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Office of Science and Technology Policy
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Washington, DC 20504

FOIA PROPOSED RULEMAKING

I offer the following comments on the proposed rulemaking for 32 CFR Part 2403.

Section 2402.3(b)

The proposed rules indicate that requesters are strongly encouraged to review documents available at the OSTP e-FOIA Reading Room. However, while the OSTP e-FOIA Reading Room has been established for some time, the e-FOIA Reading Room contains no substantive content. I recommend that the Chief FOIA Officer be assigned responsibility for including OSTP records in the e-FOIA Reading Room.

Section 2402.3(c)

The definition for "search" should explicitly state that search shall not include time spent reviewing a record for release. This statement is needed to help avoid an extremely common FOIA processing error: designating review time as search time.

Section 2402.4(a)(1)

The proposed rule states: "When requesters do not specify the preferred form or format of the response, OSTP shall produce printed copies of responsive records."

This approach is problematic because inexperienced requesters do not recognize that they can specify a preferred format. Printed copies are typically more expensive than electronic copies due to the cost of duplication. There is an increasing trend toward providing records in electronic format to reduce costs and improve service, even if the records must be scanned to create the electronic file.

I instead suggest this wording:

"When requesters do not specify the preferred form or format of the response, OSTP shall either inquire of the requester or alternatively produce the records in the least expensive format. OSTP will endeavor to provide electronic/digital copies wherever possible to minimize duplication costs."

Section 2402.8(b)(3)

The proposed rules specify a duplication fee of 15 cents per page.

Under the FOIA, "duplication" charges represent the reasonable "direct costs" of making copies of documents. 5 U.S.C. § 552(a)(4)(A)(iv); see OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

The contract associated with OSTP photoduplication machines specifies a price per black and white duplicated page of less than one cent. Even adding the cost of paper, toner, electricity and labor, the net costs for photocopying is far less than 5 cents per page. Many years ago, when photocopying was a less mature market and FOIA duplication fees were being established, the copying costs were significantly higher. High per-page duplication fees also serves as a toll-booth of sorts to deter and discourage requests.

The appropriate contemporary amount for a photocopying duplication fee reflecting reasonable direct costs of making copies of documents is ten cents. Ten cents is far greater than the agency's actual costs.

Some agencies have invoked misleading comparisons with the duplication costs charged by other agencies in order to set their duplication fees. But such comparisons are not based in reality. This has resulted in duplication costs creeping upward over time. Instead, OSTP should identify the contract cost for the office photocopiers and add in a small factor for labor, toner and paper.

Section 2402.8 (general)

The rules do not identify a threshold amount below which fees are not charged as they would cost more to collect than would be collected. Many federal agencies identify such a threshold. I suggest \$15 as a reasonable threshold for OSTP.

Section 2402.9(c)

The fee waiver standard of the Freedom of Information Act provides that fees should be waived or reduced "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

However, the proposed rules incorporate a new standard that is not found in the law: that "in exceptional cases, however, a partial waiver may be granted if the request for records would impose an exceptional burden or require an exceptional expenditure of OSTP resources."

This new proposed standard is contrary to the law as it adds additional constraints on fee waivers beyond those identified in the statute. Furthermore, this provision can be used to effectively deny access in areas in a way that gives undue discretion to the FOIA office.

Section 2402.9(d)

The proposed rule does not define “exceptional circumstances” for purpose of failure to comply with statutory time limits.

General

OSTP records include certain records that are classified national security information. The Freedom of Information Act regulations should incorporate reference to the handling of Mandatory Declassification Review requests under the provisions of Executive Order 13526 on the handling of classification of national security information.

Respectfully,

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