

Jennifer L. Hudson
Director of the Information Management Division
Office of the Director of National Intelligence
Washington, DC 20511

March 25, 2016

Re: ODNI Regulation change to 32 CFR Part 1704 allowing ODNI to charge requesters as high as \$72 per hour for Mandatory Declassification Review requests.

Dear Ms. Hudson:

We, the undersigned organizations committed to government openness and accountability, request that the Office of the Director of National Intelligence (ODNI) withdraw the rule that it published in the Federal Register on February 26, 2016.¹ As written, this regulation could cut off access to the most effective tool the public can use to request declassification of records classified by agencies within the intelligence community, the Mandatory Declassification Review (MDR) program.

ODNI has indicated in response to public comments that it plans to modify the proposed rule.² No official notification of that intent has been given, however, and the public comment period still remains open. Thus, we are submitting our comments to ensure that the widespread concerns over this proposal are entered into the public record. The regulation, which is scheduled to go into effect on April 26, 2016, unless adverse comment is received, states that document searches and declassification reviews will now cost requesters up to \$72 per hour, even if no information is found or released.³ And the fee for photocopying will be five times higher for MDR requests than for FOIA requests.⁴ Throughout the government MDR fees are commensurate to FOIA fees. This regulation, which was entered into the public record without prior notice to public stakeholders, imposes burdensome fees inconsistent with those charged for FOIA requests in other departments. Moreover, under FOIA, Congress stipulated that public interest, educational, journalism, and other fee waivers must be granted, when applicable under the statute.

The effect of the ODNI's new policy would be to price the public out of submitting MDR requests, a result contrary to the Obama Administration's transparency policy in general and its declassification policy under Executive Order 13,526 in particular. It is also contrary to ODNI's Principles of Intelligence Transparency for the Intelligence Community. These Transparency Principles specifically state that the Intelligence Community will "be proactive and clear in making information publicly available through

¹ ODNI Direct final rule on the Mandatory Declassification Review Program, 32 CFR Part 1704, published in the Federal Register February 26, 2016: <http://1.usa.gov/1o9lr1t>.

² Federation of American Scientists, Secrecy News, "ODNI Will Revise Declassification Fee Policy," March 4, 2016: <http://bit.ly/1LGFakn>.

³ In 2012, the CIA also attempted to change its regulations to raise costs for requesters up to \$72 per hour for MDR requests. After widespread public objections to these regulations, and following a lawsuit filed by National Security Counselors, the CIA suspended implementation of the new fee schedule pending the results of the case. See, Open Letter from civil society organizations to the Director of National Intelligence, James Clapper, Director of the CIA, David Petraeus and the Director of the Information Security Oversight Office, John Fitzpatrick, objecting to the CIA's regulation entered into the Federal Register on September 23, 2011: <http://bit.ly/1q23HGR>.

⁴ See the ODNI FOIA fee policy in 32 CFR 1700.6 - Fees for records services: <http://bit.ly/22vMoiP>.

authorized channels,” including taking affirmative steps to “provide timely transparency on matters of public interest.”⁵

Moreover, charging fees to requesters who receive no special private benefit from the release of documents (i.e., requesters who would be considered “non-commercial” under FOIA) is not consistent with the Independent Offices Appropriations Act (IOAA),⁶ which, according to the Supreme Court, the D.C. Circuit, and the Office of Management and Budget (OMB), indicates that the public interest must be considered before deciding to collect fees from individual parties for services which benefit the public generally.⁷ Congress has specifically stated in FOIA that people who request information and are representatives of the news media or of academic institutions are acting *in the public interest*. Still others who do not meet that definition can be acting *in the public interest* if they are requesting information which would make them eligible for a public interest fee waiver. Where one statute definitively states that a class of people requesting documents from the government are “acting in the public interest,” that class of people cease to have a cognizable “special, private benefit” from their actions; in fact, by definition, such requests produce an “independent public benefit.”⁸ Accordingly, such non-commercial requesters cannot be charged fees for an MDR request, and any rule which proposes doing so would not be in accordance with longstanding case law on the matter.⁹

For these reasons, we respectfully request that ODNI demonstrate its commitment to transparency by withdrawing this proposed rule. Representatives of our organizations are happy to meet with you to discuss this issue. For further information, please contact Patrice McDermott, Executive Director of OpenTheGovernment.org, at pmcdermott@openthegovernment.org, Nate Jones, Director of the FOIA Project at the National Security Archive, at foiadesk@gwu.edu, or Kel McClanahan, Executive Director of National Security Counselors, at kel@nationalsecuritylaw.org.

Sincerely

American Civil Liberties Union
American-Arab Anti-Discrimination Committee
American Library Association
Bill of Rights Defense Committee
Citizens for Responsibility and Ethics in Washington (CREW)
Constitutional Alliance
Defending Dissent Foundation
Demand Progress

⁵ Office of the Director of National Intelligence, Principles of Intelligence Transparency for the Intelligence Community; <http://1.usa.gov/1VEkeww>.

⁶ 31 U.S.C. § 9701.

⁷ See *National Cable Television Assn., Inc. v. United States*, 415 U.S. 336, 342 (1974); *Seafarers Int’l Union v. U.S. Coast Guard*, 81 F.3d 179, 189 n.3 (D.C. Cir. 1996) (limiting agency fees to situations where, *inter alia*, the service provided “produces a special, private benefit” and “produces no independent public benefit”). See also OMB Circular No. A-25 Revised § 6(a)(1) (covering “all Federal activities that convey special benefits to recipients beyond those accruing to the general public”); <http://1.usa.gov/1p1Nex>.

⁸ See *Center to Prevent Handgun Violence v. Dep’t of the Treasury*, 49 F. Supp. 2d 3, 5 (D.D.C. 1999) (“There is public benefit in the release of information that adds to citizens’ knowledge [of government activities].”).

⁹ “Commercial” requesters, as that term is defined by FOIA, may still be charged MDR fees under the IOAA, although even they might occasionally warrant fee reduction or waiver based on the nature of the documents in question.

Electronic Frontier Foundation
Government Accountability Project
National Security Archive
National Security Counselors
OpenTheGovernment.org
Project On Government Oversight
Public Citizen
Reporters Committee for Freedom of the Press