

1. I hereby submit my individual comments regarding the proposed rules.

My comments center on the two proposals:

to raise duplication fees per page for ordinary paper to paper photocopies from five cents to twenty cents, an increase of 200 percent (and a 100 percent increase for microfilm to paper duplication); and

To eliminate a procedural safeguard to ensure the release of information in the public interest even if it is technically exempt.

#### DUPLICATION FEES

The sole justification for this proposal is that some other agencies charge twenty cents per page.

The decision to raise fees in this way is arbitrary and capricious, and is founded on erroneous and highly misleading assumptions.

If one uses the cost that DOE pays for photoduplication equipment and supplies, the cost to DOE of photocopies is substantially less than 20 cents per page, even with the cost of the time for an employee to make the copies.

The actual figure falls far short of that.

Commercial photocopying establishment typically charge 8-10 cents per page for photocopying of this type. Typically the costs internally at an agency are even less.

The main threat of these increased fees is that it imposes a hurdle upon requester, a "toll booth" of sorts, that tends to discourage public records requests, particularly the type of public records that are releasable and quite possibly ought to have been published by the agency in the first place.

It does not appear that any real investigation into the cost of photocopying was conducted, making this determination all the worse in its import.

It is simply a rush to join the crowd, without ascertaining whether the 200% hike in fees reflects the actual costs of duplication.

As such, it is not based on reason and judgement but rather an inclination to erect barriers to access.

#### REMOVAL OF THE PROCEDURAL SAFEGUARD

The proposal also intends to erect an additional last minute change that is substantially contrary to the public interest. The existing regulations reflect an overt recognition of the discretion of the Department to release records in the public interest. The proposed change is to remove that recognition. The proposal argues that this change has no effect because the Department already conducts such a balancing test. But this is fallacious reasoning.

The presence of that public interest balancing test constitutes a legal protection for the public. It becomes part of the legal analysis. If it is not present, then overriding a statutory exemption for public interest reasons becomes more a matter of senior level policy, a gross exception to ordinary legal processing, and a highly atypical aspect of the ordinary procedural review.

Thus, without this safeguard in place, it would become harder within the DOE legal organization to advance a decision to release records in such circumstances.

As you may know, there have been numerous radiological and other questionable experiments on human beings of which DOE is cognizant or serves as the legacy responsible agency. This safeguard, now proposed for elimination, has to date helped ensure that at least some information on these types of horrendous activities has become available.

On the eve of a new presidential administration that values transparency and public access, it is not the time to institute a last minute major abrogation of that transparency, despite an attempt to downplay the effect.

Moreover, this rulemaking should also wait until it may incorporate the new FOIA provisions that took effect on December 31, 2008, one year after enactment of the recent FOIA statutory amendments.

Michael Ravnitzky  
Silver Spring, Maryland

2. From: Phil Lapsley  
Sent: Friday, January 09, 2009 3:58 PM  
To: Haggerty, Kevin  
Subject: Comments on proposed DOE FOIA rule changes (RIN 1901-AA32)

Dear Mr. Haggerty,

Please accept the following as my comments on RIN 1901-AA32, Revision of Department of Energy's Freedom of Information Act Regulations.

1. Regarding removal of the so-called "extra balancing test": While the sentence in section 1004.1 which states "To the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. 552 whenever it determines that such disclosure is in the public interest" does, literally, impose an additional burden on DOE, this burden should not be cumbersome, and is strongly in the public interest. The Notice of Proposed Rulemaking simply asserts that this burden is cumbersome but offers no evidence that it is actually so. It is difficult to imagine how such a test could substantially impact FOIA operations. Moreover, the test is clearly and strongly in the public interest and is in keeping with the FOIA's presumption of disclosure.

Additionally, it is widely anticipated in the FOIA community that the incoming Presidential administration will instruct the Department of Justice to once again move to the "no foreseeable harm" standard of

information release. If this occurs, as seems likely, your Department will appear to be out of step with the Executive branch, in that you will be moving away from disclosure at the very time the tide is turning against such a move.

2. Regarding the increase in per-page copying fees to \$0.20 per page: this increase is neither "modest" nor "reasonable": As regards its modesty it is, in fact, a 200% increase from your current rates. As regards its reasonableness, commercial photocopy establishments are able to operate, with profit, at retail prices between three and ten cents per page, and these prices are profitable including fully burdened costs such as labor and overhead.

Moreover, a focus on paper copy costs is misplaced and behind the times. Rather, DOE FOIA should be focusing on moving its FOIA operations to electronic document processing and web-based or email delivery of FOIA requests. This would allow DOE to dramatically decrease its costs and improve customer service, and would do so without imposing "tolls" that keep requesters at bay.

I therefore respectfully suggest that you do not implement the changes outlined in your Notice of Proposed Rulemaking.

Thank you very much for the opportunity to submit these comments.

Sincerely,

Philip D. Lapsley

3.

## TEDX

### The Endocrine Disruption Exchange

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January 8, 2009

Mr. Kevin Hagerty  
U.S. Department of Energy  
Office of Information Resources  
Mailstop MA-90, Room 1G-051  
1000 Independence Avenue, SW.  
Washington, DC 20585

RE: Revision of Department of Energy's Freedom of Information Act Regulations. 10 CFR Part 1004; RIN 1901-AA32. (Federal Register 73(237):74658-74661).

Dear Mr. Hagerty:

In regard to the Department of Energy's proposed Revision of Department of Energy's Freedom of Information Act Regulations. 10 CFR Part 1004; RIN 1901-AA32, the Federal Register (73(237):74658-74661) states: "This proposed rule would remove the so-called 'extra balancing test' in section 1004.1 which states: 'To the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. 552 whenever it determines

that such disclosure is in the public interest.' This sentence imposes an additional burden on DOE to reconsider a determination to legally withhold information in accordance with 5 U.S.C. 552."

Such information as the Department of Energy is seeking authority to withhold without reconsideration of whether disclosure would be in the public interest, may conceivably concern matters dealing with nuclear power plants, nuclear waste disposal, and even nuclear accidents; pollution and environmental destruction from coal mining and other fossil fuel extraction processes, including hydraulic fracturing of natural gas wells and resulting contamination of aquifers, as well as air, soil and surface water pollution from natural gas development. All of these activities represent health hazards to both humans and wildlife, and no amount of classifying these activities as "safe" will make them so. Therefore, the public must be informed of these activities, and the burden of proof should rather be to show that disclosure is NOT in the public interest.

This responsibility to inform the public should not be considered an "additional burden", but part of the Department of Energy's public responsibility. We strenuously object to abdication of this responsibility to inform the public, when public health may be at stake.

Respectfully submitted,

Lynn E. Carroll, Ph.D.  
Senior Scientist

P.O. Box 1407, Paonia, CO 81428 [tedx@tds.net](mailto:tedx@tds.net) 970-527-4082 [www.endocrinedisruption.org](http://www.endocrinedisruption.org)

4. From: Roger Strother <[rstrother@ombwatch.org](mailto:rstrother@ombwatch.org)>  
To: Hagerty, Kevin  
Cc: 'Sean Moulton' <[smoulton@ombwatch.org](mailto:smoulton@ombwatch.org)>  
Sent: Thu Jan 08 19:39:45 2009  
Subject: Comments for RIN 1901-AA32

Kevin,

I attempted to submit these comments through the Regulations.gov website but the system does not appear to be working correctly at this time. If you received them through the site then I apologize for the duplication. Please accept the attached comments.

Best,

Roger A. Strother, Jr.  
Information Policy Analyst  
OMB Watch  
1742 Connecticut Ave., NW  
Washington, DC 20009  
202.683.4835 (o)  
202.683.4863 (f)  
[www.ombwatch.org](http://www.ombwatch.org)

5. From: Roger Snodgrass  
Sent: Thursday, January 08, 2009 2:26 PM

To: Hagerty, Kevin  
Subject: "Extra balancing test" as written at 10.CFR 1004.1"

This proposed change should not be allowed. It is ambiguous and seems to narrow rather than expand the public's access to information. The Department of Energy has abused its privileges of classification to cover up incompetency, corruption and mismanagement for many years. In order to regain the credibility the organization needs to operate effectively, DOE must end this anti-democratic trend immediately without another single step into the dark side.

Roger Snodgrass  
Santa Fe, NM 87504

## 6. COMMENTS OF TEXANS FOR A SOUND ENERGY POLICY ON THE DEPARTMENT OF ENERGY'S PROPOSED RULE REVISING FOIA REGULATIONS TO ELIMINATE THE PUBLIC INTEREST BALANCING TEST AND TO INCREASE PHOTOCOPYING FEES

Texans for a Sound Energy Policy ("TSEP") submits the following comments on the Department of Energy's ("DOE") proposed rule revising its Freedom of Information Act ("FOIA") regulations to eliminate the public interest balancing test and to increase photocopying fees. 73 Fed. Reg. 74,658 (Dec. 9, 2008). TSEP's comments are limited to DOE's proposal to eliminate the public interest balancing test and do not address the agency's proposal to increase its photocopying fees.

TSEP is a non-profit educational organization based in Victoria, Texas whose purpose is to identify and evaluate energy alternatives and their environmental, social and economic impacts. To accomplish these goals, TSEP uses the FOIA to request records related to the federal government's energy programs and policies. TSEP has a FOIA request pending with the DOE regarding the DOE's loan guarantee program for nuclear power plants. Letter from Diane Curran to Chris Morris, U.S. Department of Energy's FOIA/Privacy Act Group (Nov. 17, 2008).

DOE's current FOIA regulations state that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. DOE proposes to drop this "extra" balancing test because it "goes above and beyond the requirements of the FOIA, and imposes unnecessary administrative requirements on DOE" by requiring the agency "to make available records that could be withheld under the FOIA exemptions, if DOE determines that disclosure would be in the public interest." 73 Fed. Reg. at 74,659. DOE further claims that "the extra balancing test does not alter the outcome of the decision to withhold information, as DOE already incorporates Department of Justice guidance in applying exemptions when determining whether or not to make a discretionary release of information." *Id.*

TSEP strongly disagrees with the DOE's contention that the public interest balancing test

goes beyond the requirements of the FOIA. The FOIA does not require that all information that is determined to fall within an enumerated exemption must be withheld from the public. Rather, the FOIA was intended to achieve “the fullest responsible disclosure,” and therefore requires that the government to balance the right of the public to know with its own need to keep information in confidence. S. Rep. No. 89-8 13, at 3 (1965); See also *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989). The Supreme Court has also noted that “Congress did not design the FOIA exemptions to be mandatory bars to disclosure.” *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979). The FOIA exemptions “simply permit, but do not require, an agency to withhold exempted information.” *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 282 (D.C. Cir. 1997) (emphasis added).

The public interest balancing test is thus a critical tool for ensuring that DOE complies with the FOIA’s general preference for disclosure. The agency may not choose to withhold information simply because the information falls within a particular FOIA exemption. FOIA requires that the agency make the additional determination whether the government’s need to withhold the information is outweighed by the public’s need to know. If disclosure of the information will benefit the public interest, the case law is clear that the FOIA favors disclosure.

TSEP’s pending FOIA request illustrates the importance of the public interest balancing test. Based on various public statements by DOE, TSEP understands that virtually all of the documents submitted by loan guarantee applicants or generated by DOE in reviewing those applications have been withheld from public disclosure on the ground that they contain proprietary information. Yet, the public has a stake in knowing the claims made by the applicants and DOE’s basis for choosing among them, because the loan guarantees will be taxpayer-funded. Where a private business relies on government subsidies, the public interest in disclosure of the information outweighs the applicants’ interest in protecting it from disclosure.

See *Multi AG Media, LLC v. US. Department of Agriculture*, 515 F.3d 1224, 1232 (D.C. Cir. 2008) (“[T]here is a special need for public scrutiny of agency action that distributes excessive amounts of public funds in the form of subsidies and other financial benefits.”).

Therefore, TSEP believes that the DOE may not eliminate the public interest balancing test from its FOIA regulations.

Respectfully submitted,

/s/

Diane Curran

Harmon, Curran, Spielberg, & Eisenberg, L.L.P.

1726 M Street N.W., Suite 600

Washington, D.C. 20036

T: 202/328-3500

F: 202/328-6918

[dcurran@harmoncurran.com](mailto:dcurran@harmoncurran.com)

s/

Matthew D. Fraser  
Harmon, Curran, Spielberg, & Eisenberg, L.L.P.  
1726 M Street N.W., Suite 600  
Washington, D.C. 20036  
T: 202/328-3500  
F: 202/328-6918  
[rnfraser@harmoncurran.com](mailto:rnfraser@harmoncurran.com)  
Admitted only in Louisiana;  
Supervision by Diane Curran, a member of the D.C. bar

/s/

James Blackburn, Jr.  
Blackburn Carter, P.C.  
4709 Austin St.  
Houston, Texas 77004  
713/524-1012  
713/524-5165 (fax)  
[jbb@blackbuarncater.com](mailto:jbb@blackbuarncater.com)  
January 8, 2009

7. From: Greg Kendall  
Sent: Thursday, January 08, 2009 11:46 AM  
To: Hagerty, Kevin  
Subject: RIN 1901-AA32

The FOIA rule should fall on the side of openness. The DOE seems to be requesting that the FOIA rules be switch to a defaults of being less forthcoming with information, if possible.

Do not let the DOE remove the discretionary clause governing FOIA exemptions. America's system of economics and government depends on the open flow of information. The last few years of more closely held government have resulted in a disaster for our government and economy. The default in America must be the open flow of information or we risk become just like our good buddy Putin and his disasterous government. **DON'T RISK OUR DOWNFALL AS A FREE AND OPEN SOCIETY.** Democracy is messy, that is why it works.

Thanks,

Greg Kendall  
Los Alamos, NM

8. **Docket:** DOE-HQ-2008-0022

Revision of Department of Energy's Freedom of Information Act Regulations

**Comment On:** DOE-HQ-2008-0022-0001

Revision of Department of Energys Freedom of Information Act Regulations

**Document:** DOE-HQ-2008-0022-DRAFT-0001

Comment on FR Doc # E8-28940

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### **Submitter Information**

**Name:** Steven Aftergood

**Address:**

1725 DeSales Street NW

Suite 600

Washington, DC, 20016

**Email:** saftergood@fas.org

**Phone:** 202-454-4691

**Organization:** Federation of American Scientists

**Government Agency Type:** Federal

**Government Agency:** DOE

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### **General Comment**

I wish to comment on the proposed revision to 10 C.F.R. section 1004.1 that would remove the so-called "extra balancing test." As explained below, I believe that this section has served the public interest in an identifiable way and should be retained.

The "extra balancing test" favorably differentiates the Department's FOIA practice from that of other federal agencies and has had a tangibly positive effect on Department disclosure policy.

Last April, I submitted FOIA requests to approximately ten federal agencies including DOE for a copy of agency comments on the recommendations of the Public Interest Declassification Board concerning declassification of classified national security information. (Agency comments had been requested by the President in a January 29, 2008 memorandum. At DOE, my request was designated case number FOIA-2008-000252.)

Among all the agencies that I contacted, only DOE responded with a full release of the requested material. The DoE comments were extremely informative and instructive. They have been downloaded from our web site many hundreds of times by interested members of the public.

Meanwhile, however, other agencies including the Department of Defense, the Office of the Director of National Intelligence, and the Department of Homeland Security denied an identical request in its entirety, citing FOIA exemption (b)(5) which protects privileged interagency communications. Administrative appeals have so far affirmed the denials.

Like those other agencies, DOE could have invoked exemption (b)(5) and effectively barred public access to its comments on the Declassification Board recommendations. Why didn't it do so?

I believe the answer is reflected in the contents of section 1004.1 which encourages the release of information in the public interest even when it is legally permissible to withhold it.

Instead of removing section 1004.1, I would favor adding an identical provision to the FOIA regulations of other agencies that currently withhold information unnecessarily simply because they may.

In effect, the existing DOE regulation conforms to the 1993 Attorney General policy on FOIA which urged release of all information except where there was a "foreseeable harm" to a protected government interest. The change that is now being proposed would make DOE regulations consistent with the 2001 FOIA policy of Attorney General Ashcroft that encouraged withholding of information whenever there is a "sound legal basis" to do so.

But there is a widespread and I think well-founded expectation that the incoming Obama Administration will rescind the Ashcroft FOIA policy and define a more forthcoming disclosure policy. In light of that probable scenario, I would urge DOE to cancel its proposed revision of the section 1004.1, or else to suspend action on it for six months while the new Administration prepares new government-wide FOIA guidance.

Thank you for your consideration.

9. From: Vergano, Dan [<mailto:dvergano@usatoday.com>]  
Sent: Wednesday, January 07, 2009 6:39 PM  
To: Hagerty, Kevin  
Subject: RIN 1901-AA32

Mr. Hagerty,

I'm writing to object to the proposed elimination of the public interest "balance test" in fulfilling DOE FOIA requests as described in 10 CFR Part 1004 RIN 1901-AA32. The claim that the test "imposes an additional burden on DOE to reconsider a determination to legally withhold information in accordance with 5 U.S.C. 552." is simply a statement of the obvious intent of the Act, and not a reasonable or sufficient rationale for the Energy Department to further neuter FOIA.

Why not do away with laws entirely by this reasoning? The argument is a patently obvious attempt to squelch the public's rights.

The Energy Department states "Agencies are encouraged to make discretionary releases of information in cases in which no foreseeable harm from the release of the information can be determined," on its own FOIA website (see [http://management.energy.gov/Wha\\_is\\_the\\_FOIA.pdf](http://management.energy.gov/Wha_is_the_FOIA.pdf)) None of the nine exemptions allowed for in the FOIA Act include removing "additional burden" from DOE. To put into effect this rule change would fly in the face of the Act's own language and spirit, and harm the public interest.

Respectfully,

Dan Vergano  
703 854 3791

I am a science reporter for USA TODAY, but I am speaking as a citizen, not for my employer.

#### **10. PUBLIC CITIZEN LITIGATION GROUP**

1600 TWENTIETH STREET, NW  
WASHINGTON, DC 20009  
(202) 588-1000  
(202) 588-7795 (fax)

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#### **COMMENTS OF PUBLIC CITIZEN ON THE DEPARTMENT OF ENERGY'S PROPOSED RULE REVISING FOIA REGULATIONS ON PHOTOCOPYING FEES AND THE PUBLIC INTEREST BALANCING TEST**

Public Citizen submits the following comments on the Department of Energy's (DOE) proposed rule revising its Freedom of Information Act (FOIA) regulations to increase the photocopying fee and to eliminate the public interest balancing test, 73 Fed. Reg. 74658-01 (December 9, 2008).

Public Citizen, founded in 1971, is a national non-profit membership organization that advocates for safer consumer products, corporate accountability, and government transparency. To work effectively on those issues, Public Citizen regularly uses FOIA to request records related to its advocacy work. Moreover, Public Citizen Litigation Group has represented FOIA requesters in over 300 lawsuits challenging request denials. Public Citizen has a longstanding commitment to ensuring the public's access to government records under FOIA and defending FOIA's "presumption of disclosure." *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 244 (1978). Accordingly, Public Citizen is concerned with both aspects of the proposed rule: quadrupling the photocopying charge per page and eliminating a policy of lawful disclosure of exempt documents when disclosure is in the public interest.

#### **I. QUADRUPLING THE PHOTOCOPYING FEES**

The existing DOE FOIA regulations prescribe a \$.05 per page charge for paper-to-paper copies and a \$.10 per page charge for microform-to-paper copies. 10 C.F.R. §

1004.9(a)(4). The proposed rule would mandate a \$.20 per page charge for both types of duplication. Proposed 10 C.F.R. § 1004.9(a)(4). There are several reasons why this \$.20 per page charge is excessive.

First, \$.20 per page is at the very highest end of the per page charge for standard paper-to-paper duplication among comparable cabinet-level agencies and is well above the average fee and the most common fee levied for these services. As a reference, we provide a complete list of the regulations prescribing the standard photocopy fee for each cabinet-level agency:

Department of Agriculture, 7 C.F.R. Pt. 1, Subpt. A, App. A (\$.20)  
Department of Commerce, 15 C.F.R. § 4.11(c)(1) (\$.16)  
Department of Defense, 32 C.F.R. § 286.29(c) (\$.15)  
Department of Education, 34 C.F.R. § 5.60(a)(3) (\$.10)  
Department of Health and Human Services, 45 C.F.R. § 5.43(c) (\$.10)  
Department of Homeland Security, 6 C.F.R. § 5.11(c)(2) (\$.10)  
Department of Housing and Urban Development, 24 C.F.R. § 15.110(c) (\$.18)  
Department of the Interior, 43 C.F.R. Pt. 2, App. C (\$.13)  
Department of Justice, 28 C.F.R. § 16.11(c)(2) (\$.10)  
Department of Labor, 29 C.F.R. § 70.40(d)(2) (\$.15)  
Department of State, 22 C.F.R. § 171.14(c) (\$.15)  
Department of Transportation, 49 C.F.R. § 7.43(d)(1) (\$.10)  
Department of the Treasury, 31 C.F.R. § 1.7 (g)(1)(i) (\$.20)  
Department of Veterans Affairs, 38 C.F.R. § 1.555(e) (\$.15)

The most common per page fee for standard duplication among these cabinet-level agencies is \$.10, and the second most common fee is \$.15. Only two charge \$.20, which is the highest charge among the group. The average fee in this group for this type of duplication is \$.14. Although the DOE's current \$.05 charge for standard duplication is the lowest among this group, quadrupling the charge to \$.20 per page overshoots the average by a \$.06, and overshoots the most common fee by \$.10. This shift would move the DOE from the very lowest cost for standard duplication among this group of agencies to the very highest cost for duplication in one step. Therefore, the DOE's assertion in its proposed rule that, "DOE compared the rates of fellow Cabinet-level agencies and found that the rate of 20 cents a page is comparable to the fees charged throughout the executive branch," is simply not correct.

A four-fold increase in the fee for standard photocopying also places a substantial burden on requesters and may deter the public from exercising its rights to request documents under FOIA. Particularly for requesters who regularly seek documents from the DOE, an overnight quadrupling of the fee may cause disruption to their use of FOIA.

Finally, although DOE makes the general statement that this increase is "more reflective of current costs," it provides no evidence or assertion that standard photocopying actually costs the Department \$.20 per page. Indeed, that would be surprising. Public Citizen incurs less than \$.05 per page for in-house standard copying. The U.S Court of Appeals

for the District of Columbia Circuit permits a maximum charge of only \$.07 per page for photocopying when assessing court fees. United States Court of Appeals Notice, *available at* [http://www.cadc.uscourts.gov/internet/home.nsf/content/VL+-+Forms+-+Bill+of+Costs/\\$FILE/billcos1.pdf](http://www.cadc.uscourts.gov/internet/home.nsf/content/VL+-+Forms+-+Bill+of+Costs/$FILE/billcos1.pdf). Even commercial photocopying services (which include not only the cost of copies and employees' time, but also the facilities, advertising, and a profit margin) generally cost \$.09 to \$.11 per page. (Information provided by Staples and Kinkos).

Thus, Public Citizen recommends that DOE keep its current \$.05 fee, which approximates the true cost of in-house non-commercial photocopying. Or, at the most, any fee increase implemented by the DOE should no more than double the current \$.05 per page cost, resulting in a standard photocopying fee of \$.10 per page. If any increase is actually necessary to cover DOE's costs, a \$.10 charge would bring the DOE in line with the most common charge levied by cabinet-level agencies and would reduce the impact on requesters of a sudden fee increase.

Moreover, the DOE does not provide any reason that it has decided to charge the same fee for standard photocopying and microform duplication when it previously charged a higher fee for microform (presumably because microform duplication is more costly for the agency). Requesters should only have to pay reasonable duplication costs. "[F]ees shall be limited to reasonable standard charges. . ." and "[f]ee schedules shall provide for the recovery of only the direct costs of search, duplication, or review." 5 U.S.C. 552(a)(4)(A)(ii), (iv). It is not reasonable to pay the same amount for two different duplication services that cost the agency different amounts.

The Departments of Commerce, Education, Health and Human Services, Homeland Security, Housing and Urban Development, Justice, Labor, State, Transportation, Treasury, and Veterans Affairs simply charge the actual cost of copies for nonstandard duplication, thereby allowing a higher charge for things such as microform if the cost of those duplication methods is higher. (See regulations cited in above listing) The Department of Defense differentiates between preprinted material (\$.02), photocopy (\$.15) and a microfiche copy (\$.25). 32 C.F.R. § 286.29(c). The Department of Agriculture has a detailed fee structure for duplication of various types of documents it possesses in different forms. 7 C.F.R. Pt. 1, Subpt. A, App. A. The Department of the Interior likewise has a list of different fees, including large-sized page duplication, color copies, and photographs. 43 C.F.R. Pt. 2, App. C. Indeed, the DOE's own rules provide that duplication of computer generated records is to be charged at cost. 10 C.F.R. § 1004.9(a)(4).

To be considered reasonable, different fees should be assessed depending on the cost to the agency of the duplication service that is provided. Public Citizen therefore recommends not only that standard duplication remain unchanged, or, at most, be raised to a rate of no more than \$.10 per page, but also that microform duplication simply be charged at cost.

## **II. ELIMINATING THE 'PUBLIC INTEREST BALANCING TEST'**

The existing DOE FOIA regulation provides: “To the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest.” 10 C.F.R. § 2004.1. The proposed regulation would eliminate this provision for two reasons: (1) it would streamline the agency review process by eliminating a step, and (2) the provision is ineffectual because the agency follows current DOJ guidance on FOIA which cancels out this provision. *See* Proposed 10 C.F.R. § 2004.1.

These justifications are mutually inconsistent. Either the agency engages in this “extra” step of balancing the public interest when disclosure is discretionary, or it does not. The first justification suggests that the agency does engage in this balancing, and thus that the agency would like to eliminate the step to become more streamlined in processing FOIA requests (in which case DOJ guidance must not nullify the provision). The second justification suggests that the agency doesn’t engage in this balancing test, and thus that it is superfluous and ineffectual (in which case there is no extra step which will be eliminated). The agency can’t have it both ways.

Moreover, even if we accept these reasons as plausible, neither justifies eliminating the provision. The first justification – the streamlining of FOIA request processing – although a laudable goal, should not be promoted at the expense of government transparency. It is hard to imagine that this weighing of the public interest takes a large amount of incremental time. Already, to process a request, the agency has to conduct a search for documents, determine on a document-by-document (or even word-by-word) basis whether exemptions apply, and respond to the requester with justifications for any withholdings. During the course of such a careful review, one additional factor to consider would not add a huge burden. Moreover, any additional time required to weigh the public interest is justified by the benefit to the public that comes with disclosing documents in which the public has a strong interest.

The second justification – that the provision is not being implemented as a result of current DOJ guidance on FOIA – is incorrect. Attorney General Ashcroft’s October 12, 2001, memorandum (still in effect) regarding the Freedom of Information Act does not preclude the existing DOE rule or render that rule ineffectual. To the contrary, the Ashcroft memorandum recognizes agencies’ ability to release some exempt material at their discretion. The Ashcroft memorandum states that “[a]ny discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.” *See* Ashcroft Memorandum, *available at* <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>. The memorandum’s list of interests to be considered does not state that it is exhaustive. Simply because it does not require the agency to take account of the public interest does not mean that an agency is precluded from doing so, so long as the agency does take account of the mandated factors.

FOIA was enacted with the intent to favor disclosure. *See Dep’t of Air Force v. Rose*, 425 U.S. 352, 366 (1976); *see also Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108,

1112 (D.C. Cir. 2004) (“The Supreme Court has long recognized that Congress’ intent in enacting FOIA was to implement ‘a general philosophy of full agency disclosure.’” (quoting *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754 (1989)). “FOIA was intended by Congress to balance the public’s need for access to official information with the Government’s need for confidentiality.” *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 144 (1981). DOE should be applauded for having regulations that fully effectuate FOIA’s central goals and are not in conflict with any policy announced by Attorney General Ashcroft. DOE’s FOIA regulations should maintain their public interest balancing test.

## CONCLUSION

For the reasons stated above, Public Citizen urges the DOE to incorporate our suggestions into the final rule revising its FOIA regulations. The final rule should: (1) keep the current paper-topaper duplication rate, or, at most, set a \$.10 rate; (2) charge at-cost for microform duplication; and (3) leave unchanged the provision calling for a weighing of the public interest in discretionary disclosures.

Respectfully submitted,

/s/ \_\_\_\_\_

Margaret Kwoka  
Public Citizen Litigation Group  
1600 20th St., NW  
Washington, DC 20009  
(202) 588-1000  
December 18, 2008

11. From: cmkail  
Sent: Monday, January 05, 2009 10:56 PM  
To: Hagerty, Kevin  
Subject: RIN 1901-AA32

In whatever instance the public interest (the greater good of the greater number of people) can be served to a higher degree by knowledge, and when their interests will be served to a lesser degree by secreting, withholding, or redacting knowledge, the only imperative for government (or for humanity) must be to make available and accessible the information. I strongly submit my opposition to RIN 1901-AA32.

Cathy Kail  
Issaquah, WA 98027

12.

## The National Security Archive

The George Washington University Phone: 202.994.7000  
Gelman Library, Suite 701 Fax: 202.994.7005  
2130 H Street, N.W. nsarchiv@gwu.edu

Washington, D.C. 20037  
<http://www.nsarchive.org>

December 23, 2008

Mr. Kevin Hagerty  
U.S. Department of Energy  
Office of Information Resources  
Mailstop MA-90, Room 1G-051  
1000 Independence Avenue, SW  
Washington, DC 20585

RE: Request for Public Comment on Revision of Department of Energy's Freedom of Information Act Regulations, 73 Fed. Reg. 74658 (December 9, 2008)

To Whom It May Concern:

The National Security Archive (the "Archive") submits these comments regarding the proposed Revision of Department of Energy's Freedom of Information Act Regulations, 73 Fed. Reg. 74658 (December 9, 2008) ("Proposed Rule").

We are concerned with the potential impact on disclosure of the removal of the "extra balancing test" in section 1004.1 of DOE's existing FOIA regulations, which directs DOE employees to consider the public interest in disclosure before withholding information under discretionary exemptions. DOE claims that this proposed change is intended to "streamline DOE's procedures for determining the releasability of information" and that "the extra balancing test does not alter the outcome of the decision to withhold information" because DOE follows relevant Department of Justice guidance.

The current DOJ guidance, contained in the 2001 memorandum of Attorney General John Ashcroft, directs agencies to make discretionary disclosures only upon "full and deliberative consideration" of the interests at stake and "to carefully consider the protection of all [applicable] values and interests when making disclosure determinations under the FOIA." Attorney General Ashcroft FOIA Memorandum, reprinted in *FOIA Post* (Oct. 15, 2001). This standard has widely been recognized as deterring agencies from discretionary releases and does not direct agencies to consider the public interest in disclosure when deciding whether to release a record requested under the FOIA.

The balancing test contained in DOE's existing FOIA regulations is more in line with the presumption of openness in the FOIA and with prior DOJ guidance, set forth by Attorney General Janet Reno in 1993, which endorsed a presumption of openness and allowed for consideration of the public interest in disclosure: "[I]t shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases

An independent non-governmental research institute and library located at the George Washington University, the Archive collects and publishes declassified documents obtained through the Freedom of Information Act. Publication royalties and tax deductible contributions through The National Security Archive Fund, Inc. underwrite the Archive's Budget.

where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be.” Attorney General Reno’s FOIA Memorandum, reprinted in *FOIA Update*, Vol. XIV, No. 3 (Oct. 4, 1993). If DOE has been applying the standard currently contained in its regulation, it cannot be the case that abolishing that standard and reverting to the more restrictive Ashcroft standard would make no difference in the number of discretionary disclosures at DOE. Rather, by directing agency employees to omit the public interest balancing test (and instead follow the Ashcroft standard) there will be fewer discretionary releases of information in the public interest, even when there would be no readily foreseeable harm from disclosure.

Making discretionary disclosures when no harm is readily foreseeable comports with the spirit of FOIA and the clear statement of courts that the FOIA exemptions must be construed narrowly and applied conservatively. Department of Justice guidance on FOIA does not change the statute; rather, it only states the DOJ litigating policy. The FOIA creates “a general philosophy of full agency disclosure unless information is exempted under the clearly delineated statutory language.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (quoting S. Rep. No. 813 at 3 (1965)). Moreover, the Supreme Court has held that the FOIA exemptions “are explicitly made exclusive” and “must be narrowly construed.” *Id.*; see also *United States Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) (“[c]onsistent with the Act’s goal of broad disclosure, these exemptions have been consistently given a narrow compass”); *FBI v. Abramson*, 456 U.S. 615, 630 (1982) (“FOIA exemptions are to be narrowly construed”).

By implementing the public interest balancing test and exercising its discretion to release records of interest to the public, DOE appears to be a model for other agencies. In recent years, DOE has consistently had a high percentage of requests granted in full or in part and a low percentage of denials under the FOIA exemptions, including the discretionary exemptions. In this regard, conducting the balancing test for each FOIA request processed likely reduces the burden on DOE staff. By releasing more information initially when there is a public interest, DOE likely reduces the number of appeals it receives and the number of cases brought to court. Moreover, when there is considerable public interest in particular documents or issues, DOE will receive fewer requests for the same information if it releases records to journalists and others who will publish it or posts frequently requested records as required by E-FOIA, thereby reducing the burden on the agency’s FOIA program as a whole.

Finally, the revision of DOE’s FOIA regulations on the eve of a presidential transition does not make sense. It is likely that the new Obama administration will revise the DOJ guidance and policies on FOIA, including by revoking the Ashcroft memorandum and returning to a standard much like the one used between 1993 and 2001. DOE should wait until the new administration has set its policies on discretionary disclosure and then amend its FOIA regulations, if necessary, to conform to the new executive branch policy.

Thank you for considering our comments on the proposed changes to the Department of Energy's FOIA regulations. If you have any questions or if we can provide any additional information, please do not hesitate to contact me by phone at (202) 994-7000.

Sincerely,

Meredith Fuchs  
General Counsel

13.

COMMENTS OF SOCIETY OF ENVIRONMENTAL JOURNALISTS  
ON PROPOSED DEPARTMENT OF ENERGY AMENDMENTS TO  
CFR 1004.1 and 1004.9(a)(4)  
(RIN 1901-1132)

VIA ELECTRONIC MAIL AND WWW.REGULATIONS.GOV

Mr. Kevin Hagerty  
U.S. Department of Energy,  
Office of Information Resources  
Mailstop MA-90, Room 1G-051  
1000 Independence Avenue, SW.  
Washington, DC 20585

DATE: Jan. 7, 2009

**SUBJECT:** RIN 1901-AA32: Proposed Amendments to 10 CFR Part 1004, §§ 1004.1 and 1004.9 (a) (4) of Department of Energy Regulations relating to agency compliance with the Freedom of Information Act, Proposed at 73 F.R.74658-74661 (Dec. 9, 2008).

**SUMMARY**

As more fully explained below, The Society of Environmental Journalists ("SEJ") opposes the following Department of Energy proposed amendments to 10 CFR §§ 1004.1 and 1004.9 (a) (4):

1) Elimination of the so-called "extra balancing test" found in § 1004.1 which states:

"To the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. 552 whenever it determines that such disclosure is in the public interest."

2) Amendment of §1004.9 (a)(4) to raise the per page rate to be imposed on some FOIA requesters for "paper copy reproductions" and "microform to paper copies" from 10 cents to 20 cents per page.

## BACKGROUND OF COMMENTER

Founded in 1990, the 1,500-plus-member Society of Environmental Journalists (SEJ) is North America's largest and oldest organization of individual working journalists, educators and students dedicated to improving the quality, accuracy and visibility of environmental reporting.

SEJ programs and services include annual and regional conferences; daily *EJToday* news service; quarterly *SEJournal*; biweekly *TipSheet*; diversity program including Latin America initiative; members-only listserves; annual SEJ Awards for Reporting on the Environment; mentoring program; gatekeeper project and other special initiatives. Working through its First Amendment Task Force and WatchDog Program, SEJ addresses freedom of information, right-to-know and other news-gathering issues of concern to journalists reporting on environmental topics.

## DETAILED COMMENTS

### Proposed Amendment to §1004.1

SEJ members and other journalists regularly use the Freedom of Information Act to procure documents from the Department of Energy ("DOE"). These documents obtained pursuant to the FOIA assist SEJ members in better informing the public about the actions of the Department so that citizens may be better able to judge the DOE's performance of its many important duties and statutorily mandated responsibilities.

Both of the proposed amendments to 10 C.F.R. Part 1004 would result in less disclosure of information to which SEJ members and the public are entitled --- contrary to the Congressional intent underlying the FOIA. The Department of Justice's FOIA Guide aptly describes Congress' intent:

[T]he FOIA firmly established an effective statutory right of public access to executive branch information in the federal government. The principles of government openness and accountability underlying the FOIA, however, are inherent in the democratic ideal: "The basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."

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<sup>1</sup> Quoting, NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978); see also NARA v. Favish, 541 U.S. 157, 171-72 (emphasizing that the FOIA's underlying purpose of allowing "citizens to know 'what their government is up to'" is "a structural necessity in a real democracy" (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989) )), reh'g denied, 541 U.S. 1057 (2004) .

U.S. Department of Justice, Freedom of Information Guide (March, 2007).<sup>2</sup> The DOJ Guide emphasizes that “disclosure [is] the animating objective . . . that the FOIA seeks to achieve . . . .”<sup>3</sup>

Moreover, the deletion of the 30 CFR § 1004.1 “balancing test” will reduce public understanding of the FOIA and citizen’s rights thereunder --- contrary to the mandate of Executive Order No. 13,392 (December 14, 2005) and the purpose of the FOIA. In Section 1 of Executive Order No. 13,392, President Bush ordered federal agencies including the Department of Energy to adhere to the following policy:

(a) The effective functioning of *our constitutional democracy depends upon the participation in public life of a citizenry that is well informed*. For nearly four decades, the Freedom of Information Act (FOIA) has provided an important means through which the public can obtain information regarding the activities of Federal agencies. . . .

(b) . . . in responding to a FOIA request, agencies . . . shall provide FOIA requesters, and the public in general, *with citizen-centered ways to learn about the FOIA process* . . . .

70 F.R. 75373 (December 19, 2005) (emphasis supplied.)

The 10 CFR § 1004.1 “balancing test” was promulgated to advance the purpose of the FOIA to emphasize to agency officials and the public that the Department of Energy, in many cases, has the discretion to disclose information when its release is in the public interest, even though the Act permits withholding. In contrast, DOE’s explains the rationale underlying its’ proposed amendment of § 1004.1 is to delete a sentence that contains an “extra balancing test” that “does not alter the outcome of the decision to withhold information, as DOE already incorporates Department of Justice guidance in applying exemptions when determining whether or not to make a discretionary release of information.” 73 F.R. at 74658.

The DOE proposal states that it “is proposing to remove the extra balancing test, because it goes beyond the requirements of the FOIA, and imposes unnecessary administrative

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<sup>2</sup> Available online at [http://www.usdoj.gov/oip/foia\\_guide07/introduction.pdf](http://www.usdoj.gov/oip/foia_guide07/introduction.pdf) .

<sup>3</sup> Id. The DOJ FOIA Guide also cites the following authority that describes Congress’ intent in enacting the FOIA: “See S. Rep. No. 89-813, at 3 (1965) (stating the FOIA’s statutory objective as that of achieving “the fullest responsible disclosure”); see also Attorney General’s Memorandum on the 1986 Amendments to the Freedom of Information Act 30 (Dec. 1987) [hereinafter Attorney General’s 1986 Amendments Memorandum] (same) (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 292 (1979)); cf. 5 U.S.C. § 552b note (2000 & Supp. III 2003) (policy statement enacted as part of the Government in the Sunshine Act specifying that it is “the policy of the United States that the public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government”).”

requirements on DOE.” The DOE’s rationale for deleting the balancing test has no basis in law or in fact.

The existing rule makes clear that it “contains the *regulations* of the Department of Energy (DOE) that *implement 5 U.S.C. 552 . . .*” Thus, when the regulation was first promulgated, the DOE itself confirmed that the existing “balancing test” contained in §1004.1 implements the DOE’s obligations under FOIA, contrary to DOE’s statement in the current proposal that it “goes beyond the requirements of the FOIA.”

Moreover, the sentence proposed to be deleted from § 1004.1 is not an “extra” balancing test. Rather, it implements existing FOIA law and policy, making clear to citizens FOIA requesters and to DOE officers making decisions on such requests that the agency has a significant measure of discretion and is not mandated by law to withhold all information that may fall within a specific FOIA exemption.

In fact and in law, the current §1004.1 does precisely what the Supreme Court of the United States and the Justice Department’s FOIA guidance require. The existing language of §1004.1 “provide[s] FOIA requesters, and the public in general, *with citizen-centered ways to learn about the FOIA process . . .* furthers “the FOIA’s statutory objective . . . of achieving “the fullest responsible disclosure . . . ,” and the public’s right “to the fullest practicable information regarding the decision-making processes of the Federal Government.”<sup>4</sup>

If §1004.1 is simply a reiteration of the mandate of FOIA as set forth in Department of Justice FOIA guidance, then the section does not and could not “impose an additional burden on DOE to reconsider a determination to legally withhold information in accordance with 5 U.S.C. 552” as DOE states in its’ rule amendment proposal. The DOE must necessarily undertake precisely what the §1004.1 “balancing test” requires if it is complying with DOJ guidance.

DOE’s proposal also asserts “the imposition of an extra balancing test is cumbersome and unnecessary.” This assertion again misstates the purpose of the §1004.1 sentence proposed to be deleted. The sentence cannot and could not be either cumbersome or unnecessary. It is not cumbersome because, as DOE admits, the agency is required to follow DOJ guidance. It is not unnecessary because it implements the Executive Order goals of educating the public as to citizen’s rights under the FOIA and Congressional intent to allow the fullest possible disclosure of government information. In sum, taking DOE’s assertions at face value, the existing language of §1004.1 restates existing law and thus is in no way cumbersome or unnecessary. It certainly *does not*, as DOE asserts, go “beyond the requirements of the FOIA,” *nor does it* “impose unnecessary administrative requirements on DOE.”

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<sup>4</sup> See cases, legislative history, Executive Order and DOJ FOIA Guide cited in footnotes 1-3, *supra* and accompanying text.

Any amendment to existing substantive regulations must be accompanied by a rational explanation for the change. See e.g. *SEC v. Chenery*, 318 U.S. 80 (1943); *Motor Vehicle Manufacturers' Ass'n. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983). DOE's proposal to delete the last sentence of §1004.1 is based on bald unsupported assertions that the provision has created for the DOE an extra, cumbersome, unnecessary burden. Without documentation on workload, number of requests that fall into this category, cost of the existing rule, and other relevant factors, the proposed change lacks adequate support in the rulemaking record.

The SEJ believes that the existing "balancing test" language of §1004.1 ensures that the public is properly informed about citizens' rights under FOIA and makes clear to DOE decision-makers that withholding is not mandatory in every case although information may fall within a FOIA exemption.

Indeed, DOE in its earliest days made some exemplary decisions specifically to serve the public's interest in disclosure, in particular its unprecedented declassification of records detailing the government's use of American citizens in human radiation experiments. Also, because DOE did not come into existence until many years after other agencies had promulgated their FOIA regulations, the agency was able to make a clear regulatory commitment to openness, benefiting from the experience of other agencies and improving upon the language of rules adopted earlier by other agencies.

#### **Proposed Amendment to §1004.9 (a)(4)**

The SEJ also opposes the proposed change to the fee schedule in current §1004.9(a)(4). DOE proposes to raise the prices of paper and microform copies to 20 cents per page. The proposed amendment would violate the mandate of the FOIA for the simple reason that it does not cost DOE 20 cents to photocopy a page of information. The FOIA does not permit DOE to charge more than the actual cost of reproduction as a copying fee. The rulemaking record, once again, is devoid of any factual basis for the increase in copying charges beyond the bald unsupported (and erroneous) representation that all other executive agencies charge a twenty-cent per page copying fee.

In addition, the proposed increase in costs above the actual cost of reproduction will place an unnecessary obstacle for citizens seeking to use FOIA to communicate matters of great public importance to the public.

Furthermore, while we have not done an exhaustive search and examination of fees charged by all executive agencies, our survey of departments where SEJ members frequently file FOIAs shows they are lower than the proposed rate: 15 cents a page at the U.S. Environmental Protection Agency and the Federal Energy Regulatory Commission; 13 cents a page at the Bureau of Land Management, the Minerals Management Service and the Department of the Interior. We also randomly spot-checked two large agencies

where our members are less likely to file FOIA requests. The Department of Defense and the Department of Education both impose a copying charge of only 15 cents per page.<sup>5</sup>

While it may be true that, as a practical matter, most requesters are entitled to a waiver of fees under 10 CFR 104.9(b) (1)-(3), this does not obviate the fact that some requesters, including freelance journalists among SEJ membership, may be required to pay copying fees in certain instances.

The bottom line with regard to the proposed increase in DOE copying charges is that it does not cost 20 cents to copy a piece of paper. FOIA authorizes DOE to charge no more than the actual copying cost of information requested under the FOIA. Requesters are not required to pay DOE's overhead.

### **The Proposed Amendments Constitute “Significant Regulatory Action” under Executive Order 12866**

In SEJ's view, DOE has erred in determining that this is not a “significant regulatory action” under Executive Order 12866 58 FR 51735 (Oct. 4, 1993) as amended by Executive Order 13258, 67 FR 9385 (Feb. 26, 2002). This action should be subject to review under that order by the Office of Information and Regulatory Affairs of the Office of Management and Budget.

### **SEJ Requests**

SEJ respectfully requests that DOE withdraw the proposed amendments to 10 CFR 1004. If DOE will not agree to withdraw the proposed amendments, SEJ asks it delay a final decision on promulgation of the proposed amendments until the new Presidential administration assumes office on January 20, 2009 --- a scant 11 days following the close of the comment period. At the very least DOE can postpone its action on this rule change for six months while the Obama administration begins its work. There is a widespread expectation that the new administration will err on the side of public disclosure – which is in direct contradiction to the direction these proposed rule changes would take.

We thank you for the opportunity to submit these comments.

Sincerely,

Christy George, President  
Society of Environmental Journalists

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<sup>5</sup>We make reference to these other agencies' fees without necessarily agreeing that these charges are reasonable. But all are lower than those proposed in this rule change by DOE.

Ken Ward, Jr., Chairman  
SEJ First Amendment Task Force

14. **Docket:** DOE-HQ-2008-0022  
Revision of Department of Energy's Freedom of Information Act Regulations

**Comment On:** DOE-HQ-2008-0022-0001  
Revision of Department of Energys Freedom of Information Act Regulations

**Document:** DOE-HQ-2008-0022-DRAFT-0004  
Comment on FR Doc # E8-28940

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## Submitter Information

**Name:** David Hill  
**Address:** Graham, NC, 27253

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## General Comment

Dear Sir or Madam:

I am opposed to this regulation eliminating the "public interest balancing test" for FOIA info requests. It restricts DOE FOIA information. This "additional burden" on the DOE is necessary for the flow of important info to the citizens of this country regarding DOE affairs which affect our lives. The American public needs more information on how our government works, not less. The FOIA provides this info and gives citizen oversight of the US government.

Thank you.

Dave Hill

