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November 3, 2014

Re: Proposed Rule Amending the Department of Defense Freedom of Information Act (FOIA) Program (DOD-2007-OS-0086-0005), Comments of 13 News Media Organizations

The Reporters Committee for Freedom of the Press ("Reporters Committee" or "RCFP") appreciates this opportunity to comment on the proposed rule published by the Department of Defense ("DoD") on September 3, 2014 amending its Freedom of Information Act ("FOIA") Program (the "Proposed Rule"). We submit these comments on behalf of the coalition of news media organizations set out below.

The Proposed Rule contains numerous proposed revisions to the DoD's policies and procedures implementing FOIA. As representatives and members of the news media, the coalition directs its comments to certain provisions of the Proposed Rule that expressly address FOIA requests submitted to the DoD by members of the news media.[1]

The press routinely relies on FOIA to gain access to government records in order to disseminate information of the highest public concern regarding the conduct of government entities and officials. This is especially true with respect to the DoD, which is responsible for activities and actions taken on behalf of the United States that are of the utmost importance to the American people. The coalition believes that the provisions of the Proposed Rule identified below must be addressed in order to ensure the press can effectively keep the public informed about "what their government is up to."[2]

[1] The coalition does not endorse nor take any position on any portion of the Proposed Rule not specifically addressed herein.

[2] *United States v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989) (citations omitted).

I. Section 286.29 – Initial Determination.

Paragraph (a)(4) of Section 286.29 of the Proposed Rule states:

> "The IDA [initial denial authority] should consult with PAOs [public affairs officers] to become familiar with subject matter that is considered to be newsworthy, and advise PAOs of FOIA requests from news media representatives. The IDA also should inform PAOs in advance when they intend to withhold or partially withhold a record if it appears the withholding action may be a media issue."

The coalition finds this provision of the Proposed Rule deeply troubling. Over the last few years, significant concerns have been raised over the manner in which FOIA requests related to politically sensitive topics are processed. In 2010, it was reported that the Department of Homeland Security was sending FOIA requests to senior political advisors for special scrutiny.[3] In turning over such requests, FOIA officers were asked to provide information including whether or not the requester was a reporter.[4] Just this year, it was reported that a 2009 memorandum from Gregory Craig, Counsel to the President, requested that all executive agencies consult with the White House Counsel's Office with respect to FOIA requests that may involve "White House equities."[5] The revelation has prompted questions regarding the purpose of the memorandum and its effect on federal agencies' legal obligations under FOIA.[6]

Requiring IDAs to, among other things, advise PAOs of all "FOIA requests from news media representatives" serves no legitimate purpose. Public affairs officers have no role to play in responding to FOIA requests. And, apart from fee benefits and expedited processing, there is no part of FOIA that authorizes a request from a member of the news media to be treated differently from any other FOIA request. FOIA is about informing the public about what the government is up to, not informing the government about what the press is up to. This provision of the Proposed Rule should be deleted in its entirety.

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[3] Ted Bridis, Associated Press, *Playing politics with public records requests*, NBC NEWS (Jul. 21, 2010), http://www.nbcnews.com/id/38350993/ns/politics-more_politics/#.VE_ZZfnF98G

[4] *Id.*

[5] Cause of Action, *Grading the Government: How the White House Targets Document Requesters*, CAUSE OF ACTION BLOG (Mar. 18, 2014), http://causeofaction.org/grading-government-white-house-targets-document-requesters.

[6] *See* Josh Hicks, *Lawsuit claims White House hindering FOIA requests*, THE WASHINGTON POST (Aug. 18, 2014), http://www.washingtonpost.com/blogs/federal-eye/wp/2014/08/18/lawsuit-claims-white-house-reviews-hinder-foia-requests/; Jeffrey Scott Shapiro, *Worse than Nixon? Obama White House accused of hiding public information*, THE WASHINGTON TIMES (Jun. 30, 2014), http://www.washingtontimes.com/news/2014/jun/30/white-house-censors-and-slows-release-of-informati/?page=1.

II. Section 286.33 – General Provisions (Subpart F).

There are four paragraphs of Section 286.33 of the Proposed Rule, relating to fees, that the coalition urges the DoD to address.

First, § 286.33(b)(3)(i)(B), which concerns commercial requesters, indicates that a "representative of the news media could make a FOIA request that is for commercial use (e.g., a magazine publisher asking for duty addresses of DoD personnel to solicit them to buy subscriptions to the magazine)." While it is theoretically possible that a FOIA request could be submitted to DoD by a member of the news media for such a purpose, such a scenario is unlikely and, at the very least, uncommon. If a FOIA request is submitted by a member of the news media, there should be a strong presumption that the requestor is entitled to classification as a "representative of the news media" for fee purposes. This portion of the Proposed Rule would benefit from clarifying language to this effect.

Second, § 286.33(b)(3)(ii)(C)(1) of the Proposed Rule provides several examples of news media entitles that would qualify as representatives of the news media for fee purposes. It appears that the proposed DoD rule is attempting to adopt Section 3 of the OPEN Government Act of 2007,[7] which expanded the definition of "representative of the news media," and was subsequently codified at 5 U.S.C. § 552(a)(4)(A)(ii). However, the language of the Proposed Rule differs in two critical and unfortunate ways from that codification. FOIA states that examples of news-media entities include "publishers of periodicals . . . who make their products available for purchase by or subscription by *or free distribution to the general public*."[8] The Proposed Rule, on the other hand, inexplicably truncates the definition to exclude publishers that make their publications available for "free distribution to the general public." There are countless media entities that provide their services to the public for free or through an advertisement-based model, including the overwhelming majority of broadcast and online news outlets. ABC News, National Public Radio, CBS News, Slate, NBC News, Politico, Pro Publica, and PBS are just a handful of examples of organizations that provide news to the public for free. It would be absurd for the DoD not to recognize these and other news organizations that provide free or advertising-supported journalism as representatives of the news media.

Furthermore, the authority under which the DoD is empowered to promulgate regulations regarding its implementation of FOIA, 5 U.S.C. § 552(a)(4)(A)(i), states that

> [s]uch agency regulations *shall* provide that . . . [e]xamples of news-media entities are . . . publishers of periodicals (but only if such entities qualify as disseminators of "news")

[7] OPEN Government Act of 2007, S. 2488, 110th Cong. (2007), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-110s2488enr/pdf/BILLS-110s2488enr.pdf.
[8] 5 U.S.C. § 552(a)(4)(A)(ii) (italics added).

who make their products available for purchase by or subscription by or free distribution to the general public.[9]

While the statute says such examples are "not all-inclusive," the DoD cannot promulgate regulations that are *less* inclusive than what Congress has indicated. As the Supreme Court has held with regard to an agency's construction of a statute which it administers, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[10] Therefore, the coalition urges the DoD to expand its definition of news-media entities to include publishers who make their products available for free to the public, in accordance with the express direction of Congress in the 2007 OPEN Government Act.

Third, § 286.33(b)(3)(ii)(C)(2) of the Proposed Rule states, in part, that "[f]reelance journalists *may* be regarded as working for a news organization . . . ." (italics added). Again, this language appears to largely mirror the language in the 2007 OPEN Government Act[11], which was codified at 5 U.S.C. § 552(a)(4)(A)(iii). However, the language of the Proposed Rule changes the imperative "shall" of FOIA to a permissive "may." As stated above, the authority under which the DoD is empowered to promulgate regulations regarding its implementation of FOIA, 5 U.S.C. § 552(a)(4)(A)(i), states that "[s]uch agency regulations *shall* provide that . . . [a] freelance journalist *shall* be regarded as working for a news-media entity . . . ." The DOD has no power to modify a clear and essential term contained in a statute through the regulatory process.[12] The Proposed Rule must be changed such that it properly reflects the will of Congress.

Fourth, the coalition is concerned that § 286.33(b)(3)(ii)(C)(4) of the Proposed Rule may be interpreted too narrowly by FOIA officers. This paragraph states that "[a] person or entity that merely disseminates documents received pursuant to the FOIA to an audience would not qualify as a representative of the news media because, in this case, the person or entity is not using editorial skills to turn raw materials into a distinct work." While it is true that FOIA defines "a representative of the news media" as a person or entity that gathers information and uses its editorial skills to turn such information into a distinct work for distribution,[13] the Proposed Rule would benefit from clarifying language instructing FOIA officers that it should be interpreted liberally in favor of the requestor. A person or entity that meets the definition of "a representative of the news media" may, in certain circumstances, disseminate documents received pursuant to a FOIA request in full, oftentimes publishing such documents online alongside or as a supplement to a news article or other commentary. This practice is beneficial, and should not lead to the denial of media fee status.

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[9] *Id.* at § 552(a)(4)(A)(ii) (italics added).
[10] *Chevron, U.S.A., Inc. v. NRDC, Inc*., 467 U.S. 837, 842–43 (1984).
[11] OPEN Government Act of 2007, *supra* note 10.
[12] *Chevron*, *supra* note 10.
[13] 5 U.S.C. § 552(a)(4)(A)

III. Section 286.3 – Definitions.

Compelling Need.

First, the Proposed Rule offers an unnecessarily confusing and unwieldy definition of "compelling need" for the purposes of determining when expedited processing is warranted. "Compelling need" is defined, in part, as "when the information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged government activity and the value of the information would be lost if it is disseminated at a later time." This definition incorporates the term "urgently needed," which, as discussed below, is separately defined in the Proposed Rule, in part, as information that "has a particular value that will be lost if not disseminated quickly . . . ." This unnecessarily complicated definition of "compelling need" risks being interpreted inconsistently with the definition provided by Congress in FOIA.[14] Accordingly, to avoid confusion and ensure consistency with FOIA, "compelling need" should be defined simply as: "A state that exists when the failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual, or when the information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged government activity."

Urgently Needed.

Second, the Proposed Rule defines "urgently needed" information for purposes of determining whether there is a "compelling need" that entitles a requestor to expedited processing as information that "has a particular value that will be lost if not disseminated quickly," and further provides the non-exclusive example of a "breaking story of general public interest." The coalition proposes that this definition of "urgently needed" be modified to make clear that the value of the information sought need not be at risk of being lost completely to qualify as "urgently needed." Specifically, the coalition proposes that the definition be modified to define "urgently needed" as a request for information that "has a particular value that will decline over time, and may be lost if not disseminated quickly."[15]

The Proposed Rule goes on to state that "[i]nformation of historical interest only . . . would not qualify as 'urgently needed.'" Accordingly, under the Proposed Rule, a request that

[14] *See* 5 U.S.C. § 552(a)(6)(E)(v)(II) (stating the definition of "compelling need" as, in part, "with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.")

[15] While the coalition does not object to the example cited in the Proposed Rule of a "breaking story of general public interest," it stresses that this is merely an example, and not a limitation on the definition of "urgently needed." There are many instances in which requested information can have a particular value that may be lost if not disseminated quickly apart from a breaking story of general public interest. For example, information may be urgently needed to add additional facts to a story that has already been introduced to the public. Similarly, there may be a breaking news story of immense importance to a particular group of people that may not be of interest to the public as a whole.

appears to seek information "of historical interest only," would be denied expedited processing. The phrase "historical interest only" is ambiguous and invites inconsistent application and potential abuse. There are many instances where information that might appear on its face to be "of historical interest only" is, in fact, being sought to provide context or otherwise inform a current public debate and is thus information that has a particular value that will decline over time, and may be lost if not disseminated quickly. An example of this can be seen in the recent reporting on the Central Intelligence Agency's use of former Nazis as spies during the Cold War, which was based, in part, on information obtained through FOIA requests.[16] While some of the information that formed the basis of that reporting dated back to the 1950s, the article was published shortly after the public was made aware that the Social Security Administration paid millions of dollars in benefits to suspected Nazis after they were forced out of the United States.[17] That "historical" information from the 1950s thus took on new relevance and importance in light of the current widespread public debate over the federal government's policies with respect to former Nazis.[18] Because a request for "historical" records may seek information "urgently needed" by the public, the coalition urges the DOD to strike this language or, at a minimum, clarify this portion of the Proposed Rule to make clear that there may be information of "historical interest" that is "urgently needed" and should qualify for expedited processing, and that any uncertainty regarding whether a FOIA request seeks information that is of "historical interest only" should be resolved in favor of the requester.

The portion of the Proposed Rule's definition of the term "urgently needed" which states that a "news media publication or broadcast deadline unrelated to the news-breaking nature of the information" would not qualify as "urgently needed" should, likewise, be struck or, at a minimum, modified. Information that is "urgently needed"—i.e., that has a particular value that will decline over time, and may be lost if not disseminated quickly—and thus warrants expedited processing, is not limited to information of a "news-breaking nature," a phrase that is not defined in the Proposed Rule. Indeed, there are many instances where information that does not appear related to a breaking news story is urgently needed by the press and the public. For example, information reflecting on the record of a government official seeking re-election may not be considered to be of a "news-breaking nature." Such information, however, is plainly less valuable to the public the day after the election than it is the day before the election. Thus, the additional language included in the Proposed Rule's definition of "urgently needed" concerning information of a "news-breaking nature" is internally inconsistent, invites confusion and misapplication, and should be excised.

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[16] *See* Eric Lichtblau, *In Cold War, U.S. Spy Agencies Used 1,000 Nazis*, THE NEW YORK TIMES (Oct. 26, 2014), http://www.nytimes.com/2014/10/27/us/in-cold-war-us-spy-agencies-used-1000-nazis.html.

[17] David Rising, Randy Herschaft, & Richard Lardner, *Expelled Nazis paid millions in Social Security*, THE ASSOCIATED PRESS (Oct. 19, 2014), http://bigstory.ap.org/article/97f4f581d4a7485e9878075021c49b43/expelled-nazis-paid-millions-social-security.

[18] *See*, *e.g.*, CBS New York & The Associated Press, *Rep. Maloney: Stop Social Security Benefits for Nazi Collaborators*, CBS NEW YORK (Oct. 26, 2014), http://newyork.cbslocal.com/2014/10/26/rep-maloney-stop-social-security-benefits-for-nazi-collaborators/.

Individual Primarily Engaged in Disseminating Information.

Finally, the definition of an "[i]ndividual primarily engaged in disseminating information" in the Proposed Rule is improperly limited. The coalition does not object to the first sentence of the proposed definition, which describes such an individual as "[a] person or entity whose primary activity involves publishing or otherwise disseminating information to the public." This language is identical to that in the current DoD regulations.[19] However, the second sentence of the proposed definition includes language that both confuses the definition and could be interpreted to exclude individuals who would otherwise satisfy the prerequisites for expedited processing. It states that such a person must establish that dissemination of information is their "principal professional activity or occupation, and not an incidental or secondary activity." (Emphasis added). There are individuals who are primarily engaged in disseminating information to the public for whom it is not a profession or occupation. Such individuals may include bloggers and others who are not paid for their work. Adding the word "professional" to this definition unnecessarily limits the scope of requesters who are entitled to expedited processing, is inconsistent with the spirit of FOIA and the President's stated commitment to a transparent government,[20] and represents a backwards step from the current definition used by the DoD.[21] Therefore, the second sentence of the definition in the Proposed Rule should be deleted.

IV. Conclusion

The coalition appreciates the DoD's effort to update its policies and procedures for complying with FOIA. We believe that incorporating the specific comments set forth herein into the DoD's final regulations will assist it in honoring its obligation to provide information to the public under FOIA.

Sincerely,

The Reporters Committee for Freedom of the Press
American Society of News Editors
Association of Alternative Newsmedia
Courthouse News Service
Dow Jones & Company, Inc.
Investigative Reporting Workshop at American University
National Press Photographers Association
News Corp.
The Associated Press
The McClatchy Company
The National Press Club
The Seattle Times Company
Tribune Publishing Company

[19] 32 C.F.R. 286.4(d)(3)(ii)
[20] Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009), *available at* https://www.federalregister.gov/articles/2009/01/26/E9-1773/freedom-of-information-act.
[21] 32 C.F.R. 286.4(d)(3)(ii)