January 08, 2009

Kevin Hagerty
US Department of Energy
Office of Information Resources
Mailstop MA-90, Rm. 1G-051
1000 Independence Ave., SW
Washington, DC 20585

Re: OMB Watch Comment on RIN 1901-AA32, Revision of Department of Energy's Freedom of Information Act Regulations

Dear Mr. Hagerty:

OMB Watch is submitting these comments on the proposed revision of Department of Energy's Freedom of Information Act Regulations, 73 Fed. Reg. 74658 (December 9, 2008) that would remove the "extra balancing test" from section 1004.1 and raise FOIA copying costs from 5 cents to 20 cents a page.

OMB Watch is a nonprofit research and advocacy organization whose core mission is to promote government accountability and improve citizen participation. Public access to government information has been an important part of our work for more than 15 years, and we have both practical and policy experience with disseminating government information. For example, in 1989 we began operating RTK NET, an online service providing public access to environmental data collected by the Environmental Protection Agency. Additionally, we are engaged in agency regulatory processes and encourage agency rules to be sensible and more responsive to public needs.

Appropriateness of Balancing Test within FOIA

The Department has argued that the balancing test goes beyond the requirements of FOIA. OMB Watch contends that the current policy does not go "beyond the requirements of FOIA" but instead represents a process to ensure agency compliance with the law, additional statues, and court rulings related to FOIA. The U.S. Supreme Court noted in 1976 that "disclosure, not secrecy, is the dominant objective of the Act."[1] In 1991, it upheld that opinion stating that the Act establishes a "strong presumption in

[1] *Department of the Air Force v. Rose*, 425 U.S. 352.

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favor of disclosure."[2] The language, put in place in 1988, is consistent with the standing interpretation of the Supreme Court.

The most recent law directly addressing agency implementation of FOIA across all of government was the Open Government Act of 2007. This law declared that, "the American people firmly believe that our system of government must itself be governed by a presumption of openness." The law also found that "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act." Obviously, the "practice" of FOIA is the implementation of the act by federal agencies and with passage and signing of the legislation into law both Congress and the President were expressing their dissatisfaction with that implementation. OMB Watch believes that it would inappropriate for a federal agency to eliminate a long standing mechanism that seeks to maximize discretionary disclosures shortly after the level openness and disclosure being achieved by federal agencies was found to be unacceptable.

OMB Watch disagrees with the Department's dismissive characterization of the balancing test as being "beyond the requirements of FOIA." While neither the original law nor any amendments specifically require an agency to implement a balancing test, both the statutory history and court decisions make it clear that under FOIA agencies are expected to use reasonable mechanisms to identify information for public disclosure. The balancing test is such a reasonable mechanism that has been in use by the Department for 20 years. The agency offers little evidence as to precisely why the balancing test is suddenly unnecessary and extraneous to the FOIA process.

Agency Burden

Within the proposed rule, the Department has also asserted that the balancing test places an undue burden on DOE. The Department has failed to prove that the requirement is an undue burden. No factual information concerning financial, personnel, or time costs to the Department have been provided in the reasoning for the proposed rule change. It is not enough for an agency to simply claim undue burden with no supporting documentation or evidence for the public to consider. The purpose of the public comment period in the rulemaking process is for any interested members of the public to provide the government with input a criticism of the proposal. It is the responsibility of the agency to provide sufficient information and supporting documentation that interested individuals can provide substantive points about the facts and policies. Factual evidence allows commentators to reinterpret the issue being addressed and offer the agency detailed suggestions for modifications and adjustments that may not have been considered. However, in this case the Department has provided the policy without support facts or evidence for the public consider. Without such information, the proposed rule must be considered premature and insufficiently documented to receive the substantive and meaningful public comments required in this process. OMB Watch strongly recommends that the proposed rule be withdrawn until such supporting information on the level of burden the balancing test imposes on the Department, as well

[2] *Department of State v. Ray*, 502 U.S. 164

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as other factors of the proposed rule that are under documented, can be collected and presented to the public along with the proposed rule.

Moreover, OMB Watch believes the Department has misrepresented the burden by stating that the balancing test forces "DOE to reconsider a determination to legally withhold information." The regulation language for the balancing test does not require reconsideration of determinations but is merely another component that the agency must consider when making the disclosure decision. It requires that employees weigh the public interest in disclosure before withholding information under exemptions that are *discretionary*. The language reads, "To the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under [FOIA] whenever it determines that such disclosure is in the public interest." OMB Watch finds it highly implausible that for 20 years this balancing test has been managed as a separate bureaucratic process performed after disclosure decisions have been made.

Impact of Balancing Test on Disclosure

The Department stated in the proposed rule that "the extra balancing test does not alter the outcome of the decision to withhold information" citing that the DOE follows Department of Justice guidance. However, the Department does elaborate on exactly what guidance from the Department of Justice preempts the balancing test requirement of the regulation. This lack of information makes it difficult for commentators to respond to this point with any certainty. OMB Watch believes the guidance the Department is referring to is likely the 2001 FOIA memorandum from then Attorney General John Ashcroft. However, OMB Watch again believes that the proposed rule should be withdrawn and modified to clarify this point before it can be considered and reviewed through public comment.

The Ashcroft memo restricts discretionary disclosures and promotes withholding information when there is a "sound legal basis" to do so. Relying on this more restrictive policy will certainly limit the number of discretionary disclosures made by employees if DOE has been following its own regulations. It is also perplexing that DOE is claiming an undue burden caused by the balancing test, while at the same time it states the test does not alter any decisions. OMB Watch is additionally confused because later guidance from the Department of Justice on discretionary disclosure make it clear that despite the strict language of the Ashcroft memo agencies retain some flexibility on such disclosures depending on "the nature of the FOIA exemption and the underlying interests involved."[3] Such flexibility would seem to call for a mechanism such as the balancing test to assist the agency in determining which discretionary disclosures to make.

Copying Costs

The Department stated that an increase in copying fees from 5 cents to 20 cents a page is "modest and reasonable increase that is more reflective of current costs and would bring DOE into conformity with the rest of the government." OMB Watch does not believe

[3] Department of Justice, Freedom of Information Act Guide, March 2007, pp. 866-867. Available on-line: http://www.usdoj.gov/oip/foia_guide07.htm

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that a 400% increase is "modest." If the U.S. Postal Service were to increase the price of stamps by such a ratio it would be seen as an outrage. However, it is possible that the increase is reasonable and that it would bring out of date copying costs at the agency in line with current costs by other federal agencies. Unfortunately, the proposed rule does not contain enough information to determine if these assertions are true. The Department states in the proposed rule that it reviewed the charges at other cabinet level agencies and found that 20 cents per page was the standard. However, similar to the Department's claims of undue burden from the balancing test, the claims alone cannot be considered sufficient. Doing a brief search of the Federal Register, OMB Watch found that the Departments of State, Justice, Interior, and Homeland Security –among others- all have copying fees *less than* 20 cents a page. If the Department has figures on the copy costs charged by all the other cabinet level agencies, that information should be included in the proposed rule or be provided to the public in supporting documentation. Again, OMB Watch urges the Department to withdraw the proposed rule and amend it to provide the substantive information necessary for a robust public comment process.

Also, increasing the cost of copying should reflect the cost to the DOE and not what is comparable to other agencies. DOE has also not provided any information about what the current copying costs incurred by the Department are and how the proposed increased fees better reflect those costs. Additionally, when adjusting the fees for copying DOE should keep in mind that increases create an additional burden on requestors contrary to the spirit of the FOIA.

Timing of the Proposed Rule

OMB Watch would also like to point out that the Department is proposing this rule change during a period of presidential transition. The Department is well aware that the incoming administration will almost certainly bring with it new guidance on FOIA. There will likely be a new Attorney General memorandum on FOIA along with other new policies and guidance from the Department of Justice. The Department's argument for eliminating the balancing test is that guidance on FOIA makes it unnecessary. Given that an incoming administration means likely changes to the guidance in the near term, it is imprudent and hasty to change the regulation. We advise that DOE wait until the new administration has set its policies in place. Then the Department should determine if an amendment of its FOIA regulations is necessary to conform to the new guidance.

The lack of specific information and supporting documentation for this rule makes it suspect of being hurried through the rulemaking process. Such rules can be burdensome to the taxpayer as they are often challenged in court. They also prevent the completion of a thorough and proper democratic process by minimizing public scrutiny and participation.

Summary

OMB Watch recommends the Department withdraw the proposed rule until after the incoming Obama administration has established its FOIA guidance to agencies. Should

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the DOE determine that a FOIA rule change were still necessary, the proposed rule should be revised to include greater information on the following issues:

- Burden imposed on the agency by the public interest balancing test
- Process by which the balancing test is administered
- Department of Justice guidance being referenced
- Copying charges assessed under FOIA by other agencies
- DOE's costs associated with copying records

We appreciate your consideration of our comments on the proposed changes. Please do not hesitate to contact us at 202.683.4835 if you have any questions.

Sincerely yours,

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