



Advocates for Government Accountability

A 501(c)(3) Nonprofit Corporation
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**BEFORE THE
U.S. OFFICE OF SPECIAL COUNSEL**

Washington, D.C.

Proposed Rule: Revision of Regulations Governing)
Freedom of Information Act Requests and Appeals, and) **Docket No. OSC-2016-0001**
Revision of Touhy Regulations Governing)
Release of Information in Response to Legal Proceedings)

COMMENTS OF CAUSE OF ACTION INSTITUTE

July 1, 2016

I. Introduction

Pursuant to Section 553(c) of the Administrative Procedure Act (“APA”), Cause of Action Institute (“CoA Institute”) hereby submits this comment on the U.S. Office of Special Counsel (“OSC”) proposed Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, regulations.¹

CoA Institute is a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.² In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability. CoA Institute routinely requests records under the FOIA and disseminates its analysis of those records to the interested public by various means, including a frequently visited website, newsletters, press releases, news articles, Twitter, and Facebook. CoA Institute engages in extensive FOIA litigation and many of its employees have specific expertise with respect to the history, purpose, and application of the FOIA. CoA Institute routinely confronts the issues addressed in the following comments. Therefore, CoA Institute respectfully requests that OSC consider these comments and amend its proposed rule accordingly.

II. Comments

a. § 1820.7(b)(6) – Representative of the News Media

While revisions contained in the proposed rule are to be commended, OSC has failed to address its outdated definition of “representative of the news media,”³ which is in conflict with the

¹ U.S. Office of Special Counsel, Revision of Regulations Governing Freedom of Information Act Requests and Appeals, and Revision of Touhy Regulations Governing Release of Information in Response to Legal Proceedings, 81 Fed. Reg. 27,049 (proposed May 5, 2016) (to be codified at 5 C.F.R. pt. 1820).

² CAUSE OF ACTION INST., <http://www.causeofaction.org> (last accessed July 1, 2016).

³ 5 C.F.R. § 1820.7(b)(6).

statutory definition.⁴ On August 25, 2015, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion in *Cause of Action v. Federal Trade Commission* that clarified the application of this statutory definition.⁵ It would be appropriate for an amended proposed rule to include the proper fee category definition.

Specifically, the proposed regulations improperly retain an outdated definition that requires a news media requester to be a “person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public.”⁶ This so-called “organized and operated” standard was created in guidance issued by the Office of Management and Budget in 1987.⁷ The *Cause of Action* court clarified that this outdated standard no longer applies because Congress provided a statutory definition of a “representative of the news media” in the OPEN Government Act of 2007: “Congress . . . omitted the ‘organized and operated’ language when it enacted the statutory definition in 2007. . . . [Therefore,] there is no basis for adding an ‘organized and operated’ requirement to the statutory definition.”⁸

CoA Institute therefore requests that OSC amend its proposed rule to remove the anachronistic “organized and operated” standard and to include the following definition, which tracks the FOIA statute:

§ 1820.7 Fees

[. . .]

(b)(6) “Representative of the news media” or “news media requester” means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

There are other elements of the *Cause of Action* decision that should also be considered with respect to the news media requester fee category. First, OSC should incorporate the direction that the news media requester fee category determination focus “on the nature of the *requester*, not its request.”⁹ To illustrate, “[a] newspaper reporter . . . is a representative of the news media regardless of how much interest there is in the story for which he or she is requesting information.”¹⁰ While a case-by-case inquiry into the articulated purpose of a request, the potential public interest in the requested material, or even the ability of a requester to disseminate the sought-after records rather than information in general may be appropriate in determining the eligibility of a nascent news media requester—“a new entity that lacks a track record”—it is important to remember that “the [FOIA] statute’s focus [is] on requesters, rather than [their] requests.”¹¹ The proposed regulations should reflect this proper focus.

⁴ 5 U.S.C. § 552(a)(4)(A) (“[T]he term ‘a representative of the news media’ means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.”).

⁵ 799 F.3d 1108 (D.C. Cir. 2015).

⁶ 5 C.F.R. § 1820.7(b)(6).

⁷ Office of Mgmt. & Budget, Freedom of Information Fee Guidelines, 52 Fed. Reg. 10,012, 10,015 (Mar. 27, 1987).

⁸ *Cause of Action*, 799 F.3d at 1125.

⁹ *Id.* at 1121.

¹⁰ *Id.*

¹¹ *Id.*

Further, with respect to the requirement that a news media requester use “editorial skills” to turn “raw materials” into a “distinct work,” CoA Institute respectfully directs OSC to the *Cause of Action* court clarification that “[a] substantive press release or editorial comment can be a distinct work based on the underlying material, just as a newspaper article about the same document would be—and its composition can involve ‘a significant degree of editorial discretion.’”¹² While the mere dissemination of raw records would not meet the “distinct work” standard, even a simple press release commenting on records would satisfy this criterion. OSC regulations should embrace this liberalized standard.¹³

Third, the *Cause of Action* court insisted that the statutory definition of “representative of the news media” captures “alternative media” and evolving news media formats.¹⁴ The court thereby provided a useful clarification about the interplay between evolving media and the news media dissemination requirement when it affirmed the *National Security Archive v. Department of Defense* rule that “posting content to a public website can qualify as a means of distributing it[.]”¹⁵ While “[t]here is no doubt that the requirement that a requester distribute its work to ‘an audience’ contemplates that the work is distributed to more than a single person,” “the statute does not specify what size the audience must be.”¹⁶ With this in mind, OSC should indicate that the examples of news media entities it may include in its regulations are non-exhaustive.

b. Record Preservation Requirement

CoA Institute also requests that OSC introduce a new section into the proposed rule to ensure the proper preservation of “agency records,” as that term is understood under FOIA, during the pendency of a request. It is unlawful for an agency to destroy or dispose of any record subject to a FOIA request.¹⁷ Other agencies have appropriately reflected this requirement in their FOIA regulations,¹⁸ and OSC should do the same. CoA Institute proposes the following language to be codified in a new section of 5 C.F.R. pt. 1820:

¹² *Id.* at 1122.

¹³ The *Cause of Action* court also addressed three related issues. First, the court articulated that the FOIA does not “require that a requester gather[] information ‘from a range of sources’ or a ‘wide variety of sources.’” *Id.* at 1122. “[N]othing in principle prevents a journalist from producing ‘distinct work’ that is based exclusively on documents obtained through FOIA.” *Id.* Second, with respect to the news media requester category dissemination requirement, the court provided a non-exhaustive list of the methods an agency must consider, including: “newsletters, press releases, press contacts, a website, and planned reports.” *Id.* at 1124. Finally, the court addressed the so-called “middleman standard,” rejecting the government argument that “a public interest advocacy organization cannot satisfy the [FOIA] statute’s distribution criterion because it is ‘more like a middleman for dissemination to the media than a representative of the media itself[.]’” *Id.* at 1125. The *Cause of Action* court rejected this argument because “there is no indication that Congress meant to distinguish between those who reach their ultimate audiences and those who partner with others to do so[.]” *Id.* OSC should consider incorporating these important clarifications into its final rule.

¹⁴ 5 U.S.C. § 552(a)(4)(A) (“These examples [of news-media entities] are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities.”).

¹⁵ *Cause of Action*, 799 at 1123.

¹⁶ *Id.* at 1124.

¹⁷ See, e.g., 36 C.F.R. § 1230.3(b) (“Unlawful or accidental destruction (also called unauthorized destruction) means . . . disposal of a record subject to a FOIA request, litigation hold, or any other hold requirement to retain the records.”); *Chambers v. Dep’t of the Interior*, 568 F.3d 998, 1004–05 (D.C. Cir. 2009) (“[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under the FOIA or the Privacy Act.”); *Judicial Watch, Inc. v. Dep’t of Commerce*, 34 F. Supp. 2d 28, 41–44 (D.D.C. 1998).

¹⁸ See, e.g., 26 C.F.R. § 601.702(c)(14) (“All correspondence relating to the [FOIA] requests received by the IRS . . . and all records processed pursuant to such requests, shall be preserved, until such time as the destruction of such correspondence and records is authorized pursuant to title 44 of the United States Code. Under no circumstances shall

§ 1820.[] **Records management.**

All records concerning requests under the FOIA, including correspondence relating to such requests and any responsive records, must be preserved until such time as their disposal or destruction is authorized under all relevant laws and regulations. Under no circumstances shall records be destroyed while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

III. Conclusion

Thank you for your consideration of the foregoing comments and proposed changes.



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