

The National Security Archive

The George Washington University
Gelman Library, Suite 701
2130 H Street, N.W.
Washington, D.C. 20037

Phone: 202/994-7000
Fax: 202/994-7005
nsarchive@gwu.edu
www.nsarchive.org

TO: Associate General Counsel (General Law)
Department of Homeland Security
Washington, DC 20528

DATE: February 26, 2003

RE: Comments of the National Security Archive on the Department of Homeland Security's
Freedom of Information and Privacy Act Procedures Interim Final Rule

INTRODUCTION

The National Security Archive (the "Archive") submits these comments regarding the Department of Homeland Security's ("DHS" or the "Department") "Freedom of Information Act and Privacy Act Procedures; Interim Final Rule," 68 Fed. Reg. 4055 (Jan. 27, 2003) ("Interim Final Rule"). The DHS's activities and operations are of tremendous interest to the public. For the public to place its trust in the Department's efforts to protect and enhance domestic security, it must feel confident that the Department is operating with due respect for democratic values. The maximum possible openness thus serves both the public interest and the Department's mandate. Recognition of the value of transparency in government during a time of grave security concern has historical roots; as President Johnson proclaimed when he signed the Freedom of Information Act into law against the backdrop of the Vietnam War and the Cold War, "a democracy works best when people have all the information the security of the nation permits." President Johnson's Statement Upon Signing the Freedom of Information Act, 316 Pub. Papers 699 (July 4, 1966).

The Department's implementation of the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, will have a significant impact on whether it meets the congressional intent to permit the public full access to government records unless those records are exempted under narrowly delineated exemptions. In these Comments, the Archive focuses on eight points where the Interim Final Rule fails to meet Congress's intent to increase government transparency and educate the public by making government records readily accessible.

INTEREST OF THE NATIONAL SECURITY ARCHIVE

The National Security Archive is an independent, non-governmental research institute and library located at the George Washington University that collects and publishes declassified documents obtained through the FOIA concerning United States foreign policy and national security matters. The Archive also serves as a repository of declassified and released documents on a wide range of topics pertaining to the national security, foreign intelligence, and international economic policies of the United States.

As part of its mission to broaden access to the historical record, the Archive is a leading user of the FOIA. In its 18-year history, the Archive has made over 24,000 FOIA requests to over 40 government

An Independent non-governmental research institute and library located at the George Washington University, the Archive collects and publishes declassified documents obtained through the Freedom of Information Act. Publication royalties and tax deductible contributions through The National Security Archive Fund, Inc. underwrite the Archive's Budget.

agencies. Thus, the Archive has extensive experience as an FOIA requester with agencies' implementation of the FOIA. We submit these comments to ensure that the DHS's FOIA implementation regulations serve Congress's intent of opening government records to public scrutiny. As explained in detail below, the Department should make the following changes in its interim final regulations: (1) review in full the comments received and, within 60 days, modify or affirm the Interim Final Rule in response to the comments; (2) establish an Office of Public Disclosure to manage the Department's policy development and compliance related to the FOIA; (3) involve the Departmental Disclosure Officer in the development of records management systems that enhance the Department's ability to respond to FOIA requests and the development of guidance to assist FOIA requesters; (4) incorporate the statutory time limits into the Interim Final Rule; (5) permit administrative appeal of the agency's failure to meet the statutory time limits; (6) notify requesters of their right to seek judicial review for agency failure to meet the statutory time limits; (7) handle all requests according to the date the request initially was received by the Department; and (8) separate and not conflate fee categorization and fee waiver determinations.

COMMENTS

The National Security Archive applauds the stated commitment of Department of Homeland Security Secretary Tom Ridge to ensuring that the activities of the Department will remain open to the scrutiny of the public. The Archive agrees with the Secretary that unclassified, voluntarily provided information presented to the Department should not be exempt from disclosure.¹ The American people look to the federal government for protection from harm beyond that threatened by terrorism – e.g.,

¹ At Secretary Ridge's confirmation hearing before the Senate Judiciary Committee, Secretary Ridge engaged in the following exchange with Senator Levin:

LEVIN: There's one other issue that I want to raise with you. I think I have one minute left. And that has to do with information that comes into the new Homeland Security Department, which is unclassified. I'm only talking here about unclassified information. Under the bill which was passed, anyone who divulges that information about critical infrastructure will be subject to a criminal prosecution. Now, there's real problems with that. That means that you could get information that, for instance, a company is leaking material into a river that you could not turn over to the EPA. If that company was the source of the information, you could not even turn it over to another agency. It means that a member of Congress that finds out about that information through oversight cannot act on that information, even though its unclassified information. We would be stymied from acting on it, making it public, for instance, or doing anything else in relation to information which comes to us or comes to you as a result of a voluntary submission. That is much too broad. And there are some real dangers there, because then companies could actually protect themselves from actions against them, either agency actions, congressional action or whatever, by simply giving you the information; at that point that becomes a security blanket for the company.

And so, we need you to look at that language. It's way too broad, both on the Freedom of Information Act side of it, on the whistleblower side of it, and on this language that I particularly made reference to where a criminal penalty would be attached to the public disclosure of unclassified information where it was voluntarily submitted by a company. There could be some very unintended consequences there, which could give protections for wrongdoing that threaten our health and environment which we should not be giving to wrongdoers.

RIDGE: It certainly wasn't the intent, I'm sure, of those who advocated the Freedom of Information Act exemption to give wrongdoers protection or to protect illegal activity. And I'll certainly work with you to clarify that language.

health, public safety, fraud – and the FOIA has helped advance such significant public interests.² Secretary Ridge’s strong support of openness in the Department will advance the government’s ability to assess and respond to all potential threats to the public.

Moreover, the Archive commends the Department for working closely with the National Archives and Records Administration to develop effective records management programs that will enhance the Department’s ability to serve the public through collection and dissemination of information relevant to domestic security and to maintain historical records of its work.

Protecting the core democratic values that distinguish our society must be an essential part of the mission of the Department. The confidence of the people in their government and security will be strengthened by minimizing secrecy and enhancing the transparency of the Department’s actions. As Secretary Ridge has stated:

[A]s long as we have a transparent democracy ... and a rule of law and a system of checks and balances and press that constantly probes and inquires and citizens that probe and inquire we can meet the goal of enhancing security and at the same time preserving our way of life [A]t the heart of all that is preserving our rule of law that governs our activity and our relationships.³

The Archive encourages the Department to establish its FOIA program with these core democratic values firmly in place.

- **Modify or Affirm Regulations Within 60 Days After Full Consideration of Submitted Comments.**

The Administrative Procedures Act (“APA”) establishes procedures for federal agency rulemaking, which, *inter alia*, require that the agency give notice to the public of a pending rulemaking proceeding; that the public be given the opportunity to comment on the agency’s proposed rulemaking activities; and that the agency consider the public comments before formulating its final rule. 5 U.S.C. §553(b). In this case, the DHS has invoked a limited exception to these notice and comment procedures on the grounds that it has “for good cause” found that notice and comment would be “impracticable, unnecessary, or contrary to the public interest.” *See* 5 U.S.C. §553(b)(3)(B). The Department also has determined that the effective date of the Interim Final Rule should not be delayed. *See* 5 U.S.C. §553(d)(3). Nevertheless, the Department has invited public comment on the Interim Final Rule.

The “good cause” exemption from notice and comment is “narrowly construed and reluctantly countenanced.” *American Fed’n. of Gov’t Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981). While the Department relies on its need to “promptly establish procedures to facilitate the interaction of the public with the Department,” courts generally have held that the mere existence of deadlines for agency action cannot in itself constitute good cause for a §553(b)(3)(B) exception. *Petry v. Block*, 737

² The congressional findings accompanying the 1996 Amendments to the FOIA recognize that the FOIA has “led to the disclosure of waste, fraud, abuse and wrongdoing in the Federal government” and has “led to the identification of unsafe consumer products, harmful drugs, and serious health hazards.” Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 2(a)(1), 110 Stat. 3048 (1996) (Findings).

³ Online Chat Between Secretary Ridge and MSNBC viewed on February 21, 2003 at <<http://www.dhs.gov/dhspublic/display?theme=42&content=80>>.

F.2d 1193, 1203 (D.C. Cir. 1984) (“strict congressionally imposed deadlines, without more, by no means warrant invocation of the good cause exception.”). Although the DHS Interim Final Rule adopts many of the FOIA regulations that have been promulgated by other government agencies, the promulgation of similar rules by other agencies is not a basis for avoiding full consideration of public comments. Through experience with the FOIA processing of other agencies, the public is able to identify problems and recommend solutions that should be fully considered by the Department. See Guardian Federal Savings & Loan Ins. Corp. v. Federal Savings & Loan Ins. Corp., 589 F.2d 658, 662 (D.C. Cir. 1978) (the purpose of the APA notice and comment procedure is to “assure[] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions.”).

The Archive commends the Department’s efforts to promptly establish rules that effectuate access to the records that will be requested under the FOIA. The DHS has not committed, however, to full consideration of submitted comments followed by modification or affirmation of the Interim Final Rule within a reasonable period of time. To be sure, consideration of post-promulgation comments would not cure noncompliance with the notice and comment procedures. Air Transport Ass’n of America v. Dep’t of Transportation, 900 F.2d 369, 379 (D.C. Cir. 1990).⁴ Nevertheless, courts have recognized that there may be circumstances in which “defects in an original notice [could] be cured by an adequate later notice” and opportunity to comment. Id. This is particularly the case when there is a compelling showing that “the agency’s mind remain[ed] open enough at the later stage.” McLouth Steel Prods. Corp. v. Thomas, 838 F.2d 1317, 1323 (D.C. Cir. 1988).

Accordingly, the Department should review in full the comments received regarding the Interim Final Rule and should, within 60 days, modify or affirm the Interim Final Rule in response to the comments received.

- **Establish an Office of Public Disclosure to Manage the Department’s Policy Development and Compliance Related to the FOIA.**

DHS comprises elements of more than 20 different departments, agencies, and offices with distinctive FOIA processing programs. The Department will bring together some 180,000 employees from diverse management structures and disclosure cultures, whose varied responsibilities are recorded in a wide range of different sorts of government records. Given this situation, DHS must take strong steps to ensure public access to government records. The Archive is encouraged that the Department has a Privacy Officer that will report directly to the Secretary.

Similarly, the Archive recommends the establishment of an internal office that manages the Departmental responsibilities related to the FOIA and related statutes, such as the United States Department of Justice’s Office of Information and Privacy (“OIP”). OIP’s responsibilities include (1) coordinating and implementing policy development and compliance for the FOIA and the Privacy Act, including training and counseling Departmental components; and (2) deciding all appeals from denials by

⁴ Section 553 provides “that notice and an opportunity for comment are to precede rule-making.” New Jersey v. EPA, 626 F.2d 1038, 1050 (1980). Courts strictly enforce this requirement because they recognize that an agency is not likely to be receptive to suggested changes once the agency “put[s] its credibility on the line in the form of ‘final’ rules. People naturally tend to be more close-minded and defensive once they have made a ‘final’ determination.” National Tour Brokers Ass’n v. United States, 591 F.2d 896, 902 (D.C. Cir. 1978).

any Department component of access to information under those Acts. The Archive is not recommending that FOIA processing authority be taken away from the components, but only that an umbrella policy and guidance office be established to help bring all of the DHS components up to the level of appropriate and timely disclosure that is mandated by the FOIA. Thus, the Archive recommends that the Interim Final Rule be modified to provide for an Office of Public Disclosure.

- **Involve the Departmental Disclosure Officer in the Development of Records Management Systems That Enhance The Department's Ability to Respond to FOIA Requests and the Development of Guidance to Assist FOIA Requesters.**

One of the largest obstacles to agency compliance with the FOIA historically has been that the agencies lack adequate records management systems. The FOIA has, since 1996, required that agencies provide an index of all of their major information systems, a description of all major information and record locator systems, and a guide for the public detailing how to obtain information. See 5 U.S.C. §552(g). Implementation of these requirements has varied among the federal agencies. The DHS Departmental Disclosure Officer is in a unique position to mount a Departmental effort to accomplish these goals and thereby effectuate Congress's intention that public information should be readily accessible.

The Interim Final Rule provides for decentralized processing by Department components as well as a centralized "Departmental Disclosure Officer" to whom a requester may send a request if the requester "cannot determine where within the Department" to send the request. Sec. 5.3(a). Each component retains responsibility to (1) determine which of the records it generates that are required to be made available in its own or the Department's reading room; and (2) maintain and make available a current subject-matter index of its reading room records. Sec. 5.2. In addition, responsibility for processing the FOIA requests is delegated to each component. Sec. 5.4.

The type of complete decentralization contemplated by the Department's Interim Final Rule potentially will lead to uneven FOIA processing and bureaucratic complexity that will make it virtually impossible for FOIA requesters to obtain satisfactory responses. In order to avoid these problems, the Archive urges the Department to assign to the Departmental Disclosure Officer the responsibility of establishing, as a supplement to the individual efforts of the components, a Departmental FOIA Guide, Departmental information system indices and, Departmental information and records locator descriptions, as well as maintaining a complete, up-to-date listing of all responsible FOIA officials within the Department. All of these materials should be made available on the Department's website and through links from the components' websites.

The issue of intra-Department communications and coordination is, at this early stage of the Department, of critical importance to the Department itself. The Department's November 25, 2002, Reorganization Plan includes the appointment of an Assistant Secretary for Information Analysis, whose responsibilities include integration of information, ensuring timely and efficient access to information by the Department, recommending improvements in information sharing within and outside the Department, and dissemination of information within and outside the Department. At this point, therefore, there is a unique opportunity for the Departmental Disclosure Officer to participate in the evaluation of records systems that is occurring across the Department and, as part of that process, develop Departmental indexes and guides that will assist FOIA requesters in their access to disclosable records.

From the perspective of an FOIA requester faced with a web of diverse components that each emerged from a different bureaucratic experience, the identification of records will be extraordinarily difficult without a Departmental effort to develop adequate indexes. The Department should take advantage of the fact that information management is a critical part of accomplishing its mission to protect homeland security and use its internal evaluation of records systems for the added purpose of developing useful guides and indexes for members of the public.

A good example of a useful guide and useful indices are those provided by the Department of State ("DOS") to FOIA requesters. In the experience of the Archive, the DOS guide explains in clear language how the FOIA works, what is available electronically in the DOS electronic reading room, how the DOS processes FOIA requests, who are the responsible officials and how to contact them, and what records are maintained by the DOS. The easy to use format of the guide and accompanying "Frequently Asked Questions" walk a FOIA requester through the process of making a request and includes links to other useful information, such as the listing of records maintained by DOS components, where relevant. The Guide includes helpful information about records disposition, including destruction of records and transfers of records to the National Archives, and how to request records once they have been transferred to the National Archives.

The integration of guidance concerning records management, records destruction, disclosure of records and archiving of records suggests that the DOS has a comprehensive records retention program. This approach should ensure the development of the most efficient and functional systems for the Department and demonstrate a commitment to meeting the Department's disclosure and archiving responsibilities. In the Archive's experience, many agencies have failed to take similar systematic approaches to carrying out their records management responsibilities.

Finally, the Department Disclosure Officer should maintain on the Department's main FOIA site a comprehensive, up-to-date listing of all responsible FOIA officials within the Department and their contact information. The Archive recently made FOIA requests to 35 agencies regarding each agency's implementation of certain Department of Justice and White House memoranda, and found that the contact information provided by several agencies was incorrect or outdated. A great deal of time was needed to identify correct contacts for these requests. There is a high risk that FOIA requesters who seek records from DHS components will have similar problems. The merging together of a wide range of offices and departments, reorganization of management responsibilities, and physical changes in locations may interfere with efforts to request documents under the FOIA. The Department can demonstrate its commitment to making the FOIA work and to ensuring as much transparency in the Department as is possible by assigning to the Departmental Disclosure Officer these centralized responsibilities to supplement the efforts of the individual components.

Accordingly, the Archive recommends that the Interim Final Rule be modified to specifically require that the Departmental Disclosure Officer fulfill the responsibilities outlined above.

- **Incorporate the Statutory Time Limits Into the Interim Final Rule.**

Congress adopted a time limit provision in the FOIA "in order to contribute to the fuller and faster release of information, which is the basic objective of the Act." H.R. Rep. No. 876 (1974), reprinted in, 1974 U.S.C.C.A.N. 6285, 6289. One of Congress's key concerns in enacting the 1996 Amendments to the FOIA was addressing extensive delays in responding to FOIA requests. Congress amended the FOIA to

include a twenty-day time limit for an agency to respond to FOIA requests “[i]n order to help Federal agencies in reducing their backlog of FOIA requests” H.R. Rep. No. 104-795 (1996) at 26. An agency’s failure within the statutory time period to provide a response that addresses: (1) the agency’s determination of whether or not to comply with the request; (2) the reasons for its decision; and (3) notice of the right of the requester to appeal to the head of the agency if the initial agency decision is adverse, is a constructive denial of the request. See Oglesby v U. S. Dep’t of Army, 920 F.2d 57, 65 (D.C. Cir. 1990) (citing 5 U.S.C. § 552(a)(6)(A)(i)) (additional citations omitted). Congress provided that an FOIA requester may be deemed to have constructively exhausted administrative remedies, and entitled to file a lawsuit against the agency, if the 20-day period has passed without a substantive response to the request or a notice advising of a one-time ten day extension of time for “unusual circumstances” from the agency. 5 U.S.C. §552(a)(6)(C)(i); 5 U.S.C. §552(a)(6)(B).

The statutory time limits set by Congress are rarely met by most government agencies. In the Archive’s experience many agencies fail to acknowledge, let alone respond to, FOIA requests within the 20 days statutory limitation period. See, generally, “Information Management Update on Implementation of the 1996 Electronic Freedom of Information Act Amendments,” GAO-01-493 (Aug. 2002). Several of the components that now comprise the DHS have regularly failed to meet the statutory time limits. Id. at 12, 13. Other of the components have made significant progress in reducing their backlogs and attempting to meet the statutory deadlines. Id. As the Department merges these diverse bureaucracies into an effective agency, the imposition of standards for timely response to FOIA requests will serve the purpose of encouraging those components that have failed to meet their obligations under the FOIA to improve their FOIA processing. The Department has the opportunity at this moment of its initial establishment to create effective, efficient information management programs across its many components. With this comes the prospect of sharing best practices between the components to enhance the overall FOIA processing of the Department. The improvement of component search and review capabilities for FOIA processing will serve the long-term, information management and archival goals of the Department as well.

Thus, the Archive commends the Department for providing that “[o]n receipt of a request, a component ordinarily shall send and acknowledgement letter to the requester.” Sec. 5.6(a)(Responses to requests). This practice will help ensure that the requester is able to track the progress of the request and will contribute to a cooperative working relationship between the agency and the requester. In our experience, the sending of an immediate acknowledgment may assist in preventing the problem of “lost” FOIA requests. The Department of Defense uses a postcard to acknowledge all FOIA requests, and the Archive recommends this method as quick, efficient, and less costly than the transmission of letters to acknowledge requests. The FOIA officer is able to fill out the pertinent information by hand on the postcard and immediately place it in the mail, without additional printing, folding, and envelope-stuffing time. Moreover the cost of the postcards, and the mailing of the cards, is lower than with other methods of acknowledgment.

Yet, the regulations do not adequately set forth the statutory time limit, inform requesters of the time limit, or inform requesters of the remedy for the agency’s failure to meet the time limit. We urge the Department to amend Sec. 5.5 (Timing of responses to requests); Sec. 5.6(b) (Responses to requests; Grants of requests); and Sec. 5.6(c) (Responses to requests; Adverse determinations of requests) as follows⁵:

⁵ Proposed new language is underlined. Proposed deleted language is crossed out.

Sec. 5.5 Timing of responses to requests.

- (a) In general. Components shall respond to requests within twenty days (excepting Saturdays, Sundays, and legal public holidays), except in the unusual circumstances described in paragraph (c) below. Components ordinarily shall respond to requests according to their order of receipt.

Sec. 5.6 Responses to requests

- (b) Grants of requests. Ordinarily, a component shall have twenty ~~business~~ days (excepting Saturdays, Sundays, and legal public holidays), from when a request is received to determine whether to grant ~~or deny~~ the request. ...
- (c) Adverse determinations of requests. Ordinarily, a component shall have twenty days (excepting Saturdays, Sundays, and legal public holidays), from when a request is received to determine whether to deny the request. A component making an adverse determination ...

Incorporation of the statutory time limits into the Interim Final Rule would serve Congressional intent by establishing the Department's commitment to meeting the statutory deadlines set by Congress throughout its diverse components and informing the public of the Department's obligations in responding to FOIA requests.

- **Accept Administrative Appeals In Cases of Agency Failure to Meet Statutory Time Limits.**

The National Security Archive requests that the Department modify the provision of its Interim Final Rule found at Sec. 5.9 (Appeals). That section provides: "[Y]ou may appeal an adverse determination denying your request, in any respect ..." The language of the provision is ambiguous in that it is unclear whether an administrative appeal would be allowed for the failure of a component to meet statutory deadlines for responding to a request.

As noted above, courts have found a constructive denial when an agency has failed to provide a substantive response within the 20-day statutory time limit spelling out (1) the agency's determination of whether or not to comply with the request; (2) the reasons for its decision; and (3) notice of the right of the requester to appeal to the head of the agency if the initial agency decision is adverse. See Oglesby v U. S. Dep't of Army, 920 F.2d 57, 65 (D.C. Cir. 1990) (citing 5 U.S.C. § 552(a)(6)(A)(i)). In the Archive's experience, some agencies take the position that the only remedy for constructive denial of a FOIA request is a lawsuit in court, while other agencies permit administrative appeal of constructive denials.

To the extent the DHS rule can be interpreted as limiting the right to administratively challenge a failure to meet statutory deadlines, the regulation is likely to increase the Department's litigation costs, does not promote judicial economy, and unfairly penalizes requesters who find that the Department fails to respond to a request in accordance with the statutory time limits.

In enacting FOIA, Congress provided for both appeals to the agency processing the request, 5 U.S.C. § 552(a)(6)(A), and judicial review of adverse agency decisions, 5 U.S.C. § 552(a)(4)(B). Both

serve important functions in promoting public access to information. Appeals within the agency allow for more rapid resolution of requests without the costs of litigation and give a high-level agency official an opportunity to review the agency processing of the request and adverse determination. Judicial review provides for independent review of agency determinations. Thus, judicial review is not intended to duplicate the administrative appeals process.

It is beneficial for both the Department and the FOIA requester to be able to use the administrative appeal process to resolve disclosure issues without recourse to a court. First, a rule that encourages litigation will tend to increase the Department's litigation costs, as it generally will cost more to defend lawsuits, and potentially pay attorneys' fees to successful litigants, than it would have cost to resolve them through the administrative appeals process.

Second, providing for administrative review of constructive denials of FOIA requests promotes judicial economy. Courts have consistently emphasized the need for judicial economy and the role that full administrative procedures play in ensuring that courts are not unnecessarily burdened by appeals of agency decisions. Since government agencies can generally resolve matters within their domain more quickly and efficiently than courts, it is in the best interests of all parties involved to see these matters resolved within the agency where possible. This is certainly true in the FOIA context, where the agency has access to the records at issue, but the court and the requester do not. See Vaughn v. Rosen, 484 F. 2d 820 (D.C. Cir. 1973). To the extent that the agency has already begun processing the request, then this processing time will not be wasted. Moreover, FOIA appeal officers should be able to identify problems with agency handling of a request more quickly than a court.

Third, the central goal of FOIA is to promote broad public access to government information in a timely fashion. A regulation that pushes FOIA requesters into court frustrates this purpose. The Department's Interim Final Rule cuts off access to the administrative appeal process for requesters who wish to expeditiously resolve issues at the agency level. The regulation forces the requester whose request has not been acted upon within the statutory time limits to choose only one of the remedies which are then available under the statute, since the Department will not process the appeal. This burden is significant because these requesters, like the Department, will incur substantial costs in pursuing litigation, costs which could be avoided in many cases through the Department's appeals process.

Accordingly, the Archive recommends that Sec.5.9 be revised as follows:

If you are dissatisfied with a component's response to your request, you may appeal an adverse determination denying your request, in any respect, including the failure of the component to respond to your request within twenty days (excepting Saturdays, Sundays, and legal public holidays), to the Associate General Counsel (General Law) [The request must be received] within 60 days of the date of the letter denying your request, or, in the case of an appeal based on the failure of the component to respond to your request within twenty days (excepting Saturdays, Sundays, and legal public holidays), at any time after that period has expired.

- **Notify Requesters of Their Right to Seek Judicial Review for Agency Failure to Meet the Statutory Time Limits.**

In addition, the FOIA provides that once a person makes a request and the government agency does not comply with the statutory time limits for responding to the request, the request “shall be deemed to have exhausted his administrative remedies with respect to the request.” 5 USC §552(a)(6)(C). The availability of immediate judicial review, without taking an administrative appeal, should be stated by the DHS’s rule and should be communicated to requesters who otherwise might find themselves waiting well beyond the statutory time limits with no idea of how to obtain relief. Thus, the Archive recommends that the Department’s acknowledgment of a request should notify requesters of their right under 5 U.S.C. § 552(a)(6)(C) to immediately seek review by a court when the agency fails to respond within twenty days. We suggest amending Sec. 5.6(a) (Acknowledgements of requests) by adding the following sentence to the end of paragraph (a):

The acknowledgement letter shall state: “If the Department fails to respond to your initial FOIA request within twenty days, you may seek review by a court without administratively appealing first or you may file an administrative appeal as provided in Sec. 5.9.”

- **Handle All Requests According to the Date the Request Initially Was Received by the Department.**

The Interim Final Rule provides for decentralized processing by Department components as well as a centralized “Departmental Disclosure Officer” to whom a requester may send a request if the requester “cannot determine where within the Department” to send the request. Sec. 5.3(a). The rules further provide that the “request will be considered as of the date it is received by the proper component’s FOIA office.” Sec. 5.3(a). This arrangement potentially adds significant delay to the processing of the FOIA request. In contrast, referrals and consultations within the Department are “handled according to the date the FOIA request initially was received by the first component or agency, not any later date.” Sec. 5.4(g). The Department offers no basis for this differential treatment of requests to the Departmental Disclosure Officer as opposed to requests to a specific component. In each case the requests are referred to another component within the Department.

We recommend that the DHS change the Interim Final Rule by amending Sec. 5.3(a) as follows:

request will be considered as of the date ~~it is received by the proper component’s FOIA office~~ the FOIA request initially was received by the first component or agency, or by the Departmental Disclosure Office, not any later date. Sec. 5.3(a).

- **Fee Categorization and Fee Waiver Determinations Should be Separate and Not be Conflated.**

The Archive is frequently asked for guidance concerning problems that FOIA requesters have with government agencies. Recently, the Archive has observed a trend among federal agencies to conflate the standards for fee categorization and fee waiver or reduction. The apparent confusion among agency personnel about the appropriate application of these standards potentially will have the impact of discouraging FOIA requesters from exercising their right to view government records. Moreover, the

practices of many agencies potentially will lead to unnecessary litigation as FOIA requesters seek to challenge what appear to be incorrect determinations of the fee issues.

Fee categorization concerns the determination of the type of FOIA requester that has made a request. In particular, the FOIA provides for categorization as a commercial use request, an educational institution request, a noncommercial scientific institution request, a representative of the news media request, or other request. The determination of whether a FOIA requester is obligated to pay for search, review and/or duplication depends on the fee categorization of the requester.

All requesters, other than commercial use requesters, regardless of their fee categorization, are entitled to receive the first 100 pages of duplication without charge and the first two hours of search without charge. A requester may also qualify to have all fees waived, however, if disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government.

In the Archive's experience, the determination of fee categorization and fee waiver has been blended by many agency personnel. The result is that FOIA requesters may be denied the appropriate fee status and the agencies may be more likely to be sued for fee determinations. Courts have overwhelmingly ruled in favor of the FOIA requester when agencies have conflated the fee categorization and fee waiver standards. E.g., Southam News v. INS, 1987 WL 20241 (D.D.C. 1987).

Accordingly, the Archive recommends that the Interim Final Rule include the following statement in Section 5.11 (Fees):

Fee Determinations. A component's determination in response to a request to be categorized as a commercial use request, an educational institution request, a noncommercial scientific institution request, or a representative of the news media request and/or a component's determination to grant or deny a waiver or reduction of fees under paragraph (k) of this section shall include three separate sections. The first section will specifically set forth whether the request has been categorized as a commercial use request, an educational institution request, a noncommercial scientific institution request, a representative of the news media request, or other. The second section shall specifically set forth (1) what services are provided without charge, including, to the extent relevant, the first 100 pages of duplication, the first two hours of search, as well as additional search and review costs, and (2) what charges will be assessed, including the actual or estimated amount of the fees. The third section will specifically set forth the component's determination with respect to any request for a fee waiver or reduction under paragraph (k).

CONCLUSION

For the reasons stated above, the National Security Archive urges the Department of Homeland Security to incorporate the following changes into its interim final regulations: (1) review in full the comments received and, within 60 days, modify or affirm the Interim Final Rule in response to the comments; (2) establish an Office of Public Disclosure to manage the Department's policy development and compliance related to the FOIA; (3) involve the Departmental Disclosure Officer in the development

of records management systems that enhance the Department's ability to respond to FOIA requests and the development of guidance to assist FOIA requesters; (4) incorporate the statutory time limits into the Interim Final Rule; (5) permit administrative appeal of the agency's failure to meet the statutory time limits; (6) notify requesters of their right to seek judicial review for agency failure to meet the statutory time limits; (7) handle all requests according to the date the request initially was received by the Department; and (8) separate and not conflate fee categorization and fee waiver determinations.

The direct and consistent involvement of the Secretary in the Department's disclosure programs and FOIA implementation will enhance public confidence in the Department of Homeland Security. Without such trust, the success of the Department in its mission of protecting domestic security will be in jeopardy. Thus, the Archive urges the Secretary to meet the challenge of ensuring that the public has access to all of the information that the security of the nation permits.

Respectfully submitted,

Thomas Blanton, Director
Meredith Fuchs, General Counsel
Will Ferroggiaro, Director Freedom
of Information Project
The National Security Archive
George Washington University
Gelman Library Suite 701
2130 H Street, NW
Washington, DC 20037
202-994-7000

DATED: February 26, 2003