

January 16, 2019

To: The U.S. Department of the Interior

RE: Request for Extension of Public Comment Period for the Department of the Interior's proposed amendments to its Freedom of Information Act regulations, 83 Fed. Reg. 67,176 (Dec. 28, 2018)

RIN: 1093-AA26

We, twenty-four law professors with an interest in the Department of the Interior ("Department"), the statutes it implements and resources it manages, and government transparency generally, request an extension of the comment period for the Department's proposed amendments to its Freedom of Information Act ("FOIA") regulations, 83 Fed. Reg. 67,175 (Dec. 28, 2018). The Department published its notice of proposed rulemaking on December 28, 2018, commencing a 30-day public comment period ending on January 28, 2019. We believe that this comment period provides the public with insufficient opportunity to address the proposed rule and request that it be extended 60 days, to provide for a 90-day comment period in total.

FOIA grants the public a broad right to request and receive agency records, promising transparency and a broad right to information, subject only to limited, enumerated exceptions. Its basic purpose "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.*, 37 U.S. 214, 242 (1978).

The right to information guaranteed by FOIA is often used by scholars like us to understand, evaluate, critique, and comment on the functions of government, including the activities of the Department. While all members of the public enjoy rights under the statute, FOIA recognizes the importance of the academic enterprise to its mission by giving "educational or noncommercial scientific institution, whose purpose is scholarly or scientific research" favored status alongside news media in its fees provision. 5 U.S.C. § 552(a)(4)(A)(i)(II).

The Department should undertake significant changes to its implementation of FOIA only with great care and only after an opportunity for robust, meaningful participation by the public, whose rights are at stake. The proposed rule includes significant changes including: 1) a new requirement that FOIA requests identify a "discrete, identifiable agency activity, operation, or program," rather than simply "reasonably describe" the desired records as dictated by FOIA; 2) it would allow unprecedented and potentially unlawful limits to be placed on the number of records the Department will process each month in response to a request; 3) it makes substantial and confusing changes to the Department's fee waiver process, including the removal of a provision directing that the bureau processing a fee waiver request "must not make value judgments about whether the information at issue is 'important' enough to be made public; it is not the bureau's role to attempt to determine the level of public interest in requested information;" and 4) numerous other changes to how requests are to be submitted and how the Department will process them and within what timeframe.

The current comment period is inadequate to allow the public to fully assess the effect of the proposed rule, its lawfulness under existing caselaw, and its consistency with the implementation of FOIA at other agencies, many of which receive and process a far greater number of FOIA requests each year than the Department. The timing of the comment period—during both the winter holiday season and a government shutdown that precludes the public from seeking additional information from the point of contact identified in the Federal Register—reinforce its inadequacy. Providing an extension would also be in keeping with the past practice of the Department to extend comment periods that are open during a period of lapsed appropriations. *See, e.g.,* BLM, New Dates for Close of Public Comment and Protest Periods Due to Federal Government Shutdown, 78 Fed. Reg. 67,392 (Nov. 12, 2013).

We therefore request that the Department provide at least a 90-day comment period.

Sincerely,

(All of the following are signatories in their personal capacity only. Institutional affiliations are included for identification purposes only.)

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