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April 20, 2011

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

Re: OAG Docket No. 140  
Freedom of Information Act Regulations, 76 FR 15236

Dear Ms. Smith:

OMB Watch welcomes the opportunity to comment on the Department of Justice's (DOJ) proposed Freedom of Information Act (FOIA) regulations. As a nonprofit organization dedicated to open government, accountability, and citizen participation since 1983, OMB Watch has long worked for improvements to the FOIA process. Ensuring that agencies have up-to-date FOIA regulations that support transparency is a crucial element for the proper functioning of the FOIA system, and we appreciate DOJ's steps to update its FOIA regulations.

We wish to call particular attention to the elements of the proposal that relate to proactive disclosure online; access to law enforcement, intelligence, and terrorism records; and the fee schedule for responding to FOIA requests.

We appreciate the revisions in § 16.2 that emphasize the responsibility to proactively disseminate information online. The Electronic Freedom of Information Act Amendments of 1996 (P.L. 104-231, 110 Stat. 3048) requires agencies to post online records that have been released in response to a FOIA request and that are likely to become the subject of subsequent requests, along with an index of these records. President Obama, in his Jan. 21, 2009 FOIA memo, and Attorney General Holder, in his March 19, 2009 FOIA memo, expanded on this basis to establish agencies' responsibility to post information online in advance of receiving a FOIA request. OMB Watch strongly supports online disclosure both proactively and in response to requests.

We applaud DOJ's many proactive disclosures, as described in DOJ's 2011 Chief FOIA Officer Report, and hope that the revised regulation will support even more such disclosures. At the same time, we note that the revised regulation eliminates reference to the index of such records required by E-FOIA. Compliance with section (a)(2) of FOIA is a critical factor of government transparency, and we hope that the revised regulation will not detract from needed efforts to

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1742 Connecticut Ave. NW  
Washington, DC 20009

tel: 202.234.8494  
fax: 202-234.8584

email: [ombwatch@ombwatch.org](mailto:ombwatch@ombwatch.org)  
web: <http://www.ombwatch.org>

continually improve the indexing and usability of information proactively disclosed. We further suggest that DOJ explore posting online all responses to FOIA requests that were not jointly made under the Privacy Act, a practice that the Department of Defense has begun to implement and that was recommended in *Moving Toward a 21st Century Right-to-Know Agenda*, a 2008 report by OMB Watch and other transparency advocates.

In addition, we have concerns about the proposed revision to § 16.4(a), which appears to deviate from the statute. The proposed revision states that records subject to 5 U.S.C. 552(c) “shall not be considered responsive to a request” (emphasis added). However, the statutory language states that the agency “may treat the records as not subject to the requirements of this section” (emphasis added). The regulation thus appears to foreclose the possibility of the agency exercising its discretion to disclose the records. This would seem to contravene the intent of Attorney General Holder’s FOIA memo, which states that “an agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.” OMB Watch urges you to reword the provision to use “may not” rather than “shall not” and restore the flexibility envisioned in the statute and by Attorney General Holder.

Finally, we object to some of the fee changes in the proposed regulation. OMB Watch strongly supports minimizing the fees charged to FOIA requesters and charging no more than the actual cost of fulfilling the request. We appreciate the changes in § 16.10(c)(2) and § 16.10(d)(4), reducing the cost of copies and increasing the minimum amount for which a fee will be charged. However, we are concerned about the revisions to personnel costs in § 16.10(c)(1)(ii). These changes would replace charges per quarter hour of \$4.00 for clerical personnel, \$7.00 for professional personnel, and \$10.25 for managerial personnel with a new fee structure of \$13.00 for administrative personnel and \$16.50 for professional personnel.

These changes could increase fees by as much as \$36 per hour, an increase of 225 percent. This extraordinary increase could unduly increase the burden on requesters and result in some requesters withdrawing requests because of the high cost associated with fulfilling it. Surprisingly, these fees are not comparable to recent fee changes conducted by other agencies. In the FOIA regulations adopted on April 5, 2011, by the Administrative Conference of the United States (76 FR 18635), the agency sets fees per quarter hour at \$5.00 for clerical personnel, \$10.00 for professional personnel, and \$15.00 for managerial personnel. DOJ should explain its calculations and reduce the proposed fee increase to be more in line with lower fees used by other agencies.

OMB Watch appreciates the opportunity to comment on DOJ’s proposed FOIA regulations.

We hope you take our recommendations into consideration. If you have questions about our comments or want to discuss the issues further, please feel free to contact us.

Sincerely,



Sean Moulton  
Director, Federal Information Policy  
OMB Watch



Gavin Baker  
Federal Information Policy Analyst  
OMB Watch