The Freedom of Information Act (FOIA) guarantees public access to the records of federal agencies. It embodies the view that government works best when it works in the open. On the Friday between Christmas and New Year's Eve, the Department of the Interior quietly published a proposed regulation that will make it harder for the public to access records. While most of Interior was shut down due to a lapse in appropriations, it seems that shielding itself from public scrutiny was too important to delay.

This move isn't as surprising as it is disappointing. Transparency can prove nettlesome to the federal government, in no small part because the documents disclosed under FOIA sometimes reveal inconvenient truths. That has been the recent experience at Interior. For example, records obtained through FOIA demonstrated that Interior's unprecedented review of national monuments was driven by a desire to open conservation lands to mineral development, and others revealed the high costs associated with use of private jets by former Secretary of the Interior Ryan Zinke.

Interior's assault on transparency has simmered since the first year of the Trump Administration when the Bureau of Land Management (BLM), which manages almost 250 million acres of public lands, identified FOIA as a "burden" on energy development in an internal memorandum leaked to the Washington Post and recommended that the Department take steps to reduce its use. Pause a moment to consider this. The BLM manages public lands *on behalf of the public*, not energy companies, yet it wants to suppress the right of citizens to access information on its work. Seeing the task of transparency as a "burden" is itself telling. While providing public access to records requires a fair degree of time and resources, if done properly, it is part of every federal agency's job, by law.

Before addressing the substance of the proposed regulation, let's identify with specificity the legal obligations imposed by FOIA. The Act requires that "each agency, upon any request for records" that are "reasonably described," other than certain records exempted from disclosure or already available to the public, "shall make the records promptly available to any person." Absent unusual circumstances, agencies must respond to requests within 20 working days, although these deadlines are rarely met.

The Act also authorizes agencies to recover certain fees from requesters—generally those for document search and duplication—but directs that "[d]ocuments shall be furnished without any charges or at a [reduced] charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." Historically, Interior in keeping with the practice at other federal agencies

has generally waived fees for the media, scholars, and non-profit organizations.

The most significant—and legally suspect—component of Interior's proposal would allow the bureaus (like BLM) to "impose a monthly limit for processing records" in response to a request. Nothing in FOIA authorizes such limitations. Rather the law places an unflagging obligation on federal agencies to provide records to those requesting them by strict deadlines. That Interior is falling short of that statutory obligation does not justify placing hard limits on the number of records it will process in response to a request.

The creation of such limits is particularly concerning because it would enable the Department to delay production of those records it would prefer to keep secret by producing marginally responsive records each month and then declaring that the limit had been reached. One need only scan the documents produced in response to requests seeking documents related to the national monument review to understand the potential for obstruction created by this change: the Department produced 23 volumes of documents (each thousands of pages long), many of which constitute emails with messages like "[if] you want to do a quick catch up . . . can get me on cel[l] number below tonight or tomorrow." (This transcribes the third record in the first volume produced). I don't fault Interior for producing such records, and I commend the agency for deciding to provide public internet access to records in response to these particular requests, but their prevalence creates significant risk of gamesmanship should monthly limits be adopted.

Of similarly questionable legal provenance, the proposed regulation would demand that requesters identify the "discrete, identifiable agency activity, operation, or program" of interest. FOIA requires only that a request be "reasonably described," not that it be connected to a discrete activity. Indeed, often the public may only learn about a "discrete, identifiable agency activity" through a FOIA request. For example, a citizen concerned about the influence of industry in Interior's push to expand oil drilling might submit a request seeking all correspondence between the Secretary and the American Petroleum Institute, an industry association. Such a request would appear adequate under FOIA but might be rejected under the proposed rule.

The proposed rule would also eliminate the existing procedure through which a component of Interior will forward FOIA requests more appropriately addressed to other components of the Department. An outside party may not know which component of Interior serves as the custodian of particular records. For the less sophisticated, this change will likely obstruct the right to obtain records. The most determined will send duplicative requests to every conceivable component, increasing the number of distinct requests received by Interior.

Interior also proposes to change the manner it reviews requests to waive fees under FOIA's public interest standard. Existing regulations provide that the bureau receiving a request will waive fees if it determines that disclosing requested information is "[i]n the public interest because it is likely to contribute significantly to public understanding of government operations or activities" and that the requester does not primarily pursue its own commercial interests. In making that assessment, the regulations admonish that "[t]he bureau must not make value judgments about whether the information at issue is 'important' enough to be made public; it is not the bureau's role to attempt to determine the level of public interest in requested information." The proposal simply deletes that admonition whole-cloth. While the substantive effect of this proposed change is unclear, it is deeply troubling that Interior would propose to eliminate language requiring it to process fee waiver requests even-handedly.

The Department justifies its proposed rule based on an up-tick in the number of FOIA requests and related litigation, and the costs associated with processing them. In its internal memorandum, the BLM reported receiving about 1,000 requests in 2017 and spending $2.8 million, and the Department reports receiving over 8,000 requests in 2018, a thirty percent increase since 2016.

Those numbers of requests are likely explained by the sheer volume of decisions Interior has made in its rush to erase every vestige of the Obama Administration and slash regulations designed to protect public health and the environment, not to mention the legion of ethics problems that plagued the recently-departed Secretary.

Moreover, the numbers simply don't support the suggestion that Interior faces a FOIA emergency requiring dramatic intervention. Other federal agencies receive and process vastly more FOIA requests and have done so successfully for years. In 2017, the Forest Service—the federal agency that most closely resembles the BLM in terms of mission—received 1,832 and processed 1,836 requests, and the Department of Agriculture, which houses the Forest Service, received 25,461 and processed 24,006. That same year, the Department of Labor received 15,813 and processed 15,946, the Environmental Protection Agency received 11,518 and processed 10,802, and the Department of Homeland Security received more than 350,000 and processed more than 367,545. Each of these agencies receives and processes far more FOIA requests each year than the number that Interior suggests is unmanageable. And the $2.8 million of costs cited by the BLM is hardly a rounding error in its more than $1.1 billion that the Trump Administration is currently requesting for the agency.

It's also worth noting that publishing the proposed rule during the government shutdown

would appear to conflict with the Federal Register's procedures and possibly the Antideficiency Act. On December 10, 2018, the Office of the Federal Register explained that in the event of a government shutdown—as occurred on December 22, six days before publication of the proposed rule—the Federal Register cannot publish documents "related to normal or routine activities of Federal agencies, even if funded under prior year appropriations." During such a period, the notice requires agencies to provide a "transmittal letter" indicating that "publication in the Federal Register is necessary to safeguard human life, protect property, or provide other emergency services consistent with the performance of functions and services exempted under the Antideficiency Act." It's hard to conceive of any justification for the proposed rule that would qualify under that standard.

For whatever cause, Interior *has failed* to live up to its obligation under FOIA. I can personally attest to that fact as I submitted two requests in late October and as of the time of this writing and have yet to receive any response—no partial production of documents, no denial of my request, and no indication of when the Department will turn to it. This delay is far beyond the 20-working-day deadline imposed by FOIA. I have no doubt that many who have filed requests have had similar experiences.

I don't fault the career civil servants at Interior who administer FOIA. I suspect they are doing the best they can with limited resources and a challenging task to convince leadership to give them the attention they need to locate responsive records. Interior should, however, tackle that problem head-on—by devoting additional resources, modernizing records management practices, reforming procedures to promote efficiency, and proactively providing information on-line to reduce the need for FOIA requests—rather than using its own failure as an excuse to erect new, possibly illegal, barriers to the public's right to information.

Interior welcomes public comment on its proposal for thirty days, although it's hard to take its commitment to a public process seriously when the timing of the proposed rule was so clearly designed to avoid scrutiny. I hope that it sees the error in its approach. Earlier this week, I filed a comment on behalf of twenty-four law professors requesting a sixty-day extension of the comment period to allow the public a robust and meaningful opportunity to provide views.

When Congress enacted FOIA, the Report published by the House of Representatives explained the need for the law: "A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies." Those words were prescient and important and Interior should strive to honor rather than subvert them.

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