The American Society of News Editors (ASNE) appreciates the opportunity to submit our comments in Docket Number DOJ-LA-2016-0024-0001 in order to address certain aspects of the draft policy implementing the “Release to One is a Release to All” (Release to All) presumption.

With some 500 members, ASNE is an organization that includes editors of daily news entities throughout the Americas. Founded in 1922 as the American Society of Newspaper Editors, ASNE’s priorities include freedom of information, diversity, and leadership development. As the organization’s members are regular users of the federal Freedom of Information Act (FOIA), ASNE is an active advocate for increased government transparency. It has filed comments on past regulatory proposals from the Department of Justice and other federal agencies; ASNE representatives have testified before both the United States House of Representatives and the United States Senate on several occasions. Perhaps most relevant to this docket, ASNE Legal Counsel Kevin M. Goldberg was one of two members of the public who presented comments on Release to All at the September 15, 2016 meeting of the Chief FOIA Officers Council.

ASNE supports Release to All as a positive, cost-efficient use of technology that will improve FOIA processing, but we harbor concerns about individual aspects of the program. These include: (1) the indication that agencies may withhold documents which may not be feasible or appropriate to post; (2) allowing agencies to post a list of brief descriptions online in lieu of posting all documents that were part of the original release; and (3) the proposed options for timing of the actual release to all.
General Support for Release to All

It has been twenty years since Congress first issued a mandate for agencies to engage in the proactive disclosure of “frequently requested records” as a means of tackling continually-increasing backlogs. The full potential of this requirement has not been realized, in part because of its slow implementation and inconsistent application. Among the issues that have inhibited effectiveness are the absence of a single, standard definition of what constitutes a “frequently requested record” and the lack of an obligation to post records online. These can be remedied through Release to All, making it likely to be a useful tool in combatting the FOIA backlog problem.

As ASNE Legal Counsel Kevin M. Goldberg noted in testimony before the United States Senate on March 13, 2013, early review of the earlier-but-somewhat-similar FOIA Online pilot project demonstrated that automating FOIA requesting would instantly produce tangible reductions in the time required to process each and every request and, in turn, agency backlogs:

The EPA’s early data demonstrated that significant benefits are reaped from the system from the moment a request is filed. Whereas it takes approximately twenty minutes for the request to be manually entered into most of the proprietary software used by the various agencies today and another ten minutes to generate a letter acknowledging the request, FOIA Online automates this as well, generating an instantaneous confirmation.

Here are some fun facts to put that time savings into perspective. If one looks at the 651,254 requests filed in Fiscal Year 2012 and multiplies that number by 30 minutes per request, the result is a savings of 325,627 person-hours that could be better spent on substantive processing tasks. Another way to look at that second number is that it equates to 162.8 full-time employee equivalents – you’d effectively be creating 163 new FOIA officers by using this new system.

While these statistics were offered to demonstrate the efficiencies of allowing direct, online filing of requests, the same benefits are enjoyed when proactively disclosing records online via Release to All, given the potential to simply eliminate a significant number of requests entirely. In fact, those 325,627 man-hours saved might only be the tip of the iceberg when one factors in the time (and money) also spent to search, review and copy records that have been requested on multiple occasions. When viewed in this light, any effort and expense required to implement Release to All, even with some additional protections discussed below, pale in comparison to the benefits Release to All will produce.

1 Section 4(5) of the Electronic Freedom of Information Act Amendments of 1996 created 5 U.S.C. 552(a)(2)(D), which requires disclosure – without the need for a request – of:

- copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.


3 There is little hard data available regarding the financial cost or extra time required to prepare for and effectuate Release to All. However, the small amount of data presented by the Office of Information Policy as a result of its Pilot Program reinforces that Release to All will result in a net savings for the government in several ways. The “ramp up time” for agencies to become acquainted with this process was absolutely miniscule – almost non-existent – by comparison to the potential time saved: 27 hours for the National Records and Archives Administration, 32 hours for the Office of Justice
“Good Cause” Exceptions to Posting

The draft Release to All policy states that not all records released through FOIA actually will be released to all. Instead, it says agencies may:

process particular records that, while technically releasable to a FOIA requester, are not appropriate for posting online, such as graphic videos of an automobile accident or records that raise scientific integrity risks. Agencies may process records containing information that if publicly posted could increase risks to individual privacy, such as the risk that de-identified data could be re-identified when combined with other publicly available information, exposing individuals to harms such as identity theft, reputational harm, embarrassment, financial loss, and risk to personal safety. Law enforcement agencies might process records for which there is an unacceptable foreseeable risk of harm to law enforcement or national security interests through mosaic compilation of publicly posted information.

While we understand that instantaneous, worldwide availability of certain records may raise some concerns in limited circumstances, broad permission to exclude records from the Release to All program worries us. We suggest that agencies be given further guidance in this area, specifically in the form of clear standards for exclusion, with reminders to favor disclosure over withholding.

The rationale cited in the draft policy – sensitivities surrounding personal privacy and interference with ongoing law enforcement investigations – are similar to those being raised around the country in opposition to the release of footage recorded by police body cameras. As advocates for open government have noted in response to these arguments, however, while new technology presents new challenges, it should not fundamentally change the application of public records laws which have withstood the tests of time and multiple advances in technology.

The draft policy allows for an ad hoc decision making process in applying this exception to Release to All. A decision to exclude a particular record from Release to All should require a full “re-consideration” of whether the FOIA exemption mandates against a release to all. Agencies should be required to apply the “presumption of openness” standard that was recently-codified in the FOIA Improvements Act of 2016. Release to all should occur unless the “agency reasonably foresees that disclosure would harm an interest protected by an exemption,” with that standard applied in light of the harm that might apply from a further release to all.

Posting Descriptions of Released Records as an Alternative to Posting Records Online

The draft policy raises a concern that a release to all of certain documents may prove unworkable provides a less burdensome alternative in those situations where:

an agency determines that the volume of released records, or the age or nature of the records themselves, makes contemporaneous posting of all FOIA-processed records impracticable at this

Programs, 2 hours for the Office of Director of National Intelligence, 2 hours for the Millennium Challenge Corporation and 40 hours for the Department of Defense.

time, the agency may instead briefly describe the processed records and post the list of brief descriptions online where they would otherwise post the released records.

We have little disagreement with using this alternative in limited situations, as long as agencies are formally reminded to “work toward steadily increasing the number of requests in which the records themselves are posted online as opposed to this alternative.” Adding two requirements will achieve the goals of this exclusion without undercutting Release to All entirely:

- Any follow up request for documents identified via the brief online description should be prioritized in the processing queue. The creation of a new track in an agency’s multi-track processing scheme might even be warranted to move these requests directly to the front of the line; at the very least, any request based on a “described for all” document should be considered a “simple” request. This will most accurately mimic a true release to all of the original document.

- Agencies should be required to track and report the number of times they utilize a brief description as an alternative to a full release to all to ensure they do not take advantage of what is intended to be a narrow exception to this policy.

**Timing of Postings**

The draft policy offers two options for timing of a Release to All:

Option 1: Agencies should post documents online as soon as administratively feasible following a release to a requester.

Option 2: Agencies should post documents online as soon as administratively feasible, but only after a delay of five working days following release to a requester, to allow requesters a brief period of time with exclusive access to the requested records.

Neither option is ideal, nor do they reflect the feedback provided by members of the requester community, including the Reporters Committee for Freedom of the Press (RCFP) and ASNE. We suggest a longer delay and, if possible, institution of two additional protections.

An immediate release to all is disfavored by the majority of requesters. A study of more than 100 journalists performed by the RCFP revealed that only 15.9% supported no delay before the Release to All. A more informal and anecdotal survey of ASNE members produces the same conclusion. These members offered the same general rationale for institution of some delay as those expressed in response to the RCFP survey:

- The feeling that reporters and editors would be less willing to invest time and money in FOIA requests if others could simply “free ride” off the original requester.

- A related fear that journalism as a whole would suffer as reporters (both those who might feel inclined to rush their stories to print and later free riders) might rush to publication without fully understanding the information contained in released documents.
Option 1 is not the right answer. But neither is Option 2. 44.9% of the RCFP respondents suggested a delay of longer than 5 business days, with 21.5% preferring a one-week delay and 23.4% suggesting a one month delay. Factor in that 28% voted for another, undefined delay period and it is highly likely that a majority of requesters surveyed would prefer a delay of longer than 5 business days.

Our informal survey of ASNE members revealed a similar mindset. Most ASNE members agreed that something more than one week, but less than one month provides the best balance between the competing interests of exclusivity and public availability. The prevailing view favored the longer end of that range.

Timing of the release, however, is only part of the issue. We also suggest two other options which, if implemented, might allow for use of Option 2 without fear of its negative impact:

- The draft policy can be amended to vary the delay according to the number of documents involved. This was discussed during the second Chief FOIA Officers meeting on September 15. It seems to benefit agencies and original requesters alike, as the former get more time to process the larger release to all and the latter get more time to analyze the results of the original request without fear of being beaten to publication.

- The identity of the original requester can be removed when the release to all occurs. All requester identities could be anonymized, or it could be a choice left to the original requester. Either way, this would minimize the fear that a particular journalist might be scooped by a competitor who simply shadows his or her requests with the direct intention of free riding toward earlier publication.⁴

**Conclusion**

ASNE thanks the Office of Information Policy for taking the lead on the Release to All policy and moving it closer to its implementation. We continue to support the policy as a whole because it will finally fulfill the promise of the twenty-year old requirement to proactively release “frequently requested records.” We believe the benefits of this program – especially the overall cost and time savings in both the short term and long term – are great. In fact, they are so great that they will still far outweigh the slight additional costs and time that would be added to the Release to All program if our suggested revisions are incorporated.

Respectfully submitted,

American Society of News Editors

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⁴ We do not support a delay of less than 5 business days before release to all occurs, even if these additional protections are adopted.