WASHINGTON
LEGISLATIVE OFFICE

September 28, 2015

Karen Neuman
Office of the Chief Privacy Officer
Department of Homeland Security
245 Murray Lane SW, STOP-0655
Washington, D.C. 20528-0655

RE: Docket No. DHS-2009-0036; Notice of Proposed Rulemaking; Freedom of Information Act Regulations

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Dear Ms. Neuman:

We write to offer brief comments in response to the Department of Homeland Security's ("DHS" or "the department") notice of proposed rulemaking that would amend the department's regulations implementing the Freedom of Information Act ("FOIA").[1]

Please note that the American Civil Liberties Union ("ACLU") signed a joint comment by several open government groups, and we incorporate all of those remarks by reference here.[2] We also write separately to raise several emerging FOIA issues, which we urge DHS to take into consideration when proceeding with this rulemaking.

Specifically, DHS should:

- Expressly prohibit, in its proposed rule, the department or a component agency from issuing a false response to a request for material that it deems covered under the law enforcement and national security exclusions of 5 U.S.C. § 552(c) (2012);

- Clarify that the proverbial "lonely pamphleteer"—the aspiring, amateur or part-time journalist, defined functionally—should be entitled to the same treatment with respect to expedited processing

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[1] 80 Fed. Reg. 45,101 (July 29, 2015) (the "NPRM" or "proposed rule"). We address these comments directly to Ms. Neuman in light of Mr. Holzer's appointment as director of the Office of Government Information Services.

[2] Joint Comment by OpenTheGovernment.org et al. in Docket No. 2009-0036 (Sept. 28, 2015), *available at* http://www.openthegovernment.org/node/5005.

and fee waivers as established members of the news media;[3] and

- Require a more detailed notification to a requester seeking material that the department or a component agency deems covered by exemption 4 for confidential business information to ensure that the requester can properly obtain judicial review.[4]

I. Expressly Prohibit False Responses to Requests for Excluded Documents

In 2011, the Department of Justice proposed a set of new FOIA regulations, one of which would have allowed components of the department to effectively lie when faced with requests that they determine are covered under the exclusions of 5 U.S.C. § 552(c) (2006).[5] This proposal was removed from the DOJ's 2015 final rule. We urge DHS, however, to go a step further and to expressly prohibit false exclusion responses (indeed, all false responses) in its final rule.

The exclusions, created through an amendment to FOIA in 1986, were meant to cover the very limited set of circumstances where merely acknowledging the existence of responsive material could imperil an ongoing law enforcement action.

That is, the statute authorizes the government to "treat records as not subject to the requirements of FOIA" in three narrow circumstances: (1) where the request concerns an investigation into the requester and the requester is not yet aware of the investigation (and where disclosure could impair the investigation);[6] (2) where the requester seeks information about a specific informant and the informant's identity has not been publicly confirmed;[7] and (3) where the request seeks FBI records pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information.[8]

As proposed, the new regulation would have mandated that the DOJ component "respond to the request as if the excluded records did not exist. This response should not differ in wording from any other response given by the component."[9]

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3 *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) ("[L]iberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.").

4 5 U.S.C. § 552(b)(4) (2012).

5 Freedom of Information Act Regulations, Proposed Rule, 76 Fed. Reg. 15,236, 15,239 § 16.6(f)(2) (March 21, 2011) (to be codified at 28 C.F.R. pt. 16).

6 5 U.S.C. § 552(c)(1)(A)-(B) (2006).

7 § 552(c)(2).

8 § 552(c)(3).

9 76 Fed. Reg. at 15,239 § 16.6(f)(2).

As detailed in separate comments submitted by the ACLU and open government groups, nowhere in the legislative history of FOIA or its amendments, or in any of the governing case law, is there authority for any agency to lie to a requester.[10] Rather, the appropriate response to a legitimate § 552(c) exclusion could mirror the response in a "Glomar" case, in which an agency claims that the existence of the records itself is classified and responds that it will therefore neither confirm nor deny the existence of the records.[11]

Such a response would protect the government's interests but would permit a FOIA requester to challenge an agency's claim that, as a legal matter, the subject matter of the request falls within one of the exclusions.[12]

Although, as noted, the DOJ pulled the offending proposal from its 2011 NPRM, the ACLU recently received a response from the Bureau of Prisons ("BOP"), a DOJ component, that we have reason to believe is a false claim that records do not exist.[13]

We strongly urge DHS to better protect against this practice, which has no place in a democratic society, especially in cases involving national security issues, which are already often cloaked in unmerited secrecy and overclassification. Further, were such falsehoods to become routine, they would have the perverse result of encouraging needless FOIA litigation. Groups like the ACLU would increasingly be unwilling to take "no responsive documents" responses at face value and

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[10] Comments from the ACLU et al. to Caroline A. Smith, Office of Information Policy, Dep't of Justice, Re: Docket No. OAG 140; AG Order No. 3259-2011; RIN 1105-AB27 (Oct. 19, 2011) [hereinafter *ACLU Comments*].

[11] Glomar responses were first articulated in *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976), in response to a FOIA request to the CIA seeking records on the Glomar Explorer, a deep sea drilling vessel built secretly for the CIA to recover the Soviet submarine K-129. The ACLU comments suggested language to this effect: "we interpret all or part of your request as a request for records that, if they exist, would not be subject to the disclosure requirements of FOIA pursuant to section 552(c), and we therefore will not process that portion of your request." *See ACLU Comments*, *supra* note 10, at 2.

[12] Some agencies have subsequently adopted this Glomar-esque approach, but it is not at all clear that all agencies have adopted a uniform policy that bars false representations to FOIA requestors (and, potentially, the courts). *See Islamic Shura Council of S. California v. F.B.I.*, 779 F. Supp. 2d 1114, 1117 (C.D. Cal. 2011) (finding that FBI made "blatantly false" statements to FOIA requestor and the court when it apparently relied on section 552(c) and denied the existence of responsive documents).

[13] For more detail, please see Ensuring Transparency Through the Freedom of Information Act, Hearing Before the H. Comm. On Oversight and Reform, 114th Cong. (2015) (testimony of Gabriel Rottman). The ACLU submitted a FOIA request to BOP seeking records on the black site prison known as the "Salt Pit" in Afghanistan. Despite detailed documentation in the Senate's torture report of a BOP delegation to the Salt Pit on or around November 2002, the BOP flatly denied the existence of any responsive documentation, without invoking any exemption or exclusion. *See* Executive Summary of the Senate Select Committee on Intelligence's Study of the Central Intelligence Agency's Detention and Interrogation Program 60 (2015). At the very least, such a delegation would have produced travel documentation, internal discussion of who should attend and interagency communications with the CIA to coordinate logistics of the trip, as well as more substantive documents like assessments, briefings and debriefings, training documents and notes from visiting personnel.

would be forced to go to court to "look behind" the asserted "no responsive documents" claim each and every time. DHS should expressly prohibit this practice in the final rule.

II. Clarify that Any Requester Seeking to Disseminate Information to the Public Qualifies for Both Expedited Processing and Fee Waivers on the Same Basis as Professional Journalists

As noted in the joint comments referenced above, the proposed rule implies an overly restrictive definition of a part-time "representative of the news media" in new section § 5.5(e)(3).

Under the proposed rule, a requester seeking expedited processing must include a certified statement explaining the basis for the request. The proposed rule follows the Department of Justice's ("DOJ") recent final FOIA rule in including an example that could be read to give the agency grounds to deny expedited processing to functional, but non-professional, members of the news media.[14] That is, the proposed rule states that 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."[15]

As suggested in the joint comments, a better formulation would be to eliminate the "professional" requirement and treat a requester who is engaged in the dissemination of information to the public as a representative of the news media. We further submit that a requester who aspires to disseminate information, but has not performed that function in the past, or is not primarily engaged in that function at the time of requesting, should likewise be entitled to request expedited processing on the same basis as a requester primarily engaged in information dissemination.

Also concerning is the definition of "freelance journalist" in proposed section § 5.11(a)(6) with respect to fee waivers, which also tracks the DOJ's final rule. The definition states that freelance journalists must "demonstrate a solid basis for expecting publication *through* a news media entity in order to be considered as working for a news media entity."[16]

This proposed definition raises two issues. One, it could be read as precluding fee waivers for, for instance, long-form journalists working on "spec" pieces (that is, projects pursued on a "speculative" basis, without a publication commitment). Relatedly, the statement that a past publication record can be considered in determining who qualifies as a freelance journalist puts new freelance journalists, without an established track record, at an unfair disadvantage when using FOIA. Two, the language requiring a "solid" basis for publication "through" a separate entity could be read as precluding expected self-publication, which is an exceedingly common form of publication for all manner of journalists today.

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[14] Revision of Department's Freedom of Information Act Regulations, 80 Fed. Reg. 18,099, 18,108 (Apr. 3, 2015) (final rule).

[15] Proposed Rule, *supra* note 1, at 45,108 (emphasis added).

[16] *Id.* at 45,111 (emphasis added).

In light of similar concerns, the recent D.C. Circuit decision in *Cause of Action v. Federal Trade Commission* endorsed an inclusive approach to the definition of a member of the news media.[17] Among other things, the court rejected a reading of the "likely to contribute significantly to public understanding" standard that would require a broad or wide audience to receive the information,[18] and clarified that there is no minimum number of outlets a requester must have.[19]

Additionally, the court found that very niche outlets qualify as representatives of the news media,[20] and that firm plans to self-publish a newsletter satisfy the news media test.[21] And, the court found that a "public interest advocacy organization" can satisfy the distribution requirement even if it does not do the reporting directly, but uses press releases to get the information to established media entities.[22]

This case clearly shows that the better, and more statutorily faithful, approach to expedited processing and fee waivers for media entities would be to adopt a definition of a representative of the news media that would require the requester to establish that, as a functional matter, she is collecting and curating (though not necessarily altering or synthesizing) information for public dissemination.[23]

Finally, we would also note several troubling cases where Immigration and Customs Enforcement ("ICE") has improperly denied fee waivers to the ACLU based on its purported "commercial interest" in the records requested.[24]

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[17] No. 13-5335, 2015 WL 5009388 (D.C. Cir. Aug. 25, 2015).

[18] *Id.* at *6.

[19] *Id.*

[20] *Id.* at *11 (noting that requester qualifies "regardless of how much interest there is in the story for which he or she is requesting information").

[21] *Id.* at *14.

[22] *Id.* at *15.

[23] *See* Gabe Rottman, *Senate Finally Frees the Press (Kind Of)*, ACLU.org, Sept, 13, 2013, https://www.aclu.org/blog/senate-finally-frees-press-kind.

[24] *See, e.g.*, Letter from ICE FOIA Office to ACLU Immigrants' Rights Project re: 2015-ICFO-99765, dated Sept. 21, 2015; Letter from ICE FOIA Office to ACLU Immigrants' Rights Project re: 2015-ICFO-95034, dated Aug. 26, 2015; Letter from ICE FOIA Office to ACLU of Maryland re: 2015-ICFO-72149, dated Mar. 17, 2015.

In several such cases, ICE itself reversed the denial, meaning that the initial improper denial needlessly prolonged the process and wasted taxpayer and agency resources.[25] These cases are also inconsistent with the numerous cases where the department and component agencies have granted waivers to the ACLU for substantially similar requests. To the extent this is an emerging trend, we urge the department to stop misapplying the standard and to appropriately grant fee waivers to advocacy organizations like the ACLU.

III. Require an Adequate Explanation of the Basis for an Exemption 4 Claim in Material Produced by Private Providers of Government Services

Although less of a concern with the DHS than with DOJ (and BOP), we continue to face obstacles to transparency through the overuse of the FOIA exemption for confidential business information.[26] In particular, the BOP permits private prisons to designate material as not subject to disclosure under this exemption. The BOP is then responsible for independently reviewing the material to ensure it is, in fact, properly exempt from disclosure.

In practice, we fear this is not the case,[27] and BOP has broadly exempted material in the public interest from disclosure without providing the requester adequate information in its response to permit it to seek appropriate judicial review.[28]

Accordingly, we urge the DHS to include in its final rule a requirement that the department or a component that has a similar arrangement with a private provider of government services include enough information in its response to identify the grounds for withholding the particular documents or information under exemption 4.

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[25] *See, e.g.*, Letter from Debbie Seguin, ICE Office of the Principal Legal Advisor, to ACLU National Prison Project re: 2015-ICAP-00436, 2015-ICFO-74151 (July 6, 2015); Letter from Catrina M. Pavlik-Keenan, ICE FOIA Officer, to ACLU of Southern California re: 2011FOIA4894 (Mar. 28, 2012). Notably, ICE reversed its fee waiver denial in 2011FOIA4894 only after the ACLU of Southern California filed suit to challenge its decision. *See* Complaint, *ACLU of Southern California v. U.S. Immigration and Customs Enforcement*, CV11-10148 (C.D. Cal. filed Dec. 7, 2011).

[26] 5 U.S.C. § 552(b)(4) (2012) (protecting "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential").

[27] *See Raher v. Fed. Bureau of Prisons*, No. 09-CV-536-ST, 2013 WL 26205, at *3 (D. Or. Jan. 2, 2013) (noting that, in FOIA litigation requesting contracts between BOP and private prison companies CCA and GEO Group, "[f]or whatever reason, BOP apparently relied on its two primary submitters (CCA and GEO Group) to supply reasons for withholding information under Exemption 4 and never thoughtfully re-examined its position in response to the evidence and arguments made by [the FOIA requester].").

[28] For example, in March 2014, BOP stated, in response to an ACLU of Georgia FOIA request for documents related to the D. Ray James Correctional Facility (a BOP-contracted private prison in Georgia), that 668 pages were being withheld in their entirety under exemptions 4, 5, 6 and 7(C) without providing any information about the nature of the withheld pages or the reasons why the withheld pages purportedly fell within these exemptions.

We thank the department for issuing this proposed rule, and for working to update DHS's FOIA regulations to reflect the important improvements in the OPEN Government Act of 2007.

Please do not hesitate to contact Gabe Rottman, legislative counsel and policy advisor at the ACLU's Washington Legislative Office, with any questions or comments. He can be reached at 202-544-1681 or grottman@aclu.org.

Sincerely,

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