January 29, 2019

Executive Secretariat
FOIA Regulations
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240

Re: Department of the Interior Proposed Freedom of Information Act Regulations, 83 Fed. Reg. 67,175–80 (Dec. 28, 2018) [Docket No. DOI-2018-0017]

To Whom It May Concern:

On December 28, 2018, the Department of the Interior ("DOI" or "Department") issued a Proposed Rule that would substantially revise the Department's Freedom of Information Act ("FOIA") regulations. The undersigned[1] believe that DOI's proposed regulations are contrary to law in several respects and would decrease overall transparency and accountability of the agency, thereby undermining the very purpose of FOIA. We therefore urge DOI to reconsider several aspects of its proposed rule, as set forth in detail below.

I. DOI's Stated Rationale Is Inconsistent with the Purpose of FOIA and Does Not Support the Proposed Changes.

The Notice of Proposed Rulemaking ("NPRM" or "Proposed Rule") issued by DOI purports to justify the proposed changes contained therein based on "the unprecedented surge in FOIA requests and litigation" in recent years. 83 Fed. Reg. 67,175, 67,176. Specifically, the NPRM notes the significant increase in both FOIA requests and the number of FOIA-related litigations involving the Department between Fiscal Year ("FY") 2016 and FY 2018, and concludes that "[t]he Department's FOIA processing therefore must be more efficient if the Department is to meet its statutory obligations." *Id.* Thus, DOI asserts that the proposed changes "are necessary to best serve our customers and comply with the FOIA as efficiently, equitably, and completely as possible." *Id.*

But the Proposed Rule would not make the Department more efficient in meeting its statutory obligations, and instead attempts to alter the underlying FOIA obligations themselves in a manner fundamentally at odds with FOIA's purpose. Were DOI truly committed to improving transparency and accountability, the obvious solution would be to simply devote additional

[1] American Oversight and Democracy Forward Foundation are nonprofit, nonpartisan organizations dedicated to exposing government corruption and increasing government accountability through transparency. As such, both organizations rely heavily on FOIA to effectuate their missions, and would be significantly affected by the Department's proposed revisions to its FOIA regulations.

resources to fulfilling the agency's legal obligations under FOIA—an option that the NPRM fails to address.

A. Purpose and History of FOIA

Congress enacted FOIA to give the public access to information about government operations in order to inform public participation in democratic decisionmaking and ensure that the public could hold the government accountable for its actions. In its committee report regarding FOIA, the Senate Judiciary Committee observed that "the theory of an informed electorate is vital to the proper operation of democracy."[2] Similarly, the House Committee on Government Operations stressed in its committee report its concerns that agencies were developing their own bodies of "secret" law affecting the American people but not subject to public disclosure, and that large portions of the government had become unaccountable to its people.[3] President Johnson's signing statement acknowledged "with a deep sense of pride that the United States is an open society" and insisted that "[a] democracy works best when the people have all the information that the security of the Nation permits."[4]

Federal courts have routinely reaffirmed these animating principles: the Supreme Court has stated that "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). More recently, the Court emphasized that the public's knowledge of government action is "a structural necessity in a real democracy." *NARA v. Favish*, 541 U.S. 157, 172 (2004).

Congress has long recognized that true transparency and accountability can only be achieved with *prompt* access to information. The first amendments to the FOIA statute in 1974 imposed time limits on agencies to respond to FOIA requests.[5] In its committee report on the amendments, the House Committee on Government Operations explained the introduction of time limits, stating that "excessive delay by the agency in its response is often tantamount to denial."[6] And the D.C. Circuit long ago admonished that "stale information is of little value." *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988). Providing access to records only long after the underlying issue has lost its public salience, or after the political officials responsible for the relevant agency conduct are no longer in office, is of limited value to democratic participation and accountability. "Telling the requester 'You'll get the documents 15, or eight, years from now' amounts as a practical matter in most cases to saying 'regardless of

[2] S. Rep. No. 89-813, at 3 (1965).
[3] *See* H.R. Rep. No. 89-1497, at 7 (1966).
[4] Lyndon B. Johnson: "Statement by the President Upon Signing the 'Freedom of Information Act'" (July 4, 1966), Am. Presidency Project, https://www.presidency.ucsb.edu/documents/statement-the-president-upon-signing-the-freedom-information-act.
[5] *See* Pub. L. No. 93-502 § 1(c), 88 Stat. 1561 (1974) (codified as amended at 5 U.S.C. § 552(6)(a)(i) (1974) (subsequently amended)).
[6] H.R. Rep. No. 93-876, at 6271 (1974).

whether you are entitled to the documents, we will not give them to you.'" *Seavey v. U.S. Dep't of Justice*, 266 F. Supp. 3d 241, 246 (D.D.C. 2017) (quoting *Fiduccia v. U.S. Dep't of Justice*, 185 F.3d 1035, 1041 (9th Cir. 1999)). Delayed disclosure undermines the interest of an informed citizenry and meaningful democratic participation.

B. DOI Has Adequate Resources to Devote to Satisfying Its FOIA Obligations

DOI routinely fails to meet its obligation to make timely determinations on FOIA requests, and, as a result, has developed a significant FOIA backlog. It is this backlog that DOI asserts necessitates the changes laid out in the Proposed Rule. However, such drastic changes to the agency's regulatory scheme are not necessary in order to address that backlog (nor, as addressed below, are they legally sound or good policy). To the contrary, DOI has the resources necessary to respond to all FOIA requests on a reasonable timetable, or at least to do materially better than it is doing now. The agency's apparent choice to understaff and underfund its FOIA offices does not justify the Proposed Rule.

Contrary to popular misconception, FOIA resources are not fixed by Congress. There is no FOIA "line item" in agency appropriations. Rather, the resources used to fund statutory FOIA obligations typically come from an agency's general appropriation, or the appropriations for the relevant agency component if the component has a separate appropriations account.[7] Consistent with the Purpose Act, 31 U.S.C. § 1301(a), and in the absence of a specific appropriation, an agency or component typically can use its general appropriation to fund any of its authorized programs and operations, including activities necessary to meet the agency's legal obligations.[8] Consequently, decisions about how to allocate agency resources to meet the agency's legal obligations under FOIA—including how much of the agency's or component's available appropriation should fund its FOIA program as opposed to other programs and activities—are usually made at the agency or component level.

Typically, therefore, underfunded FOIA programs are not the fault of Congress but instead reflect an intentional decision not to fund FOIA processing efforts at a level adequate to meet the demand the agency expects to face. Presumably, this happens because agencies view FOIA as a burden rather than as a core part of their mandate, and agency employees view FOIA responsibilities as secondary obligations. But this approach inappropriately discounts FOIA's

[7] The Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, 132 Stat. 348 (2018), which funds most of the current operations of the Department of the Interior, contains only a handful of references to FOIA. The Act does not place limitations on funds available for agency FOIA efforts. Rather, the Act refers to FOIA in the context of spurring agencies to improve their efforts to respond to requests in a timely fashion and to reduce FOIA backlogs. For instance, the Act directs one agency to reduce FOIA backlogs and improve response times, and to report back to Congress on the steps taken to do so. *Id.* § 7707(c)(3). More generally, the Act requires agencies' operating plans to include funds planned for "measurably reducing the FOIA and Congressional oversight requests backlog." *Id.* § 7077(c)(4)(B).

[8] *See generally* Gov't Accountability Off., GAO-17-797SP, The Principles of Federal Appropriations Law 3-1-411 (2017) (Chapter 3: Availability of Appropriations: Purpose).

vital democratic function. Meeting legal obligations to FOIA requesters is no different from meeting any other legal obligation an agency faces, and requesters' statutory right of access to government information under FOIA should not be treated as a second-class right.

Moreover, it is not clear that allocating more resources to the agency's FOIA efforts would necessarily have a material effect on DOI's other programs and activities. In FY 2017 (the most recent year for which figures are available), DOI reported spending slightly less than *.08 percent* (that is, eight one-hundredths of one percent) of its available appropriations on FOIA processing. DOI could therefore dramatically increase FOIA processing resources with at most a negligible effect on its overall budget.[9] The NPRM arbitrarily fails to discuss these budgetary trade-offs (or lack thereof).

C. DOI Has Decreased the Resources Devoted to FOIA Despite a Predictable Increase in FOIA Requests and Increased Public Interest in Certain DOI Components

The root cause of the problems described by DOI in its Proposed Rule—an increasing backlog of FOIA requests without at least a partial response, and the corresponding increase in FOIA litigation—is DOI's failure to adequately fund and resource its FOIA responsibilities in the face of increasing FOIA demand during a time when there has been heightened public interest in DOI activities in certain components. Rather than further curtailing public access to agency records—as the Proposed Rule purports to allow—DOI should endeavor to increase the resources it allocates to its FOIA processing responsibilities, both via improvements in the agency's information systems and an increase in personnel.

DOI's Proposed Rule asserts that the Department has experienced "exponential increases in [FOIA] requests" between FY 2016 and FY 2018. But rather than allocate additional resources to meet this increase in demand for public transparency about DOI's operations, DOI has instead *decreased* the resources devoted to processing FOIA requests during that period. From FY 2016 to FY 2017 (the last year for which such figures are available), DOI reduced its FOIA processing expenditures from approximately $18.8 million to approximately $14.6 million.[10] DOI has also reduced the number of Full-Time FOIA Staff in the Office of the Secretary ("OS")—the office that the Proposed Rule names as an office hit "especially hard"—from 13 in FY 2016, to 9.5 in FY 2017, to approximately seven in the middle of FY 2018.[11] The increased FOIA demand upon

[9] *Compare* DOI, Budget in Brief, app. A, Comparison of 2017, 2018, and 2019 Budget Authority, https://edit.doi.gov/sites/doi.gov/files/uploads/fy2019_bib_a0001.pdf *with* Dep't of the Interior, Freedom of Information Act 2017 Annual Report, https://www.doi.gov/sites/doi.gov/files/uploads/doi_fy17_final.pdf.

[10] Dep't of the Interior, Freedom of Information Act 2016 Annual Report, https://www.doi.gov/sites/doi.gov/files/uploads/doi_fy_16_annual_foia_report.pdf; DOI, Freedom of Information Act 2017 Annual Report, https://www.doi.gov/sites/doi.gov/files/uploads/doi_fy17_final.pdf.

[11] *Id*; Decl. of Clarice Julka, *Allen v. DOI*, No. 17-cv-2656 (Feb. 12, 2018) 0 (ECF No. 10-1); 83 Fed. Reg. at 67,176.

which DOI relies in support of its Proposed Rule would be more appropriately addressed by agency decisionmakers allocating additional resources to meet the agency's clear statutory obligations, not by seeking to abjure or delay its legal obligations, as the Proposed Rule would do.

The rationale offered for the Proposed Rule also ignores the reality that the increased volume of FOIA requests flows largely from requests to components likely to contain records and information related to developments of great public interest during the period between FY 2016 and FY 2018. Nearly two-thirds of the increase in FOIA requests received by DOI is attributable to only two of DOI's twelve components: the OS and the Office of the Inspector General ("OIG").[12] This increase is a logical result of public demands for information and transparency related to former-Secretary Ryan Zinke's leadership in light of the questionable conduct of the Secretary, which resulted in eighteen investigations, including eight investigations conducted by OIG.[13] It is likely that many other requests have flowed from understandable public interest in other DOI appointees and officials with conflicts of interests, such as Acting Secretary David Bernhardt or Daniel Jorjani.[14] As discussed above, courts have regularly acknowledged that a primary purpose of FOIA is to allow the public to hold government officials accountable for their actions. The increase in FOIA requests received by OS and OIG during this period is directly related to this central purpose of FOIA, and DOI should not seek to respond by curtailing public access to information—yet that is exactly what the Proposed Rule would do.

Moreover, the increased number of requests received by DOI has been partly caused by agency decisions to decrease voluntary or proactive disclosures, forcing the public to submit more FOIA requests to receive information. For example, DOI press contacts have reportedly advised reporters to submit FOIA requests to obtain information that the agency could otherwise make available to the media in an effort to inform the public of its activities.[15] It is self-evident that

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[12] DOI data demonstrates that there were 1,919 more total requests to the Department in FY 2018 than in FY 2016, and OS and OIG alone accounted for 1,224 of this increase in requests: 64 percent of the total increase. OS received 1,076 additional requests, and OIG received 148 additional requests. DOI, Freedom of Information Act 2016 Annual Report, https://www.doi.gov/sites/doi.gov/files/uploads/doi_fy_16_annual_foia_report.pdf; DOI Quarterly FOIA Reports, FY 2018, https://www.doi.gov/foia/quarterly.

[13] Caroline Zhang, *A Guide to the 18 Federal Investigations into Ryan Zinke, Citizens for Responsibility and Ethics in Washington*, Aug. 9, 2018, https://www.citizensforethics.org/a-guide-to-the-14-federal-investigations-into-ryan-zinke/ (summarizing the eighteen investigations into former Secretary Zinke's conduct as of August 2018).

[14] *See, e.g.*, Juliet Eilperin, *Zinke's #2 Has So Many Potential Conflicts of Interest He Has to Carry a List of Them All*, Wash. Post, Nov. 19, 2018, https://www.washingtonpost.com/national/health-science/the-man-behind-the-curtain-interiors-no-2-helps-drive-trumps-agenda/2018/11/18/6403eb4c-e9ff-11e8-b8dc-66cca409c180_story.html?utm_term=.813465aec33c.

[15] *See, e.g.*, Eric Lipton (@EricLiptonNYT), Twitter (Mar. 12, 2018 9:38 AM), https://twitter.com/EricLiptonNYT/status/973236836280696832 (*New York Times* reporter told

when agencies stop proactively making useful information available, the people who use that information to keep the public informed of government operations will submit more FOIA requests. DOI's failure to proactively disclose does not justify restricting FOIA requesters' access to records and information.

The Proposed Rule seeks to reduce DOI's FOIA backlog by limiting and delaying requesters' access to information and public records. DOI should instead devote appropriate resources to FOIA processing to fulfill the purpose of FOIA and allow timely access to information of public interest and importance.

II. Proposed Changes to What Constitutes a Reasonably Described FOIA Request Are Contrary to Law and Arbitrary and Capricious.

The FOIA statute provides that "each agency, upon any request for records which . . . reasonably describes such records . . . shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A). DOI's current FOIA regulations provide additional information about what constitutes a reasonable description: "[a] reasonable description contains sufficient detail to enable bureau personnel familiar with the subject matter of the request to locate the records with a reasonable amount of effort." 43 C.F.R. § 2.5(a).

The Proposed Rule alters that language in two principal respects. First, it adds the requirement that a "reasonable description" must "identify the discrete, identifiable agency activity, operation, or program in which you are interested." 83 Fed. Reg. 67,175, 67,177. Second, it specifies that "[e]xtremely broad or vague requests or requests requiring research do not satisfy this requirement," and thus "[t]he 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." *Id.* Each of these additional requirements is contrary to law and arbitrary and capricious, and should not be implemented.

A. DOI's Proposed Limitation on Volume of Material that Can Be Requested

There is a clear judicial consensus as to what constitutes "reasonably described" records under FOIA: the inquiry turns on "whether the agency is able to determine precisely what records are being requested." *Yeager v. DEA*, 678 F.2d 315, 326 (D.C. Cir. 1982) (citation omitted). Thus, a request will be found to have "reasonably described" the requested records if it enables "a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort." *Kenney v. Dep't of Justice*, 603 F. Supp. 2d 184, 188 (D.D.C. 2009) (citation omitted). DOI's current FOIA regulation tracks this language precisely, and any deviation from this standard—as the Proposed Rule contemplates—is contrary to settled law.

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by DOI press office that he had to submit FOIA to see data on the safety record of offshore companies).

In particular, the NPRM's restriction based solely upon the volume of requested material has no bearing on whether a request has been "reasonably described." In fact, "the Act puts no restrictions on the quantity of records that may be sought." *Tereshchuk v. Bureau of Prisons*, 67 F. Supp. 3d 441, 455 (D.D.C. 2014), *aff'd* 2015 WL 4072055 (D.C. Cir. June 29, 2015); *see also id.* (FOIA "anticipates that requests for records may be so voluminous as to require an agency to carry an unusual workload"). Indeed, the Department of Justice has stated that "[t]he sheer size or burdensomeness of a FOIA request, in and of itself, does not entitle an agency to deny that request on the ground that it does not 'reasonably describe' records within the meaning of 5 U.S.C. § 552(a)(3)(A)."[16] And federal courts routinely uphold FOIA requests for large volumes of material. *See, e.g.*, *Yeager*, 678 F.2d at 326 (finding that request for over a million records was reasonably described because "the number of records requested appears to be irrelevant to the determination" and it was "clear" that the agency knew "precisely" which of its records had been requested).

To be sure, an agency need not honor a request that requires an "unreasonably burdensome search." Courts have considered whether a request poses such an unreasonable burden by considering whether processing the request would pose an "undue burden" to the agency. *See, e.g.*, *Crisman v. DOJ*, 332 F. Supp. 3d 139, 153 (D.D.C. 2018) ("Thus, to fulfill Crisman's request, DHS—which does not maintain a central index of records about individuals—would have to take on the burdensome task of examining and sifting through numerous records, without guidance as to the timeframe, location, or likely format of the records Plaintiffs seek."); *Hainey v. DOI*, 925 F. Supp. 2d 34, 45 (D.D.C. 2013) (request "would require a search of every email sent or received by 25 different employees throughout a two-year time period," and the department "would need to individually review each potentially responsive email to confirm its releasability").

DOI's Proposed Rule makes no reference to the "undue burden" analysis, however, and instead would give the Department blanket authority to deny FOIA requests seeking a "vast quantity of material," regardless of the degree to which search and review would burden the agency.[17] In light of electronic search capabilities, DOI can very easily identify all emails containing a particular phrase, or all emails exchanged between certain entities, even though the volume of such materials may be quite large. Similarly, electronic review and redaction capabilities can make relatively quick work of even voluminous reviews. Indeed, courts have recognized that

[16] Office of Information Policy, Department of Justice, *FOIA Update Vol. IV, No. 3* (1983), https://www.justice.gov/oip/blog/foia-update-foia-counselor-questions-answers-21.

[17] The language in the Proposed Rule appears to come from the D.C. Circuit's 1990 decision in *AFGE v. U.S. Dep't of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990). However, that case involved an extraordinarily broad FOIA request that was submitted prior to the development of electronic search and review capabilities, such that complying with the request required the agency to lay eyes on virtually every file in the agency's possession. *See id.* at 208 (request "would require the Bureau to locate 'every chronological office file and correspondent file, internal and external, for every branch office, staff office [etc.]'"). Moreover, the "vast" material that would have been required to be reviewed and redacted by the agency in that case was "largely unnecessary to the [requesters'] purpose." *Id.* at 209.

searches and productions of electronic documents significantly reduces the burden on agencies. *See People for Am. Way Found. v. DOJ*, 451 F. Supp. 2d 6, 15 (D.D.C. 2006) (holding that, although a manual search of 44,000 files for records responsive to a FOIA request would be unduly burdensome, an electronic search of those files would not place an undue burden on the agency); *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318 (S.D.N.Y. 2003) (noting, in the civil discovery context, that "[e]lectronic evidence is frequently cheaper and easier to produce than paper evidence because it can be searched automatically, key words can be run for privilege checks, and the production can be made in electronic form obviating the need for mass photocopying"). And under existing presidential directives and guidance from the National Archives & Records Administration, DOI is under a continuing obligation to maintain its electronic records in a manner that facilitates identification and reproduction of those records for transparency purposes.[18] It can hardly be "unduly burdensome" for DOI to conduct searches in a manner consistent with how it is already obligated to maintain its electronic records.

Thus, DOI's proposal to permit the agency to deny a FOIA request any time it involves a "vast quantity of material" is contrary to law. It is also, of course, contrary to the animating spirit and purpose of FOIA, which is to shed light on government activities. Denying a FOIA request precisely because it would bring *too much* government activity to light would turn the FOIA statute on its head. The undersigned therefore urge DOI not to adopt the portion of its Proposed Rule that would allow it to deny FOIA requests that require DOI to search for, review, or redact a "vast quantity of material," regardless of the burden involved in doing so.

At a minimum, DOI should amend its Proposed Rule to provide some context and clarification of what constitutes a "vast quantity of material." That phrase, as currently drafted, is too vague for requesters to apply with any reasonable level of certainty. Likewise, it is too vague and subjective to facilitate consistent application across DOI employees and requests—what constitutes a "vast quantity of material" to one person may not seem so vast to another. Is the phrase to be defined in terms of number of hours of manpower required to satisfy a request? Number of dollars expended to satisfy the request? Sheer number of records reviewed? Absent more information, and contrary to DOI's assertions, the NPRM's language only hampers a requester's ability to predict whether she has reasonably described the records sought. And it may have a chilling effect on transparency if requesters (or DOI FOIA staff) incorrectly interpret this standard to foreclose typical FOIA requests, e.g., those for hundreds of email records.

[18] *See* Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records; Off. of Mgmt. & Budget, Exec. Off. of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, "Managing Government Records Directive," M-12-18 (Aug. 24, 2012), https://www.archives.gov/files/records-mgmt/m-12-18.pdf ("By December 31, 2016, . . . [e]mail records must be retained in an appropriate electronic system that supports records management and litigation requirements . . . , including the capability to identify, retrieve, and retain the records for as long as they are needed.").

Should DOI choose to leave the "vast quantity" standard in the final rule, it should include a definition or other context providing clear, concrete, and lawful standards for the application of this provision.

B. DOI's Proposed Requirement to Specify the Agency Activity in Which a Requester Is Interested

The Proposed Rule provides that a reasonable description of the records sought must "identify the discrete, identifiable agency activity, operation, or program in which [the requester is] interested." 83 Fed. Reg. at 67,177 (proposed amendment to section 2.5(a)). This seemingly minor addition would fundamentally narrow the landscape of permissible FOIA requests and would thereby have a significant chilling effect on transparency and accountability.

This new requirement is contrary to law in several respects. First, as discussed above, there are clear legal principles governing when a request is "reasonably described," and nothing in those principles requires a requester to identify the particular agency activity in which they are interested, or why. It is entirely common, and entirely appropriate, that FOIA requests seek records cutting across specific agency activities. Nothing in FOIA prevents a requester from submitting such a request, and there is a strong public interest in being able to make such requests.

Second, the proposed language is contrary to the basic structure of FOIA, which relies on a presumption of transparency regarding governmental operations and presupposes that any clearly-described agency record is subject to disclosure unless it falls within one of the nine narrowly-drawn exemptions or three exclusions. It has long been acknowledged that a requester need not state the purpose for which they are requesting records; anyone may request records for any reason, so long as the records are not exempt. *See Favish*, 541 U.S. at 172 ("[A]s a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information."). The Proposed Rule would effectively require a requester to explain the purpose for their FOIA request by stating what aspect of government activity they are trying to uncover. That is contrary to law.

Finally, the core tenet of FOIA is to enable the public to "know what their Government is up to." *Favish*, 541 U.S. at 171–72 (citation omitted). But the Proposed Rule presupposes that the requester knows what the government is up to before they submit a FOIA request by requiring them to identify a particular activity, operation, or program to which their request relates. Requesters, including American Oversight and Democracy Forward Foundation, regularly submit FOIA requests for records (such as calendars of agency employees) precisely to determine what activities, operations, or programs agency officials are working on. Similarly, FOIA requesters, including American Oversight and Democracy Forward Foundation, routinely investigate whether outside individuals or entities have an undue influence on government policymaking by requesting all communications, on any topic, between those outside groups and certain governmental employees. Often, it is not until we receive responses to those FOIA requests that we—and the rest of the American public—ever learn what operations and programs an agency is working on. Indeed, FOIA requests of this type have uncovered significant,

newsworthy information at DOI and other agencies in recent years. The Proposed Rule would therefore significantly hamper government transparency and accountability, and would run afoul of FOIA's basic principles.

The undersigned therefore respectfully urge DOI not to adopt the requirement that a FOIA requester "identify the discrete, identifiable agency activity, operation, or program in which [the requester is] interested." 83 Fed. Reg. at 67,177.

III. DOI's Proposed Requirement to Specify the Agency Activity in Which a Requester Is Interested as Part of a Request for a Fee Waiver Is Contrary to Law and Arbitrary and Capricious.

The same requirement discussed above—that a request must "concern discrete, identifiable agency activities, operations, or programs with a connection that is direct and clear, not remote or attenuated"—appears in the proposed amendment to Section 2.48, regarding the Department's evaluation of requests for fee waivers. 83 Fed. Reg. at 67,179. For the reasons discussed above, as well as those added below, we urge DOI to reconsider adding this new requirement to its regulations, as the requirement is both contrary to law and arbitrary and capricious.

FOIA provides that a requester may be entitled to a waiver or reduction of fees if "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). Nothing in the statute requires that the requester identify *which* governmental operation or activity the information will illuminate, and for good reason: as set forth above, FOIA requests are often designed to fill gaps in the requester's understanding of which governmental programs warrant particular scrutiny because they are unlawful or inappropriate. The extra-statutory requirement added by the proposed fee waiver provision improperly requires FOIA requesters to already possess the information that they are seeking, and is therefore contrary to law and would undermine FOIA's purpose and operation.

IV. DOI's Proposed Limitation to the Number of Records to be Processed for Any Given Requester Is Contrary to Law and Arbitrary and Capricious.

The Proposed Rule's amendment to Section 2.14 of the Department's FOIA regulation would allow DOI to "impose a monthly limit for processing records in response to [a requester's] request in order to treat FOIA requesters equitably." 83 Fed. Reg. at 67,178. This is plainly contrary to law. The FOIA statute requires that agencies make a determination on FOIA requests within 20 working days, or 30 working days when a request presents "unusual circumstances," without exception. 5 U.S.C. § 552(a)(6)(A)(i), (a)(6)(B)(i). The statute also permits agencies to seek a stay of these obligations in litigation where the agency can establish that there are "exceptional circumstances." *Id.* § 552(a)(6)(C). Finally, the statute contains no provision allowing agencies to limit or privilege the processing of the FOIA requests of any given requester, except to the extent that some requesters may qualify for expedited processing of

certain requests if the requester is "primarily engaged in disseminating information." *Id.* § 552(a)(6)(E)(v)(II).

The Proposed Rule unlawfully seeks to circumvent these statutory obligations by effectively giving DOI blanket authority to make its own subjective decisions about the timing and rate at which it will respond to FOIA requests, thereby allowing the agency to apply this authority in arbitrary or discriminatory fashion. The Proposed Rule would allow DOI to unlawfully limit its responses to certain requests if it determines that such limitations would result in "equitabl[e]" treatment across requesters but does not explain what DOI believes would result in "equitabl[e]" treatment of requesters. In so doing, DOI disturbingly arrogates to itself the power to judge which requests should receive the prompt response to which all requests are entitled by law, and risks the improper and inequitable selection of "winners" and "losers." DOI may not simply ignore statutory requirements in favor of an undefined standard that the agency may argue permits it to limit or privilege certain requesters within its discretion.

If DOI penalizes requesters who make numerous FOIA requests, DOI will harm the transparency interest FOIA is designed to safeguard by hamstringing the requesters who are most likely to disseminate information to the public. Public interest and news media organizations are among the most likely requesters to submit numerous FOIA requests, and consequently DOI could claim that they fall under the NPRM's restrictions; however, these organizations are precisely the requesters that foster the broadest possible transparency by widely disseminating the information they receive. To the extent that DOI seeks to limit its responsiveness to iterative public interest requesters in favor of individuals with narrower, private interests, DOI will hurt government transparency.

Moreover, as noted above, FOIA allows an agency to privilege the processing of a FOIA request on the basis of a requester's identity and characteristics in only one place, i.e., the statute's expedited processing provision. This provision requires that certain requests receive expedited processing only when made by a requester "primarily engaged in disseminating information." 5 U.S.C. § 552(a)(6)(E)(v)(II). Many of the requesters that are "primarily engaged in disseminating information" are reporters and public-interest organizations that regularly submit FOIA requests to facilitate the transparency that is FOIA's central purpose. The Proposed Rule's changes to Section 2.14 may allow DOI to exercise its discretion to "treat FOIA requesters equitably" in a manner that perversely *curtails* responses to the very requesters that Congress singled out to receive preferential treatment.

The undersigned therefore respectfully urge DOI not to adopt the Proposed Rule's modifications to Section 2.14, which are contrary to law and would harm the interests of transparency that FOIA was enacted to foster.

V. Other Proposed Changes Would Hinder Transparency and Public Oversight.

- The Proposed Rule's changes to Section 2.48(a)(2)(iv) place new emphasis on a requirement that a requester must address its "expertise in the subject area" in making a fee waiver request, 83 Fed. Reg. at 67,179, suggesting that DOI may consider such

expertise necessary for the grant of a fee waiver. But FOIA requires only that requesters demonstrate that requested information "is likely to contribute significantly to public understanding of the operations or activities of the government," 5 U.S.C. § 552(a)(4)(A)(iii), and requesters who specialize in disseminating information to the public need not have specific subject matter expertise to make significant contributions to public understanding. The proposed change therefore could result in unlawful fee waiver denials, insofar as the language is employed to deny waivers to public interest transparency organizations and news media representatives that may not have specific expertise in a given subject matter and are instead experts in disseminating information. The undersigned respectfully urge DOI to amend this language to make clear that subject matter expertise is not required to receive a fee waiver.

- Section 2.20(a)(2)(iii) of the Proposed Rule strikes the clause explaining that "a breaking news story of general public interest" on a topic ordinarily demonstrates that requested information has value that will be lost if not disseminated quickly and may therefore qualify for expedited processing. 83 Fed. Reg. at 67,178. DOI's proposed deletion of this clause could harm transparency if DOI no longer considers breaking news stories of general public interest to be compelling evidence of an urgent need to inform the public for the purposes of granting expedited processing. Whether recent news stories of broad public interest exist on a given subject is a valuable indicator of whether a request concerns a government activity or operation about which there is an urgent need to inform the public and where expedited processing is warranted. The undersigned respectfully urge DOI not to delete this clause in its current regulations.

- The Proposed Rule amends Section 2.3 to emphasize the primacy of submitting FOIA requests by electronic portal and removes any direct reference to the submission of requests by email, while continuing to explicitly note that requests may be submitted by physical mail. 83 Fed. Reg. at 67,177. The undersigned do not object to DOI encouraging FOIA requesters to use electronic portals, but believe that email submission should always be available as a secondary method of submission for several reasons. First, electronic portals—including DOI's current portal—sometimes lack the capability to allow requesters to upload documents containing all of the information necessary to explain a request and justify requests for fee waivers and/or expedited processing. Second, electronic portals are sometimes unavailable to requesters.[19] Third, electronic

[19] During the lapse in appropriations to the Department, until January 22, 2019, visitors to DOI's FOIA portal were met with a message stating, "No FOIA requests can be accepted or processed at this time." The Department apparently resumed FOIA processing thereafter. We have grave concerns about the legal authority for DOI's apparent decision to suspend receipt of FOIA requests during the first month of the lapse in appropriations. There is no legal support for the implication that the public may not submit FOIA requests during the pendency of the appropriations lapse. Moreover, as the Department of Justice has itself acknowledged, the Department's duty to process a FOIA request within 20 days excludes only "Saturdays, Sundays, and legal public holidays," 5 U.S.C. § 552(a)(6)(A)(i), and does not exclude days during which the government may be closed for some other reason, such as weather or an appropriations lapse.

portals often do not provide detailed confirmation receipts. Given these drawbacks to electronic portals, the undersigned urge DOI not to alter its regulations in a manner excluding email as a means of submitting FOIA requests.

- Section 2.45(a) of the Proposed Rule changes DOI's fee waiver provisions to indicate that DOI will make fee waiver determinations "considering the information [the requester has] provided," not "all available information," as the current regulation provides. 83 Fed. Reg. at 67,179. The undersigned acknowledge that the requester generally bears the burden of demonstrating eligibility for a fee waiver, but DOI's proposed change here may harm the interests of transparency by purporting to allow DOI to deny fee waivers even where the agency has information indicating that a fee waiver is warranted. For example, a reporter or public interest organization with which DOI is already familiar may submit a time-sensitive FOIA request that does not fully catalog the requester's track record of disseminating information. In that case, DOI could use the language of the proposed regulation to unjustifiably deny the requester a fee waiver despite DOI's prior knowledge. The undersigned respectfully urge DOI to include or retain regulatory language allowing DOI to consider readily available information, even if that information was not directly provided by a given FOIA request. Preferable alternative regulatory language would include, for example, "considering the information you have provided, verifying it as appropriate, as well as other readily available information."

- The Proposed Rule also strikes Section 2.45(f) of the fee waiver regulations, which currently states that DOI "must not make value judgments about whether the information at issue is 'important' enough to be made public." The undersigned are concerned that if DOI removes this provision, DOI FOIA officials will be empowered to make politically-biased, subjective determinations when reviewing fee waiver requests. If officials are able to determine that fee waiver requests are not warranted because, in their judgment, requested information is not important to the public, officials may curtail access to public records due to the political viewpoints of requesters. The undersigned urge DOI not to strike the current language of Section 2.45(f).

VI. Daniel Jorjani Does Not Have Authority to Issue the Proposed Rule.

Daniel Jorjani purports to have issued the Proposed Rule in his capacity as the inferior officer "exercising the authority of the Solicitor" of the Department of the Interior, presumably based on authorities delegated to the Solicitor and because the Department has designated the Solicitor as the Department's Chief FOIA officer.[20] The undersigned do not believe that Mr. Jorjani has

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See Department of Justice, *Calculating FOIA Response Times After the Government Shutdown*, https://www.justice.gov/oip/blog/calculating-foia-response-times-after-government-shutdown (Oct. 29, 2013).

[20] *See* Secretarial Order No. 3371, The Department of the Interior Freedom of Information Act Program (Nov. 20, 2018), https://www.doi.gov/sites/doi.gov/files/elips/documents/so_3371_0.pdf (designating the Solicitor as the Chief FOIA Officer); Secretarial Order No. 3345, Temporary Redelegation of Authority

lawful authority, under either the Appointments Clause of the Constitution or applicable federal statutes, to issue the Proposed Rule or any final rule.

As an initial matter, the Department's Manual provides that DOI officials are not authorized to issue rulemaking documents unless such authority is specifically delegated to them. *See* Ex. A, Departmental Manual Part 200 § 1.6(A) ("Delegations of authority in the Delegation Series do not include authority to issue documents in the Code of Federal Regulations initiated by the Department of the Interior unless such authority is specifically mentioned in the delegation."). But the Proposed Rule does not identify any source of authority that permits the Solicitor to issue new rules governing the Department's FOIA processes. And insofar as the Department believes that the Solicitor *does* have authority to issue such rules, the Proposal fares no better because Mr. Jorjani cannot legally exercise the Solicitor's powers under the Constitution's Appointments Clause and the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. § 3345 *et seq.*

The Constitution's Appointment Clause provides that:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const., Art. II, § 2, cl. 2.

"The Senate's advice and consent power [under the Clause] is a critical structural safeguard of the constitutional scheme," *NLRB v. Sw. Gen., Inc.*, 137 S. Ct. 929, 935 (2017) (citation omitted), because it serves as "'an excellent check upon a spirit of favoritism in the President' and as a guard against 'the appointment of unfit characters . . . from family connection, from personal attachment, or from a view to popularity[,]" *id.* (quoting The Federalist No. 76, at 457 (A. Hamilton) (C. Rossiter ed., 1961)).

The Department's Solicitor is an inferior officer. As such, the Appointments Clause requires that the position be filled in the manner provided for "by Law." Congress has deemed the Solicitor position one for which appointment by the President and confirmation by the Senate is required. 43 U.S.C. § 1455. Congress has also permitted a temporary appointment pursuant to the FVRA. To lawfully perform the functions and duties of the office under the FVRA, the acting officer must either (1) have served as the "first assistant" to the pertinent office for at least 90 out of the 365 days prior to the occurrence of the vacancy (among other

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for Certain Vacant Non-Career Senate-Confirmed Positions (Nov. 13, 2018), https://www.doi.gov/sites/doi.gov/files/elips/documents/3345a23_temporary_redelegation_of_authority_for_certain_vacant_non-career_senate-confirmed_positions_0.pdf (delegating authorities of Solicitor to Mr. Jorjani, expiring January 31, 2019).

requirements), or (2) be appointed to temporarily fill the office by the President (and only the President). 5 U.S.C. § 3345(a)(1)-(3). An acting officer who qualifies under either of these criteria may perform the functions and duties for a limited period of time—normally 210 days from the date the vacancy occurs, subject to extensions in certain circumstances. *See id.* § 3346.

The Department's attempt to delegate the Solicitor's powers and duties to Mr. Jorjani—on which the Department has relied to propose the Rule—satisfies neither the Appointments Clause nor the FVRA.

Mr. Jorjani has not been confirmed by the Senate to serve as the Department's Solicitor. Nor does the Department's purported delegation of the Solicitor's duties to Mr. Jorjani satisfy the FVRA's requirements. Specifically, he does not qualify as the "first assistant" to the Solicitor pursuant to 5 U.S.C. § 3345(a)(1) because he was neither appointed Acting Solicitor by the President nor was he the "first assistant" to the Solicitor for 90 of the 365 days preceding the occurrence of the vacancy on January 20, 2017.[21] And the Department may not sidestep the FVRA's requirements by delegating the Solicitor's functions and duties to Mr. Jorjani without formally naming him the Acting Solicitor. The statute provides "the exclusive means for temporarily *authorizing* an acting official to perform the *functions and duties* of any office of an Executive agency . . . for which appointment is required to be made by the President, by and with the advice and consent of the Senate." 5 U.S.C. § 3347(a) (emphasis added).[22] Congress has deemed the Department's Solicitor to be a position subject to this provision. *See* 43 U.S.C. § 1455. But Mr. Jorjani is not eligible to perform the functions and duties of the office of the Solicitor under the FVRA's mandatory requirements. He therefore lacks authority—insofar as such authority belongs to a properly appointed Solicitor in the first place—to issue the Proposed Rule. *See* 5 U.S.C. § 3345.

Even assuming, *arguendo*, that Mr. Jorjani were eligible to temporarily perform the functions and duties of the Solicitor under the FVRA, he could have done so only for 210 days from the date on which the previous nominee for Solicitor withdrew his name from consideration. *See id.* § 3346(a). Because Ryan Nelson withdrew his nomination on May 10,

[21] *See* DOI, *Interior Announces 19 New Hires* (May 26, 2017), https://www.doi.gov/pressreleases/interior-announces-19-new-hires (press release announcing Jorjani's appointment as Principal Deputy Solicitor); Gov't Accountability Off., *Federal Vacancies Reform Act*, https://www.gao.gov/legal/other-legal-work/federal-vacancies-reform-act (last visited Jan. 28, 2019) (reflecting January 20, 2017 vacancy date).

[22] "Functions and duties" as used in section 3347(a) of the FVRA is not defined in statute, and thus is entitled to its ordinary meaning. *Compare* 5 U.S.C. § 3347(a) *with id.* § 3348(a)(2)(A)(i)-(ii) (defining "functions and duties" *for purposes of section 3348* to refer to functions or duties that are "established by statute" and "required by statute to be performed by the applicable officer (and only that officer)").

2018,[23] Mr. Jorjani could not perform the functions and duties of Solicitor beyond December 6, 2018, prior to issuance of the Proposed Rule on December 28, 2018.

The order purporting to delegate the functions and duties of the Solicitor to Mr. Jorjani is plainly inconsistent with the Appointments Clause and the FVRA. Mr. Jorjani has not been appointed in the manner prescribed "by Law" within the meaning of the Appointments Clause, i.e., with nomination by the President and confirmation by the Senate, or pursuant to the provisions of the FVRA. Accordingly, Mr. Jorjani could not have relied on this delegation order as the source of his authority to issue the Proposed Rule.

Sincerely,

/s/ Austin Evers

Austin Evers
Executive Director
American Oversight

/s/ Anne Harkavy

Anne Harkavy
Executive Director
Democracy Forward Foundation

[23] *PN1368—Ryan Douglas Nelson—Department of the Interior*, Congress.gov, https://www.congress.gov/nomination/115th-congress/1368?pageSort=asc (last visited Jan. 28, 2019)