

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND REFORM

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March 5, 2019

The Honorable David Bernhardt
Acting Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Dear Acting Secretary Bernhardt:

We write to express significant concern with the rule recently proposed by the Department of the Interior (DOI) concerning its Freedom of Information Act (FOIA) procedures.¹ The proposed rule appears to restrict public access to DOI's records and delay the processing of FOIA requests in violation of the letter and spirit of FOIA. The American people have the right to access information from DOI, and the proposed rule needlessly encroaches on that right.

First, the proposed rule would shift the burden of identifying the location of agency records from the agency to the public. Agencies are required under FOIA to respond to any request for records which "reasonably describes such records."² The proposed rule, however, would require requesters to "identify the discrete, identifiable agency activity, operation, or program in which you are interested."³ Such ambiguous language places an unjustified and unreasonable burden on the public to understand the bureaucracy of the agency and which office may hold a particular set of records.

Congress structured FOIA to require agency officials who are familiar with their own records to bear the burden of locating them, rather than the public. A report issued by the House Committee on Government Operations when FOIA was amended in 1974 described the standard that should be used to determine whether a requester adequately described the information requested:

¹ Department of the Interior, *Freedom of Information Act Regulations*, 83 Fed. Reg. 67175 (Dec. 28, 2018) (proposed rule) (online at www.govinfo.gov/content/pkg/FR-2018-12-28/pdf/2018-27561.pdf).

² 5 U.S.C. § 552(a)(3)(A).

³ Department of the Interior, *Freedom of Information Act Regulations*, 83 Fed. Reg. 67177 (Dec. 28, 2018) (proposed rule) (online at www.govinfo.gov/content/pkg/FR-2018-12-28/pdf/2018-27561.pdf).

A ‘description’ of a requested document would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort.⁴

Courts have used this same standard.⁵ The proposed change would conflict with the responsibility Congress imposed on agencies, such as DOI, to respond to FOIA requests.

Second, the proposed rule would set limits on requests when they involve the processing of a “vast quantity of material.”⁶ Guidance issued by the Department of Justice states:

The sheer size or burdensomeness of a FOIA request, in and of itself, does not entitle an agency to deny that request on the ground that it does not ‘reasonably describe’ records.⁷

The proposed rule does not define what constitutes a “vast quantity of material,” leaving it vulnerable to abuse and arbitrary decision making.

Third, the proposed rule would replace the phrase “time limit” in DOI’s FOIA regulations with “time frame.” While seemingly technical, this change departs from the statutory language, which designates a clear “time limit” for requests, subject only to certain exceptions. The proposed change in language, for which no rationale was provided, raises the concern that DOI might treat FOIA’s statutorily prescribed time limits as mere guidelines.

Further, the proposed rule would allow DOI to “impose a monthly limit for processing records” for a given requester. FOIA requires agencies to strictly adhere to the statutory time limits unless they demonstrate “exceptional circumstances.”⁸ The proposed rule, however, does not explain how the monthly limits would be determined, and it creates a vague standard that could be implemented arbitrarily and unfairly. More importantly, we struggle to understand how imposing such limitations on requesters’ rights would further FOIA’s purpose.

These are just some of the troubling changes that the proposed rule would make to DOI’s FOIA regulations. Rather than clarifying DOI’s FOIA process, the proposed rule would make the process more confusing and potentially expose it to politicization and unnecessary litigation. In the spirit of transparency and advancing the public’s right to know, we urge you to reconsider the proposed rule.

⁴ H.R. Rep. No. 93-876.

⁵ *Forsham v. Califano*, 587 F.2d 1128 (D.C. Cir. 1978).

⁶ Department of the Interior, *Freedom of Information Act Regulations*, 83 Fed. Reg. 67175 (Dec. 28, 2018) (proposed rule) (online at www.govinfo.gov/content/pkg/FR-2018-12-28/pdf/2018-27561.pdf).

⁷ Department of Justice, Office of Information Policy, *FOIA Update Vol. IV*, No. 3 (1983) (online at www.justice.gov/oip/blog/foia-update-foia-counselor-questions-answers-21).


⁸ 5 U.S.C. §§ 552(a)(4)(A)(viii)(II)(cc); (a)(6)(B)(ii); (a)(6)(C)(i).

The Honorable David Bernhardt

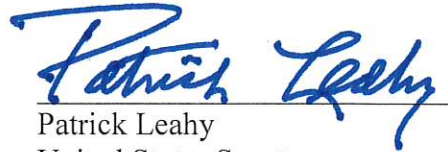
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Thank you for your prompt attention to this matter.

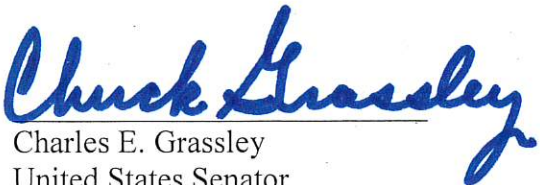
Sincerely,



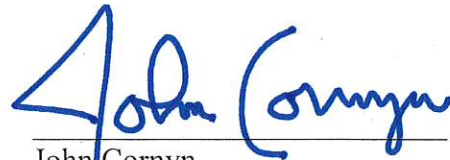
Elijah E. Cummings
Elijah E. Cummings
Chairman
House Committee on Oversight
and Reform



Patrick Leahy
Patrick Leahy
United States Senator



Charles E. Grassley
Charles E. Grassley
United States Senator



John Cornyn
John Cornyn
United States Senator

cc: The Honorable Jim Jordan, Ranking Member,
House Committee on Oversight and Reform