

COMMENTS OF CAUSE OF ACTION

To

THE WHITE HOUSE OFFICE OF SCIENCE AND TECHNOLOGY POLICY

“Proposed Freedom of Information Act Regulations”

June 11, 2012

Cause of Action (CoA), a nonpartisan, nonprofit organization that uses public advocacy and legal reform strategies to ensure greater transparency in government and protect taxpayer interests and economic freedom, respectfully submits these comments and recommendations in response to a notice published on May 9, 2012 in the Federal Register by the White House Office of Science and Technology Policy (OSTP) concerning proposed agency regulations that implement the Freedom of Information Act of 1974 (FOIA).¹

CoA routinely requests records under FOIA and disseminates the information to its supporters and benefactors, government officials, appropriate news media, and to the American public at large through a variety of means, including a frequently visited website, www.causeofaction.org, newsletters, press releases, news articles, Twitter, and Facebook. CoA also engages in extensive FOIA litigation and has specific expertise with respect to the history, purpose, and application of FOIA.

**Proposed Section 2402.3(c) General Policy and Definitions
(Representative of the news media or news media requester)**

You have proposed in section 2402.3(c) defining a “representative of the news media or news media requester” as “any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public.” Furthermore, the proposed definition of

¹ 5 U.S.C. § 552(a), *et seq.*

“news media” is “television or radio stations broadcasting to the public at large and publishers of periodicals.”

This definition, however, is regrettably and unnecessarily narrow and antiquated. We would suggest mirroring FOIA’s language in 5 U.S.C. § 552(a)(4)(A)(ii), as recently amended in the OPEN Government Act of 2007, Pub. L. No. 11-175, 121 Stat. 2524, which specifically includes alternative news media entities:

In this clause, the 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. In this clause, the term ‘news’ means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ‘news’) who make their products available for purchase by or subscription by or free distribution to the general public. *These examples 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.* A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination. (Emphasis added).

Such an expanded definition would also be consistent with judicial precedent. In *National Security Archive v. U.S. Dep’t of Defense*,² the Court of Appeals for the District of Columbia Circuit noted that FOIA’s legislative history demonstrates that “it is critical that the phrase ‘representative of the news media’ be broadly interpreted if the act is to work as expected In fact, any person or organization which regularly publishes or disseminates information to the

² 880 F.2d 1381, 1386 (D.C. Cir. 1989)

public . . . should qualify for waivers as a ‘representative of the news media.’”³ In *Electronic Privacy Information Center v. Dep’t of Defense*,⁴ the court broadly construed a Department of Defense regulation defining “representative of the news media” to include organizations that, like CoA, maintains a frequently visited website and regularly publishes an e-mail newsletter.

Therefore, CoA respectfully urges you to revise the definition of a “representative of the news media or news media requester” as the following:

Representative of the news media or news media requester mean any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. For purposes of this definition, the term “news” means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances where they can qualify as disseminators of “news”) who make their products available for purchase or subscription by the general public. *These examples 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.* For “freelance” journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization. A publication contract would be the clearest proof, but OSTP shall also look to the past publication record of a requester in making this determination. To be in this category, a requester must not be seeking the requested records for a commercial use. A request for records supporting the news-dissemination function of the requester shall not be considered to be for a commercial use.

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³ *Id.* at 1386 (citing 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986)).

⁴ 241 F. Supp. 2d. 5, 12-15 (D.D.C. 2003).