April 3, 2015

VIA FACSIMILE AND ELECTRONIC MAIL

Office of Information and Regulatory Affairs,
Office of Management and Budget
Attn: Department of the Interior Desk Officer (1085-XXXX)


The views expressed herein are presented on behalf of the Section of Science & Technology Law (the "Section") of the American Bar Association ("ABA"). These comments have not been approved by the House of Delegates or the Board of Governors of the ABA and, accordingly, should not be construed as representing the position of the ABA.

The Section of Science & Technology submits this comment, prepared by its Museums & the Arts Law Committee ("MALC"), in response to the Department of Interior’s Notice and Request for Comments for its Proposed New Information Collection: OMB Control Number 1084-XXXX, published in the Federal Register on February 3, 2015.

Introduction

MALC is a committee of the American Bar Association’s Section of Science & Technology Law. Most of our members are attorneys and law students. Non-attorneys can be associate members. Our primary stakeholders are our members, including attorneys representing museums, museum professionals, students interested in careers in museology and law, and the public.

MALC particularly benefits smaller museums lacking legal resources of their own. We provide publications to the public free of charge, collaborate with other museum associations, and consult our network of attorneys across the U.S., and even the world, to supply news and legal updates and create educational content for the museum profession. MALC’s interest in the Department of the Interior’s ("DOI") proposed information collection arises from our objective of keeping the museum community apprised of relevant changes in the legal landscape, but we also recognize how this proposed information collection may affect our members and stakeholders.

The DOI requested comments on:
(a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
(b) the accuracy of the agency’s estimate of the burden of the collection and the validity of the methodology and assumptions used;
(c) ways to enhance the quality, utility, and clarity of the information to be collected; and
(d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other collection techniques or other forms of information technology.

MALC’s comment is structured accordingly.

A. Comment on Whether the Collection of Information is Necessary for the Proper Performance of the Functions of the Agency, Including Whether the Information Will Have Practical Utility.

The DOI’s proposed information collection potentially affects museums that have objects collected on Federal lands under DOI jurisdiction. Museums, generally, are quasi-public institutions dedicated to increase and diffuse knowledge through the collection, study, interpretation and display of objects. These activities comprise the primary nexus between museums and the DOI, and the resulting relationship is a symbiotic one. Museums have been able to further their own missions with objects collected on DOI lands. They have been able to increase public knowledge by making those DOI-claimed objects available for public exhibition and scientific and scholarly study. In doing so, museums have provided a significant service to the DOI by providing requisite storage and conservation for those objects. Likewise, the DOI has contributed to the increase of public knowledge by placing its objects in venues where the public can access them better and easier than if the DOI provided its own venues.

This arrangement of housing objects collected on DOI-managed lands in museums is mutually beneficial to museums and to the DOI. The public has likely benefited the most, but it is unclear how the DOI’s proposed information collection is necessary for the proper performance of the agency. It is not apparent how the public will benefit from the proposed information collection. It must be noted that the stated objective of this proposed information collection is, inter alia, to help the DOI account for its objects not in DOI custody. The DOI’s interest in accounting for its objects is well-intentioned. However, it is not clear why this information collection is necessary to the DOI’s performance of its functions.

If “practical utility” is gauged as the amount the public benefits from the information collection, then the proposed information collection will have the most
practical utility if it is properly organized and publicly shared so that institutions, researchers, and individuals may become aware of what objects and specimens the DOI owns, what institutions house them, and how to gain access to them for study. Considering the incredible burden the proposed information collection may place on responding institutions (discussed in Section B below), any information collected should be utilized in a way that provides the most benefit to the public.

The DOI is seeking some information that, regardless of whether properly organized and publicly shared, would have little or no practical utility. For example, requiring museums to list individual researchers’, collectors’, or staff names in connection with information collection of a given object. How does collecting individual names benefit the public? The DOI has not stated a reason for wanting such information. Museums are educational institutions. In addition to paid staff, museums use in their operations students seeking practical experience, volunteers contributing their time and skills, and visiting researchers exchanging knowledge, techniques, and discoveries. When an object from DOI-managed lands comes into the custody of a museum, the persons involved in its collection, transport, conservation and display are not always recorded. Accordingly, a museum’s personnel records may not be a reliable indicator of individuals involved with an object and may not reflect fully the assistance of all the students, volunteers, and visiting researchers working on the matter. Another example of collecting information that has little or no practical utility would be where the DOI requires a responding institution to provide data that the DOI has in its custody already, instead of confirming what it knows and asking the institution to provide corrections.

Additionally, some of the information DOI seeks may even have negative utility. An example is the disclosure of detailed location information. MALC acknowledges that the intent for requiring this information is to account for DOI objects’ physical location. This is well-intentioned, but requiring the disclosure of such detailed information presents a security risk for the responding institution, for the Federal collections themselves, and potentially for staff members. Even if the DOI does not make such location data public, it would still be subject to a FOIA request and vulnerable to a cybersecurity breach, and thus be easily obtainable.

### B. Comment on the Accuracy of the Agency’s Estimate of the Burden of the Collection and the Validity of the Methodology and Assumptions Used.

The DOI underestimates the burden of the proposed information collection. The estimated amount of respondents (900) is too low, the estimated time of 2.33 hours per responding institution / 2,100 total nationwide hours annually is grossly underestimated, and the estimated amount of objects (19 million) will depend on the DOI specifying geographic and temporal boundaries.

Regarding the amount of respondents, we cannot tell what criteria the DOI used to arrive at its estimation of 900 institutions. According to the Institute of Museum and Library Sciences, as of May 19, 2014 there were approximately 35,144 active museums in
the United States,\textsuperscript{1} which puts the DOI’s estimated amount of responding institutions at just above 2% of all U.S. museums. Granted, not all museums have objects collected from DOI-managed lands in their collections. Natural history museums are most likely to comprise the majority of responding institutions. However, other types of museums and institutions may come within the purview of the DOI’s information collection, because they sometimes hold objects collected on DOI-managed lands. The responding institutions may also include history museums, science museums, historic sites, historic societies, and even aquariums and botanical gardens. A significant portion of those museums, many of them small and with severely limited resources, could come under the purview of the DOI’s information collection.

Regarding the estimated amount of time a responding institution will spend on responding to the DOI’s information collection, the DOI estimates each responding institution will spend 2.33 hours annually. The DOI estimates that the total annual burden for all responding institutions will be 2,100 hours (2.33 hours per institution times an estimated 900 responding institutions). These estimates are grossly inaccurate. Many responding institutions would likely spend months, not hours; some may spend years and others may not even be able to respond without financial assistance. What the DOI is proposing would be a monumental task for many responding institutions. The DOI should consider the following reasons why its estimation of time is grossly underestimated.

1. DOI proposes five forms for its information collection. DOI’s estimated time of 2.33 hours might be plausible for completion of these five forms if all of the information has already been compiled and is readily available. Realistically, however, the information would need to be compiled first, and further processing after compiling is likely necessary. This is an enormous task, because in order to compile the requested information, an inventory of collections would need to be completed – something the DOI itself contemplates in its proposed information collection.

2. Completing an inventory will be problematic for many institutions for myriad reasons, but some common reasons are listed below.

   a. Museums will need time to complete an inventory. The respondents most likely to hold DOI-owned objects – natural history museums – would need the most time to complete an inventory. Many natural history museums are well-established institutions with collections that date back centuries. Inventories require time to complete. Time needed to inventory any given collection grows exponentially as the size and age of the collection increases. A well-established natural history museum with millions of objects and specimens dating back to the 19\textsuperscript{th} century – not an uncommon occurrence – could take years to inventory in accord with the DOI request for information.

\textsuperscript{1} \url{http://www.imls.gov/government_doubles_official_estimate.aspx}, accessed March 27, 2015.
b. In addition to time, museums will need financial resources to carry out such a labor-intensive task. Museums will still need to carry out their education, exhibition, and access programs during information collection. Most museums are short-staffed already, which means a museum must add additional staff to comply with the DOI’s information collection. As quasi-public institutions, museums generally do not operate for profit. A great many museums do not have the fortune of having hefty endowments to fund operations. Indeed, most museums operate on very slim budgets.

c. Accordingly, most museums that would be subject to the DOI’s proposed information collection are not in a financial position to hire additional staff. Museums with limited budgets would likely determine that complying with the DOI’s proposed information collection is simply not financially feasible. To ensure the best quality and highest rate of response, the DOI should provide financial assistance to responding institutions to procure the necessary resources to respond the request for information.

3. Because DOI’s time estimate was calculated using an underestimated number of responding institutions, the time estimate is inherently defective. Realistically, the diversity of responding institutions’ collections makes estimating a time to compile information a best guess in the best instance.

For the aforementioned reasons, the DOI should acknowledge that its time estimate does not include time needed to gather the information necessary for completion of said forms.

Regarding the amount of DOI-owned objects held by museums, MALC has no opinion on the DOI’s estimate of 19 million but notes that the number of DOI-owned objects depends on a number of factors which have not been defined in the proposed information collection. For example, does the DOI plan to assert ownership over biological specimens or objects / specimens that were obtained prior to DOI management of the site but subsequent to the jurisdiction of another Federal agency? Simply asserting ownership over biological specimens would potentially add tens of millions of specimens to the DOI’s estimate and raise a plethora of issues relating to collecting that the DOI would then have to address in the interest of both public policy and public safety. Geographical and temporal boundaries are another significant factor affecting the DOI’s estimate of the amount of objects. Jurisdiction – and when jurisdiction commenced – can be a nebulous matter. As Hawaii’s Bishop Museum’s comment pointed out, some areas where objects and specimens collected are a virtual jurisdictional kaleidoscope involving the DOI and other Federal agencies. The DOI should define geographical and temporal boundaries it intends to apply. And as Chicago’s Field Museum suggested, a map created by the USGS that outlines areas where the proposed information collection applies would be most useful to responding institutions.

To gain a better perspective on how massive this information collection may be and how to better estimate the time required, the DOI may want to review the history of the
Native American Graves and Repatriation Act (“NAGPRA”) compliance subsequent to its enactment. With NAGPRA, the class of responding institutions was defined and the number known with a relatively high degree of accuracy. Similar to what may be required under the DOI’s proposed information collection, institutions responding to NAGPRA compliance were required to inventory their collections for remains and associated funerary objects. Many responding institutions took years of diligent effort to complete their inventories, owing to the size and age of collections, among other factors. To help defray a small portion of costs associated with completing an inventory, Federal funding was available for NAGPRA compliance. An unintended yet pleasant effect of the process of museums complying with NAGPRA was the spirit of collaboration that was borne between responding institutions, the Federal government, and affected Native American tribes. That same spirit of collaboration may also be latent within the DOI’s proposed information collection.

What the DOI is proposing appears to be a long-term endeavor requiring that the museums and the DOI work closely together, exchanging information. This effort contemplated by the proposed information collection cannot be completed meaningfully in 2.33 hours.

C. Comment on Ways to Enhance the Quality, Utility, and Clarity of the Information to be Collected.

MALC suggests a threefold approach to enhance the quality, utility, and clarity of the information to be collected: (i) define the responding institutions, (ii) define geographical and temporal boundaries, and (iii) provide a detailed description of how this information collection will be used.

(i) Defining specifically the institutions that must respond will enhance the quality of information collection. It will ensure that only appropriate institutions respond with relevant information. However, defining the scope of responding institutions requires DOI to define the geographical and temporal boundaries to which the information collection is to apply.

(ii) Defining geographical and temporal boundaries would enhance both the quality and clarity of the information to be collected. Responding institutions cannot provide reliable information on objects if they are unsure of whether the lands they were collected upon were under DOI management at the time of collection. For example, if an object was collected on lands managed by the military pursuant to a permit under the 1906 Antiquities Act, and management of that land was subsequently transferred to the DOI some decades later, the determination of whether that object is subject to information collection would be a legal one. Leaving museums to make these types of legal determinations would degrade the quality and clarity of information collected for the following reasons:

1. Museums having in-house legal counsel are the exception rather than the norm. Many museums – smaller museums especially – do not regularly seek legal advice
due to lack of resources, lack of access to an attorney or a host of other reasons. The determination of geographical and temporal boundaries not only requires legal knowledge, but often specialized experience and familiarity with historical events giving rise to shifts in boundaries or changes in management. These museums simply are not equipped nor qualified to make such legal determinations.

2. Competent legal professionals given the same set of facts and circumstances may render different yet equally valid opinions.

3. Having museums make the legal determination of geographical and temporal boundaries would result in inconsistent determinations, thus degrading the quality, clarity, accuracy, and reliability of information collected.

Inconsistent determinations will provide unreliable information. To maximize the quality and clarity of information collected, the DOI should define geographical and temporal boundaries to which the information collection applies, providing maps and timelines to responding institutions as appropriate.

(iii) Last, the DOI should provide details of how the proposed information collection will be used. As described previously, this information collection will have the greatest utility if the public benefits. Providing detailed information about its proposed use will increase utility by raising public visibility of the proposed information collection and by informing museums of its practical application. If museums know the practical application, they will be in a better position to maximize its utility by disseminating information about the information collection or including components of it in their own programming.

D. Comment on Ways to Minimize the Burden of the Collection of Information on Those Who are to Respond, Including Through the Use of Appropriate Automated, Electronic, Mechanical, or Other Collection Techniques or Other Forms of Information Technology.

In addition to the aforementioned suggestions in the previous section, we propose the following to minimize the burden of information collection on responding institutions.

The museum community is remarkably efficient at self-regulation. Museums subscribe to and adhere to their own code of ethics, which are promulgated (and enforced) by regional and national museum associations. Certain museum associations offer accreditation for those museums who meet their standards for, inter alia, collections care, policies and procedures, and ethics. The DOI should look to these accrediting institutions to determine overlap with its proposed information collection and standards required for accreditation. Using established processes and mechanisms for accreditation where appropriate will help to minimize the burden of information collection on both responding institutions and the DOI. For example, facility evaluations used in some accrediting processes may suffice for DOI purposes.
To further minimize the burden of responding to the DOI’s proposed information collection, the DOI should consider allowing responding institutions to respond in any number of formats generally accepted in the museum field and in use. Given the range of recording systems in use through the decades, from handwritten cards and logbooks to databases of various compositions, and the lack of a settled industry-standard form, the DOI should recognize that its proposed information collection may be undemanding for some museums to complete and challenging for others. The DOI should allow institutions to respond in a format they are currently using. This may shift the burden to the DOI, but it will decrease the burden on responding institutions by eliminating redundancy of effort to duplicate (and possibly migrate) information in a different format. The DOI has stated that this information collection is (at least partially) for the DOI’s own compliance purposes. Accordingly, the DOI should receive information in generally accepted, in use formats, even if it results in the DOI bearing the burden of harmonizing data from responding institutions to meet its purpose.

Conclusion

The DOI’s proposed information collection may be well-intentioned but it is defective in certain respects. For the reasons stated above, the DOI should re-evaluate its proposed information collection, address the concerns and issues identified in this letter, as well as those submitted by other organizations and institutions, and revise the proposed new information collection accordingly.

Sincerely,

Michael Hawes
Section Chair

cc:
Steven Floray, Office of Acquisitions and Property Management, US Dept. of the Interior