



# Society of Environmental Journalists

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Office of the Secretary, Interior  
Executive Secretariat, FOIA Regulations  
Department of the Interior  
1849 C Street NW  
Washington, DC 20240

January 28, 2019

Submitted via regulations.gov

## **Re: Proposed Revisions to the Department of Interior's Freedom of Information Act Regulations, RIN 1093-AA26/Docket No. DOI-2018-0017**

To Whom It May Concern:

The Society of Environmental Journalists submits these comments in response to the proposed rule (Docket No. DOI-2018-0017; *Federal Register* December 28, 2018) amending the Freedom of Information Act Regulations for the Department of the Interior.

The Society (SEJ) is a 501(c)3 nonprofit dedicated to strengthening the quality, reach and viability of journalism to advance public understanding of environmental issues. SEJ works on behalf of its 1,350 members and of all journalists.

The proposed rule would violate the spirit as well as the letter of the Freedom of Information Act. It would effectively make it harder for journalists and the public to obtain documents and information on how DOI is managing America's lands, water, wildlife, and energy resources.

The proposed rule is based on flawed information and a failure to acknowledge that the alleged FOIA problems the Department of interior (DOI) cites are of its own making. The changes the proposed rule would make in handling FOIA requests would be counterproductive and detrimental to the public's right to know.

The Department asserts that the proposed regulatory change is warranted because of an "exponential" increase in FOIA requests and litigation. Yet the Department's own data fail to support that claim -- a 30 percent increase in FOIA requests across the entire Department from FY2016 to FY2018 is far from exponential.

The only section of the Department that the proposal lists experiencing an exponential increase in FOIA requests is the Office of the Secretary. Yet that should come as no surprise to anyone following the news. Former Interior Secretary Ryan Zinke, who resigned in December, had come under more than a dozen investigations during his nearly two-year tenure, including inquiries into allegations of ethical violations and improper government-funded travel. As the clouds of controversy and scandal grew

over the Secretary, so did the interest of journalists and the public in seeking documents that might prove the truth or falsity of those allegations.

The Department has seen a large increase in FOIA-related litigation, but that's hardly surprising, either. The Department failed to keep pace with the 30 percent increase in FOIA requests filed from FY 2016 to FY 2018, because it increased its processing of such requests by less than 8 percent. As a result, the backlog of requests lacking even a partial response has grown. The Department even acknowledges that the increase in litigation could be attributed "particularly" to its non-response to initial FOIA requests.

The proposal repeats the phrase "focus on meeting its statutory obligations" over and over -- quite often as a justification for changes that appear contrary to the clear intent of FOIA. The FOIA obliges agencies to give people information, and to err on the side of disclosure (the "presumption of openness" in 52 USC (8)(A)(i)). The proposed DOI rule creates a series of new extralegal excuses to deny FOIA requests, working against the core purpose of the law itself. This rule in essence returns to the doctrine of the Ashcroft Memo, misusing a purported *letter* of the law to contravene its *spirit*.

While the proposed changes purport to improve the efficiency of Interior's FOIA responses, they will do just the opposite. They will stifle legitimate inquiries about the operation of the Office of Secretary and of the Department of the Interior generally at a time when this Administration has reversed or at least revisited policy and regulatory decisions of its predecessors, some of them longstanding.

Among the most egregious changes proposed:

In Part 2, Subpart B, titled "How to Make a Request," Section 2.5 would be amended by introducing vague and arbitrary terms for determining whether a FOIA request will be honored.

For instance, it says Department staff won't process any request that requires what it calls an "unreasonably burdensome search." This phrase distorts the wording of the existing law, which requires that agencies "shall make reasonable efforts to search" for responsive records. But the Department proposal would shift the burden of reasonableness from the agency to the requester. Nowhere is the term "unreasonably burdensome" defined. It would give the Department a pretext not to look for responsive records.

In the same paragraph, the Department says it will reject any request that requires it "to locate, review, redact or arrange for inspection of a vast quantity of material." Again, the proposal does not define what quantity is "vast," so it leaves this determination up to the subjective judgment of Interior officials, allowing arbitrary and capricious rejection of requests.

In Part 2, Subpart D, titled "Timing of Responses to Requests," Section 2.14 would be amended to add the following: "The bureau may impose a monthly limit for processing records in response to your request in order to treat FOIA requesters equitably by responding to a greater number of FOIA requests each month."

That would seem to say that the Department may choose to limit the time it spends on multiple requests from the same party or on requests for multiple documents, so it can fulfill a larger number of requests overall -- presumably, simpler requests for just one or two documents. But FOIA does not authorize departments or agencies to "slow-walk" requests they deem time-consuming, just so they can process easier, less troublesome requests. Further, by allowing Interior to determine the way in which it will handle requests, that provision would offer cover for stalling or ignoring responses to queries that might reveal embarrassing or controversial information.

In the same Subpart D, Section 2.20 would be amended to require that all DOI bureaus consult with the Office of the Solicitor before granting requests for expedited processing of a FOIA request. Adding this new mandatory intermediate bureaucratic step (especially without specifying a time limit) would only lengthen the response time for such requests -- negating and counteracting the effect of "expediting" a request. Such requests

often come from news media under deadline pressure. Putting those decisions in the hands of a political appointee invites political manipulation of public access to legitimate information.

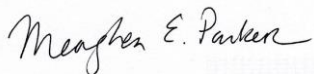
Finally, in Subpart I, titled "General Information," section 2.70, part d., the definition of "Representative of the News Media" would be amended to add the following: "Distributing copies of released records, electronically or otherwise, does not qualify as using editorial skills to turn the raw materials into a distinct work." Commercial brokers do not deserve fast processing. But legitimate news outlets do often disseminate raw records as part of larger editorial projects. We support an expansive and inclusive definition of news media.

We understand that a 30 percent increase in FOIA requests over a two-year period poses a challenge for the Department in meeting its statutory obligations to respond in a timely manner. The proper remedy to that challenge is to increase resources for processing FOIA requests, including by adding staff. Promptly fulfilling requests, as the law requires, rather than looking for excuses to deny them or kick them back to the requesters, would reduce the backlog, and the litigation.

Moreover, the Department may reduce its FOIA burdens substantially by embracing more transparency in disclosing what it's doing or considering and why. As one small example, if the Secretary's full calendars of activities and meetings were fully and promptly posted online in advance and every day, nobody would have to FOIA them. Voluntarily and proactively posting agency information -- as mandated under § 552(a) -- is a far better way of reducing FOIA requests and litigation.

We urge the Department to withdraw this proposal, rewrite it, and re-propose only those parts that comply with the spirit and the letter of the Freedom of Information Act.

Sincerely,

A handwritten signature in cursive script that reads "Meaghan E. Parker". The signature is written in black ink on a white background.

Meaghan Parker  
Executive Director