

September 28, 2015

Re: Proposed Rule Amending the Department of Homeland Freedom of Information Act Regulations (Docket No. DHS-2009-0036)

Comments of the Reporters Committee for Freedom of the Press

1156 15th St. NW, Suite 1250
Washington, D.C. 20005
(202) 795-9300
www.rcfp.org
Bruce D. Brown
Executive Director
bbrown@rcfp.org (202) 795-9301

STEERING COMMITTEE

STEPHEN J. ADLER
Reuters

SCOTT APPLEWHITE
The Associated Press

WOLF BLITZER
CNN

DAVID BOARDMAN
Temple University

CHIP BOK
Creators Syndicate

JAN CRAWFORD
CBS News

MICHAEL DUFFY
Time

RICHARD S. DUNHAM
Tsinghua University, Beijing

ASHLEA EBELING
Forbes Magazine

SUSAN GOLDBERG
National Geographic

FRED GRAHAM
Founding Member

JOHN C. HENRY
Freelance

NAT HENTOFF
United Media Newspaper Syndicate

JEFF LEEN
The Washington Post

DAHILIA LITHWICK
Slate

TONY MAURO
National Law Journal

JANE MAYER
The New Yorker

DAVID McCUMBER
Hearst Newspapers

JOHN McKINNON
The Wall Street Journal

DOYLE MCMANUS
Los Angeles Times

ANDREA MITCHELL
NBC News

MAGGIE MULVIHILL
Boston University

SCOTT MONTGOMERY
NPR

BILL NICHOLS
Politico

JEFFREY ROSEN
The National Constitution Center

CAROL ROSENBERG
The Miami Herald

THOMAS C. RUBIN
Seattle, Wash.

ERIC SCHMITT
The New York Times

ALICIA SHEPARD
Freelance

MARGARET LOW SMITH
The Atlantic

JENNIFER SONDAG
Bloomberg News

PAUL STEIGER
Pro Publica

PIERRE THOMAS
ABC News

SAUNDRA TORRY
USA Today

JUDY WOODRUFF
PBS/The NewsHour

I. Introduction

The Reporters Committee for Freedom of the Press (“Reporters Committee” or “RCFP”) appreciates this opportunity to comment on the Department of Homeland Security’s (“DHS”) proposed updates to its Freedom of Information Act (“FOIA”) regulations (hereinafter the “Proposed Rule”).¹

The press routinely relies on FOIA to gain access to government records in order to gather and disseminate information of public interest regarding the conduct of government entities and officials. This is especially true with respect to DHS, which receives more FOIA requests than any other federal agency. The Reporters Committee welcomes DHS’s efforts to update its regulations to address recent amendments to FOIA, but believes that the provisions of the Proposed Rule identified below must be addressed in order to ensure the press can effectively keep the public informed about “what their government is up to.” *United States v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989) (citations omitted).

¹ The text of the Proposed Rule is available at <https://www.federalregister.gov/articles/2015/07/29/2015-18388/freedom-of-information-act-regulations#sec-5-2>. The Reporters Committee does not take any position on any portion of the Proposed Rule not specifically addressed herein.

II. Responding to FOIA Requests and Appeals

There are three aspects of the Proposed Rule regarding DHS components' responses to FOIA requests and appeals that the Reporters Committee wishes to comment on. First, § 5.3(c) states that a FOIA request may be “administratively closed” by a DHS component if the request does not adequately describe the records being sought, and the requester does not respond to a request for clarification within 30 days. The Reporters Committee recommends that the timeframe for a requester to reply be extended to 60 days. Inevitable delays in processing outgoing communications from federal agencies will, as a practical matter, leave a requester with fewer than 30 days to respond. As many journalists are often on assignment without access to physical mail or email for days and weeks at a time, a 30-day window could unfairly jeopardize the processing of their FOIA requests in the event that a DHS component requests a clarification, requiring them to unnecessarily re-submit requests, and delaying their access to requested records. Extending the response time to 60 days does not impose any additional burden on DHS components, but would assist requesters.

Second, the Reporters Committee notes that § 5.3(c) is the only provision of the Proposed Rule that references an “administrative closure.” DHS components have, however, administratively closed FOIA requests in the past through other measures, including so-called “still interested”² letters. *See* Letter from James Holzer, Director, Office of Government Information Services, to Karen Numan, Chief Privacy Officer, Department of Homeland Security (Sep. 15, 2015), <http://perma.cc/3WL6-6F3Z>. The use of “still interested” letters as a means to administratively close FOIA requests is not addressed in the Proposed Rule.

Accordingly, it appears from the Proposed Rule that DHS has no intention of utilizing “still

² *See* Adam A. Marshall, *Agencies want to know: Are you still interested?*, THE NEWS MEDIA AND THE LAW Vol. 38, No. 4 (Fall 2014), <http://perma.cc/FD4H-WFHV>.

interested” letters to administratively close FOIA requests in the future. The Reporters Committee welcomes this decision. Such letters place a significant and unwarranted burden on FOIA requesters that runs counter to FOIA. However, if DHS does intend to administratively close FOIA requests in circumstances not specified in the Proposed Rule, then the public should be afforded an opportunity to comment on the practice. *Cf. Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991) (an agency may promulgate final rules different from proposed regulations only if they are a “logical outgrowth”; an “unexpressed intention cannot convert a final rule into a ‘logical outgrowth’ that the public should have anticipated.”).

Third, § 5.8(d) of the Proposed Rule, which concerns the timeframe for a DHS component to respond to an administrative appeal, states that “the Appeals Officer may extend the time limit [beyond 20 working days] for responding to an appeal provided the circumstances set forth in 5 U.S.C. 552(a)(6)(B)(i) are met.” This language should be clarified to specify that under 5 U.S.C. § 552(a)(6)(B)(i) the time limit for responding to an administrative appeal may not be extended more than ten working days.

III. Fee Categorizations

There are two aspects of the Proposed Rule regarding fees that the Reporters Committee wishes to comment on. First, § 5.1(a)(2) states that DHS components should read the Proposed Rule in conjunction with the 1987 Office of Management and Budget (“OMB”) guidelines. A recent ruling from the D.C. Circuit Court of Appeals, however, held that significant portions of those guidelines are incompatible with FOIA and its 2007 amendments. *See Cause of Action v. Federal Trade Commission*, 2015 U.S. App. LEXIS 14934, (D.C. Cir. Aug. 25, 2015). The Reporters Committee recommends adding clarifying language to this section to make clear that

the OMB guidelines should only be relied upon to the extent that they do not conflict with subsequent amendments to FOIA and or judicial interpretations of the statutory language.

The influence of the OMB guidelines is most clearly seen in § 5.11(b)(6) of the Proposed Rule, which defines a representative of the news media as “any person or entity *organized and operated* to publish or broadcast news to the public that actively gathers information of potential interest to a segment of the public” (emphasis added). The “organized and operated” language should be removed. As the D.C. Circuit made clear in *Cause of Action*, Congress “omitted the ‘organized and operated’ language when it enacted the statutory definition [of a representative of the news media] in 2007. . . . Accordingly, there is no basis for adding an ‘organized and operated’ requirement to the statutory definition.” *Id.* at *42.

Second, the definition of a representative of the news media in § 5.11(b)(6) of the Proposed Rule also states that examples include “television or radio stations that broadcast ‘news’ to the *public at large*” and “publishers of periodicals that disseminate ‘news’ and make their products available through a variety of means to the *general public*” (emphasis added). Again, such language is incompatible with the current language of FOIA is interpreted by the D.C. Circuit in *Cause of Action*, 2015 U.S. App. LEXIS 14934. The D.C. Circuit made clear in that case that “beyond requiring that a person or entity have readers (or listeners or viewers), the statute does not specify what size the audience must be.” *Id.* at *37. Accordingly, the definition of a “representative of the news media” in § 5.11(b)(6) of the Proposed Rule should be revised to make clear that no particular audience size is required to qualify, let alone the “public at large” or the “general public.”

IV. Exemptions

The Reporters Committee recommends that an additional subsection be added to § 5.6 of the Proposed Rule incorporating the directions from the President and the Attorney General on the use of exemptions under FOIA. On January 21, 2009, President Obama issued a memorandum to all department and agency heads requiring them to “adopt a presumption in favor of disclosure” when responding to FOIA requests, as well as directing the Attorney General to issue new guidelines for executive branch agencies. Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009), <http://perma.cc/T5DD-YZFJ>. The Attorney General did so on March 19, 2009. 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), <http://perma.cc/45DE-9RRZ>. Under those guidelines, an agency “should not withhold records simply because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.” *Id.* The Attorney General has stated that the Department of Justice will defend a denial of a FOIA request *only if* (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law. *Id.* Accordingly, the Proposed Rule should incorporate the presumption of openness standard and the Attorney General’s guidance to ensure exemptions under FOIA are properly asserted by DHS components.

V. Conclusion

The Reporters Committee appreciates DHS’s efforts to update its policies and procedures for complying with FOIA. We believe that incorporating the specific comments set forth herein

into DHS's final regulations will assist it in honoring its obligation to provide information to the public under FOIA.

Sincerely,

The Reporters Committee for Freedom of the Press