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Submitted via regulations.gov

Re: Interim Rule RIN 1105-AB51; Docket No. OAG 115

To Whom It May Concern:

The Reporters Committee for Freedom of the Press (the “Reporters Committee” or “RCFP”) appreciates this opportunity to comment on Interim Rule RIN 1105-AB51, published January 4, 2017, which contains updates to the regulations of the Department of Justice (“DOJ” or the “Department”) implementing the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA” or the “Act”) (hereinafter, the “Interim Rule”).¹

The Reporters Committee recommends that additions be made to the Interim Rule regarding the methods for submitting electronic FOIA requests and administrative appeals. Because the DOJ maintains a decentralized FOIA processing system,² it is important for there to be continuity across the Department so that the public and press can effectively and efficiently exercise their rights under the Act. To that end, the Reporters Committee recommends that Section 16.3(a) be amended to require all DOJ components to accept FOIA requests via email, in addition to online portals or other methods. We also recommend that Section 16.8(a) be amended to require the Office of Information Policy (“OIP”) to accept administrative appeals submitted via email.

Most DOJ components, very helpfully, maintain email addresses for the submission of FOIA requests.³ The Department also provides a centralized email address requesters can submit requests to if they are uncertain which DOJ component or components maintains records they are

¹ The Reporters Committee takes no position on any portion of the Interim Rule not specifically addressed herein.

² 28 C.F.R. § 16.3(a)(1).

³ These include the Antitrust Division, the Bureau of Alcohol, Tobacco, Firearms and Explosives, the Civil Division, the Civil Rights Division, the Community Relations Service, the Criminal Division, the Drug Enforcement Administration, the Environment and Natural Resources Division, the Executive office for Immigration Review, the Executive Office for Organized Crime Drug Enforcement Task Forces, the Executive Office for U.S. Trustees, the Federal Bureau of Prisons, the Foreign Claims Settlement Commission of the U.S., INTERPOL, the Justice Management Division, the National Security Division, the Office of Community Oriented Policing Services, the Office of Justice Programs, the Office of Legal Counsel, the Office of Professional Responsibility, and the Office of the Inspector General, the Office of the Pardon Attorney, the Office of the Solicitor General, the Office on Violence Against Women, the Professional Responsibility Advisory Office, the Tax Division, the U.S. Attorneys office, the U.S. Marshals Service, and the U.S. Parole Commission. See *Find a FOIA Contact at DOJ*, <https://www.justice.gov/oip/find-foia-contact-doj/list>.

seeking.⁴ The availability of these email addresses offers representatives of the news media and members of the public an easy and effective method for submitting FOIA requests.

Other components of the DOJ, however, only accept electronic FOIA requests through an online portal. Confusingly, there are multiple online portals used by different DOJ components: some use FOIAOnline,⁵ a multi-agency portal, while the Federal Bureau of Investigation (“FBI”) uses “eFOIPA”⁶ to receive requests and a different site to provide updates on the status of those requests.⁷ The Office of Tribal Justice purports to use FOIAOnline, but there is no option to submit a request to it in FOIAOnline, and OIP does not identify itself as the DOJ office responsible for processing requests for that component.⁸

The exclusive use of online portals to accept electronic FOIA requests imposes unnecessary burdens for members of the press and the public. In 2009, then-Attorney General Eric Holder issued a memo to all agencies encouraging the use of modern technology to improve the FOIA process and reminding them that “[u]nnecessary bureaucratic hurdles have no place in the ‘new era of open Government’” that President Obama had announced.⁹ Unfortunately, that is precisely what has happened with respect to those DOJ components that do not accept FOIA requests or appeals via email.

For example, until recently, OIP maintained its own portal called “eFOIA” to accept, track, and respond to FOIA requests. eFOIA, however, was shut down on February 16, 2016.¹⁰ When it was closed, requesters lost all correspondence and documents uploaded to their account,¹¹ which would not had happened if email had been used. The FBI’s new portal—“eFOIPA”—is also bad for users. Until recently, eFOIPA did not accept requests on the weekend, only permitted one request per day, and only permitted requests to be made about certain subjects.¹² Even though those restrictions were removed,¹³ other bureaucratic hurdles remain. Instead of permitting requestors to simply submit their FOIA request via email, eFOIPA requires that a requestor first input

⁴ 28 C.F.R. § 16.3(a)(1)

⁵ Including the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Legislative Affairs, Public Affairs, Legal Policy, and Information Policy. See Department of Justice, *Submit and Track a Request or Appeal*, <https://www.justice.gov/oip/submit-and-track-request-or-appeal/>

⁶ FBI, *eFOIPA*, <https://efoia.fbi.gov>.

⁷ FBI, *FDPS*, <https://vault.fbi.gov/fdps-1/@/@search-fdps>.

⁸ See Department of Justice, *Submit and Track a Request or Appeal*, <https://www.justice.gov/oip/submit-and-track-request-or-appeal>.

⁹ Memorandum from the Attorney General to Heads of Executive Departments and Agencies, March 19, 2009, <https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf>.

¹⁰ See archive.org, <https://web.archive.org/web/20160128130642/http://www.justice.gov/oip/efoia-request-portal>.

¹¹ See *id.*; <https://www.justice.gov/oip/efoia-request-portal>.

¹² See Dell Cameron, *FBI will revert to using fax machines, snail mail for FOIA requests*, The Daily Dot (Feb. 6, 2017), <https://www.dailydot.com/layer8/fbi-foia-records-requests-email-fax/>.

¹³ Andrew Coutts & Dell Cameron, *FBI to lift restrictions on online FOIA system after reports it would ditch email, switch to fax*, Daily Dot (Feb. 7, 2017), <https://www.dailydot.com/layer8/fbi-foia-efoipa-freedom-of-information-act-fax-email/>.

her email address into the system and then wait for the FBI to send her an email. When that email arrives, it contains a link that the requestor must then click to take her back to eFOIPA, where she can begin the FOIA submission process. At that point, the requestor faces additional hurdles and restrictions in submitting her request. For instance, eFOIPA imposes a three-thousand character limit on the description of the records being requested (the requestor does have the option of attaching a PDF or other document containing her request, which is effectively the same as permitting her to submit her request via email). In addition, there is no field or prompt in eFOIPA for a requestor to identify the fee category applicable to the request, which can have significant consequences under FOIA's fee provisions.¹⁴ A representative of the news media must identify herself as such to ensure that she is not assessed search or review fees.¹⁵ The lack of any option to do so within eFOIPA is thus very problematic, particularly for freelance reporters who may not have an email address associated with an established news organization, but who are nevertheless entitled to a fee benefit as a representative of the news media.¹⁶ Further, the Reporters Committee has also received a report that eFOIPA imposes restrictions on the number of times that files in the system can be accessed: links to files are only active for 48 hours, and such links can only be renewed twice before they are no longer accessible to the requestor. Finally, if a user wishes to check the status of her FOIA request, she cannot use eFOIPA, but must instead use a different portal: "FDPS."¹⁷ That site only provides a small amount of information regarding pending FOIA requests, and instructs members of the public with additional questions to "*e-mail* foipaquestions@ic.fbi.gov."¹⁸ It is difficult to comprehend how the eFOIPA and FDPS system can be viewed as streamlining or improving the FOIA process for requestors in any way. It is certainly not a more efficient or effective means for submitting FOIA requests than allowing requestors to simply email their requests to a dedicated email address.

The lack of an email address for the submission of administrative appeals at DOJ also makes the FOIA process inefficient and cumbersome for members of the news media and the public. To send an electronic administrative appeal concerning the determination of any DOJ component, a requester must use FOIAOnline, even if the component that made the determination *does not* use FOIAOnline.¹⁹ For example, to appeal a determination by the FBI, a requester must copy information from the FBI's "eFOIPA" portal and/or the "FDPS" portal to the multi-agency "FOIAOnline" portal used by OIP. Because these systems are not interoperable all information and documentation must be manually inputted.

If a requester does not want to sift through the myriad of online portals currently used by those DOJ components that do not accept requests and appeals via email, they

¹⁴ See 5 U.S.C. § 552(a)(4)(A).

¹⁵ See *id.*

¹⁶ *Id.* § 552(a)(4)(A)(ii).

¹⁷ FBI, *FDPS*, <https://vault.fbi.gov/fdps-1/@@search-fdps>.

¹⁸ *Id.* (emphasis added).

¹⁹ See Department of Justice, *Submit and Track a Request or Appeal*, <https://www.justice.gov/oip/submit-and-track-request-or-appeal/>.

are forced to revert to submitting requests and appeals via U.S. mail or fax (a technology with origins in the mid-19th century²⁰). This is unacceptable in 2017 when there is a well-established, ubiquitous, and effective method for electronic communications that creates a permanent, time-stamped, and accessible record for all parties: email. That the vast majority of DOJ components maintain an email address, alongside the general Department FOIA email address, makes clear that it is entirely possible for all components to provide one. Even the United States Citizenship and Immigration Services, a component within the Department of Homeland Security that received 162,986 FOIA requests in FY 2015 (more than 12 times as many as the FBI) maintains an email inbox for FOIA communications.²¹

In sum, the *exclusive* use of online portals by certain DOJ components to accept electronic FOIA requests and administrative appeals creates procedural impediments and practical headaches for requestors, and in no way facilitates the public's exercise of its statutory rights under FOIA. Accordingly, the Reporters Committee recommends that the following changes be made when the DOJ's final rule is issued:

- 1) Section 16.3(a) be amended to require all components of the DOJ to accept FOIA requests by email, in addition to online portals or other methods; and
- 2) Section 16.8(a) be amended to require OIP to accept administrative appeals via email, in addition to online portals or other methods.

The Reporters Committee believes that incorporating the comments set forth herein will assist requestors and the Department in administering the Freedom of Information Act.

Sincerely,

The Reporters Committee for Freedom of the Press

²⁰ Chris Baraniuk, *Why the fax machine isn't quite dead yet*, BBC (Feb. 25, 2015), <http://www.bbc.com/future/story/20150224-why-the-fax-machine-wont-die>.

²¹ See www.foia.gov; <https://www.uscis.gov/about-us/freedom-information-and-privacy-act-foia/how-file-foia-privacy-act-request/how-file-foiapa-request>.