

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

DEPARTMENT OF COMMERCE

Public Information, Freedom of Information Act and Privacy Act Regulations

15 CFR Part 4

[Docket No. 140127076-4076-01]

RIN 0605-AA33

Notice of Proposed Rulemaking

March 31, 2014

By notice published on February 27, 2014, the Department of Commerce (“Department”) has proposed regulations implementing the Freedom of Information Act (“FOIA”) and the Privacy Act.¹ Pursuant to the notice, the Electronic Privacy Information Center (“EPIC”) submits these comments to largely support the Commerce Department’s FOIA proposals, and to also urge the Department not to prematurely close FOIA requests.

EPIC is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values. EPIC regularly submits administrative agency comments encouraging federal agencies to uphold the FOIA.² The Privacy and Civil Liberties Oversight

¹ Public Information, Freedom of Information Act and Privacy Act Regulations, 79 Fed. Reg. 11,025 (proposed Feb. 27, 2014) (to be codified at 15 C.F.R. pt. 4).

² See, e.g., EPIC, Comments of the Elec. Privacy Info. Ctr. to the Privacy and Civil Liberties Oversight Bd. on Freedom of Information Act, Privacy Act, and Government in the Sunshine Act Procedures (July 15, 2013) (RIN 0311-AA01), available at http://epic.org/open_gov/EPIC-PCLOB-FOIA.pdf; EPIC, Comments of the Elec. Privacy Info. Ctr. to the Dep’t of the Interior on Proposed Freedom of Information Act Regulations (Nov. 13, 2012) (RIN 1093-AA15), available at http://epic.org/open_gov/EPIC-DOI-FOIA-Regs-Cmts.pdf; EPIC, Comments of the Elec. Privacy Info. Ctr. to the Dep’t of Justice on Proposed Freedom of Information Act Regulations (Oct. 18, 2011) (RIN 1105-AB27), available at <http://epic.org/foia/EPIC-DOJ-FOIA-Comments-FINAL.pdf>.

Board, the Federal Trade Commission, and the Interior Department have incorporated EPIC's recommendations into final agency FOIA regulations.³ EPIC has submitted extensive comments to the Department of Justice and the Department of Defense's Defense Logistics Agency ("DLA") on their FOIA proposals.⁴ Those final FOIA rules are still pending. EPIC also engages in extensive Freedom of Information Act litigation.⁵

Scope of Proposed Rulemaking

Several of the Commerce Department's proposals will benefit FOIA requesters. For example, the Department proposes a broad definition for "representative of the news media" for fee purposes:

Representative of the news media, or news media requester, means any person or entity organized and operated to publish or broadcast news to the public that actively gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting 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 including news organizations that disseminate solely on the Internet. To be in this category, a requester must not be seeking the requested records for a commercial use. A request for records that supports the news-dissemination function of the requester shall not be considered to be for a commercial use. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would be the clearest proof, but components shall also look to the past publication record of a requester in making this determination. 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 of the material.⁶

³Procedures for Disclosure of Records Under the Freedom of Information Act, 6 C.F.R. § 1001 (2013); Freedom of Information Act; Miscellaneous Rules, 16 C.F.R. § 4 (2014); Freedom of Information Act Regulations, 43 C.F.R. § 2 (2013).

⁴ See *supra* note 2, Comments of the Elec. Privacy Info. Ctr. to the Dep't of Justice on Proposed Freedom of Information Act Regulations; EPIC, Comments of the Elec. Privacy Info. Ctr. to the Defense Logistics Agency of the Dep't of Defense on Proposed Rule Amending the Freedom of Information Act Program (Dec. 5, 2012) (RIN 0790-AI87), available at http://epic.org/open_gov/EPIC-DLA-FOIA-Regs-Cmts.pdf.

⁵ See, e.g., *Elec. Privacy Info. Ctr. v. U.S. Dept. of Homeland Sec.*, 811 F. Supp. 2d 216 (D.D.C. 2011); *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30 (D.D.C. 2006); *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5 (D.D.C. 2003); *Litigation Docket*, EPIC, <http://epic.org/privacy/litigation/>.

⁶ *Supra* note 1, at 11,031.

The definition is favorable to FOIA requesters because it acknowledges that representatives of the news media no longer rely on print and broadcast media but also post online, blog, and tweet.⁷ Other agencies, such as the Department of Justice, have proposed restrictive definitions that would unnecessarily limit the ability of journalists today to obtain favorable fee status.⁸

The Commerce Department also proposes that, “Whenever a component refers a record to another Federal agency for direct response to the requester, the component’s FOIA Officer shall notify the requester in writing of the referral and informed the requester of the name of the agency to which the record was referred.”⁹ This is a good practice. Other agencies, such as the DLA, have proposed to withhold the identities of agencies to which it refers records.¹⁰ As EPIC noted in comments to the DLA, “an agency’s failure to notify a requester where her request has been referred, regardless of the agency’s reasoning for doing so, would frustrate the requester’s ability to meaningfully pursue the processing of her request.”¹¹ Moreover, withholding the name of the other agency would permit agencies to evade administrative and judicial review, because requesters could never appeal nonresponses from clandestine agencies.

Although the Commerce Department’s proposals generally promote open government, the Department has proposed a rule change that contravenes the letter and spirit of the FOIA. This proposal exceeds the agency’s statutory authority under the FOIA and should be amended as described below. The agency has proposed the following new requirements for making requests:

Proposed 15 C.F.R. § 4.4.

(c) Description of records sought:

A FOIA request must reasonably describe the agency records sought, to enable Department personnel to locate them with a reasonable amount of effort . . .

⁷ *Id.*

⁸ Freedom of Information Act Regulations, 76 Fed. Reg. 15, 236, 15,241 (proposed March 21, 2011) (to be codified at 28 C.F.R. pt. 16). *See also supra* note 2, Comments of the Elec. Privacy Info. Ctr. to the Dep’t of Justice on Proposed Freedom of Information Act Regulations.

⁹ *Supra* note 1, at 11,028.

¹⁰ Defense Logistics Agency Freedom of Information Act Program, 77 Fed. Reg. 62,469 (proposed Oct. 15, 2012) (to be codified at 32 C.F.R. pt. 300).

¹¹ *See supra* note 4, EPIC, Comments of the Elec. Privacy Info. Ctr. to the Defense Logistics Agency of the Dep’t of Defense on Proposed Rule Amending the Freedom of Information Act Program.

When a requester fails to provide sufficient detail after having been asked to reasonably describe the records sought, the component shall notify the requester in writing that the request has not been properly made, that no further action will be taken, and that the FOIA request is closed.

The Commission should not adopt the proposed language because it curtails FOIA requesters' access to information. By prematurely closing FOIA requests, the Commerce Department would violate the FOIA by curtailing the public's opportunity to receive information on government functions. The agency, therefore, should not close the file prematurely if requesters do not amend their requests, but instead can relegate the request to a lower processing track.

Therefore, to give requesters sufficient time to amend FOIA requests, the language in 15 C.F.R. § 4.4 should be revised as follows:

(c) A FOIA request must reasonably describe the agency records sought, to enable Department personnel to locate them with a reasonable amount of effort . . . When a requester fails to provide sufficient detail after having been asked to reasonably describe the records sought, the component shall notify the requester in writing that the request has not been properly made, that no further action will be taken, and that the FOIA request is closed, and that the FOIA request may lose priority in the agency's processing track until the requester provides sufficient detail for the agency to complete the request.

The Commerce Department's proposal to prematurely close FOIA requests directly contravenes the Obama Administration's stated commitment to transparency. On January 21, 2009, President Obama issued a memorandum on the Freedom of Information Act, transparency and open government, and announced his intention to make the federal government more transparent:¹²

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.¹³

¹² 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.

¹³ *Id.*

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.”¹⁴

On March 19, 2009, Attorney General Eric Holder issued new guidelines that establish a “presumption of openness” governing federal records.¹⁵ On September 30, 2009, Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, stated that the Committee “will continue to do its part to advance freedom of information, so that the right to know is preserved for future generations.”¹⁶

Conclusion

As stated above, EPIC generally supports the Commerce Department’s proposed FOIA regulations. The regulations, however, must be revised so that the agency does not prematurely close FOIA requests.

Respectfully submitted,

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¹⁴ *Id.*

¹⁵ 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>.

¹⁶ Statement Of Senator Patrick Leahy, Committee On The Judiciary,
Hearing On “Advancing Freedom Of Information In The New Era Of Responsibility,” Sept.30, 2009,
<http://leahy.senate.gov/press/200909/093009b.html>.