

August 16, 2004

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mail to: ADMIN-S&E@hq.dhs.gov

Re: Department of Homeland Security's Proposed Management Directive 5100.1, Environmental Planning Program – published in 69 Fed. Reg. 33,043 (June 14, 2004).

Dear Sir/Madam:

The American Library Association submits the following comments concerning the Department of Homeland Security's (DHS) Proposed Management Directive 5100.1 for the Environmental Planning Program (proposed directive). While the proposed directive is intended to "establish procedures that DHS will use to comply with" its obligations under NEPA and the Council on Environmental Quality's Regulations for Implementing NEPA (CEQ Regulations), the scope of information that would be withheld from disclosure under this directive is striking and well beyond the statutory authority of the Department. Rather than complying with the clear and unequivocal disclosure requirements of the National Environmental Policy Act (NEPA), it would keep secret potentially vast amounts of information on the environmental impact of federal actions. We urge DHS to revise the Directive to comply with the law by limiting its non-disclosure provisions to information that unambiguously qualifies for withholding under one of the exemptions provided in the Freedom of Information Act (FOIA). (5 U.S.C. § 552(b))

The American Library Association has a membership of over 64,000 librarians and library supporters. Its mission is to promote the highest quality library services and public access to information. The Association and its members have a long and vigorous history of promoting the public's right to know information created or held by the government as essential to the functioning of our democratic system of governance.

The Proposed Management Directive is intended to "establish procedures that DHS will use to comply with" its obligations under NEPA and the Council on Environmental Quality's Regulations for Implementing NEPA (CEQ Regulations). (Section 1.B) As the proposed directive notes, "NEPA provides a tool for carrying out federal environmental policy." It is important to note that NEPA requires federal agencies to factor environmental considerations into the decision-making process by undertaking a *public* evaluation of the environmental consequences of any proposed "major Federal action[] significantly affecting...the...environment." (42 U.S.C. 4332(C)). The public nature of this NEPA "tool" is essential to its efficacy: NEPA and the CEQ Regulations require agencies to involve the public in the drafting of Environmental Impact Statements (EIS) and to incorporate the public's comments into final EISs.

The American Library Association is concerned that the proposed directive's instructions in Section 6.2, requiring officials to shield from public review large, ill-

defined categories of information contained in environmental-study documents, will result in the public's inability to participate meaningfully in these evaluations. The public's ability to hold its government accountable is directly dependent on the availability of information on governmental decisions and actions. While ALA recognizes that there may be limited circumstances in which some information contained in an EIS or related documentation may properly be withheld from the public, the blanket nature of the Proposed Directive's non-disclosure provisions undercut its stated intent in this directive. They also appear an attempt to accomplish by regulation based on definitions and what has not been mandated by either statute or Executive Order.

Categories of Information That "DHS Will Not Disclose"

Subsection 6.2(A) of the Proposed Directive provides that "[n]otwithstanding other sections of this chapter, DHS will not disclose":

- (1) "classified, protected, proprietary, or other information that is exempted from disclosure by the Freedom of Information Act (FOIA), (5 U.S.C. 552),"
- (2) "critical infrastructure information as defined in 6 U.S.C. 131(3),"
- (3) "sensitive security information as defined in 49 CFR Part 1520, E.O. 12958, the DHS Management Directive 0460.1, 'Freedom of Information Act Compliance', and the DHS Management Directive 11402, 'Safeguarding Sensitive But Unclassified (For Official Use Only) Information', or other laws, regulations, or Executive Orders prohibiting or limiting the release of information."

ALA has no problems with the proper withholding of information specifically exempted by the Freedom of Information Act. We do, however, have substantial concerns about the invocations of the other two categories. CEQ regulations limit what may be withheld to classified information. (40 C.F.R. § 1507.3(c)) The proposed directive would, however, prohibit the disclosure of "critical infrastructure information" and "sensitive security information." (69 Fed. Reg. at 33,063, § 6.2(A)) Moreover, the prohibition appears to be based on *definitions* of such information, not on statutory authority.

Critical Infrastructure Information

In Section 6.2(A) of the proposed directive, DHS asserts authority to withhold CII "as defined in 6 U.S.C. 131(3)" of the Critical Infrastructure Information Act (CII Act). However, this subsection does not grant DHS authority to withhold information; it merely *defines* CII. Moreover, the subsection defines CII as "information not customarily in the public domain and related to the security of critical infrastructure or protected systems." Congress did create, in a subsequent section, a statutory exemption to FOIA for CII thus defined *only if two further conditions are met*, namely, if the CII

- (1) "is voluntarily submitted to a covered Federal agency," (6 U.S.C. 133(a)) and

(2) is not independently obtained by “a State, local, or Federal Government entity, agency, or authority, or any third party.” (6 U.S.C. 133(c))

Information contained in environmental-study documentation is customarily in the public domain as long as that information does not fall within one of the narrow exemptions under FOIA.

The proposed directive’s non-disclosure list, with its separate enumeration of FOIA-exempted information *and* (implied) CII, can be read to mean that DHS believes there could be CII that can be withheld even though the information must be disclosed under FOIA. Congress did not, however, exempt CII from disclosure, but, rather, the much more narrowly defined category – *protected* CII. (6 U.S.C. 133(a)(1)(c))

ALA urges DHS to delete the category ““critical infrastructure information as defined in 6 U.S.C. 131(3)” from its list of information that DHS will not disclose. It does not have the statutory authority to withhold information merely because it is “defined” as “critical infrastructure information.” If it is DHS’s intent to withhold “*protected* CII,” the directive should clearly state this.

Sensitive Security Information

DHS also asserts authority to withhold “sensitive security information” (SSI) based solely on definitions. DHS plans to withhold from the public NEPA information that constitutes SSI “as defined in 49 CFR Part 1520, E.O. 12958, the DHS Management Directive 0460.1, ‘Freedom of Information Act Compliance’, and the DHS Management Directive 11402, ‘Safeguarding Sensitive But Unclassified (For Official Use Only) Information.’ Only one of the sources cited for the definition of SSI actually provides such a definition; namely, 49 C.F.R. Part 1520 (Part 1520); DHS Management Directive 11402 incorporates this definition by reference. It is not clear why the DHS Management Directive 0460.1 and E.O. 12958 are cited, as they have no reference to SSI.

Even though Part 1520 does contain a *definition* of SSI, the problem remains that DHS is basing its non-disclosure authority on a definition, and not on a congressional mandate deeming such non-disclosure proper. There is such a mandate in the NEPA provision that incorporates FOIA by reference. It is unnecessary—and, indeed, illegal—for DHS to assume the power to withhold outside the bounds of that mandate.

ALA urges that DHS remove the provisions for non-disclosure of CII and SII from the final version of the Directive because *definitions* of CII and SSI in statutory and other sources do not provide DHS with the authority to withhold such information from the public. DHS should instead confine non-disclosure of NEPA documents to the limits imposed on agencies in FOIA.

“Essentially Meaningless” Material

While DHS, commendably, indicates that “to the fullest extent possible, DHS will segregate any such classified or protected information into an appendix sent to appropriate reviewers and decision makers, and allow public review of the remainder of the NEPA analysis,” the proposed directive also requires DHS officials to withhold another “category” of information by providing, in section 6.2(C), that “if segregation (of classified or protected information) would leave essentially meaningless material, the DHS elements will withhold the *entire* NEPA analysis from the public.” This is a violation of the spirit (at the least) of NEPA, which places a central emphasis on the public’s right and responsibility to participate in governmental decision-making. Congress understood that in many circumstances, the people who live in a given area have a much better understanding than government officials of what information is meaningful when it comes to determining whether to undertake an action that will significantly impact their home.

ALA urges DHS to delete the provision requiring officials to withhold “essentially meaningless” information not otherwise subject to exemption from disclosure so the public can determine whether such information is meaningful, as intended by Congress.

Procedural Issues

Although, as noted above, the proposed directive indicates that “to the fullest extent possible, DHS will segregate any such classified or protected information into an appendix sent to appropriate reviewers and decision makers, and allow public review of the remainder of the NEPA analysis,” it fails to include any provision for the public to challenge DHS’s decision to withhold information contained in NEPA documents. Public dissemination of “segregated” information may give the public some indication whether the remaining portions of the NEPA analysis were properly withheld.

ALA urges that the final version of the Directive should provide that federal, state, and local agencies and any third party may appeal a decision to withhold information contained in NEPA documents and that DHS will consider such appeals in a timely and attentive manner.

The current processes for determining what identifying what information will be withheld from disclosure are excessively vague and based on insubstantial claims of statutory authority. It is not clear at this point whether this is carelessness on the part of DHS or whether it is an attempt to use a directive to exclude from public disclosure information that DHS has not been able to get Congressional authority to exclude. The final version of the directive will make this clear and we urge DHS not to continue to overstep its lawful authority in this regard.

We appreciate the Commission’s consideration of these comments. Please contact Patrice McDermott, Deputy Director of ALA’s Office of Government Relations, at 202-628-8410 if you have any questions.

Sincerely,

Emily Sheketoff
Executive Director
American Library Association
Washington Office