F.R. § 2.107(l)(2)(iv) (EPA); 32 C.F.R. § 286.28(d)(3)(i)(D) (Department of Defense); 6 C.F.R. § (k)(2)(iv) (Department of Homeland Security); 24 C.F.R. § 15.110(h)(1)(i)(D) (Department of Housing and Urban Development); 5 C.F.R. § 1820.7(k)(2)(iv) (Office of Special Counsel); 1 C.F.R. § 304.9(k)(2)(iv) (Administrative Conference); 5 C.F.R. § 2411.13(b)(4)(ii)(D) (FLRB); 38 C.F.R. § 1.561(n)(3)(iv) (Veteran's Affairs).

Courts that have addressed the issue are in agreement: agencies are simply to review the information submitted by the FOIA requester for facts that explain the significance (chiefly, the novelty) of the information: Is the public interested in the information, and will disclosing the information help to satisfy that interest? "Where statements of the public value of requested information are contained in the plaintiff's correspondence with the agency and are stated with 'reasonable specificity,' they meet at least the threshold test for informative value." *Citizens for*

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[87] 5 U.S.C. §§ 552(e), (e)(1)(M) (requiring agencies to report to the Attorney General on the number of fee waiver requests granted and denied, "and the average and median number of days for adjudicating fee waiver determinations" in the previous fiscal year).
[88] U.S. DEP'T OF JUSTICE, FOIA UPDATE: NEW FEE WAIVER POLICY GUIDANCE (1987), https://www.justice.gov/oip/blog/foia-update-new-fee-waiver-policy-guidance.
[89] *See Inst. For Wildlife Prot. v. U.S. Fish & Wildlife Serv.*, 290 F. Supp. 2d 1226, 1229 (D. Or. 2003) (describing two-part statutory test with the same four public-interest factors).
[90] *Id.*
[91] *Id.*
[92] *Id.* (emphasis added).

*Responsibility & Ethics in Washington v. U.S. Department of Justice*, 602 F. Supp. 2d 121, 128–29 (D.D.C. 2009).

The fee-waiver test does not permit gradations of public interest; it does not allow the agency to decide which public interests are important enough to merit a fee waiver and which are not. *Ettlinger v. Federal Bureau of Investigation*, 596 F. Supp. 867, 875 (D. Mass. 1984) (statute does not permit the agency to consider the "intrinsic value of the subject matter"). Instead, the agency, and the reviewing court, may properly consider only whether there is "some *objectively* demonstrable interest by some segment of the public. *Id.* at 875. Accordingly, DOI must retain the prohibition on making value judgments.

***ii) DOI may not require pointless specificity in fee waiver requests.***

Under the current § 2.45(a) of its regulations, DOI determines fee waiver eligibility "based on all available information." Under the proposed change, DOI would make such determinations "considering the information you have provided and verifying it as appropriate." The proposed revision's emphasis on "the information you have provided" suggests an intent to review fee waiver requests with greater scrutiny, looking for technical reasons to avoid what should be clear and obvious conclusions that requesters are entitled to a waiver of fees. We also object to the addition of the language, "verifying it as appropriate," which suggests that DOI sees the fee waiver process as adversarial, allowing the Department to speculate or draw inferences that cut against eligibility for waiver.

Both aspects of the revision are problematic because they are inconsistent with the requirement that fee waivers be liberally granted for noncommercial requesters. *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1315 (D.C. Cir. 2003). *See also MESS v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. 27, 190 (1986) (Sen. Leahy)). Accordingly, DOI cannot play games with fee waiver requests, requiring "pointless specificity." *Rossotti*, 326 F.3d at 1314. It is therefore unlawful for the Department to draw inferences against or engage in speculation about a requester's eligibility for waiver. *See id.* (holding that where a requester described the ways it ordinarily disseminates information to the public, the agency could not deny a fee waiver merely because the requester did not connect the dots and assert that it would use those methods to disseminate the particular records requested).

We suggest that the Department revise Section 2.45(a) as follows: "…if the bureau determines, considering the information you have provided, that you have demonstrated that disclosure (1) is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government and (2) is not primarily in the

commercial interest of the requester. If you are a noncommercial requester, the bureau will draw all reasonable inferences in favor of your eligibility for a waiver. If the bureau is unable to determine whether you are eligible, it will contact you for further information or clarification."

***iii) DOI must clarify that a requester's "commercial interest" turns on the use to which the requested information would be put, not identity of the requester.***

Under FOIA an agency must waive or reduce fees if (1) "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government" and (2) "is *not primarily in the commercial interest* of the requester." 5 U.S.C. § 552(a)(4)(A)(iii) (emphasis added). OMB and DOJ have consistently interpreted the "commercial interest" prong to require an evaluation of the "*use* to which the requested information would be put, rather than on the identity of the requester."[93] Indeed, "use" is the "exclusive determining criterion."[94] As OMB's and DOJ's guidance makes clear, a commercial-use requester is one who "seek[s] records for 'a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is being made.'"[95] Moreover, FOIA's fee waiver requirements are to "be liberally construed in favor of waivers" of fees for requesters seeking information for noncommercial use. *Judicial Watch, Incorporated v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (quoting 132 CONG. REC. 27,190 (1986) (Sen. Leahy)); *see also* Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) (emphasizing that the Freedom of Information Act reflects a "profound national commitment to ensuring an open Government" and directing agencies to "adopt a presumption in favor of disclosure").

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[93] DOJ, Guide to the Freedom of Information Act, Fees and Fee Waivers at 3 (emphasis added) https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/fees-feewaivers.pdf; *see also* Office of Management and Budget, *The Freedom of Information Reform Act of 1986; Uniform Freedom of Information Act Fee Schedule and Guidelines*, 52 Fed. Reg. 10,012, 10,013 (Mar. 27, 1987). Because Congress charged the Office of Management and Budget with the responsibility of providing a "uniform schedule of fees" for agencies to follow when promulgating their FOIA fee regulations, the agency's interpretation of FOIA is instructive. 5 U.S.C. § 552(a)(4)(A)(i); *see Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 432 F.3d 945, 947 (9th Cir. 2005) ("FOIA calls for the Office of Management and Budget to promulgate [fee] guidelines for agencies to follow.") (citation omitted); *Media Access Project v. FCC*, 883 F.2d 1063, 1069 (D.C. Cir. 1989) (rejecting plaintiff's claim that OMB's authority is limited to establishing "price list").

[94] 52 Red. Reg. at 10,013.

[95] DOJ Guide to the FOIA, Fees, and Fee Waivers at 3; 52 Fed. Reg. at 10,012-13, 10,017-18; *see also Research Air, Inc. v. Kempthorne*, 589 F. Supp. 2d 1, 10 (D.D.C. 2008) (looking to requester's stated intent to determine whether it was a commercial use).

Thus, if a public interest organization satisfies the public interest factors and articulates a facially-plausible intent to use the requested information for noncommercial use, DOI should generally grant a waiver. *Cause of Action v. Federal Trade Commission*, 961 F. Supp. 2d 142, 155 (D.D.C. 2013) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'"). If the intended use is not clear from the request itself, DOI should seek additional information or clarification from the requester.[96]

DOI's proposed revisions to its commercial-use regulation, 43 C.F.R. § 2.48(b), arbitrarily and unlawfully departs from these principles, in several ways. First, the revisions impermissibly give the agency's FOIA officer unfettered discretion to consider whether the request would "further **any** commercial interest" of the requester, regardless of how attenuated that interest might be.[97] As noted, OMB and DOJ have consistently interpreted the "commercial interest" inquiry to turn on the "use to which the requested information would be put, rather than on the identity of the requester."[98] The requester's stated "use" is the "exclusive determining criterion,"[99] not some indefinite, attenuated, or speculative interest the requester *might* have.

As presently written, DOI's regulation arbitrarily and unlawfully allows the FOIA officer to speculate about the commercial interests or activities of a requester, regardless of logical relationship or relevance of those activities and interests to the "*use* to which the requested information would be put." *Cf. Community Legal Services v. U.S. Department Housing and Urban Development*, 405 F. Supp. 2d at 560 (finding that agency's speculative inference that requester's use of "information in advising clients suggests a litigious motive" was arbitrary and capricious given that requester's services include counseling as well as litigation and there was no evidence of any pending lawsuits against the agency); *see also* 132 Cong. Rec. S14,298 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy) (emphasizing that agencies should administer fee waiver provision in "an objective manner and should not rely on their own, subjective view as to the value of the information").[100] On some level, virtually every organization or entity has *some* interest that could be defined as commercial—managing an

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[96] DOJ Guide to Fees and Fee Waivers at 3; 52 Fed. Reg. at 10,018 (specifying that where "use is not clear from the request . . . agencies should seek additional clarification before assigning the request to a specific category")

[97] 83 Fed. Reg. at 67,179 (proposed 43 C.F.R. § 2.48(b)(1)) (*emphasis added*).

[98] DOJ Guide to Fees and Fee Waivers at 3; 52 Fed. Reg. 10,012, 10,013.

[99] *Id*.

[100] DOJ Guide to the FOIA, Fees and Fee Waivers at 3 (emphasis added); 52 Fed. Reg. 10,012, 10,013.

operational budget, for example. But if the information requested is not to be used to further those general commercial interests, the agency cannot consider them.

Second, and relatedly, the proposed changes appear to allow FOIA officers to make subjective determinations about whether disclosure might further any commercial interest, or whether that interest is the primary interest furthered by the request.[101] As noted, DOI must clarify that whether a requester has a "commercial interest" in disclosure turns on the use the to which the requester states that they will put the information, not the identity of the requester or any subjective judgment about what the FOIA officer believes the requester might do with the information. At a minimum, DOI must clarify that any "commercial-use" determination must be an objective one, based on the information provided in the FOIA request itself. Agencies are not permitted to employ subjective value judgments as to whether disclosure would, in fact, further some undefined or speculative interest of the requester.[102]

Third, read together, DOI's proposed subsections (b)(1) and (b)(2) could be interpreted to create an impermissible presumption that nonprofit organizations are commercial requesters, or to create a heightened burden for demonstrating that a particular request is not for commercial use. Although courts have held that the FOIA requester bears the initial burden of proving that disclosure is not primarily in the requester's commercial interest, *Larson v. CIA,* 843 F.2d 1481, 1483 (D.C.Cir.1988). FOIA's fee waiver requirements are to "be liberally construed in favor of waivers for noncommercial requesters." *Western Watersheds v. Brown*, 318 F. Supp. 2d 1036, 1038, 1040 (D. Id. 2004) (granting fee waiver and accepting requester's statement regarding use of the information); *see also Clemente v. F.B.I.*, 741 F. Supp. 2d 64, 77 (D.D.C. 2010) (granting fee waiver where no reason to believe that request was primarily, if at all, commercial). Moreover, courts have held that agencies should generally accept the requester's representations regarding the purpose or use to which it intends to put the requested information. *Id.* This is consistent with the general rule that fee waiver determinations be based

[101] 83 Fed. Reg. at 67,179 (proposed 43 C.F.R. § 2.48(b)(2) (proposing to add, "the bureau must determine whether that is the primary interest furthered by the request").

[102] *Cf.* DOJ Guide to the FOIA, Fees and Fee Waivers at 36 (in the related context of determining the public interest in disclosure, "agencies are not permitted to make separate value judgments as to whether any information that would in fact contribute significantly to public understanding of government operations or activities is 'important' enough to be made public"); *see also* 132 Cong. Rec. S14,298 (emphasizing that agencies should administer fee waiver provision in "an objective manner"); *cf. Cmty. Legal Servs.*, 405 F. Supp. 2d at 560 (agency's inference that requester's use of "information in advising clients suggests a litigious motive" was purely speculative and arbitrary given that requester's services include counseling as well as litigation and there was no evidence of any pending lawsuits against agency).

on objective considerations, rather than subjective attempts to determine a requester's motives or intent. Moreover, for the same reasons that media requesters are subjected to a somewhat relaxed burden, public interest requesters should also be liberally granted fee waivers.

DOI should make clear that the Proposed Rule does not create any presumption about the commercial-use interest of a particular requester based on their identity or organization. Nor should DOI's revisions be interpreted to heighten the burden for public interest groups to obtain fee waivers.

To address these concerns, we urge DOI to make clear that the commercial use factor turns on the requester's representations of the use for which he or she seeks the information, and not any unrelated, general commercial interest the requester might have. Specifically, we urge DOI to revise the proposed language as follows:

> To determine whether disclosure of the requested information is primarily in your commercial interest, the bureau will consider, based solely on information contained in the request itself:
>
> (1) Whether the requester plainly seeks disclosure to further a commercial interest.
>
> (2) If the requester seeks to further 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 the identified commercial interest is not the primary interest furthered by the request.
>
> > (A) 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.
> >
> > (B) When a public interest requester has satisfied paragraph (a) above, and demonstrates a public interest use for the requested information that is not primarily in the commercial interest of the requester, the bureau should ordinarily presume that the request is not in the commercial interest of the requester.

Finally, to the extent that the requester's intended use is not clear on the face of the FOIA request, OMB and DOJ guidance instruct federal agencies to seek additional information or clarification from the requester.[103] DOI's final FOIA regulations must make clear that the agency follows the same practice, or provide a rational explanation for departing from OMB's and DOJ's suggested approach.[104] We urge DOI to add the following sentence to 43 C.F.R. § 2.48(b)(3):

> (3) You are encouraged to provide explanatory information regarding this consideration. Where the requester's intended use is not clear from the request, the bureau will request additional clarification before assigning the request to a specific category.

***iv) The Department of Interior must not use the requirement that information be "meaningfully informative" to illegally deny fee waivers***

Proposed revisions to § 2.48(a)(2)(i) purport to clarify the existing requirement that "the contents of the records [be] meaningfully informative." As elaborated by the Proposed Rule, "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."

This added language is inaccurate because it omits an important part of the standard, and it unlawfully invites the Department to deny fee waivers if some unstated, arbitrary proportion of the requested records are already in the public domain. The proposed change also imposes an unlawful burden on requesters.

DOI must clarify that there is no requirement that any arbitrary proportion of responsive records be novel, and that "the substantive contents of even a single document may substantially enrich the public domain and justify a fee waiver." *Project on Military Procurement*

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[103] 52 Fed. Reg. at 10,018 (specifying that where "use is not clear from the request . . . agencies should seek additional clarification before assigning the request to a specific category").

[104] *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016) ("[T]he agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" (quoting *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009))); *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 42 ("If Congress established a presumption from which judicial review should start, that presumption . . . is not against safety regulation, but against changes in current policy that are not justified by the rulemaking record.").

*v. Department of Navy*, 710 F. Supp. 362, 366 (D.D.C. 1989). *See also Fitzgibbon v. Agency for Internal Development*, 724 F. Supp. 1048, 1051 n.10 (D.D.C. 1989) (holding that selectively released records had not "informed the public to such a degree as to preclude [Plaintiffs] from making a significant contribution to public understanding."). Relatedly, DOI must clarify that "only material that has met a threshold level of public dissemination will not further 'public understanding' within the meaning of [FOIA's] fee waiver provisions." *Campbell v. U.S. Department of Justice*, 164 F.3d 20, 36 (D.C. Cir. 1998).

In addition, DOI must clarify that if *any* of the records would contribute to public understanding, then the entire request qualifies for a fee waiver. *Schoenman v. FBI*, 604 F. Supp. 2d 174, 194 (D.D.C. 2009). The fee-waiver provision of FOIA "implicitly assume[s] that valuable government information tends not to be freestanding . . . . Congress presumably did not intend agencies to pick through responsive records to determine the percentage of the record that contains interesting morsels and to deem the remainder of the record irrelevant to public understanding." *Campbell*, 164 F.3d at 36. Consequently, when an agency's files contain records of public interest and "non-substantive clutter," both will "fall under the waiver." *Id.*

Finally, DOI must clarify that it is not the requester's responsibility to establish that records are not in the public domain. As written, the proposed revision would impose an impossible burden on requesters, contrary to requirement that fee waivers be liberally granted in favor of noncommercial requesters. Requesters simply cannot be expected to know how much responsive material will be novel; that information is solely in the agency's possession. To establish eligibility for a fee waiver, requesters need only assert that there is public interest in the material. It is the *agency's* responsibility to negate the assertion by showing that "no new meaningful information is to be gained" from disclosure. *CREW v. Department of Health & Human Servs.*, 481 F. Supp. 2d 99, 111-12 (D.D.C. 2006) (holding that an agency arguing "that the requested documents are already publicly available must do more than merely make that assertion").

## V. The Department Must Comply with NEPA and May Not Rely on a Categorical Exclusion for this Rulemaking.

Due to the breadth and scope of this rulemaking, it is essential that DOI comply with the requirements of the National Environmental Policy Act ("NEPA") and prepare a full Environmental Impact Statement ("EIS") to consider its impact. NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA's specific procedural mandates are designed "to foster excellent action" by "help[ing] public officials make decisions that are based on [an] understanding of environmental consequences, and tak[ing] actions that

protect, restore, and enhance the environment." *Id.* § 1500.1(c). The Federal Government's obligations under FOIA dovetail with its obligations under NEPA because public transparency and access to information is critical to ensuring full consideration of environmental impacts and stewardship of the environment.

NEPA requires agencies to prepare a detailed EIS for "all major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). "Major federal actions" include, among other things, "new or revised agency rules, regulations, plans, policies, or procedures." 40 C.F.R. § 1508.18(a). When it is unclear whether a proposed action will have a significant effect on the environment, the agency must prepare an EA to determine whether an EIS is required. *See id.* § 1508.9. "Effects" are defined broadly to include ecological, aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative, and encompass both beneficial and detrimental effects. *Id.* § 1508.8.

The "significance" of the proposed action's "environmental effects depends on both its context and its intensity." 40 C.F.R. § 1508.27. Context refers to the scope of the activity, ranging from its potential effects to "society as a whole" to the "affected region, the affected interests, and the locality," at both short and long-term timescales. *Id*. § 1508.27(a) (2018). Intensity, on the other hand, refers to the severity of the activity as revealed through the consideration of ten factors. *Id.* § 1508.27(b).

Furthermore, "[a] determination that significant effects on the human environment will in fact occur is not essential" for an EIS to be required; "[i]f substantial questions are raised whether a project *may* have a significant effect upon the human environment, an EIS must be prepared." *Sierra Club v. U.S. Forest Service*, 843 F.2d 1190, 1193 (9th Cir. 1988) (emphasis added); *see also Steamboaters v. F.E.R.C.*, 759 F.2d 1382, 1393 (9th Cir. 1985) (an agency "must supply a convincing statement of reasons why potential effects are insignificant.").

Several of the ten intensity factors would appear to be met or exceeded by the Proposed Rule including: (1) Impacts that may be both beneficial and adverse; (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial; (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration; (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts; and (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment. *Id.* § 1508.27(b)(1), (4), (6), (7), and (10)

Nonetheless, the Department's December 28, 2018 Federal Register notice states, without discussion, that the draft rule "does not constitute a major Federal action significantly affecting the quality of the human environment" and does not warrant preparation of an EIS.[105] The notice appears to rely on the Department's categorical exclusion for:

> Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.

43 C.F.R. § 46.210(i).[106]

The Department has not justified its reliance on this Categorical Exclusion. First, the draft rule is not purely procedural in nature; it fundamentally implicates the public's statutory right to access governmental information for all the reasons explained in Section IV. As a direct and inevitable result of cutting off this information, the physical environment will suffer: public lands will be degraded and wildlife populations will decline. NEPA is built on the assumption that informed public participation leads to better balancing of development needs against environmental impacts. This draft rule would undermine the public's critical role.

Nor does the rule satisfy the second clause of the categorical exclusion because its environmental effects will not be subject to NEPA analysis at a later date. First, the Department will not analyze the effects of all the positive changes that would be sparked by an informed and engaged public. As shown in the examples below, information released under the FOIA can result in public feedback that prompts environmentally beneficial decisions and policies. With less access to information, however, those decision processes would never begin, and consequently they would never be analyzed. Second, the Department will exclude from analysis many future decisions that, with input from a properly informed public, would have been considered in an EA or EIS. Information that should be timely provided under FOIA will often show that a Determination of NEPA Adequacy ("DNA") or CE is inadequate. Without timely access to that information, however, the public will often lack the ability to convince the Department to undertake needed analysis.

These effects are not too speculative to study now. The Department has ready access to records of all of its decision processes. At the least, the Department can identify those processes

[105] 83 Fed. Reg. at 67,177.

[106] The draft rule cites various departmental manual provisions, rather than the regulation that actually provides the categorical exclusion.

in which a project was proposed for a DNA or CE, but for which public feedback caused the project to receive analysis in an EA or EIS. In all those cases, any mitigation commitments or improvements to project design can be directly attributed to the role of a well-informed public. All of those environmental benefits would be lost due to the suite of FOIA policies addressed in these comments, which would cripple the public's ability to participate effectively—especially when decision processes are moving quickly.

Even if the Proposed Rule did satisfy the threshold criteria for a Categorical Exclusion, extraordinary circumstances apply. *See* 40 C.F.R. § 1508.4 (categorical exclusions do not apply where there are "extraordinary circumstances in which a normally excluded action *may have* a significant environmental effect" (emphasis added)). Those circumstances generally mirror the types of "significant" impacts that would trigger an EIS. *Compare* 43 C.F.R. § 46.215 (enumerating DOI extraordinary circumstances), *with* 40 C.F.R. § 1508.27(b) (cataloguing "intensity" factors to assess whether an action may have significant impacts).

Several extraordinary circumstances apply to the Proposed Rule, making application of a Categorical Exclusion inappropriate. For instance:

- ***Highly controversial environmental effects (43 C.F.R. § 46.215(c)).*** Public controversy around the DOI's rollbacks of environmental policies and protections—and its lack of transparency in implementing its agenda—is high. By further limiting public access to information, the Proposed Rule is likely to advance that agenda and undermine the public's ability to gather information on government activities and to provide input and oversight of those activities.
- ***Direct relationship to other actions with individually insignificant but cumulatively significant environmental effects (43 C.F.R. § 46.215(f)).*** The impacts of DOI's proposed revision of its FOIA regulations must be considered in the context of the Trump Administration's broader efforts to "streamline" public participation and access to information. *See, e.g.*, Executive Order 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects," 82 Fed. Reg. 40463 (Aug. 24, 2017); Secretarial Order No. 3355, "Streamlining National Environmental Policy Act Reviews and Implementation of Executive Order 13807" (Aug. 31, 2017). These efforts are already having significant negative impacts on the public's ability to access important information and adequately participate in government decision-making about DOI's management of public resources and the environment. The Proposed Rule can be expected to further restrict public access to information about those critical governmental functions, with cumulatively significant

effects on public transparency and engagement in DOI projects, plans, policies, and other activities.

- ***Violate a Federal law, or a State, local, or tribal law or requirement imposed for the protection of the environment (43 C.F.R. § 46.215(i)).*** As described in Section IV, above, the Proposed Rule violates FOIA in a number of respects. While FOIA is a government transparency law, it plays a significant role in protection of the environment, by ensuring that the public has access to information about government decision-making and management of public resources and the environment. Armed with that information, the public can more effectively engage in and influence government decision-making and, where necessary, challenge decisions that violate environmental laws. By constraining the public's ability to timely and transparently access information, the draft rule will harm those critical public functions, ultimately leading to more violations of environmental laws.

In short, the Department has not justified its use of a Categorical Exclusion. Instead, the Proposed Rule raises "substantial questions whether [the rulemaking] may have a significant effect on the environment," thus compelling preparation of an EIS. *See Anderson v. Evans*, 371 F.3d 475, 488 (9th Cir. 2004) (quotation omitted). As described in detail in Section IV, above, the Proposed Rule provisions simultaneously raise the burden on FOIA requesters and lessen the burden on DOI agencies to respond to FOIA requests, with the anticipated impact of decreasing public transparency and access to information about critical governmental functions related to management and stewardship of the environment and compliance with environmental laws. These anticipated impacts will occur in multiple contexts and at multiple scales–impacting local efforts to understand and influence a particular plan, project, or other Department activity (such as a BLM decision to offer particular public land parcels for oil and gas leasing), as well as regional or national efforts to access information related to policy development or other programmatic initiatives (such as an EPA rulemaking related to climate change or other issues of national or global significance).

Examples of how FOIA has been employed in the past to improve environmental outcomes makes clear how this rulemaking may have significant impacts on the environment.

- **Glacier National Park**: On May 2, 2014, a retired Glacier National Park wildlife biologist represented by the Western Environmental Law ("WELC") Center submitted a FOIA request seeking information relating to the National Park Service's ("NPS") failure to manage an area owned by NPS in Glacier National Park, the Middle Fork Bald Eagle Roost ("the Roost"). The Roost is a special piece of NPS land. Although it is a small parcel, the Roost possesses exceptionally high value for wildlife. Specifically, the Roost has old-growth

characteristics that make it a magnet for an unusual diversity of wildlife including bald eagles, black bears, elk, deer and pileated woodpeckers.

Although the Roost is NPS property, it was opened to hunting during the 2012 Montana hunting season and it appeared that NPS had relinquished jurisdiction over it. Between 2012 and 2014, WELC sought informally, but without success, to remind Park personnel that the Roost was Park property. The NPS failed to respond to WELC's FOIA request and on July 11, 2014, WELC filed a complaint in federal court asking the court to compel NPS to respond to the request and provide all responsive records. One month later, on August 11, 2014, the NPS granted Plaintiffs' request in full.

The FOIA litigation spurred significant, environmentally-beneficial changes. These included: (1) A "Land Description Review" prepared by the BLM confirming NPS ownership of and jurisdiction over the Roost—which had not previously been made available to the public—was released. (2) In response to WELC's inquiries about the completeness of the FOIA response, the NPS made public for the first time the fact that it would longer seek a Solicitor's Opinion on jurisdiction over the Roost and was satisfied with the determination of the aforementioned BLM Opinion, which placed ownership and jurisdiction with the NPS. (3) The NPS made public the fact that it had accepted management responsibility for the Roost.

The effect of the litigation was to ensure that a small but important parcel of public land remained under the protective umbrella of Glacier National Park.

- **ESA Practices**: During the Bush Administration, a variety of groups placed FOIAs on questionable practices under the ESA. When the documents were released[107] the news media published front page stories about DOI's Deputy Assistant Secretary for Fish and Wildlife and Parks directly interfering with decisions about the listing of at least eight species under the ESA.[108] Exposure of

[107] *See* UNION OF CONCERNED SCIENTISTS, SCIENTIFIC INTEGRITY IN POLICYMAKING: AN INVESTIGATION INTO THE BUSH ADMINISTRATION'S MISUSE OF SCIENCE (2004) *available at* https://www.ucsusa.org/sites/default/files/legacy/assets/documents/scientific_integrity/rsi_final_fullreport_1.pdf.

[108] *See* Juliet Eilperin, *Bush Appointee Said to Reject Advice on Endangered Species*, WASH. POST (Oct. 30, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/10/29/AR2006102900776.html; Patrick Reis, *Charges of meddling at FWS lead to expanded habitat for Canada lynx*, ENVIRONMENT & ENERGY PUBLISHING (Feb. 24, 2009), https://www.eenews.net/stories/74713; Elizabeth Williamson, *Interior Dept. Official Facing Scrutiny Resigns*, WASH. POST, (May 2, 2007) http://www.washingtonpost.com/wp-dyn/content/article/2007/05/01/AR2007050101920.html; Emma Marris, *Disgraced official was paid work bonus*, NATURE (June 6, 2007) https://www.nature.com/articles/447621a.

this information led, for example, to DOJ quickly settling court cases challenging agency decisions for some of these species and to DOI's decisions on species being reversed. As a result of the information release, more species were protected.

- **Sage Grouse:** Conservation Groups used documents obtained through FOIA to put together a 400-page listing petition for Sage Grouse. By using FOIA, the groups were able to show that the species had been insufficiently studied and protected by the federal government. As a result, the Obama Administration implemented what they called "the largest landscape-level conservation effort in U.S. history" for the species.[109]

## VI. The Proposed Rule would be made in Violation of the Federal Vacancies Reform Act

In addition to violating the public process requirements contained in the APA and NEPA, the process by which the Proposed Rule was noticed fails to conform to the requirements of the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. § 3345 *et seq.*, and the Department's succession and delegation regulations implementing FVRA, because Daniel Jorjani cannot lawfully sign the rulemaking or its notice as "*Principal Deputy Solicitor, Exercising the Authority of the Solicitor*." 83 Fed. Reg. 67,180.

The Appointments Clause of the Federal Constitution generally requires "Officers of the United States" to be nominated by the President "by and with the Advice and Consent of the Senate." U.S. CONST. Art. II § 2, cl. 2. However, in order to "keep the federal bureaucracy humming," the FVRA permits the President to appoint acting officers who can serve on a temporary basis without first obtaining the Senate's blessing. *SW General Incorporated v. National Labor Relations Board*, 796 F.3d 67, 70 (D.C. Ct. App. 2015). The FVRA provides that in the event of a vacancy in a position requiring presidential nomination and Senate Confirmation (known as a "PAS" position), the "first assistant" to the vacant PAS position automatically takes over in an acting capacity. 5 U.S.C. § 3345(a)(1); *SW General Incorporated v. National Labor Relations Board*, 796 F.3d at 70-71. Alternatively, the President may appoint a senior employee from the same agency or a PAS officer from another agency to serve as the acting officer. 5 U.S.C. § 3345(a)(3), (a)(2). In either case, the acting officer may generally only serve a maximum of 210 days, *Id.* § 3346(a)(2), and may not become the permanent nominee for the PAS position

[109] *See* Christy Goldfuss, Sally Jewell, Tom Vilsack, *Unprecedented Collaboration to Save Sage-Grouse is the Largest Wildlife Conservation Effort in U.S.*, ARCHIVED OBAMA WHITE HOUSE WEBSITE (Sep. 22, 2015, 2:27 PM), https://obamawhitehouse.archives.gov/blog/2015/09/22/unprecedented-collaboration-save-sage-grouse-largest-wildlife-conservation-effort-us

they are temporarily filling, *Id.* § 3345(b)(1)(B). The FVRA renders actions taken by persons serving in violation of the Act *void ab initio*. *Id.* § 3348(d) ("an action taken by a person who is not acting [in compliance with the FVRA] shall have not force or effect" and "may not be ratified."); *S.W. General, Incorporated v. National Labor Relations Board*, 796 F.3d at 71.

The position of Solicitor for DOI, a PAS position, has remained vacant for the last two years. The President's nominee, Ryan Nelson, withdrew his name from consideration prior to a confirmation hearing. Mr. Daniel Jorjani was announced as the new Principal Deputy Solicitor on May 26, 2017.[110] On November 13, 2018, the Secretary of the Interior issued Order No. 3345, which "temporarily redelegate[d] authority" for several vacant PAS positions.[111] Order No. 3345 delegated "all functions, duties, and responsibilities" of the Solicitor to Mr. Jorjani.[112] On December 14, 2018, exercising the authority of the Solicitor, Mr. Jorjani signed the Proposed Rule. 83 Fed. Reg. 67,180.

Mr. Jorjani lacks authority to exercise the Solicitor's authority to promulgate regulations. Either a) he became Acting Solicitor by operation of law and remained Acting Solicitor for an unlawfully long period, or b) he is attempting to exercise powers which were improperly delegated to him in violation of law. FVRA provides that in the event of a vacancy in a PAS position, the "first assistant" automatically takes over in an acting capacity. Pursuant to FVRA Mr. Jorjani—the Principal Deputy Solicitor and therefore the "first assistant" to the Solicitor—automatically took over in an acting capacity during the summer of 2017. DOI records have repeatedly asserted that Mr. Jorjani has been the "Acting Solicitor" of DOI since 2017. For example, Mr. Jorjani's own email signature, beginning at least as early as November 17, 2017, referred to himself as the "Acting Solicitor & Principal Deputy Solicitor."[113] Moreover, the DOI Office of Inspector General, in an April 16, 2018 investigative report, also referred to Mr. Jorjani as the "Acting Solicitor."[114] Mr. Jorjani has therefore been serving as the acting Solicitor for well over 210 days, and is currently serving in violation of FVRA. Therefore, all the actions he has

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[110] DOI, Interior Announces 19 New Hires ( May 26, 2017) https://www.doi.gov/pressreleases/interior-announces-19-new-hires.

[111] Secretary of the Interior, Order No. 3345, Amendment No. 23 (Nov. 13, 2018).

[112] *Id.* at 1.

[113] Email from Daniel Jorjani, Acting Solicitor & Principal Deputy Solicitor, Department of the Interior, to Heather Swift, Department of the Interior, Subject: ASAP NEED REPLY Elephants (Nov. 17, 2017, 6:45 pm), *available at* https://www.fws.gov/irm/bpim/docs/elephants/Part_5_IOS_SOL_Combined_Email_Final_Binder_revised_Redacted.pdf

[114] Office of Inspector General, Department of the Interior, *Investigative Report on Secretary Zinke's Use of Chartered and Military Aircraft Between March and September 2017* at 4 (Apr. 16, 2018).

taken "exercising the authority of the solicitor" beyond the 210-day period prescribed by the FVRA have no force or effect, and the Proposed Rule, if finalized, will be a legal nullity.

If Mr. Jorjani did not automatically become the acting Solicitor pursuant to FVRA, he may not exercise the "authority of the Solicitor" in this manner because he lacks power to initiate formal rulemaking. While a Solicitor might have authority to delegate his power to initiate rulemaking,[115] a Secretary may not delegate the authority to a non-PAS position, as attempted in Order 3345. To allow such a machination would violate the language and spirit of the Appointments Clause by allowing agency personnel to indefinitely act with the authority of PAS officers while evading Senate review. DOI's Departmental Manual specifically provides that only the Solicitor may "in writing, redelegate or authorize written redelegation of any authority delegated to him."[116] For purposes of delegating authority, courts have ruled that departmental guidance like the Manual is presumptively binding. *See Stand Up for California v. Department of Interior*, 298 F. Supp. 3d 136, 149-50 (D.D.C. 2018). The Solicitor has not redelegated his power to "issue amendments of and additions to the material in the Code of Federal Regulations"[117] to the Deputy Solicitor. Therefore, Mr. Jorjani has no authority to issue the Proposed Rule. Accordingly, DOI should rescind this rulemaking until such time as it can be properly issued.

**Summary and Conclusion**

To summarize, the proposed revisions to DOI's FOIA regulations have been rushed through in a way ill-suited to engage the public. The rulemaking process itself violates the APA, NEPA and the FVRA. The specifics of the proposed revisions massively overstep the limited authority DOI has to interpret and implement FOIA and are arbitrary and capricious. Many of the proposed revisions are in excess of statutory jurisdiction and authority and, in fact, sit in direct opposition to the plain language of FOIA and established federal case law. They are not supported by any evidenced need; they are bad policy; and they limit rather than promote transparency. Moreover, while touted as being necessary to promote efficiency and reduce backlogs, the revisions would in fact introduce unnecessary new layers of bureaucracy,

[115] Even if the Solicitor had attempted to delegate his authority to initiate a rulemaking to the deputy solicitor, he arguably would lack authority to do so because the authority to initiate a rulemaking is exclusive in nature. The Office of Legal Counsel has determined that "those functions or duties assigned exclusively to the PAS officer by statute or regulation" cannot be delegated under any circumstance, including the Solicitor's rulemaking authority and the authority to issue delegations of the office's own powers. 23 Op. O.L.C. 60, 72.
[116] Department of the Interior, 209 Departmental Manual 3.3 (1992).
[117] *Id.* at 3.1(B)

confusion, uncertainty, and additional litigation to the FOIA process. Because DOI is already failing uniformly to meet FOIA's time limits, any changes that would lead to additional delay are facially unlawful.

Rather than continue with this rulemaking, we urge DOI to terminate the rulemaking process and focus on becoming more transparent. After all, every FOIA request is a failure of open government. Making more documents available online, and increasing staffing in the agency's FOIA offices would do much more to promote the purposes of FOIA than these ill-advised, illegal proposed regulations.

We appreciate the opportunity to submit these comments.

Sincerely,

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