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Executive Secretariat – FOIA Regulations
U.S. Department of the Interior
1849 C St. NW
Washington, DC 20240
via Federal eRulemaking Portal

Re: Docket No. DOI-2018-0017

To the Executive Secretariat – FOIA Regulations:

The Partnership for Civil Justice Fund submits this comment on the U.S. Department of the Interior's proposed revisions to the regulations governing implementation of Freedom of Information Act (FOIA) requests that would restrict, burden and in some instances, eliminate, public access to government records. 83 Fed. Reg. 67,175 (December 28, 2018). The proposed rulemaking not only defies the Agency's obligation to transparency and the public's right to know what their government is up to, but appears to directly violate the Agency's legal obligations under the FOIA itself.

While the Agency, and its top officials, may wish to conceal their actions from public oversight of whether such actions conform to the law and the Agency's obligations as steward of our public lands, such desires are inconsistent with both the FOIA and democracy.

The Partnership for Civil Justice Fund has extensive experience as a requestor and as counsel in litigation regarding FOIA requests. The PCJF is a non-profit organization dedicated to defending and advancing fundamental civil and human rights. Its FOIA work involving the Department of Interior and its National Park Service has been significant in exposing and analyzing government actions in the context of First Amendment rights. The PCJF has a long-standing commitment to ensuring transparency in government operations and acting as a watch-dog in protection of constitutional rights. The PCJF's mission and ability to carry out its work will be materially harmed by the proposed rulemaking.

As an initial matter, the PCJF supports the requests for extension of the public comment period and requests for public hearings submitted by WildEarth Guardians and other commenters for the reasons stated in those submissions.

We note that the Department of Interior had failed its legal obligation to provide adequate and full opportunity and information for public comment. It issued its proposed rulemaking during the government shutdown, allocating the resources to do so while simultaneously failing to allocate the additional resources necessary to comply with its obligations for the public comment period, including the regular update and posting of information for public viewing on the public comment page, and resources for available staff to respond to questions regarding the proposed rulemaking.

The proposed rulemaking itself fails to adequately explain and justify the changes it has proposed, and despite inquiry from the public and Congress, the Agency has failed and refused to provide necessary explanation and justification. The proposed rulemaking also lacks explanation and definition sufficient to allow the public to be fully apprised of the consequences of the proposal, rendering the process improper and inadequate.

The proposed rulemaking fails to explain, justify or provide adequate evidence or analysis showing the need for the deviation from existing rules. The Agency has failed to show that it considered whether the proposed rule changes conform to its obligations under the Freedom of Information Act, which they do not, and the Agency has failed to explain or justify its deviation from prior rulemaking and public policy regarding the FOIA.

1. **The Agency's Claim that It Must Restrict the American People's Access to Information Based on the Public's Increased Interest in Obtaining Information Is Unjustified and Illogical**

The Agency in its brief narrative complains that its proposed restrictions on public access to information under the FOIA are necessitated by an increase in FOIA requests and also by an increase in litigation of FOIA requests. 83 Fed. Reg. 67176.

First, that the public may have an increased interest in learning of the conduct of a government agency does not provide a lawful basis for restriction of access. Indeed, during the period of increased FOIA requests of which the Agency complains, public records requests have been pivotal in exposing actions and conduct that would have otherwise been concealed from public view including high level conflicts of interest and possible corruption. While the Agency, or its officials, may not like such exposure, it is necessary to ensure democratic governance.

Second, it is the Agency itself that necessitates litigation to obtain FOIA materials by failing to properly satisfy requests pursuant to the FOIA. The fact that a requestor must seek court intervention to obtain information that should be made public, cannot properly form the basis for further restriction on public access.

The Agency has failed to provide sufficient budget and historical statistical evidence to support its claims regarding resources. However, if the Agency has a problem that is resource driven, then it should reallocate resources to satisfy its FOIA obligations and seek budget

increases as necessary to properly carry out those obligations. Attempting to truncate its legal obligations for transparency to the public is not a justifiable response.

The Agency provides virtually no other explanation, evidence, analysis or justification for the substantial overhaul that it proposes. It has failed for each of its substantial proposed changes to existing regulations to explain why each change is necessary, justification for each change, nor any evidence supporting a justification. It has provided no analysis showing that it considered other alternatives to its proposed rule changes to address any claimed need for such revision. It has provided no analysis showing that it considered the impact of its proposed rule changes on its obligations under the FOIA and to "compliance with statutory requirements of transparency, accountability and prompt production." 83 Fed. Reg. 67176.

2. The Agency's Proposed Rule Changes Create an Obstructive Shell Game and Violate the FOIA

The Agency's proposed rulemaking places obstructive burdens on public access to information that are unjustified. The Agency appears to be making the public's right to understand what its government is up to into a shell game.

If a requestor does not know the name of, and does not properly guess, a "discrete, identifiable agency activity, operation or program" when seeking information, the Agency plans to dismiss the request. Proposed Amendment [Prop] at § 2.5. However, the FOIA requires simply that requestors "reasonably describe[]" records sought. 5 U.S.C. § 552(a)(3)A).

If the public does not identify the correct bureau or component where responsive documents are located within the Agency, the Agency plans to no longer refer FOIAs from one component to the component that does possess the requested information. Prop § 2.4. Yet the FOIA obligates an Agency to forward a request to the bureau or component likely to possess responsive information. 5 U.S.C. § 552(a)(6)(A)(ii).

3. The Agency's Proposed Quantity Rule to Deny Requests Based on an Undefined Amount of Responsive Information Violates the FOIA

Further, the Agency seeks to deny requests based on the quantity of responsive information in its possession. Prop § 2.5 ("The bureau will not honor a request that requires an unreasonably burdensome search or requires the bureau to locate, review, redact, or arrange for inspection of a vast quantity of material.").

This is not a proper basis for denial. If a request is properly tailored to seek information that informs the public about government conduct and operation, and it happens that responsive information is of substantial quantity, the Agency may not summarily dismiss that request or refuse to process it. Moreover, the Agency provides no definition as to what is considers "vast."

4. The Agency's Proposal to Place Monthly Limitations on FOIA Requests Violates the FOIA

While planning to restrict FOIA requests based on the quantity of information that may be responsive, the Agency simultaneously plans to restrict requestors who file multiple requests

for information by imposing a monthly limitation on FOIA requests. Prop § 2.14. A requestor who would thus seek to limit the scope of potentially responsive information in order to comply with the Agency's proposed (and undefined) new quantity rule by breaking down a request into smaller component parts, will thus be denied or delayed for submitting even narrower requests.

This proposal would unlawfully deny any person their right to have a FOIA request processed once they had reached an undefined monthly limit. A journalist covering multiple stories during a month, for example, would be stopped from obtaining information. The FOIA requires that all requests be timely processed in order to make records "promptly available" to the requestor. 5 U.S.C. § 552(a)(3)(A). The Agency may not unilaterally stop processing requests.

5. The Agency's Attempted Redefinition of Mandatory "Time Limits" Would Violate the FOIA

The Agency plans to redefine its time limit obligations to respond to requests by eliminating the language that states that requests "will" take a certain amount of time and replacing it with the permissive and uncertain phrase "would generally." Prop § 2.15. The Agency further strikes the phrase "time limit" and replaces it with the phrase "time frame," throughout. This appears to be an unlawful effort to eliminate the Agency's obligations to timely process requests and produce responsive information as required by the FOIA.

6. The Agency's Plan to Restrict and Burden Expedited Processing Decisions Appears to be a Political Gatekeeping Maneuver and Fails to Provide Required Justification

The Agency has failed to provide justification for its proposed rule change that would create the needless and extreme burden of requiring a requestor provide a line by line individualized justification for "all elements and subcomponents" of expedited processing requests. Prop § 2.20. Further, while the Agency complains about FOIA processing burdens it proposes to create greater bureaucratic burdens by requiring its FOIA staff to pass all expedited processing requests through its Solicitor's Office. There is no justification given for such a change, which appears to be a political gatekeeping effort to ensure that no news media can request and receive urgent information without review from the Agency's lawyers. FOIA officers should be competent to respond to expedited processing requests without lawyer oversight for every decision. The Agency claims repeatedly that its proposals will "streamline" the FOIA process, but these changes do the exact opposite. The Agency also proposes delete the standard for expedited processing that explains the request "refers to a breaking news story of general public interest." It provides no justification, nor could it, for eliminating this basis for expedited processing.

7. The Agency's Plan to Engage in Discretionary, Content-Based Determinations and "Value Judgments" for Fee Waiver Requests is Unjustified and Unlawful

The Agency plans to create a higher burden for fee waivers, again without explanation or justification. The Agency has added a requirement that a request must "concern discrete,

identifiable agency activities, operations, or programs with a connection that is direct and clear, not remote or attenuated." Prop § 2.48. There is no explanation as to what this is intended to mean, how it will change or affect the processing of fee waiver requests, or what is necessary to meet this requirement. It is not possible for the public to understand the impact of the rule, other than to gather that it creates some undefined further burden and obstruction.

The Agency also plans to give itself the discretion to evaluate the quality of a possible disclosure's contribution to the public's enlightenment, by inserting the word "significantly" before the world "contribute" in the fee waiver criteria: "How disclosure is likely to [significantly] contribute to public understanding of those operations or activities." Prop § 2.48(a)(2). The Agency provides no explanation as to how it will determine whether a disclosure "significantly contributes" or where contributing to public understanding will be deemed insufficient.

The Agency proposes to delete the following paragraph currently at § 2.45(f): "The bureau must not make value judgments about whether the information at issue is 'important' enough to be made public; it is not the bureau's role to attempt to determine the level of public interest in requested information."

These two changes together make clear that the Agency wishes to arrogate to itself the power and discretion to determine the "importance" or quality of information disclosure as a factor in making fee waiver determinations. This creates an unlawful, content-based, discretionary decisionmaking process.

For the reasons herein, the Agency should rescind its proposed rulemaking in full.

Sincerely,

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Partnership for Civil Justice Fund