

March 3, 2022

Office of Special Counsel
1730 M Street NW, Suite 218
Washington, DC 20036-4505

RE: FY2022 Proposed Reg Comments

Dear Office of Special Counsel:

Public Citizen writes to comment on the Office of Special Counsel’s notice of proposed rulemaking entitled “Prohibited Personnel Practices, Disclosures of Information Evidencing Wrongdoing, FOIA, Privacy Act, and Disability Regulations to Conform with Changes in Law and Filing Procedures and Other Technical Changes,” 87 Fed. Reg. 5409 (February 1, 2022). In particular, these comments address the proposed changes concerning the Freedom of Information Act (FOIA) and the proposed changes concerning the filing of complaints and disclosures of information evidencing wrongdoing.

Public Citizen is a nonprofit consumer advocacy organization founded in 1971. On behalf of its nationwide membership, Public Citizen advocates before the courts, legislatures, and administrative agencies for safer consumer products, corporate accountability, worker protection, and openness in government decision making.

Changes Concerning FOIA

Since its founding, Public Citizen has regularly used FOIA to request records related to its advocacy efforts. Public Citizen submits these comments to address five aspects of the proposed regulations that, if finalized, would place unnecessary burdens on FOIA requesters: 1) the proposed requirement that FOIA requests contain the words “FOIA Request”; 2) the proposed provision providing that making a FOIA request is an agreement to pay all applicable fees; 3) confusing and inconsistent language in the opening paragraph of the proposed section on FOIA fees; 4) the proposed provision allowing OSC to charge an additional fee when it provides a special service at its discretion; and 5) the proposed standards for obtaining a public-interest fee waiver.

I. If a request is clearly a FOIA request, it should be processed regardless of whether it states “FOIA request.”

The proposed regulations state that “the request letter and envelope or email subject line should be clearly marked ‘FOIA Request’” and that “[r]equests *must* state in the letter, email, or other prescribed electronic method the words ‘FOIA Request’ or ‘FOIA/Privacy Request.’” Proposed §§ 1820.2(a)(2), (b) (emphasis added). The mandatory nature of this language contrasts with the

language in the current regulation, which states that “[f]or the quickest handling,” the letter and envelope or subject line “should be clearly marked ‘FOIA Request.’” 5 C.F.R. § 1820.2(a)(2).

Agencies have “a duty to construe a FOIA request liberally.” *Inst. for Just. v. Internal Revenue Serv.*, 941 F.3d 567, 572 (D.C. Cir. 2019) (citation omitted). Accordingly, the final rule should make clear that, although it may be a best practice to include the words “FOIA Request,” those are not magic words that must be used for a request to be processed. If a request is received by the agency and understood to be a FOIA request, it should be processed even if it is not labeled “FOIA Request.”

II. FOIA requesters whose fee waiver requests are denied and requesters who agree only to pay a specified amount of fees should not be deemed to have agreed to pay all applicable fees.

Current § 1820.2(c) provides that a FOIA requester will be deemed to have agreed to pay applicable fees up to \$25 “unless the requester asks for a waiver of fees or specifies a willingness to pay a greater or lesser amount.” Proposed § 1820.2(c) changes this language to say that a FOIA requester will be deemed to have agreed to pay all applicable fees “unless the Special Counsel waives fees, the requestor is exempt, or the requestor otherwise qualifies for a waiver of fees.” Thus, under the proposal, a FOIA requester who seeks a fee waiver that is denied will be deemed to have agreed to pay all applicable fees. Moreover, FOIA requesters will be deemed to have agreed to pay all applicable fees even if their FOIA requests specify a willingness to pay only a certain amount.

This proposed provision may have a chilling effect on FOIA requesters. Although we recognize that proposed § 1820.7(d) requires the agency to notify the requester of anticipated fees over \$25, some requesters may not be able to afford \$25 and may be discouraged from filing a FOIA request out of fear that they will be liable for that amount, even if they specify a lower amount in their request.

The final rule should require the agency to notify requesters whose fees waivers are denied of that denial and provide them the opportunity to specify the amount of fees they are willing to pay before any fees are incurred. It should also respect any specification in the FOIA request of the amount of fees the requester is willing to pay.

III. The opening paragraph of the proposed regulation on FOIA fees contains confusing and inconsistent language.

Proposed § 1820.7(a) states that “OSC provides the first two hours of search time and the first 100 pages of duplication free of charge to all requestors. In exceptional circumstances, OSC may charge fees after determining that unusual circumstances exist.” This proposed language is confusing. “Unusual” and “exceptional” circumstances are different concepts in FOIA, and neither set of circumstances allows the agency to charge for the first two hours of search time or first 100 pages of duplication. The final rule should omit the sentence stating that “[i]n exceptional circumstances, OSC may charge fees after determining that unusual circumstances exist.”

In addition, § 1820.7(a) should make clear that requesters in any fee category can receive a waiver or reduction of fees under 5 U.S.C. § 552(a)(4)(A)(iii). Proposed § 1820.7(a) states that OSC charges commercial requesters search, review, and duplication fees, unless the requesters receive a waiver or reduction of fees. The proposed regulation then states that the agency charges educational and non-commercial scientific institutions and representatives of the news media duplication fees. Unlike the sentence addressing commercial requesters, however, this proposed provision does not state that such requesters may receive a waiver or reduction of fees. Likewise, the proposed regulation states that OSC charges “all other requesters” search and duplication fees but does not acknowledge that those requesters may receive a fee waiver or reduction. The final rule should be consistent and should acknowledge that educational institutions, scientific institutions, members of the news media, and all other requesters, as well as commercial requesters, may be entitled to a waiver or reduction of fees under 5 U.S.C. § 552(a)(4)(A)(iii).

IV. FOIA requesters should not be charged an additional fee for special services without permission.

Proposed § 1820.7(e) states that OSC will “ordinarily charge an additional fee when OSC chooses as a matter of administrative discretion to provide a special service, such as shipping records by other than ordinary mail.” The current regulations contain a similar provision. *See* 5 C.F.R. § 1820.7(f). The additional fee, however, may be a burden to a FOIA requester, particularly if that requester is an individual or a non-profit organization. The final rule should state that OSC will not charge additional fees for special services that are not necessary to respond to the FOIA request without receiving advance approval from the FOIA requester.

V. The requirements for a waiver or reduction of fees are overly narrow.

Two aspects of the proposed regulations regarding public interest fee waivers are overly narrow. First, proposed § 1820.7(h)(2)(ii) provides that whether the release is likely to contribute to an understanding of government operations or activities turns on whether the “releasable portions of the requested records” are meaningfully informative about government operations and activities. A requester’s entitlement to a public interest fee waiver, however, “should be evaluated based on the face of the request” and should not turn on whether the records are ultimately found to be “exempt from disclosure” unless they are “patently exempt documents.” *Carney v. U.S. Dep’t of Just.*, 19 F.3d 807, 815 (2d Cir. 1994); *see also, e.g., Citizens for Resp. & Ethics in Washington v. U.S. Dep’t of Just.*, 602 F. Supp. 2d 121, 125–28 (D.D.C. 2009). Accordingly, the final rule should exclude the reference to the “releasable portions” of the requested records.

Second, proposed § 1820.7(h)(3)(ii) provides that, in determining whether the disclosure is “not primarily in the commercial interest of the requester,” OSC will consider “[w]hether any identified public interest is greater in magnitude than that of any identified commercial interest in release.” The relevant question under the statute, however, is whether the commercial interest outweighs the public interest, not whether the public interest outweighs the commercial interest. For disclosure to be “not primarily in the commercial interest of the requester,” 5 U.S.C. § 552(a)(4)(A)(iii), the public interest in disclosure needs to be only equal to the commercial interest. It does not need to be “greater in magnitude than” the commercial interest, and the final rule should not require it to be. The final rule should be revised accordingly.

Changes Concerning the Filing of Complaints and Disclosures of Information Evidencing Wrongdoing

Public Citizen is joining the Make It Safe Coalition's comments regarding the whistleblower elements of this proposed rule. However, we would like to reiterate the following points:

Regulations are designed to implement statutes, setting forth practical guidance for how the law will be interpreted and administered.

Under 5 U.S.C. § 1213, OSC is charged with processing complaints and investigating cases where a federal employee whistleblower discloses wrongdoing by the federal agency employer. Part 1800 of the proposed regulation details how this section of the code will be implemented. We are concerned that section 1800 of the proposed regulation fails to put appropriate limits on OSC discretion in processing disclosures of agency wrongdoing. Without these limits, individual whistleblowers cannot be sufficiently informed of their rights under the law and the necessary steps to enforce those rights.

Only a small percentage of the written disclosures of agency wrongdoing submitted to OSC actually result in a field investigation of documents and witnesses. The proposed regulation provides no guidance on the types of evidence or information required for OSC to initiate a field investigation. The decision is left entirely to the discretion of the OSC representative, making case progression inconsistent and seemingly arbitrary.

The problem continues with the decision to refer the case to the agency head. The statute requires OSC to "determine whether there is a **substantial likelihood** that the information discloses a violation of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety" before referring the case to the agency head for further investigation. The proposed regulation, however, provides no explanation or description of evidence necessary to meet the "substantial likelihood" test.

Without guidance on evidentiary requirements, decisions on case investigation and referral are made at the discretion of OSC without any accountability. Moreover, neither employee whistleblowers, nor the stakeholder community, are given guidance on how to provide the information necessary to meet the "substantial likelihood" test. Thus, whistleblowers are unable to effectively and efficiently pursue their rights. Moreover, OSC is handicapped in its ability to successfully oversee agency ethics.

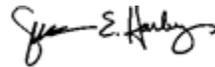
Recommendations

Section 1800 of the proposed regulation should set clear guidelines for OSC decision-making in case investigations and require that information be made available to federal employee whistleblowers. In addition, these employees must be given useful, accessible tools regarding vindicating their rights, including guidance in a language that they can understand.

We request that the Special Counsel convene a public town-hall meeting to hear from employee and management stakeholders to improve these proposed regulations in a manner that effectively protects the rights of whistleblowers and improves the management of OSC investigations based on federal employee disclosures. Public stakeholder dialogue could help create an experience-based record to address issues that are missing from the current regulatory proposal.

Thank you for considering these comments. Please feel free to contact us with any questions.

Sincerely,



Susan E Harley
Managing Director, Congress Watch
Public Citizen



Juley Fulcher
Worker Health and Safety Advocate
Public Citizen