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ELECTRONIC PRIVACY INFORMATION CENTER

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER (EPIC)

to the

DEPARTMENT OF HOMELAND SECURITY

Freedom of Information Regulations

6 CFR Part 5

[Docket No. DHS-2009-0036]

RIN 1601-AA00

Notice of Proposed Rulemaking

September 28, 2015

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By notice published on July 29, 2015, the Department of Homeland Security ("DHS") has proposed regulations regarding the Freedom of Information Act ("FOIA").[1] Pursuant to the notice, the Electronic Privacy Information Center ("EPIC") submits these comments and recommendations to address the substantial risks to open government and agency accountability that the proposed regulatory changes raise.

## I. EPIC's Interest

EPIC is a public interest research center in Washington, D.C.[2] EPIC was

[1] Freedom of Information Regulations, 80 Fed. Reg. 45,101 (proposed July 29, 2015) (to be codified at 6 C.F.R. pt. 5).
[2] *About EPIC*, EPIC (2015), https://epic.org/epic/about.html.

established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and democratic values. EPIC regularly submits administrative agency comments encouraging federal agencies to uphold the FOIA.[3] EPIC also engages in extensive Freedom of Information Act litigation with the agency.[4] EPIC has also published a leading guide for FOIA practitioners and requesters,[5] and authored an influential law review article on teaching open government lawyering to law students.[6] EPIC, along with Citizens for Responsibility and Ethics in Washington ("CREW"), and the National Security Archive, developed the Model FOIA Regulations.[7] The Model FOIA Regulations recommend a common set of practices to ensure agencies best enhance the public's right to know. Additionally, since 2012, EPIC has run a clinic in collaboration with the Georgetown University Law Center to train students in FOIA law and litigation. And EPIC has recently established a website with extensive resources on the Freedom of Information Act.[8]

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[3] *See, e.g.,* EPIC, Comments of EPIC to the Dep't of Commerce on Proposed Public Information, Freedom of Information Act and Privacy Act Regulations (Mar. 31, 2014) (RIN 0605-AA33); EPIC, Comments of EPIC to the Priv. and Civ. Liberties Oversight Bd. on Proposed Freedom of Information Act Regulations (July 15, 2013) (RIN 0311-AA01); EPIC, Comments of EPIC 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-A187); EPIC, Comments of EPIC to the Dep't of the Interior on Proposed Freedom of Information Act Regulations (Nov. 13, 2012) (RIN 1093-AA15); EPIC, Comments of EPIC to the Dep't of Justice on Proposed Freedom of Information Act Regulations (Oct. 18, 2011) (RIN 1105-AB27).

[4] *See, e.g.*, *EPIC v. U.S. Dep't. of Homeland Sec.*, 811 F. Supp. 2d 216 (D.D.C. 2011); *EPIC v. Dep't of Justice*, 416 F. Supp. 2d 30 (D.D.C. 2006); *EPIC v. Dep't of Def.,* 241 F. Supp. 2d 5 (D.D.C. 2003); *EPIC FOIA Cases*, EPIC (2015), https://epic.org/foia/.

[5] EPIC, *Litigation Under the Federal Open Government Laws 2010* 138 (Harry A. Hammitt, Ginger McCall, Marc Rotenberg, John A. Verdi, & Mark S. Zaid, eds., 2010).

[6] Rotenberg, McCall, & Horwitz, *The Open Government Clinic: Teaching the Basics of Lawyering*, 48 Indiana. L. Rev. 149 (2014).

[7] Model Federal FOIA Regulations, http://www.modelfoiaregs.org/2014/05/model-federal-foia-regulations.html, EPIC (July 2014).

[8] "FOIA ROCKS" http://FOIA.ROCKS.

## II. Analysis of Proposed Changes to Agency Regulations

The agency proposes changes to 6 C.F.R. part 5, which are FOIA regulations applicable to all DHS components. Several of the DHS proposals are favorable to FOIA requesters and strengthen the FOIA. For example, DHS proposes to amend the current regulations to include additional reasons for granting expedited processing (proposed Section 5.5 (e)). DHS has also proposed revisions that "encourage components to communicate with FOIA requesters having access to the internet through electronic means, to the extent practicable." (Proposed Section 5.6(a)). Additionally, for fee waiver purposes, DHS proposes to adopt a broad definition of "representative of the news media."(Proposed Section 5.11 (b) (6)). These proposals would help streamline individuals' access to information. DHS should adopt these revisions.

There are, however, certain proposed changes that would undermine the FOIA, are contrary to law, and exceed the agency's authority. EPIC therefore urges DHS to revise the proposed regulations in accordance with the suggestions described here.

**Proposed Section § 5.1 "General provisions"**

DHS proposes to remove the following language currently in 6 C.F.R. § 5.1 (a)(1):

> Information routinely provided to the public as part of a regular Department activity (for example, press releases issued by the Assistant Secretary for Public Affairs may be provided to the public without following this subpart).

According to the agency, the provision is "self-evident."[9] Contrary to DHS's rationale, the activity referred by this section is not self-evident to all DHS FOIA Officers, FOIA

[9] 80 Fed. Reg. 45,102.

Public Liaisons. and other officials dealing with public information. EPIC also supports comments submitted by the OpenTheGovernment.org coalition of NGOs opposing the removal of 6 C.F.R. § 5.1 (a)(1). The provision ensures an important safeguard in preventing unlawful withholding of information. Accordingly, DHS should not remove the provision.

**Proposed § 5.3 "Requirements for Making Requests"**

> Under DHS's current regulations, 6 C.F.R. § 5.3(a):
>
> > If you are making a request for records about another individual, either a written authorization signed by that individual permitting disclosure of those records to you or proof that that individual is deceased (for example, a copy of a death certificate or an obituary) must be submitted.

Under the proposed change, 6 C.F.R. § 5.3(a)(4):

> > Where a request for records pertains to a third party, a requester may receive greater access by submitting either a notarized authorization signed by that individual, in compliance with the verification of identity provision set forth in subpart B of this part, or a declaration made in compliance with the requirements set forth in 28 U.S.C. 1746 by that individual, authorizing disclosure of the records to the individual is deceased (e.g., a copy of a death certificate or an obituary). As an exercise of its administrative discretion, each component can require a requester to supply additional information if necessary in order to verify that a particular individual has consented to disclosure.

The proposal facilitates greater access to government records by removing the administrative hurdle of having requesters provide authorization and verification. At the same time, however, it is necessary for FOIA officers to protect individual privacy. To both facilitate open access to government records about government officials while still protecting personal privacy of the general public, DHS should amend the current regulation as follows:

> > If you are making a request for records about another individual <u>who is not a public official</u>, either a written authorization signed by that individual permitting

> disclosure of those records to you or proof that that individual is deceased (for example, a copy of a death certificate or an obituary) must be submitted.

This language would both protect personal privacy and facilitate access to information about government officials.

Under the proposed change, 6 C.F.R. § 5.3(c), DHS would permit agency components to administratively close FOIA requests.

Under current DHS regulation 6 C.F.R. § 5.3(b):

> (b) *Description of records sought.* You must describe the records that you seek in enough detail to enable Department personnel to locate them with a reasonable amount of effort. Whenever possible, your request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record. If known, you should include any file designations or descriptions for the records that you want. As a general rule, the more specific you are about the records or type of records that you want, the more likely the Department will be able to locate those records in response to your request. If a component determines that your request does not reasonably describe records, it shall tell you either what additional information is needed or why your request is otherwise insufficient. 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.

The agency has proposed the following new requirement for making requests:

> (c) If a request does not adequately describe the records sought, DHS may seek additional information from the requester. If the requester does not respond to the request for additional information within thirty (30) days, the request may be administratively closed at DHS's discretion. This administrative closure does not prejudice the requester's ability to submit a new request for further consideration with additional information.

DHS should not adopt the proposed language because it curtails FOIA requesters' access to information. By prematurely closing FOIA requests, the agency would violate

the FOIA by curtailing the public's opportunity to receive information on government functions.

The agency's proposed language is inconsistent with clear guidance from the President regarding the implementation of the FOIA. 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:[10]

> 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.[11]

The President made clear the importance of open and accountable government: "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."[12] Then-Attorney General Eric Holder also made clear a "presumption of openness" governing federal records.[13] And Senator Patrick Leahy, Chairman of the Senate Judiciary Committee,

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[10] 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.

[11] *Id*.

[12] *Id*.

[13] 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.

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."[14]

DHS, 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 new paragraph (c) should be revised as follows:

> (c) If a request does not adequately describe the records sought, DHS may seek additional information from the requester. If the requester does not respond to the request for additional information within thirty (30) days, ~~the request may be administratively closed at DHS's discretion. This administrative closure does not prejudice the requester's ability to submit a new request for further consideration with additional information.~~ DHS shall notify the requester in writing that the request has not been properly made, 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.

DHS's current proposal to administratively close FOIA requests contravenes the letter and spirit of the FOIA, exceeds the agency's statutory authority under the FOIA, and should be amended as described above.

**Section 5.4 "Responsibility for Responding to Requests"**

Under the DHS's current regulations, 6 C.F.R. § 5.4(c), concerning Consultations and Referrals:

> When a component receives a request for a record in its possession, it shall determine whether another component, or another agency of the Federal Government, is better able to determine whether the record is exempt from disclosure under the FOIA and, if so, whether it should be disclosed as a matter of administrative discretion. If the receiving component determines that it is best able to process the record in response to the request, then it shall do so. If the

[14] Advancing Freedom of Information in the New Era Of Responsibility: Hearing Before the S. Comm. on the Judiciary, 111th Cong. (2009) (statement of Sen. Patrick Leahy), http://leahy.senate.gov/press/200909/093009b.html.

> receiving component determines that it is not best able to process the record, then it shall either:
>
> (1) Respond to the request regarding that record, after consulting with the component or agency best able to determine whether to disclose it and with any other component or agency that has a substantial interest in it; or
>
> (2) Refer the responsibility for responding to the request regarding that record to the component best able to determine whether to disclose it, or to another agency that originated the record (but only if that agency is subject to the FOIA). Ordinarily, the component or agency that originated a record will be presumed to be best able to determine whether to disclose it.

Under the proposed change, 6 CFR § 5.4(c):

> (c) Re-routing of misdirected requests. Where a component's FOIA office determines that a request was misdirected within DHS, the receiving component's FOIA office shall route the request to the FOIA office of the proper component(s).

The proposed change is favorable to FOIA requesters and promotes the fundamental right of access to public information. The proposed text should be read in line with the current 6 CFR § 5.4(f) that mandates components to notify requesters when the component has referred a FOIA request. This notification enables the FOIA requester to closely follow and keep track of the process of the filed FOIA request.

Under DHS's current regulations, 6 C.F.R. § 5.4(f), concerning Notice of Referral:

> Whenever a component refers all or any part of the responsibility for responding to a request to another component or agency, it ordinarily shall notify the requester of the referral and inform the requester of the name of each component or agency to which the request has been referred and of the part of the request that has been referred.

Under the proposed change, 6 C.F.R. § 5.4(f):

> 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 disclosure of the identity of the component or agency would harm an interest protected by an applicable exemption, in which case the component should coordinate with the other component or agency, rather than refer the records.

EPIC notes that the proposed section 5.4(f) references referral of records and not requests. This appears to be an oversight, as referrals do not entail referrals of records, but instead implicate requests. Additionally, DHS has not substantiated its claim that merely naming the agency to which a FOIA request has been referred "would harm an interest protected by an applicable exemption."

Accordingly, DHS should not adopt the revised "notice of referral" provision and should retain the current language for 6 C.F.R. § 5.4(f).

**Section 5.5 "Timing of Responses to Requests"**

Under the DHS's current regulations, 6 C.F.R. § 5.5(a):

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

Under the proposed change, 6 C.F.R. § 5.5(a):

> Components ordinarily will respond to requests according to their order of receipt. Appendix I to this subpart contains the list of components that are designated to accept requests. In instances involving misdirected requests that are re-routed pursuant to 6 CFR 5.4(c), the response time will commence on the date that the request is received by the proper component, but in any event not later than ten working days after the request is first received by any DHS component designated in appendix I of this subpart.

The proposed language that the agency's response time will commence not later than ten working days after the request is first received by any DHS component is aligned with the FOIA's statutory requirements and therefore DHS should adopt this proposal.

Under DHS's current regulations, 6 C.F.R. § 5.5(d), concerning Expedited Processing:

(1) Requests and appeals will be taken out of order and given expedited treatment whenever it is determined that they involve:

(i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information.

Under the proposed change, 6 C.F.R. § 5.5(e):

(1) Requests and appeals will be processed on an expedited basis whenever the component determines that they involve:

(i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person who is primarily engaged in disseminating information;

(iii) The loss of substantial due process rights; or

(iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence.

The additional provisions regulating expedited procedure are crucial for the fundamental right of access to information to prevail. Certain government records are time sensitive, and it is important that requesters obtain information in an expedited fashion.

EPIC supports the proposed change to include "two new available justifications for requesting expedited processing"[15].

[15] 80 Fed. Reg. 45,101.

The above favorable provision that provides new reasons for expediting processing is undercut by current provisions elsewhere in the regulation. DHS proposes to adopt, with no change, the following language currently in DHS FOIA regulations:

> 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, though it need not be his or her sole occupation.[16]

This language creates an additional burden on the requester to establish that the requester's primary professional activity or occupation is to disseminate information. The reference to primary professional activity or occupation should be revised. Specifically, EPIC supports the recommendation of the OpenTheGovernment.org NGO coalition, which recommended the following language:

6 C.F.R. § 5.5 (d)(3)

> a requester who is not a full-time member of the news media must establish that he or she is a person who is primarily engaged in disseminating information to the general public.

**Proposed § 5.6 "Responses to Requests"**

The proposed section 5.6 includes favorable changes to existing provisions. For example, the proposed revision would add a new subsection to encourage DHS components to communicate with requesters via email. (Proposed Section 5.6(a)). The proposed section would also require DHS components to assign individualized tracking number to requests that will take longer than ten business days to process, and to include a brief description of the request in its response to the requester. (Proposed Section 5.6(b)).

[16] 6 C.F.R. § 5.5 (d)(3).

However, this section would also expand the grounds on which DHS components can deny a FOIA request. Under the current 6 C.F.R. § 5.6(c),

> Adverse determinations, or denials of requests, consist of: A determination to withhold any requested record in whole or in part; a determination that a requested record does not exist or cannot be located; a determination that a record is not readily reproducible in the form or format sought by the requester; a determination that what has been requested is not a record subject to the FOIA; a determination on any disputed fee matter, including a denial of a request for a fee waiver; and a denial of a request for expedited processing.

Under the proposed 6 C.F.R. § 5.6(d).

> Adverse determinations, or denials of requests, include decisions that the requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Adverse determinations also include denials involving fees, including requester categories or fee waiver matters, or denials of requests for expedited processing.

The proposed section would authorize DHS components to deny FOIA requests based on inadequate descriptions of the records sought, rather than seeking more information from the requester. This change creates unnecessary obstacles to public access to information and would allow DHS to shirk its responsibilities under FOIA rather than meaningfully respond to requests.

EPIC urges DHS to retain the current version of 6 C.F.R. § 5.6(d).

**Proposed § 5.8 "Administrative appeals"**

This proposed section would extend the timeframe to submit an appeal.

Under current regulations 6. C.F.R. § 5.9(a)(1), appeals must be

> received by the Associate General Counsel (General Law) within 60 days of the date of the letter denying [a] request.

Under the proposed §5.8(a)(1), appeals:

> must be postmarked or, in the case of electronic submissions, transmitted to the Appeals Officer within 60 business days after the date of the component's response." DHS should adopt the proposed language because it loosens the stringent deadline to appeal adverse FOIA determinations.

DHS also proposes to introduce new language clarifying FOIA requester obligations necessary before seeking court review. Specifically, DHS proposes to amend section 5.8 to include language that

> a requester is not required to first file an appeal of an adverse determination of a request for expedited processing prior to seeking court review.

EPIC supports the proposed change to §5.8(a)(1) because it will help ensure that FOIA requesters can expeditiously seek judicial redress for adverse expedited processing determinations.

**Proposed § 5.10 "FOIA Requests for Information Contained in a Privacy Act System of Records"**

This proposal would add a new section regarding the treatment of FOIA requests for records also covered by the Privacy Act.

Under proposed 6 C.F.R. § 5.10(b):

> (b) *When both Privacy Act and FOIA exemptions apply*. Only if both a Privacy Act exemption and a FOIA exemption apply can DHS withhold information from a requester if the information sought by the requester is about him or herself and is contained in a Privacy Act system of records applicable to the requester.

EPIC supports the addition of 6 C.F.R. § 5.10(b), which would ensure that the requester receive the greatest access to information authorized under both FOIA and the Privacy Act.

**Proposed § 5.11 "Fees"**

DHS's proposal arbitrarily narrows the definition of "educational institution[s]" that qualify for fee waivers. Under DHS's current regulations, 6 CFR § 5.11 (b)(4):

> (4) 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" is

> any school that operates a program of scholarly research. A requester in this fee category must show that the request is authorized by, and is made under the auspices of, an educational institution and that the records are not sought for a commercial use, but rather are sought to further scholarly research. To fall within this fee category the request must serve the scholarly research goal of the institution rather than an individual research goal.

DHS provides the following example of what, according to the agency, would not qualify as a request made on behalf of an education institution:

> A student who makes a request in furtherance of the completion of a course of instruction would be presumed to be carrying out an individual research goal, rather than a scholarly research goal of the institution, and would not qualify as part of this fee category.

Students enrolled in educational institutions, making FOIA requests pursuant to their coursework are the quintessential example of scholarly research. DHS has provided no justification to arbitrarily exclude this type of student research. DHS's proposed change completely reverses the language of the current regulations. Accordingly, the current language should stand as it gives members of educational institutions further opportunities to pursue FOIA requests.

EPIC opposes the proposed change to 6 CFR § 5.11 (b)(4).

DHS's proposal also changes the agency's determination of "commercial use requests" for fee calculation purposes. Under the current 6 C.F.R. § 5.11, "commercial use request" is defined as follows:

> Commercial use request means a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, which can include furthering those interests through litigation. Components shall determine, whenever reasonably possible, the use to which a requester will put the requested records. When it appears that the requester will put the records to a commercial use, either because of the nature of the request itself or because a component has reasonable cause to doubt a requester's stated use, the component shall provide the requester a reasonable opportunity to submit further clarification.

Under the proposed 6 C.F.R. § 5.11(b)(1), this definition would read,

> Commercial use request is a request that asks for information for a use or a purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation. A component's decision to place a requester in the commercial use category will be made on a case-by-case basis based on the requester's intended use of the information.

The proposed regulation significantly broadens a component's discretion in determining whether a request is commercial in nature. Moreover, the revision to this definition removes the requirement that "the component shall provide the requester a reasonable opportunity to submit further clarification." 6 C.F.R. § 5.11(b)(1). This revision serves no useful purpose and therefore DHS should retain the current definition of "commercial use request."

EPIC opposes the proposed change to 6 CFR § 5.11 (b)(1).

Proposed 6 C.F.R. § 5.11(k)(5) contains an additional problematic change:

> In cases in which a component requires advance payment, the request shall not be considered received and further work will not be completed until the required payment is received. If the requester does not pay the advance payment within 30 calendar days after the date of the component's fee determination, the request will be closed.

This change would create additional financial barriers to accessing information. This section authorizes advance payments when a DHS component determines that the total fee will be greater than $250.00. (proposed § 5.11(k)(2)). The proposed change to require payment in full within 30 days is particularly problematic in light of DHS's proposed redefinition of educational institution to exclude students making FOIA requests in furtherance of their academic coursework. DHS should remove the proposed 6 C.F.R. § 5.11(k)(5).

EPIC opposes the proposed change to 6 CFR § 5.11 (k)(2).

## III. Conclusion

As stated above, EPIC recommends that the Department of Homeland Security 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. As currently written, several of DHS's proposed revisions are contrary to the Freedom of Information Act, arbitrary, exceed the scope of the agency's rulemaking authority, and should be revised as indicated.

Respectfully submitted,

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