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Sent electronically to Federal eRulemaking Portal

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Cindy Cafaro,
Office of Executive Secretariat and Regulatory Affairs
Department of the Interior
1849 C Street NW
Washington, DC 20240

Re: Comments on Rule to Revise the Department of the Interior’s Regulations for Processing Records under the Freedom of Information Act (83 *Federal Register* 248, Friday, December 28, 2018) (Reference Docket No. DOI–2018–0017)

Dear Ms. Cafaro:

The Desert Tortoise Council (Council) is a non-profit organization comprised of hundreds of professionals and laypersons who share a common concern for wild desert tortoises and a commitment to advancing the public’s understanding of desert tortoise species. Established in 1975 to promote conservation of tortoises in the deserts of the southwestern United States and Mexico, the Council routinely provides information and other forms of assistance to individuals, organizations, and regulatory agencies on matters potentially affecting desert tortoises within their geographic ranges.

We appreciate this opportunity to provide comments on the above-referenced rule. Our comments are intended to help the Department of the Interior (DOI) comply with the purpose and intent of the Freedom of Information Act (FOIA), prepare clear regulations, and assist the public with their FOIA requests to reduce the DOI’s workload and future litigation.

In this *Federal Register* Notice, the DOI proposes to revise its regulations because of the unprecedented surge in FOIA requests and litigation against the DOI for failure to comply with current regulations. “From Fiscal Year (FY) 2016 to FY 2018, incoming FOIA requests to the Department increased 30 percent” (83 *Federal Register* 67176). The DOI has determined the proposed changes are necessary “to best serve our customers and comply with the FOIA as

efficiently, equitably, and completely as possible” (83 *Federal Register* 67176). Some of the DOI’s proposed changes include requiring FOIA requesters to be specific in their requests for records to alleviate the DOI of an unreasonably burdensome search, giving the bureaus more flexibility in placing FOIA requests on a slower processing track, and possibly limiting the number of FOIA requests each group or person can send monthly to treat requestors equitably.

Our understanding of the FOIA is that it established a statutory right of public access to Executive Branch information in the federal government (Department of Justice 2019a). “The fundamental purpose of the Freedom of Information Act (FOIA) is to inform citizens about “what their government is up to” through disclosure of agency records.” (*DOJ v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989)) (Department of Justice 2019b). In this *Federal Register* Notice, the DOI says it “is fully committed to an equitable FOIA program that ensures compliance with the statutory requirements of transparency, accountability, and prompt production.” However, the DOI is also proposing that the DOI agencies “will not honor a [FOIA] request that requires an unreasonably burdensome search or requires the bureau to locate, review, redact, or arrange for inspection of a vast quantity of material” (83 *Federal Register* 67177).

We do not believe the DOI’s proposed changes to the FOIA regulations are consistent with the purpose and intent of the FOIA or with the DOI’s commitment to implement a “FOIA program that ensures compliance with the statutory requirements of transparency, accountability, and prompt production.” We agree that the “Department’s FOIA processing therefore must be more efficient if the Department is to meet its statutory obligations” (83 *Federal Register* 67176). However, rather than change the DOI’s FOIA regulations to increase time limits, limit requests, and place more of a burden on the requester to know enough about the program/project/action/decision to specify this in the FOIA request, we suggest that the DOI examine why there was a 30 percent increase in number of FOIA requests from FY 2016 to 2018. This approach is supported by the “director of the Justice Department’s Federal Programs Branch and the director of Government Information Services who serves as the government-wide FOIA ombudsman. They each singled out the growing avalanche of FOIA lawsuits and the need to address their root causes as a top concern” (FOIA Project 2018). In identifying the root cause of the increase in FOIA requests and lawsuits, perhaps the DOI may discover that it can do a better job of being transparent regarding the disclosure of the DOI and its bureau’s records.

In addition, we offer three suggestions on what the DOI and its bureaus can and should be doing to increase transparency, accountability, efficiency, and prompt production and to reduce the number of FOIA requests.

1. The DOI and its bureaus should do a better job of implementing the FOIA requirement of operating a FOIA library. According to the Department of Justice, the FOIA “requires agencies to make certain other information available for public inspection and copying, which is typically accomplished by posting the records on the agency’s website.” These proactive disclosure provisions have long required agencies to make certain categories of non-exempt records available to the public without waiting for a formal request. Moreover, to the extent that requests are made, if the agency determines that they concern a matter of popular interest and so are likely to be the subject of subsequent requests, the FOIA requires agencies to

proactively post those FOIA-processed records so that they are readily available to everyone” (Department of Justice 2019b).

We believe the DOI and its bureaus can do a better job of being transparent by providing more types of non-exempt records on their respective FOIA library webpages. We note that most FOIA library webpages for DOI bureaus contain the minimum type of non-exempt records required by FOIA. If more non-exempt records were available (e.g., permits, grants, leases, biological opinions, MOUs, MOAs, etc.), we believe the DOI would achieve a greater level of transparency and would reduce the number and/or extent of FOIA requests and lawsuits.

2. The DOI and its bureaus can do a better job of informing the public of the availability and function of FOIA Requester Centers. These Centers have the potential to reduce the number and types of FOIA requests. According to the DOI, a Center’s function is to (1) assist the public in identifying information that is already posted and available; (2) inform the public about the types of records maintained by the bureau; (3) provide suggestions for formulating requests; (4) describe the DOI’s various processing tracks and the average processing times for the various tracks; and (5) answer questions about expedited processing standards and the FOIA’s fee provisions (DOI 2019). However, if the public is unaware of their existence, how to contact the Centers, or the services they provide, they are not helping the DOI provide transparency, accountability, and prompt production or reduce the number of FOIA requests. The DOI should develop and implement an ongoing outreach strategy so the public is informed of these Centers and the services they provide. Such an approach would be preferable to placing restrictions on the FOIA requester, which is what some of the DOI’s proposed changes to the FOIA regulations do.
3. We suggest that the personnel at the FOIA Requester Centers and staff with FOIA duties at bureau offices work with the FOIA requester to inform them of other options available than invoking the FOIA to obtain non-exempt federal records. Frequently a requester is unaware that they can request a non-exempt record or records, and the bureau can provide the records quickly without invoking the sometimes time-consuming procedures under the FOIA. Such an approach would reduce the number of FOIA requests and possibly lawsuits.

We appreciate that the DOI’s proposed changes to the FOIA regulations were just that, a presentation of the proposed changes. There was no discussion of why each change would be beneficial or adverse to the DOI, or beneficial or adverse to the requester. However, we found the method that the DOI used to present the proposed changes to be unclear and confusing. As written, the *Federal Register* Notice is a collection of proposed edits excised from current regulations to show only the proposed changes to the regulations. It identifies the subsection of the regulations and states that a word, phrase, or sentence is omitted, added, or changed. It becomes the responsibility of the reviewer to find the existing regulations; find each of the subsections proposed for change; and omit, add, or change the word, phrase, or sentence. We were unable to locate in the *Federal Register* Notice the proposed revised regulations so the public may read the entire document.

To make the proposed changes clear to the public, that is, to follow a progression of thought and obtain a full understanding of how the proposed changes would affect the DOI’s entire

FOIA regulations, the DOI should provide a link in the *Federal Register* Notice. This link would provide the current regulations with strikeout for the proposed omitted language and bold or another color/font for the proposed added language. Most businesses and the federal government use bold font or a different color font for proposed added wording and strikethrough for proposed deleted wording (e.g., Track Changes) or a similar method when proposing changes to documents. We recommend that the DOI and all federal agencies use this method when proposing changes to regulations. Changing a regulation should be an open, transparent process and the public should be provided with all relevant information in the *Federal Register* Notice, including the wording of the proposed revised regulation in its entirety with the changes indicated.

Unfortunately, with the DOI's proposed approach, the impression we have is the DOI is placing the burden on the public to find the existing document/regulations and compare it to the proposed changes. This approach makes it difficult for the public, as it requires more time and effort, and ultimately discourages the public from commenting on the proposed changes. In addition, it is not efficient for the federal agency to prepare a separate document for *Federal Register* publication that excises the changes from the already drafted proposed regulations. This practice is likely to result in errors when the agency is excising the changes into a separate document for publication in the *Federal Register*, and by the public in correctly reading and interpreting these proposed changes. Please see our Specific Comments #4, 8, 12, and 13 below for potential errors from the DOI's excising and providing only the proposed edits.

Throughout the proposed regulations, there are requirements to "notify" the FOIA requestor, but the method of notification is not specified in all situations. We request that the notification be in writing (email or letter) to provide documentation of compliance with FOIA timelines for both the requestor and the bureaus. In some cases, we found no mention that the bureaus would notify the requestor of their decision or determination. Each time the DOI or a bureau makes a determination regarding a FOIA action, the DOI or bureau should provide that determination to the requester in writing.

Specific Comments

Below are our specific comments on the proposed changes. For many of the proposed changes, we found they do not comply with the purpose and intent of the FOIA.

1. Section 2.4: This section is proposed for deletion. This section discusses what the DOI or bureau(s) will do if a FOIA request is not appropriate or relevant to them. Removal of this section means there would be no notification to the FOIA requestor of this determination. The FOIA requestor would assume their request is being worked on when it is not. We suggest that section 2.4(e) be reworded to say "If your request is received by a bureau that believes it is not the appropriate bureau to process your request, the bureau that received your request will attempt to contact you (if possible, via email) to confirm that you deliberately sent your request to that bureau for processing. If you do not confirm this, the bureau will deem your request as a mistake and send correspondence (email or letter) saying that it is not the appropriate bureau to process your request, This will conclude that FOIA request."

2. Section 2.5(d): We are opposed to the addition of “The bureau will not honor a request that requires an unreasonably burdensome search or requires the bureau to locate, review, redact, or arrange for inspection of a vast quantity of material.” As we stated above, the FOIA established a statutory right of public access to Executive Branch information in the federal government. Congress did not place a limit on the number of records. In addition, given the electronic storage of records on computers and search capabilities of computers and servers, locating a large number of documents should take little time. We also find the terms “unreasonable,” “burdensome,” and “vast quantity” as terms that are not defined, and as such, would be subject to arbitrary or capricious determinations. Therefore, this proposed language should be removed.

For proposed paragraph 2.5(d), the term “reasonable effort” is used. We request that this term be defined, as what is considered “reasonable” varies from person to person.

3. Section 2.5(e): We note that the proposed change says, “If the bureau determines that your request does not reasonably describe the records sought, the bureau will return the request to you; notify you that it will not be able to comply with your request unless you sufficiently clarify your request, in writing.” We found no time requirement for the bureau to return the request. This should be included in the regulations and it should be less than 20 days, as the bureaus have an obligation under the FOIA to comply quickly with FOIA requests, and most requests are submitted electronically.

For proposed paragraph 2.5(e), please add at the end, “The bureau will notify you in writing (email, or letter) that it has closed the file on the request.”

For proposed paragraph 2.5(e), please clarify how the bureau will “notify you that it will not be able to comply with your request...” Will it be using the same written method used to initiate the FOIA request?

4. Section 2.12: Please revise section 2.12[Amended] to read “Revise section 2.12 Paragraph (d) to read as follows:”. It is paragraph (d) that is being revised, not (b).

In section 2.12, the DOI is proposing the following wording, “In § 2.14, add the following sentence at the end ‘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.’” We can interpret this sentence three ways: (1) A bureau may limit the number of records it looks up and compiles in response to a FOIA request; (2) a bureau may limit the number of FOIA requests that a requester may submit; or (3) all FOIA requests will be worked on in the order they are received. However, if a request for numerous records that would take more time is received prior to a request for a few records that would take little time to respond to, the latter request may be completed prior to the former request.

If the first or second interpretations are correct, we find this proposed language arbitrary. What would be the basis for determining the monthly limit? If documents are in an electronic format and stored on a server, it takes seconds or minutes to locate and compile them and a short time for a solicitor or FOIA Office to search/review to determine if a record should be exempted.

Imposing a monthly limit using number of records or number of requests does not comply with the DOI's earlier statement of ensuring "compliance with the statutory requirements of transparency, accountability, and prompt production" or of providing an equitable FOIA program. In addition, we are unaware of a statutory requirement for "equitability" with respect to FOIA or how that would be defined/determined. We note that not all records are created equal. For these reasons, we request that the proposed sentence and "a monthly limit" or similar numerical limit for FOIA requests be eliminated throughout the proposed regulations.

If the third interpretation is correct, we have similar concerns regarding "monthly limit for processing records" and "equitability," and request that the sentence be eliminated. That the sentence is unclear is also a reason to remove it from the proposed regulations.

5. Section 2.13: For proposed paragraph 2.13, we request that the following wording be added. "When a bureau notifies you of the referral, it should include information on whether the referral was for part or all of your request."

6. Section 2.17 When does the basic time limit begin for misdirected FOIA requests: In the proposed regulations, the DOI would remove this section. We found no discussion of why the DOI is proposing to remove this section. We believe language that addresses misdirected FOIA requests must remain in the regulations to address what should occur in this situation even if it is a rare event. Because of this absence of transparency and failure to address a rare but likely situation under FOIA, we oppose its removal.

7. Section 2(20): In, section 2.20(b)(1), the DOI's proposed added language (underlined) is –"Explains in detail how all elements and subcomponents of your request meets each element of one or both of the criteria in paragraph (a) of this section." After searching the existing DOI FOIA regulations and the statute, we found no definition of "element" or "subcomponent." Without definitions for these terms as applied to a FOIA request, it is difficult to determine what they mean or how they improve the existing regulatory wording. Because they do not clarify the existing regulatory wording and may confuse the requestor, we are opposed to these word additions.

8. Section 2.24: The DOI proposes to remove in section 2.24 paragraph (b)(4) the wording "unless including" adding in its place the wording "unless the bureau notes that it does not have or could not locate responsive records or that including" in paragraph (b)(5), removing the word "record", adding in its place the wording "record unless the Office of the Solicitor has expressly preapproved such a withholding". We believe this sentence is awkward and an example of unclear wording that occurred when the DOI excised the proposed changes from the regulations. We are unsure of the change(s) the DOI is proposing to section 2.24(b)(4) and request that this be clarified, preferably in a format that shows the current regulations and proposed changes. This may be an example of an incorrect excision from the proposed regulations.

9. Section 2.45: We are opposed to the DOI removing section 2.45(f), which reads "(f) The bureau 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.” Proposing to remove this wording with no explanation is troubling. It leaves the public to wonder if the bureaus will now make value judgments about the level of public interest in the requested information if this section is removed, and how those value judgements will be made. Value judgements suggest applying an arbitrary or capricious process. In addition, there is no explanation for how this removal would improve or clarify the existing regulatory wording and comply with the purpose and intent of the FOIA. For these reasons, we conclude there is no reason to remove this language and request that section 2.45(f) remain in the DOI FOIA regulations.

10. Section 2.47: In section 2.47(d), the DOI is proposing to increase the appeal time of the requestor from 30 workdays to 90 days. We support this extension of time and thank the DOI for proposing this change.

11. Section 2.48: In section 2.48(a)(1) - “How the records concern the operations or activities of the Federal government,” the proposed regulation is “The subject of the request must concern discrete, identifiable agency activities, operations, or programs with a connection that is direct and clear, not remote or attenuated.” The DOI FOIA regulations speak to bureaus, not agencies, within the DOI. “Agencies” refers to those outside the DOI. As proposed, section 2.48(a)(1) would apply only when a FOIA request involves an agency outside the DOI. We do not believe this is the intent of this section of the current or proposed regulations and request that it be clarified to apply to DOI bureaus only, to agencies outside the DOI, or both.

We are opposed to adding “significantly” to the existing wording in section 2.48(a)(2) on “How will the bureau evaluate your fee waiver request?” This section requires that “you must address and meet each of these criteria in order to demonstrate that you are entitled to a fee waiver.”

The proposed wording (underlined) for the first criterion is “How disclosure is likely to contribute significantly to public understanding of those operations or activities, including:

- (i) How the contents of the records are meaningfully informative;
- (ii) The logical connection between the content of the records and the operations or activities;
- (iii) How disclosure will contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to your individual understanding;
- (iv) Your identity, vocation, qualifications, and expertise regarding the requested information and information that explains how you plan to disclose the information in a manner that will be informative to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to your individual understanding;
- (v) Your ability and intent to disseminate the information to a reasonably broad audience of persons interested in the subject (for example, how and to whom do you intend to disseminate the information). If we have categorized you as a representative of the news media under § 2.38, we will presume you have this ability and intent.”

We are opposed to adding the word “significantly” for two reasons: it was not required before and its addition results in the DOI and the bureaus imposing an arbitrary measure of what becomes significant. Congress passed the FOIA in 1966. From then until the DOI’s proposed change in late 2018, there has not been a requirement that the disclosure is likely to contribute significantly to public understanding of bureau operations or activities. We note the most recent

amendment to FOIA, the FOIA Improvement Act of 2016, does not require a significant contribution or discuss it. We were unable to find in the *Federal Register* Notice why the DOI believes this change is needed.

“Significantly” has several definitions, most of which are capricious or arbitrary. The exception is the science of statistics. We contend it would be difficult for the DOI or bureaus to set a threshold or establish a measurement to determine when a disclosure would contribute significantly to public understanding versus contribute to public understanding. Because this proposed change would not improve transparency, accountability, and prompt production of responses; would not contribute to efficiently implementing FOIA, and invites the DOI to be arbitrary or capricious in its determinations, we are opposed to adding “significantly” to this section, section 2.48(a)(2), or any section in the DOI’s FOIA regulations.

12. Section 2.57: In section 2.57 paragraph (a)(7) and paragraph (c), we have the same comment as for section 2.24 [Amended] (Number 8 above). The proposed change is to replace the word “limit” that we were unable to locate in the referenced section. If the proposed changes were provided in a format that shows the current regulations and proposed changes, such as bold font for proposed new words and strikeout for proposed deleted words (e.g., Track Changes), the public would clearly see the proposed changes for that sentence, and in the context of the entire paragraph and major section. In addition, the DOI would eliminate their errors from excising and describing the proposed changes.

13. Section 2.59: For section 2.59(f), we have the same comment as section 2.57 above.

In conclusion, we note that some of our suggested changes to clarify FOIA requests and DOI/bureau procedures have been implemented unofficially by some bureaus in the DOI and have been effective in helping the requestor better define the information they are requesting, and the bureaus in reducing the number of records provided and time spent on FOIA requests. We also note that most records are stored in an electronic format, and bureaus have record policies that mandate how records are electronically created, named, organized, and stored. These electronic formats and procedures enable the bureaus to quickly search for and compile records using computer-generated searches. If bureaus are following these policies, when a bureau receives a FOIA request, it should take minutes to identify, retrieve, and download these records. This efficiency is in marked contrast to the hours or days required to conduct a records search when Congress passed the FOIA in 1966. At that time, documents were printed; more difficult to manage, search for, and review; and the bureaus would have made paper copies and mailed them to the requester.

In summary, we urge the DOI to examine the reason(s) for the upsurge in FOIA requests and address these reason(s), provide more documents in the DOI and bureau FOIA libraries, increase the public’s understanding and use of FOIA Requester Centers, work more with the public before and during the initial period of a FOIA request to make more records available to the public, and help the public determine if a FOIA request is the best method to obtain records. We encourage more transparency in the FOIA process and a dialogue between the public/FOIA requester and DOI bureaus. With the implementation of these changes, we believe many of the

proposed DOI changes to the FOIA regulations will not be necessary. We also believe that many of the proposed DOI changes are not consistent with the purpose and intent of the FOIA and impede transparency.

We appreciate this opportunity to provide input on these proposed changes.

Regards,



Edward L. LaRue, Jr., M.S.
Desert Tortoise Council, Ecosystems Advisory Committee, Chairperson

Literature Cited

Department of Justice. 2019a. About FOIA. <https://www.justice.gov/archives/open/foia>
Accessed 2019-1-20.

Department of Justice. 2019b. Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request. Office of Information Policy. <https://www.justice.gov/oip/oip-guidance/proactive-disclosure-of-non-exempt-information>
Accessed 2019-1-20.

Department of the Interior. 2019. FOIA Centers and Public Liaisons. Freedom of Information Act. <https://www.doi.gov/foia/foiacenters>

FOIA Project. 2018. FOIA Lawsuits Surge in Trump Administration's First Year. <http://foiaproject.org/2018/01/16/lawsuits-trump-first-year/>. Accessed 2019-1-20.