COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

To

THE DEPARTMENT OF JUSTICE

[Docket ID OAG Docket No. 140]

RIN 1105-AB27

"Revision of Department of Justice Freedom of Information Act Regulations"

October 18, 2011

By notice published on March 21, 2011, the Department of Justice ("DOJ") has proposed to revise the agency regulations that implement the Freedom of Information Act of 1974 ("FOIA").[1] The comment period for that rule closed on April 20, 2011, however, on September 19, 2011, the DOJ reopened the comment period for an additional 30-day period.[2] Pursuant to the original notice as subsequently modified, the Electronic Privacy Information Center ("EPIC") submits these comments and recommendations to address the substantial risks to open government and agency accountability of the proposed changes in agency regulations.

EPIC is a public interest research center in Washington, D.C. It was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy,

[1] Docket No. OAG 140; AG Order No. 3259-2011, published in the Federal Register on Mar. 21, 2011, http://www.federalregister.gov/regulations/1105-AB27/disclosure-or-production-of-records-or-information.
[2] Federal Register, "Proposed Rule: Revision of Department of Justice Freedom of Information Act Regulations," Sept. 19, 2011, http://www.federalregister.gov/articles/2011/09/19/2011-23903/revision-of-department-of-justice-freedom-of-information-act-regulations#p-3. [Hereinafter "Proposed DOJ FOIA Rule"]

the First Amendment, and constitutional values. EPIC engages in extensive Freedom of Information Act litigation, including matters before the agency that would be subject to the proposed regulations.[3] EPIC also publishes *Litigation Under Federal Open Government Laws* Guide, a leading guide for FOIA practitioners and requesters, and has specific expertise with respect to the history and purpose of the FOIA.[4]

The Scope of the Proposed Changes to the Justice Department's FOIA Regulations

The agency proposes extensive changes to Subpart A of 28 C.F.R. §16 that govern the Procedures for Disclosures of Records Under the Freedom of Information Act. Such procedures include: General provisions, 16.1; Proactive disclosures of Department records, 16.2; Requirements for making requests, 16.3; Responsibility for responding to Requests, 16.4; Timing of responses to requests, 16.5; Responses to requests, 16.6; Confidential business information, 16.7; Administrative appeals, 16.8; Preservation of records, 16.9; Fees, 16.10; Other rights and services, 16.11.

EPIC objects to many of the proposed changes as indicated below. These changes would undermine the federal open government act, are contrary to law, and exceed the authority of the agency. Not only has the agency proposed a series of steps that, in whole and in part, retreat from current practice to comply with the federal statute that enables government accountability and transparency, it has also failed to evince any interest in implementing the views expressed by the President of the United States and the Attorney General in support of open government. In addition to exceeding the agency's statutory authority, the proposed changes are also profoundly disappointing.

[3] EPIC, Freedom of Information Act appeal to the Federal Bureau of Investigation, Sept. 8, 2011, available at: http://epic.org/foia/WikiLeaks%20FBI%20FOIA%20Appeal.pdf.
[4] EPIC, *Litigation Under the Federal Open Government Laws* 2010, 138 (Harry A. Hammitt, Ginger McCall, Marc Rotenberg, John A. Verdi, and Mark S. Zaid, eds., 2010).

Proposed Section 16.3(a) Requirements for making requests ("General Information")

Under the current regulation, 28 CFR § 16.3(a)(1):

> You may make a request for records of the Department of Justice by writing directly to the Department component that maintains those records. You may find the Department's "Freedom of Information Act Reference Guide"—which is available electronically at the Department's World Wide Web site, and is available in paper form as well—helpful in making your request. For additional information about the FOIA, you may refer directly to the statute.

Under the proposed regulation, 28 CFR § 16.3(a)(1), the agency states:

> To make a request for records of the Department, a requester must write directly to the FOIA office of the Department component that maintains those records. § 16.3(a)(1) . . . When a requester is unable to determine the proper Department component to which to direct a request, the requester may send the request to the FOIA/PA Mail Referral Unit, Justice Management Division, Department of Justice, Washington, DC 20530–0001. § 16.3(a)(2).

The proposed change to the agency regulations will allow the agency to summarily deny requests when the requester fails to write to the correct "FOIA office of the Department component" that maintains the records. This is an unfair and unreasonable requirement that will frustrate the purpose of the Freedom of Information Act. First, except for the expert requester, it is extremely unlikely that a FOIA requester will be able to provide much specificity beyond the appropriate federal agency when requesting documents in possession of the federal government. Second, agencies themselves are often unclear as to which entity is in possession of the records. Third, the DOJ itself has defined in its own proposed regulation as "the FOIA office of each separate bureau, office, division, commission, service, center, or administration that is designated by the

Department as a primary organizational entity," an extraordinarily broad listing of agency entities guaranteed to frustrate even the diligent FOIA requester.[5] Fourth, to make use of the alternative submission proposed to the FOIA/PA Mail Referral Unit under the proposed regulation, the requester would have to be "unable to determine the proper Department component to which to direct a request, . . ."[6] In other words, to fully comply with the proposed rule, the requester could be required to demonstrate that they had attempted to determine the correct component but were unable to determine the proper component "to which to direct a request."

None of these obligations exist in the current regulation. The agency should revise this part of the proposed regulations as follows. First, the agency should make clear that the need to direct a request to the appropriate component is encouraged but not mandatory. Section 16.3(a)(1) should be revised as follows:

> (1) To make a request for records of the Department, a requester *should* write directly to the FOIA office of the Department component that maintains those records. (Emphasis added).

Second, the agency should make clear that requests may also be directed to the FOIA/PA Mail Referral Unit without the burden of trying to locate the appropriate component. Section 16.3(a)(2) should be revised as follows:

> (2) A requester may also send a FOIA request to the FOIA/PA Mail Referral Unit, Justice Management Division, Department of Justice, Washington, DC 20530-0001.

[5] The agency lists 38 different FOIA components in the rulemaking. "Appendix I to Part 16 – Components of the Department of Justice." Proposed DOJ FOIA Rule.
[6] *Id.*

There is no need to include the qualifier "When a requester is unable to determine the proper Department component to which to direct a request."

Together these changes accomplish the agency goal of encouraging requesters to direct requests to the appropriate component without creating any additional obstacles for FOIA requesters. If however, the agency chooses to adopt the regulatory language it proposes it would establish new barriers to access, contrary to the federal statute and case law, and outside of the agency's rulemaking authority. (It is also worth noting that the current 28 CFR § 16.3(a)(1) reflects a desire to assist the requester by using the term "helpful" and pointing the requester to useful resources provided by the agency. The proposed regulations replace these bridges that promote access to information to information in the federal government with walls intended to limit access.)

Regarding the certification of identity, there is under the current regulation no requirement that a *FOIA requester* provide their identity for the agency to process a request. Moreover, individuals who are not citizens of the United States or an alien lawfully admitted for permanent residence have no rights under the Privacy Act to obtain records about themselves.

Under the proposed regulation, 28 CFR § 16.3(a)(3), the agency states:

> A requester who is making a request for records about himself or herself must comply with the verification of identity provision set forth in subpart D of this part.

The agency regulation should be revised to reflect the actual law as follows:

> A requester who *is "a citizen of the United States or an alien lawfully admitted for permanent residence," and* is making a request for records about himself or herself, *under the Privacy Act,* must comply with the verification of identity provision set forth in subpart D of this part.

Proposed Section 16.3(c) Requirements for making requests ("Description of records sought")

Under the current regulation, 28 CFR § 16.3(c):

> . . . The component also shall give you an opportunity to discuss your request so that you may modify it to meet the requirements of this section. If your request does not reasonably describe the records you seek, the agency's response to your request may be delayed.

Under the proposed regulation, 28 CFR § 16.3(c), the agency states:

> . . . When a requester fails to provide sufficient detail after having been asked to clarify a request, the component shall notify the requester that the request has not been properly made and that no further action will be taken.

This is a significant change in agency practice that allows the agency to deem that a request "has not been properly made" and to terminate the processing of the request. This change would establish new barriers to access, is contrary to the federal statute and case law, and is outside of the agency's rulemaking authority.

If the agency wishes to terminate a FOIA request on its own authority because it has failed to clarify the intent of the requester even after the requester has set out the request in writing and directed it to the appropriate agency of the federal government, the agency should be required to notify the FOIA Ombudsman of its action, and to provide the opportunity for a FOIA official, independent of the agency, to assist the requester. To accomplish this goal, the relevant section should be modified as follows:

> . . . When a requester fails to provide sufficient detail after having been asked to clarify a request, the component shall notify the requester that the request has not been properly made and that no further action will be taken. *In such circumstances, the component shall also notify the FOIA Officer and the FOIA Ombudsman of the action taken, provide copies of the relevant documents, and shall also indicate the basis upon which it determined that a "request has not been properly made."*

Proposed Section 16.4(a) Responsibility for responding to requests. ("In general")

The agency proposes to add a new provision to 28 CFR § 16.4(a) that states:

> A record that is excluded from the requirements of the FOIA pursuant to 5 U.S.C. §552(c), shall not be considered responsive to a request.

For reasons expressed in more detail *infra*, the agency's treatment of FOIA requests subject to record exclusion, 5 U.S.C. §552(c), is far in excess of its statutory authority. This new provision should be removed. The agency may choose, if it wishes, to notify the requester that records requested are subject to 5 U.S.C. §552(c), an assertion that the agency may make, but must remain subject to judicial review. Moreover, the authority to assert record exclusion as with the authority to assert record exemptions must be viewed as permissive and not mandatory. The purpose of the Act is to promote disclosure, as virtually every FOIA case has noted.

Proposed Section 16.4(e) Responsibility for responding to requests ("Notice of Referral")

The agency proposes to revise 28 CFR § 16.4(e) as follows:

> Whenever a component refers any part of the responsibility for responding to a request to another component or agency, it will notify the requester of the referral and inform the requester of the name of each component or agency to which the records were referred*, unless identifying the recipient will itself disclose a sensitive, exempt fact.* (Emphasis added).

At present, there is no precedent for an agency to withhold information concerning the identity of a component agency to which a request is referred. Coupled with the agency's newly proposed burden on the requester to properly identify the component to which to direct a FOIA request, this effort to then conceal the existence of the relevant component to which a request is properly

referred borders on the Kafkaesque.[7] As such an action would clearly frustrate the ability of the requester to meaningfully pursue the request, it should be removed from the proposed changes to the regulation.

Proposed Section 16.5(a) Timing of responses to requests ("In general")

At present, the agency regulation simply states:

> Components ordinarily shall respond to requests according to their order of receipt.

28 CFR Ch. I at 272 (7–1–11 Edition). The proposed regulation would add the following text:

> Appendix I to this part contains the list of the Department components that are designated to accept requests. In instances involving misdirected requests, *i.e.,* where a request is sent to one of the Department components designated in Appendix I but is actually seeking records maintained by another Department component, the response time will commence on the date that the request is received by the appropriate component, but in any event not later than ten working days after the request is first received.[8]

This is another unnecessarily complicated procedure that places additional burdens on the requester and allows the agency to grant itself an extension of the statutory time limits, *because of the complexity it has created*, which is contrary to law and exceeds the agency's rulemaking authority. These proposed changes should be withdrawn.

Proposed Section 16.5(e) Timing of responses to requests ("Expedited processing")

The proposed changes of the agency unnecessarily restricts the circumstances under which expedited processing should be granted. Under the original regulation:

[7] "Marked by a senseless, disorienting, often menacing complexity." Definition for "Kafkaesque," Wiktionary, available at http://en.wiktionary.org/wiki/Kafkaesque.
[8] Proposed DOJ FOIA Rule at 15238.

> (3) A requester who seeks expedited processing must submit a statement, certified to be true and correct to the best of that person's knowledge and belief, explaining in detail the basis for requesting expedited processing. For example, a requester within the category in paragraph (d)(1)(ii) of this section, if not a full-time member of the news media, must establish that he or she is a person whose main professional activity or occupation is information dissemination, though it need not be his or her sole occupation.[9]

But under the proposed regulation, the agency states:

> (3) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. For example, under paragraph (d)(1)(ii) of this section, 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.

By removing the original phrase "though it need not be his or her sole occupation" the agency has unnecessarily narrowed the circumstances under which expedited processing should be granted. The original language should be restored.

The agency seeks to further undercut the means by which a requester may seek expedited processing by proposing the inclusion of the following text which did not exist in the original regulation:

> A requester cannot satisfy the ''urgency to inform'' requirement solely by demonstrating that numerous articles have been published on a given subject.

FOIA requesters routinely make use of news articles and other publication related to the subject matter of a FOIA request to demonstrate the need for expedited processing. Indeed, such news reports provide an objective metric to assess whether a matter satisfies the "urgency to inform" requirement set out in the statute,[10] as opposed to the simple assertions of importance that a FOIA requester might otherwise make. In some instances,

[9] 28 C.F.R. § 16.5(d)(3) (2011).
[10] The Freedom of Information Act of 1974, 5 U.S.C. § 552(a)(E)(v)(II) (2009).

"numerous articles" could indeed be sufficient to establish the need for expedited processing. And courts have clearly relied on the existence of numerous articles to support a finding in favor of expedited processing.[11]

While EPIC does not suggest that in all circumstances the fact "that numerous articles have been published on a given subject" necessarily requires the grant of expedited processing, EPIC believes that a proposed change to the DOJ FOIA regulations that prohibits the grant of expedited processing based on "numerous articles" on the subject matter of the FOIA request is contrary to the plain text of the statute and case law, and exceeds the agency's rulemaking authority.[12]

> Further in the proposed changes in this section, the agency suggests that:
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> If a component denies expedited processing, any appeal of that decision *which complies with the procedures set forth in § 16.8 of this subpart* shall be acted on expeditiously.[13] (Emphasis added.)

However, the agency's current regulation imposes no such procedural requirements as it simply states:

> If a request for expedited processing is denied, any appeal of that decision shall be acted on expeditiously.[14]

The agency has imposed an unnecessary procedural obstacle. The original language should be maintained.

Proposed Section 16.6(a) Response to requests ("Acknowledgement of requests")

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[11] *See, e.g., Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence,* 639 F.3d 876, 879-80 (9th Cir. 2010) (noting that the district court grant expedited processing following the publication of news articles concerning the subject matter of the FOIA request in *The New York Times* and *Newsweek*); American Civil Liberties Union v. U.S. Dep't of Justice, 321 F.Supp.2d 24, 29-30 (D.D.C. 2004) ("The articles cited by plaintiffs in their request for expedited processing reflect not only the public concern regarding the Act but also address section 215 specifically." [Noting stories in *USA Today, The Boston Globe*, and the *San Francisco Chronicle*]).

[12] 76 Fed. Reg. 15239.

[13] *Id.*

[14] 28 C.F.R. § 16.5(d)(4).

EPIC supports the proposed change to 16.6(a). The prior regulation suggested that the agency should routinely "confirm the requester's agreement to pay fees under § 16.3(c)" but many FOIA requesters are not subject to fees and, in the first instance, the primary obligation of the agency is to acknowledge receipt of the request.

Proposed Section 16.6(d) Response to requests ("Content of denial letter")

EPIC notes that the agency proposes to subdivide the original 16.6(c) ("Adverse determinations of requests"), which included the contents of the denial letter, into 16.6(c) ("Adverse determinations of requests" and 16.6(d) ("Content of denial letter"). In so doing, the agency appears to have dropped the requirement in the original regulation that the denial letter shall be signed by "the head of the component, or the component head's designee."[15] As EPIC sees no need to drop this requirement, which helps ensure efficient administration and agency accountability, the provision should be restored in the new 16.6(d).

Proposed Section 16.6(f) Response to requests ("Use of record exclusions")

Section 5 U.S.C. 552(c) states as follows:

> (1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and--
> (A) the investigation or proceeding involves a possible violation of criminal law; and
> (B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,
> the agency may, during only such time as that circumstance continues, *treat the records as not subject to the requirements of this section*.
> (2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may *treat the records as not subject to the requirements of this section* unless the informant's status as an informant

[15] 28 C.F.R. § 16.43(c).

has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, *treat the records as not subject to the requirements of this section*. (Emphasis added).

Relying solely on this provision in the Act, the agency proposes a new section 16.6(f) which states as follows:

(2) When a component applies an exclusion to exclude records from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), the component utilizing the exclusion will *respond to the request as if the excluded records did not exist*. This response should not differ in wording from any other response given by the component. (Emphasis added).

In other words, the agency asserts the authority to make a material misrepresentation regarding the existence of records in possession of the agency responsive to a FOIA requester and subject to disclosure under the Act.

This violates the most essential tenets of FOIA, the presumption of openness and the availability of judicial review. As a district court has recently explained, "Judicial review of an agency's decision to withhold information is meaningless if it is based on misinformation. When the Executive Branch provides a court with misinformation it impermissibly usurps the Judiciary's authority to say what the law is."[16]

The proposed provision should be (a) struck or (b) revised as follows:

(2) When a component applies an exclusion to exclude records from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), the component utilizing the exclusion shall notify the requester that records may be subject to exclusion pursuant to 5 U.S.C. 552(c).

[16] *Islamic Shura Council of S. California v. F.B.I.*, 779 F. Supp. 2d 1114, 1123 (C.D. Cal. 2011).

This notification is necessary so that the agency's processing of a FOIA request will be subject to judicial review, a central requirement of the Act. 5 U.S.C. § 552(a)(4)(B).

Proposed Section 16.7 Response to requests ("Use of record exclusions")

The proposed section provides record exclusion guidelines for "confidential commercial information" which is "protected from disclosure under Exemption 4 of the FOIA."[17] The original section, codified by 28 C.F.R. § 16.8, refers to this information as "Business information."

The proposed § 16.7(b) states:

> A submitter of confidential commercial information *must* use good faith efforts to designate by appropriate markings, either at the time of submission or within a reasonable time thereafter, any portion of its submission that it considers to be protected from disclosure under Exemption 4. (Emphasis added).

The current regulation does not mandate good faith efforts, but states:

> A submitter of business information will use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4.[18]

The mandatory language in the proposed regulation advances the aim of the Freedom of Information Act because it ensures that submitters narrow the exercise of FOIA Exemption 4, and do not claim overly broad withholding.

However, the proposed changes for submitters' objections to disclosure should be removed. Both the current and proposed regulations mandate that submitters demonstrate why certain information is a trade secret, or commercial or financial information that is

[17] 76 Fed. Reg. 15240.
[18] 28 C.F.R. § 16.8(c).

privileged or confidential under FOIA Exemption 4.[19] However, the proposed regulation does not place similar requirements on submitters who withhold information under other FOIA exemptions.

The proposed regulation states:

> If a submitter has any objections to disclosure, it *should* provide the component a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA.[20] (Emphasis added).

The current regulation states:

> If a submitter has any objection to disclosure, it is *required* to submit a detailed written statement. The statement *must* specify all grounds for withholding any portion of the information under any exemption of the FOIA . . .[21] (emphasis added).

The text of the proposed regulation is permissive and not mandatory: submitters are encouraged to provide explanations for withholding information but are not required to as with the current regulation. This will make it easier to assert withholdings which is contrary to the purpose of the Act.

The agency should maintain the current requirement that those wishing to assert a FOIA exemption provide a detailed written statement and specify all grounds for withholding any portion of the information of the information sought. Maintaining the current regulation will help prevent the excessive invocation of FOIA exemptions and further the purpose of open government.[22]

Proposed Section 16.9 Preservation of Records

The proposed change unnecessarily narrows the scope of records subject to FOIA

[19] 28 C.F.R. § 16.8(f); 76 Fed. Reg. 15240.
[20] 76 Fed. Reg. 15240.
[21] 28 C.F.R. § 16.8(f).
[22] *See, e.g.,* FCC v. AT&T Inc., 131 S. Ct. 1177 (U.S. 2011) (rejecting a corporation's claim that it is entitled to assert the FOIA exemption for "personal privacy.")

requests that will be preserved by the agency. Under the current regulation:

> Records will not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the FOIA.[23]

However, the agency now proposes that:

> Records *that are identified as responsive to a request* will not be disposed of or destroyed while they are the subject of a pending request, appeal, or lawsuit under the FOIA. (Emphasis added).

The agency's proposed change clearly narrows the scope of its obligation to preserve records and also grants the agency the authority to "dispose of or destroy" records that are the subject of a pending request, but not "identified as responsive to a request," a determination which lies solely within the authority of the agency. Such a change not only frustrates the intent of the Act it would permit the agency to place beyond review by a court records that the agency may have improperly withheld.

Proposed Section 16.9(a)(3) Fees ("Duplication")

The agency proposes to eliminate a critical provision in the original regulations concerning the duplication of agency records which stated that:

> Components shall honor a requester's specified preference of form or format of disclosure if the record is readily reproducible with reasonable efforts in the requested form or format by the office responding to the request.

This provision was intended to help ensure that requesters are able to make the most effective use of the materials requested. For example, in a request for a dataset, the requester almost certainly wants a machine-readable and in a format that is useful to requester. The original text acknowledged this purpose and sought to accommodate such request. The revised text would frustrate this purpose. The original text should be restored as the proposed text would unnecessarily frustrate the purpose of the FOIA.

[23] 28 C.F.R. § 16.48.

Proposed Section 16.9(a)(4) Fees ("Educational institution")

This proposed change to "educational institution" unnecessarily narrows the number of educational institutions that may appropriately assert the relevant FOIA fee standards, is contrary to law, and beyond the agency's authority. Under the current regulation, an educational institution:

> means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, that operates a program of scholarly research. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research.

Under the proposed change, an educational institution would have to establish that "operates a program of scholarly research."[24] A requester in this category "must show that the request is authorized by, and is made under the auspices of, a qualifying institution and that the records are not sought for a commercial use, but rather are sought to further scholarly research."[25] The agency further states that "Records requested for the intention of fulfilling credit requirements are not considered to be sought for a scholarly purpose."[26]

In this reinterpretation of "educational institution," the agency has effectively excluded the nation's elementary schools, high schools, and vocational schools unless they can specifically establish that they operate a program of scholarly research. Even record sought by students at the nations universities may not qualify as affiliated with educational institutions if the records they are requesting are for the purpose of receiving

[24] 76 Fed. Reg. 15241.
[25] *Id.*
[26] *Id.*

academic credit.

This is absurd. Why should the agency seek to deny requesters in such circumstances the status of an "educational institution" in a law that is intended to provide greater public understanding of the operation of government? Not only should the original language be maintained, but the agency official responsible for this proposal should be transferred to another agency that is not concerned with the promotion of open government.

Proposed Section 16.10(a)(6) Fees ("Representative of the news media")

The proposed regulation restates the antiquated formulation of news media by suggesting that:

> Examples of news media entities include television or radio stations that broadcast ''news'' to the public at large and publishers of periodicals that disseminate ''news'' and make their products available through a variety of means to the general public.[27]

But the media has entered the twenty-first century and it would clearly be appropriate to include examples of media entities that are online. Indeed, several of the most popular media outlets today exist only on the Internet.[28] But the current formulation suggest that a news organization must first have a television, radio, or print presence before the agency may consider that its products are also "available through a variety of means." This should be revised as follows:

> Examples of news media entities include television or radio stations that broadcast ''news'' to the public at large and publishers of periodicals that disseminate ''news'' and make their products available through a variety of means to the general public, *as well as news organizations that operate*

[27] *Id.*
[28] The Huffington Post has an estimated 54,000,000 unique monthly visitors, Endgadget has 11,500,000, and TechCrunch has 7,500,000. "Top 15 Most Popular Blogs (October 2011)," http://www.ebizmba.com/articles/blogs. These numbers far exceed the base of most television and radio stations in the United States.

solely on the Internet.

The agency further seeks to undermine the "Representative of the news media" status, as well as the plain text of the FOIA, when it proposes that:

> A component's decision to grant a requester media status will be made on a case-by-case basis based upon the requester's intended use.[29]

There is nothing in the statute to suggest that FOIA requesters need to reestablish their status for fee purposes, or that agencies should engage in such second-guessing of the purpose of a FOIA request or the "requester's intended use" of the documents sought. In fact, the statute and the caselaw both expressly prohibit the agency from considering the purpose of a FOIA request when processing the request.[30] There is nothing to support the agency's assertion that it has such authority when it comes to the fee determination*, which is based on the status of the entity and not the content of the request.*[31] A determination by an agency that an entity is entitled to be a "Representative of the News Media" for fee purposes under FOIA should be binding across the government unless there is a substantial material change in the activities of the entity such that it no longer engages in any news related function. Otherwise, the agency's rule will have a chilling effect on media requesters, precisely the category of the FOIA requesters that Congress sought to promote with the revised fee standard.

This sentence should be removed as contrary to law and outside the agency's authority.

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[29] *Id.*
[30] 5 U.S.C. § 552(a). *See Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989).
[31] 28 C.F.R. § 16.11.

Proposed Section 16.10(k)(2)(iii) Fees ("Requirements for waiver or reduction of fees.")

The original regulation said simply:

> It shall be presumed that a representative of the news media will satisfy this consideration.[32]

Under the proposed regulation, the agency states:

> It shall *ordinarily* be presumed that a representative of the news media satisfies this consideration. (Emphasis added.)

Is there any reason to insert the word "ordinarily" in this provision other than to provide an agency with one more excuse to deny a fee waiver or reduction of fees to a representative of the news media? The word should be removed and the original intent restored. There is no legal basis for the change.

But when it comes to data brokers and those who merely "compile and market government information for direct economic return," the agency is far more generous in its proposed rule. The original regulation stated that:

> Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest.

16.12(k)(3)(ii). However, that text does not appear in the proposed regulations. As the original made clear that the data broker industry shall not be presumed to primarily serve the public interest for the obvious reason that much of the information is compilations of personal data sold directly to private parties for commercial gain, and there have been no intervening changes in law to alter the fee waiver standard, there is no legal basis to change this prior regulation. It should be maintained.

[32] 28 C.F.R. § 16.11(k)(2)(iii).

Many of the Proposed Changes in the DOJ FOIA Regulations Are Contrary Not Only to Law But Also the Express Statements of the President and the Attorney General

Many of the agency's proposed changes directly contravene the Obama Administration's stated commitment to transparency. On January 21, 2009, President Obama issued memoranda on the Freedom of Information Act, transparency and open government, announcing his intention to make the federal government more transparent:[33]

> All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.[34]

The President stated the central importance of transparency under his new Administration: "We will achieve our goal of making this administration the most open and transparent administration in history not only by opening the doors of the White House to more Americans, but by shining a light on the business conducted inside it."[35] On March 19, 2009, Attorney General Eric Holder issued new guidelines that establish a "presumption of openness" governing federal records.[36] On September 30, 2009, Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, stated that the Committee

[33] President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies re: Freedom of Information Act, Jan. 21, 2009, http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/; President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies re: Transparency and Open Government, Jan. 21, 2009, http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment.
[34] *Id.*
[35] *Id*.
[36] Attorney General Eric Holder, Memorandum for the Heads of Executive Departments and Agencies re: Transparency and Open Government, Mar. 19, 2009, http://www.usdoj.gov/ag/foia-memo-march2009.pdf.

"will continue to do its part to advance freedom of information, so that the right to know is preserved for future generations."[37]

Nowhere in the proposed regulations is it possible to find an effort to implement these objectives.

Conclusion

As stated above, EPIC recommends that the Department of Justice revise the proposed regulations, remove the new barriers to access to government information, and incorporate new procedures that ease, not burden, the public's efforts to learn about the activities of its government. Proper regulation of the FOIA would, at a minimum: (1) not place an unreasonable burden on the requester to locate the correct "component" within the agency; (2) not terminate the processing of a FOIA request without notice to an independent authority of the basis of the agency's action; (3) not unnecessarily delay the processing of requests; (4) not place new burdens on educational institutions or reporters seeking to exercise their rights under the Act; (5) not allow public officials to make material misrepresentations regarding the existence of records responsive to a FOIA request; (6) not make requests for expedited processing more complex than necessary; and (7) not destroy records subject to a FOIA request.

The current NPRM is contrary to law, exceeds the scope of the agency's rulemaking authority, and should be revised as indicated.

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[37] Statement Of Senator Patrick Leahy, Committee On The Judiciary,
Hearing On "Advancing Freedom Of Information In The New Era Of Responsibility," September 30, 2009,
http://leahy.senate.gov/press/200909/093009b.html.

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