

September 28, 2015

Department of Homeland Security
Office of the Chief Privacy Officer
245 Murray Lane SW STOP 0655
Washington, DC 20528-0655

RE: Comment on RIN 1601-AA00

Dear Chief Privacy Officer:

The undersigned organizations write to provide comments on the proposal to amend the Department of Homeland Security's (DHS) regulations under the Freedom of Information Act (FOIA). We appreciate the efforts by the DHS to update and streamline the language of several of its FOIA procedural provisions, and to incorporate changes brought about by the amendments to the FOIA under the OPEN Government Act of 2007. We nonetheless have concerns that certain provisions of the proposed regulations could hinder the FOIA process, and believe the proposed regulations can go further to ensure greater access to public interest information. Accordingly, we submit the following comments that are designed to ensure that the DHS FOIA regulations uphold requesters' rights under the FOIA statute, and conform with the Attorney General's guidance on the presumption of openness.

A. Comments

Subpart A – Procedures for Disclosure of Records Under the Freedom of Information Act

§ 5.1 General Provisions

Subsection (a)(1)

The proposed DHS regulations would remove a part of section 5.1, current paragraph (a)(1), which clarifies that “[i]nformation routinely provided to the public as part of a regular DHS activity. . . may be provided to the public without following this subpart.”

We strongly oppose the removal of this portion of section 5.1. The proposal states that DHS considers this provision to be self-evident, and therefore proposes to remove it from the regulation. However, we believe, based on the past difficulties in obtaining such documents information, that the authority to disclose information that is routinely provided to the public as part of regular DHS activity is *not* necessarily apparent to all DHS FOIA Officers, FOIA Public Liaison, and representatives of the DHS Privacy Office. Additionally, the inclusion of this portion of section 5.1 helps to ensure greater consistency in FOIA review decision-making and lessens the likelihood of incidental unnecessary withholding of information. We do not see any reason for the removal of this language and strongly urge that it is kept in the DHS FOIA regulations.

§ 5.3 Requirements for Making Requests

Subsections (b) through (c)

Section 5.3 addresses DHS procedures for handling FOIA requests that do not reasonably describe the records sought. Subsection (b) states: “If after receiving a request, a component determines that it does not reasonably describe the records sought, the component should inform the request what additional information is needed or why the request is otherwise insufficient.” We recommend this paragraph be changed to read that “...the component *will* inform the requester what additional information is needed...” This clarification is important to ensure that agency officials do not simply close requests without any explanation or effort on the part of FOIA officials to clarify the request.

Subsection (c) indicates that if a “requests does not adequately describe the records sought, DHS may seek additional information from the requester. If the requester does not respond to the request for additional information within thirty (30 days), the request may be administratively closed at DHS’s discretion. This administrative closure does not prejudice the requester’s ability to submit a new request for further consideration with additional information.”

Similar to the prior subsection, we recommend this subsection change to read as follows: “If a request does not adequately describe the record sought, DHS *will* seek additional information from the requester.” This is important to emphasize that DHS officials are required to seek additional information from requesters to ensure that FOIA officials do not simply close a request that is “not reasonably descriptive” without any explanation.

We further recommend this subsection clarify that before administratively closing a request, a DHS FOIA Officer, its FOIA Public Liaison, or representative of the DHS Privacy Office, should make an effort to contact the requester after the 30 days, using more than one means of communication, before closing the request. Following the OIP guidance¹ on “still-interested” inquiries, if the requester does respond after the 30-day deadline, the clarified request should not go to the end of the processing line, but rather should be reopened and placed back into the processing queue the date of when the original request was filed.

§ 5.5 Timing of Responses to Requests

Subsection (e)(3)

Section 5.5 specifies the requirements for requesters who seek expedited processing. It states that “a requester who is not a full-time member of the news media must establish that he or she is a person whose primary professional activity or occupation is information dissemination, though it need not be his or her sole occupation.”

¹ U.S. Department of Justice, Office of Information Policy Guidance, Implementation Checklist for OIP Guidance on “Still-Interested” Inquiries: <http://www.justice.gov/oip/oip-guidance-7>.

This would add a new requirement to the test for expedited processing; adding a cumbersome requirement for a requester to establish that their primary professional activity or occupation is to disseminate information.

We support the recommendation, submitted by Michael Ravnitzky on July 31, 2015, to change the language in the proposed rule to remove the references to “primary professional activity or occupation,” so that it reads “...a requester who is not a full-time member of the news media must establish that he or she is a person who is primarily engaged in disseminating information to the general public.”

§ 5.6 Responses to Requests

In order to ensure greater access to information in the public interest, we recommend section 5.6 include additional information to conform to the Attorney General’s guidance² on the presumption of openness. We recommend this section include the following provision, based on the model civil society FOIA regulations,³ updated by civil society experts in July 2014:

(3) When responsive records are located, we adopt a presumption of disclosure and openness. This means we evaluate records with a view toward what can be disclosed, rather than what can be withheld, and we will not withhold information simply because we can do so legally.

§ 5.11 Fees

Subsection (e)(2)

Section 5.11 includes a proposed change to paragraph (e) to improve clarity on fees that a non-commercial requester is required to pay. The section by section analysis of the proposed rule should clarify that this means that a non-commercial requester who refuses to pay any fees still gets two free hours of search time. There is disagreement between agencies as to whether or not this is the case, and the DHS should clarify its stance on this. To be clear, it is the position of the undersigned organizations that the FOIA statute clearly requires that non-commercial requesters be provided two free hours of search time even if they do not commit to paying any fees.

New Section: Categories of Exemptions

We recommend the proposed rules incorporate a new section to the FOIA regulations on applying categories of exemptions to require DHS FOIA officers to consider the public interest

² Office of the Attorney General, Memorandum for Heads of Executive Departments and Agencies, The Freedom of Information Act (FOIA), March 19, 2009: <http://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf>.

³ Civil Society Model FOIA Regulations, Updated July 15, 2014: <http://www.modelfoiaregs.org/2014/07/model-foia-regulations-updated-7152014.html>.

in disclosure and balance that interest against the agency interest in withholding when processing FOIA requests.

Under this new section, the following language should be adopted on the application of a public interest balancing-test:

§ 5.14 Disclosure of Information in the Public Interest:

(a) DHS FOIA Officers, FOIA Public Liaison, and representatives of the DHS Privacy Office shall:

(i) review records to determine whether the release of information contained within the records would be in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the DHS;

(ii) for records containing information determined to be in the public interest, reasonably segregate and redact any information within the records otherwise exempt from disclosure.

We thank you for the opportunity to submit comments, and appreciate your consideration. For further information, please contact Patrice McDermott at OpenTheGovernment.org (pmcdermott@openthegovernment.org) with any questions.

Sincerely yours,

American Civil Liberties Union
American Library Association
American-Arab Anti-Discrimination Committee
Campaign for Accountability
Citizens for Responsibility and Ethics
Government Accountability Project
National Security Archive
National Security Counselors
The Niskanen Center
OpenTheGovernment.org
TechFreedom