The National Security Archive

The George Washington University
Gelman Library, Suite 701
2130 H Street, N.W.
Washington, D.C. 20037

Phone: 202/994-7000
Fax: 202/994-7005
nsarchiv@gwu.edu
www.nsarchive.org

February 7, 2007

Via Facsimile (703) 613-3007
Chief of Information Management Services
Central Intelligence Agency
Washington, DC 20505

RE: Request for Public Comment on CIA Proposed Amendment of Regulations on Public Access to CIA Records Under the Freedom of Information Act, 72 Fed. Reg. 694 (January 8, 2007)

To Whom It May Concern:

The National Security Archive (the "Archive") submits these comments regarding the Central Intelligence Agency's ("CIA" or "the Agency") proposed amendment to its Freedom of Information Act ("FOIA") regulations governing fees for the processing of FOIA requests, 72 Fed. Reg. 694 (Jan. 8, 2007) ("Proposed Rule").

The Archive is a not-for-profit foreign policy research institute that uses FOIA to assemble and publish indexed collections of declassified government agency records documenting key U.S. foreign policy issues. The Archive's publications are widely distributed in print and electronic formats. As part of its mission to broaden access to the historical record, the Archive is a leading user of the FOIA and regularly submits requests to the CIA.

One of the reasons the Archive is commenting on these Proposed Regulations is because processing fees charged by the CIA have been a recurring problem for requesters and, in particular, the Archive. The Archive has been forced to sue the CIA two times to enforce its right under the FOIA to be treated as a representative of the news media. Despite a court order issued in 1990 against the CIA providing that the Archive was to be treated as a representative of the news media, the CIA revised its processing regulations in 1997 to alter the definition of representative of the news media in a manner that the CIA believed rendered that court ruling irrelevant, and which was invalid under the governing law. *See National Security Archive v. Dept of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (Ruling that the Archive is a representative of the news media); *National Security Archive v. Central Intelligence Agency*, No. 88-501 (D.D.C. Jan. 30, 1990) (same); 32 C.F.R.1900.02(h)(3) (revision of definition of representative of the news media that adds new criteria to the definition) (published as an Interim Rule, 62 FR 32479 (June 16, 1997)).

In 2005, the CIA began refusing to accord news media status to the Archive, in purported reliance on the 1997 revised, invalid regulations. The CIA then contended that the Archive had

no right to administratively appeal those illegal determinations. Thus, the Archive was forced to sue the CIA for a second time to enforce its right to be treated as a representative of the news media. Only after a complaint and motion for summary judgment had been filed by the Archive in the United States District Court for the District of Columbia did the CIA purport to reverse its determinations for the 42 FOIA requests at issue, but even then the CIA fell short of committing to abide by controlling judicial precedents. This history demonstrates how the Agency's frequent changes of policy can impact FOIA requesters and how an agency can use its fee policy as a tool to discourage FOIA requesters. In fact, the CIA collected only $4732.80 in fees in FY 2006 but incurred costs of $8.87 million for FOIA processing and $1.19 million for FOIA-related litigation activities. So, it is hard to imagine that any fiscal motivation was behind these changes in policy. CIA Annual FOIA Report for FY 2006, available at http://www.foia.cia.gov/annual_report.asp.

Introduction

The CIA's activities and operations are of tremendous interest to the public. The Agency's transparency serves the public interest by ensuring that the Agency remains accountable to the democratic values of our nation. The value of transparency in government, even during a time of grave national security concern, was recognized with the enactment of FOIA. As President Johnson proclaimed when he signed the Freedom of Information Act into law against the backdrop of the Vietnam War and the Cold War, "a democracy works best when people have all the information the security of the nation permits." President Johnson's Statement upon Signing the Freedom of Information Act, 316 Pub. Papers 699 (July 4, 1966).

An honest and efficient FOIA process is essential to ensuring maximum accountability in the activities of the CIA. Too often agencies have relied upon FOIA processing fees to limit the amount of information that is released to the public. Moreover, as is demonstrated by the disparity between the cost of the CIA's FOIA program and the amount collected in fees, the time-consuming and resource draining effort expended on fee disputes may not be economically rational. Prohibitive fees or prolonged fee disputes discourage the public from pursuing requests for information. The legislative history of the FOIA, however, demonstrates that it is Congress' intent to ensure that fees be fair and uniform, and not be used a barrier to citizens' access to government information. S. Rep. No. 93-854, at 163 (1974).

The Freedom of Information Reform Act of 1986, Pub. L. 99-570, amended the fee provisions of the FOIA and directed the Office of Management and Budget ("OMB") to promulgate a uniform fee schedule and guidelines for agencies regarding the requirements for the charging and waiving of fees under FOIA. In 1987, pursuant to public notice and comment, OMB issued its Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10012 (Mar. 27, 1987) ("OMB Guidelines"). The OMB Guidelines were intended "to establish a consistent government-wide framework for assessing and collecting FOIA fees." 52 Fed. Reg. at 10017. Among the provisions of the OMB Guidelines are definitions for five categories of requesters (commercial, educational institution, non-commercial scientific institution, representative of the news media, and all other) and a description of what fees may be charged to each category.

Elimination of Search and Review Fees for Most Requesters

The Proposed Rule purports to eliminate search and review fees for all categories of FOIA requesters except for prisoners in a penitentiary or correctional facility. §§ 1900.20(f)-(g). If the rule is intended to eliminate search and review fees for all requesters aside from those in a penitentiary or correctional facility, then there is no apparent need to define other categories of requesters, particularly when the definitions in the Proposed Rule differ from those in the OMB Guidelines and those set forth in judicial decisions. With the exception of the narrow category of prisoner-requesters, the use that a given requester will make of records should be entirely irrelevant under the proposed fee scheme. Therefore the CIA need not, and to avoid confusion or misinterpretation, should not, include § 1900.20(a), "Categories of FOIA Requesters," in its final rule.

If the final rule does retain requester categories then the definitions should be revised because they conflict with the OMB Guidelines and binding judicial precedent. In particular, the proposed definition of "representative of the news media" inappropriately uses the word "general" to describe the type of circulation a news media requester must demonstrate in order to fall within the news media category. When it promulgated the Guidelines in 1987, OMB removed the word "general" from its proposed language describing how a publication is circulated, stating that the intention was "to refer to a newsworthy product that was broadcast or published in a manner that made it *available* to the general public, not that it had to have an exclusively general content or that it had to be circulated exclusively to a general audience." 52 Fed. Reg. at 10015. The CIA should remove the word "general" and clarify that a requester's publication must be *available* to any member of the public and not that the publication must be targeted at the public generally or as a whole. This revision of the definition is supported by the decision of the Court of Appeals for the District of Columbia Circuit, which interpreted the FOIA's news media provision broadly, holding that a representative of the news media is a person "that gathers information of *potential* interest to a *segment* of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes the work *to an audience*." *National Security Archive v. Dept of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (emphasis added). This definition is binding upon the CIA, pursuant to a related case in which the District Court for the District of Columbia adopted the *National Security Archive v. Dept of Defense* decision. *National Security Archive v. Central Intelligence Agency*, No. 88-501 (D.D.C. Jan. 30, 1990).

Moreover, the proposed news media language does not explicitly recognize the standing of freelance journalists or other unaffiliated media representatives to qualify as representatives of the news media or the significance of prior publication history in determining news media status. The OMB Guidelines specifically stated that freelancers "may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it," 52 Fed. Reg. at 10018, and referred to the significance of prior publication history. The CIA definition, if retained, should incorporate similar language.

Agreement to Pay and Prepayment of Fees Requirements

The proposed regulation requires that each FOIA requester submit a fee commitment with the initial request, and states that the CIA "will not accept any FOIA fee request unless the requester has agreed in writing to pay all applicable fees." 72 Fed. Reg. 694. The CIA will contact any requester that fails to include the agreement, but the burden is then placed on the requester to respond within thirty days or the request will be closed automatically. Under the FOIA, all non-commercial use requesters are entitled to two hours of free search time and 100 pages of records without charge. Many FOIA records requested under FOIA can be found within two hours and are not longer than 100 pages. Thus, fee charges are completely inapplicable in those cases. Moreover, most agencies' FOIA regulations include a presumption that the filing of a FOIA request is a commitment to pay up to $25 in fees. The benefit of that approach is that it makes it possible for relatively small FOIA requests from ordinary members of the public to proceed with minimum administrative complications.

The CIA's Proposed Regulation, by contrast, is likely to impose a significant administrative burden on the Agency, given that it will have to correspond with many requesters about the fee commitment. It also is likely to discourage members of the public who do not regularly make FOIA requests and will be deterred by a letter demanding an open-ended fee commitment. In light of the significant difficulties that agencies have had in communicating effectively with requesters, this process may result in the canceling of requests that would have been subject to no fees or very limited fees. Accordingly, the CIA should adopt a rule that presumes that the filing of a FOIA request is a commitment to pay up to $25 in fees and retain its existing rule that requires a specific fee commitment only when the cost of the processing will exceed $100.00. 32 C.F.R. § 1900.13 (e).

Moreover, under the proposed rule, a requester is required to submit the fee agreement even if the requester also is seeking a public interest fee waiver. The rule provides no guarantee that such a requester will receive a ruling on the fee waiver request before the CIA incurs costs in processing the request and no opportunity to withdraw the request if costs are incurred and the fee waiver is subsequently denied. Thus, the Proposed Rule may deter members of public interest organizations from submitting to the CIA the very sort of FOIA requests that Congress sought to encourage when it enacted into law the public interest fee waiver provisions. Requesters seeking public interest fee waivers, or ordinary requesters of limited means, may decide not to file a request if they must agree to pay all fees before receiving any estimate of those fees from the Agency.

The CIA also proposes prepayment of fees in circumstances that conflict with the FOIA, the OMB Guidelines and is inconsistent with another provision in the proposed regulations. Under the proposed § 1900.20(h)(2)(i)(C), the CIA "will honor a requester's specified preference of form or format of disclosure only if . . . [t]he requester prepays the fees billed by the agency." Yet, in proposed § 1900.20(l), the regulation states that "[t]he CIA may require an advance payment only as specified in this section." That section specifically tracks the language of the OMB Guidelines, which limits allowable advance payment requirements to two defined situations: when the agency estimates that fees associated with a request will exceed $250; or when a requester has previously failed to pay fees on time. 52 Fed. Reg. at 10020. The FOIA

mandates that "an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B). This statutory provision addresses only agency obligations with regard to maintaining and generating records in electronic form, and in no way contemplates or authorizes enhanced fee requirements in conjunction with these obligations. Indeed, the FOIA specifically limits prepayment of fees to the two circumstances specified in the OMB Guidelines. 5 U.S.C. § 552(a)(4)(A)(v). In preparing its final rule, the Agency should remove the prepayment requirement in § 1900.20(h)(2).

Duplication Fees

Under the FOIA, agencies must limit fees charged to "reasonable standard charges" for search, review, and duplication, and they may only recover "direct costs" incurred in processing a FOIA request. § 552(a)(4)(A). The OMB Guidelines define "direct costs" for duplication as "those expenditures which an agency *actually incurs* in . . . duplicating . . . documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing work . . . and the cost of operating duplicating machinery." 52 Fed. Reg. at 10017 (emphasis added). Most agencies charge a standard per-page duplication charge.

The proposed regulation significantly alters the current CIA policy regarding duplication rates. The amended duplication rates will include two components, "the salary of the individual performing the duplication and the cost of operating duplication machinery." 72 Fed. Reg. at §1900.20(h)(3). The CIA's unique new calculation of duplication fees consists of flat rates for specified page ranges, rather than a standard charge for each page. There is no explanation as to how these rates were derived, or what portions of each rate covers staff costs compared to equipment costs. The result is that a requester who obtains 101 pages of documents from the CIA will be charged $25, while another requester who receives 150 pages will also be charged $25. The first requester pays $25 for a single page, but the second pays only 50 cents per page for each page received beyond the 100 pages that are copied free of charge. In addition, there is an upper limit to the duplication fee that can be charged: for more than 1000 pages, the flat rate fee is $1000. This means that a requester could pay as much as one dollar per page, while another with an extremely large request with thousands of responsive documents would pay a much lower per-page charge.

The definition of "direct costs" as "expenditures which an agency *actually incurs*" clearly cannot support the conclusion that the cost for duplicating one page (beyond the first 100 pages) ranges from 50 cents (150 pages produced) to $25 (101 pages produced), depending upon the overall size of the request. It is hard to imagine that direct equipment and personnel costs for producing a single, black and white copy could rise above $1, let alone amount to $25. The proposed policy runs afoul of the principle of fairness that the FOIA embodies. The statute requires that non-exempt records or portions of records "shall be provided to *any person* requesting such records." 5 U.S.C. § 552(b) (emphasis added). It is highly doubtful that Congress intended for all requesters to be treated equally regarding access to records, but that some requesters could be charged different fees for duplication services.

In addition, the proposed fee for records reproduced in electronic form—$100 per CD—does not comport with the dictates of the statute and the OMB Guidelines regarding "direct costs." The actual cost of a blank compact disc is miniscule in comparison to this fee. Packages of blank rewritable CD-ROMs are available at major office supply chains at a cost of as low as 20 to 30 cents per CD. Moreover, copying files onto a blank CD-ROM is a relatively simple task, which rarely takes more than a few minutes with current computer technology.

The CIA's proposed rate for electronic duplication also potentially runs afoul of the letter and spirit of the Electronic FOIA Amendments, which codified the current requirement that agencies provide a record "in any form or format requested," if a record is "readily reproducible" in that form. This provision promoted Congress' finding in passing the E-FOIA amendments that "Government agencies should use new technology to enhance public access to agency records and information." P.L. 104-231, 110 Stat. 3048, Sec. 2(a). By charging a high fee for documents reproduced in electronic form, a fee which is disproportionately higher for requesters who only receive a small number of responsive pages, the CIA will effectively deter requesters from seeking documents in electronic form. The CIA should clarify and amend this provision in its final regulations, to account for the actual costs associated with producing electronic records based on the number of pages or file sizes of responsive documents.

Public Interest Fee Waiver Standard

Finally, the CIA's proposed revision of the standards for granting a public interest fee waiver go far beyond that authorized by the FOIA and appear aimed at limiting substantially the granting of such waivers. By also encouraging extensive disputes about fee waivers, the proposed new regulation is likely to encourage litigation.

The FOIA itself requires a fee waiver 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." 5 U.S.C. Sec. 552(a)(4)(A)(iii). The Proposed Regulation adds the requirements that the connection between the requested records and activities of government be "direct and clear, not remote or attenuated," "meaningfully informative," not already in the public domain, and contribute to the "public at large, as opposed to … a narrow segment of interested persons." These added limitations are contrary to the intent of the public interest waiver provision. If applied strictly, these added requirements might mean that information relevant to a matter of significant public interest would not qualify for a fee waiver simply because the information is dispersed among several records, with no one record telling the whole story. It could mean that if another FOIA requester already has the information, but is not doing anything with it, the fee waiver will not be granted even though a subsequent requester has the desire and means to disseminate the information.

Further, the Proposed Regulation requires consideration of the "requester's expertise in the subject area" and whether public understanding will be enhanced to a "significant extent." These limits will make it possible for the agency to pick and choose among requesters and subjects to control the way the fee waiver will be granted. Instead of adding additional limits on the

granting of a public interest fee waiver, the CIA should develop a policy that encourages dissemination of information about its activities.

Conclusion

For the reasons stated above, the National Security Archive urges the Central Intelligence Agency to incorporate the following changes into its proposed rule regarding FOIA fees: (1) eliminate the definitions of FOIA requester categories ; (2) amend the provision requiring a written fee commitment to apply only where the Agency estimates fees will exceed $100; (3) eliminate the provision mandating prepayment before the CIA will honor form or format requests; (4) revise the proposed duplication fees provisions so that the rates charged result in each requester paying only those "direct costs" actually incurred in the processing of her request, whether for paper or electronic duplication; and (5) revise its public interest fee waiver provisions to more closely follow the letter and intent of the FOIA.

Thank you for considering our comments on the proposed amendment to the CIA's FOIA fee regulations. If you have any questions or we can provide any additional information, please do not hesitate to contact Meredith Fuchs or Thomas Blanton (202-994-7000).

Sincerely,

--S--

Thomas Blanton
Director

--S--

Meredith Fuchs
General Counsel

Cc:
Ms. Melanie Ann Pustay, Acting Director, Office of Information and Privacy, Department of Justice
The Honorable Patrick J. Leahy, Chairman, Senate Committee on the Judiciary
The Honorable Arlen Specter, Ranking Member, Senate Committee on the Judiciary
The Honorable John D. Rockefeller IV, Chairman, Senate Select Committee on Intelligence
The Honorable Christopher S. Bond, Ranking Member, Senate Select Committee on Intelligence
The Honorable Henry A. Waxman, Chairman, House Committee on Government Reform
The Honorable Tom Davis, Ranking Member, House Committee on Government Reform
The Honorable Wm. Lacy Clay, Chairman, House Subcommittee on Information Policy, Census, and National Archives
The Honorable Silvestre Reyes, Chairman, House Select Committee on Intelligence
The Honorable Peter Hoekstra, Ranking Member, House Select Committee on Intelligence