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19 October 2011

Caroline A. Smith  
Office of Information Policy  
U.S. Department of Justice  
Suite 11050  
1425 New York Avenue, NW  
Washington, DC 20530-0001

Re: FOIA Request – Comments on Proposed Rule DOJ-OAG-2011-0005

Dear Ms. Smith:

On behalf of National Security Counselors, I wish to applaud your efforts to streamline the DOJ FOIA Regulations and bring them in line with the current state of FOIA jurisprudence. We strongly second all the comments made by our colleagues at Public Citizen (especially the final comment regarding the inappropriate definition of “news media”) as well as those made by the Office of Government Information Services. However, we find that two aspects of these Proposed Rules have not been addressed by any other commenters, and we respectfully offer our thoughts on them.

*Responses to requests:*

Section 16.6(d)(3) specifies that denial letters shall include “[a]n estimate of the volume of any records or information withheld, for example, by providing the number of pages or some other reasonable form of estimation.” However, such an estimate by itself does not meet the requirements of the FOIA case law in instances in which documents are withheld in their entirety. In such cases, an agency is required to include (at a minimum) a list of the withheld documents in any denial letter. *See Shermco Indus. v. Sec’y of the U.S. Air Force*, 452 F. Supp. 306, 317 n.7 (N.D. Tx. 1978) (“A person cannot effectively appeal a decision about the releasability of documents . . . if he is not informed of at least a list of the documents to which he was denied access . . . and why those decisions were made. Denial of this information would in all likelihood be a violation of due process as well as effectively gutting the reasons for applying the exhaustion doctrine in FOIA cases.”); *see also Va. Transformer Corp. v. DOE*, 628 F. Supp. 944, 947 (W.D. Va. 1986) (“determination” response sent to a person requesting information under FOIA must include at least “a statement of what the agency will release and will not release, including a list of the documents that are releasable and withheld . . .”) (quoting

*Shermco*); *Reith v. IRS*, No. 80-87, 1980 U.S. Dist. LEXIS 14188, \*13 (N.D. Ind. Sept. 10, 1980) (same); *Marschner v. Dep't of State*, 470 F. Supp. 196, 199 (D. Conn. 1979) (same).

In accordance with *Shermco* and its progeny, DOJ should amend this section by adding the sentence, “In instances in which a DOJ component has withheld one or more records in their entirety, the denial letter shall include, at a minimum, a list of the withheld documents.”

*Fees in excess of \$25:*

Section 16.10(e) states:

In cases in which a requester has been notified that the actual or estimated fees are in excess of \$25.00, the request shall not be considered received and further work will not be completed until the requester commits in writing to pay the actual or estimated total fee. Such a commitment must be made by the requester in writing, must indicate a given dollar amount, and must be received by the component within 30 calendar days from the date of notification of the fee estimate. If a commitment is not received within this period, the request shall be closed.

There are two major issues with this statement. The first is that it cannot be reconciled in its current form with the clear rule, recognized in Section 16.10(d)(3), that all non-commercial requesters are entitled to two free hours of search and 100 free pages of duplications, period. As in, if a non-commercial requester files a FOIA request in which he clearly refuses to pay any fees, and a DOJ component estimates that it will accrue charges in excess of \$25 and accordingly requests a commitment from the requester, the DOJ component *must* still perform up to two hours of search and provide up to 100 pages of duplications if the requester still refuses to pay any fees, or for that matter *even if the requester never responds*. The DOJ cannot close the request within 30 days because the requester relied on his clear right under FOIA to up to two hours of search time and 100 pages of duplications.

Similarly, the DOJ component may not require, as this Proposed Rule states, that the requester commit to paying “the actual or estimated total fee” or else face the closure of his/her request. If a requester commits to paying up to a set amount of fees (e.g., \$100), and an agency determines that it will cost more than that to completely process the request (e.g., \$500), the agency must nevertheless perform a search for as much time as will be covered by the commitment, allowing some margin of error for duplication fees. The agency cannot simply say, “Promise to pay whatever we charge or we will not process your request at all.”

As a corollary to these two items, it is therefore improper to consider a request to “not be received” until the fee issues have been resolved. Agencies are allowed to toll the processing time of FOIA requests while fee issues are resolved, but they are not allowed to pretend that they never received them. For all non-commercial requesters, the agency has twenty business days to respond to a FOIA request. If, after performing a two-hour search (as well as a search for which the requester has committed to pay a set amount), the agency cannot *continue its search* without a further fee commitment, it may then toll the response deadline (presuming that all this took place within the first twenty days) until an arrangement can be reached. But the clock is still

running for the time it is performing the initial two-hour search. Consider the following example:

1. Requester submits a FOIA request to DOJ on August 1, 2011. He agrees to pay for two additional hours of search and any duplication fees.
2. DOJ acknowledges receipt of this request and categorizes Requester as an “all other” requester.
3. DOJ commences searching for records responsive to Requester’s request.
4. On August 19, 2011, DOJ informs Requester that it has completed the four hours of search and cannot continue searching unless Requester commits to paying for approximately three more hours of searching.
5. On September 9, 2011, Requester refuses to pay any more fees.

In this scenario, DOJ must complete its processing of the request and release any records located in the first four hours of search by September 16, 2011, five business days after Requester refused to pay more fees, or else lose its ability to charge search fees. Fifteen business days passed while DOJ was performing the first four hours of search (two free hours and two hours for which Requester agreed to pay). DOJ does *not* have until October 7, 2011 (twenty business days after the refusal to pay more fees) to complete the processing of the request, as would be the case if the request were not considered to be received until after the fee issue had been resolved. This is not an academic argument; some federal agencies (including some DOJ components) currently maintain that only a commitment to pay *all* fees will suffice, and anything less is grounds for closing the request unprocessed. Such an interpretation is in stark opposition to the vast corpus of case law on FOIA fee provisions.

Thank you for your consideration of our comments. If you wish to discuss any of our recommendations, please do not hesitate to contact me at the above address.

Sincerely,



Kel McClanahan  
Executive Director