



September 10, 2012

VIA E-MAIL AND FIRST CLASS MAIL

Mr. David P. Berry
Inspector General
National Labor Relations Board
1099 14th Street, NW Room 9820
Washington, DC 20570
E-mail: OIGHOTLINE@nrlrb.gov

RE: FREEDOM OF INFORMATION ACT REQUEST

Dear Inspector General Berry:

We write on behalf of Cause of Action, a nonprofit, nonpartisan organization that uses investigative, legal, and communications tools to educate the public on how government accountability and transparency protects taxpayer interests and economic opportunity.

On August 30, 2011, Cause of Action sent a Freedom of Information Act (FOIA) request to the National Labor Relations Board (NLRB) requesting communications and records concerning the NLRB's decision to sue the Boeing Company (Boeing). On September 12, 2011, Cause of Action sent a supplemental FOIA request to the NLRB requesting the daily calendars of NLRB Members and documents concerning the operating budgets of NLRB regional offices, as well as certain advertising documents. These two FOIA requests were consolidated and Cause of Action began receiving production on September 19, 2011, with additional FOIA production being received on a rolling basis.

On November 22, 2011, Cause of Action wrote to you, stating that on the basis of documents received and reviewed by Cause of Action, "we have serious concerns about . . . *ex parte* communications . . . at the [NLRB]."¹ In our November 22 request for investigation, we provided the legal basis for concluding *ex parte* communications had occurred given the facts uncovered via the FOIA production:

Under the Administrative Procedures Act . . . a member of the NLRB must not make a prohibited communication with interested persons outside the agency.² The American Bar Association's Model Code of Judicial Conduct bars *ex parte*

¹ See Letter from Will Hild, Associate Attorney, Cause of Action, to David Berry, Inspector General, National Labor Relations Board (Nov. 22, 2011) (enclosed) at 1.

² 5 U.S.C. § 557(d)(1)(C).

communications except those limited to “consultation with court personnel . . . or with other judges.”³ The NLRB's own *ex parte* rules prohibit communications with outside, interested persons . . . According to the NLRB rules . . . no agent of the [NLRB] shall request any prohibited *ex parte* communications or “make or knowingly cause to be made” any prohibited *ex parte* communications about the proceeding to any interested person outside the agency relevant to the merits of the proceeding.”⁴ The NLRB rules define “person outside this agency” to include “any individual outside this agency, partnership, corporation, association, or other entity, or an agent thereof, **and the general counsel or his representative when prosecuting an unfair labor practice proceeding before the [NLRB] pursuant to section 10(b) of the Act.**”⁵

On April 13, 2012, Congressman John Kline (R-MN), Chairman of the U.S. House of Representatives, Committee on Education and the Workforce, wrote to you requesting that you “commence an investigation to determine whether Acting General Counsel Lafe Solomon or his staff made any prohibited *ex parte* communications regarding the Boeing case, 19-CA-32431.”⁶ On April 17, 2012, Fred Wszolek, Executive Director of the Workforce Fairness Institute, reiterated these requests for investigation.⁷

According to your office’s website, the NLRB’s Office of Inspector General (OIG) “receives information, which may be characterized as a complaint, allegation, or referral”, whereupon it

[R]eviews the information and makes an initial determination of what action is required. If an allegation appears to be credible, the OIG will generally take one of three actions: (1) initiate an investigation; (2) initiate an audit or inspection; or (3) refer the allegation to management or another agency. If an investigation is initiated, the OIG will then determine whether the allegation is criminal or administrative.⁸

In your most recent Semiannual Report, you stated the NLRB OIG “[i]nvestigated two matters involving the [NLRB]. The investigative reports were provided to the appropriate

³ American Bar Ass’n, Model Code of Judicial Conduct Canon 2.9(A)(3)(2011) (cited in the original as American Bar Ass’n, Model Code of Judicial Conduct Canon 3(B)(7)(1990)).

⁴ 29 C.F.R. § 102.126 (1998)

⁵ Letter from Will Hild, Associate Attorney, Cause of Action, to David Berry, Inspector General, National Labor Relations Board (Nov. 22, 2011) at 7, quoting 9 C.F.R. § 102.127(a) (emphasis added).

⁶ Letter, Chrmn. John Kline, H. Comm. Ed. & Workforce, to David P. Berry, NLRB IG, (Apr. 13, 2012) at 1.

⁷ See Letter, Fred Wszolek, WFI, to David P. Berry, NLRB IG, (Apr. 17, 2012), *available at* <http://www.biglaborbailout.com/2012/04/17/wfi-requests-nlr-ig-investigate-general-counsel-board-communication/>.

⁸ See NLRB Website, Office of Inspector General – Investigations, *available at* <http://www.nlr.gov/who-we-are/inspector-general/oig-investigations>.

Congressional oversight committees. OIG-I-467 and OIG-I-468.”⁹ On the basis of documents released by House Education and Workforce Committee Ranking Member George Miller and given that the Semiannual Report concluded on March 31, 2012, well before Chairman Kline’s April 13, 2012 request to commence an investigation, it is obvious that the Semiannual Report’s mention of “investigative reports . . . provided to the appropriate Congressional oversight committees” did not relate to the *ex parte* communications at the NLRB raised in Cause of Action’s November 22, 2011 letter. According to the OIG’s disclosures of investigations, the OIG’s last Inspection Report was issued on June 29, 2011¹⁰ and the last Audit Report was issued on January 9, 2012.¹¹

Cause of Action provided you with extensive information in our letter of November 22, 2011 evidencing possible *ex parte* communications at the NLRB.¹² The OIG either (1) did not find this information to be “credible”, (2) has failed to open an investigation, or (3) has begun an investigation only after significant delay given that credible allegations were presented to the OIG over nine (9) months ago.

We are particularly troubled that a decision, if any, to investigate the allegations of *ex parte* communications by Wilma Liebman and Lafe Solomon after substantial delay may be arbitrary and capricious, if not politically charged. The two NLRB OIG investigative reports included in the last Semiannual Report both involved Republican members of the NLRB. Report OIG-I-467 relates to your investigation of Republican Board Member Brian C. Hayes¹³ and Report OIG-I-468 relates to your investigation of former Republican Counsel and Board Member Terence Flynn.¹⁴

Deposition transcripts from March 15, 2012¹⁵ related to your investigation into Terence Flynn create the impression that you maintained “too closed a mind” in your investigations as

⁹ NLRB Semiannual Report, Investigations Program (October 1, 2011 – March 31, 2012) at 9, *available at* http://www.nlr.gov/sites/default/files/documents/202/sar_oct_2011_mar_2012.pdf.

¹⁰ See NLRB, OIG Inspection Reports, *available at* <http://www.nlr.gov/oig-inspection-reports>.

¹¹ See NLRB, OIG Audit Reports, *available at* <http://www.nlr.gov/oig-audit-reports>.

¹² See Letter from Will Hild, Associate Attorney, Cause of Action, to David Berry, Inspector General, National Labor Relations Board (Nov. 22, 2011).

¹³ See NLRB OIG, Memorandum, *Report of Investigation – OIG-I-467*, (January 23, 2012), *available at* <http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/112/pdf/NLRBOIGReport.pdf>.

¹⁴ See NLRB OIG, Memorandum, *Report of Investigation – OIG-I-468*, (Mar. 19, 2012), *available at* <http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/112/pdf/letters/DOCFlynnTransmittal.PDF>.

¹⁵ In the Matter of Terence Flynn, Case No. OIG-I-468, Investigative Interview of Terence Flynn, (Mar. 15, 2012), *available at* <http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/112/pdf/IE%2054%20Part%20A%201-19.pdf> [hereinafter “Flynn Deposition”].

IG.¹⁶ While proper investigative interviews are designed to develop facts, deposition testimony reflects your active disagreement with Terence Flynn:

[MR. FLYNN:] [M]y sense of this is that there is no predicate for this investigation, none. And that the kind of thing that we're talking about here is the kind of thing that would surface if you looked at any government official's e-mail. . . . By saying this, I don't mean to concede any even technical wrongdoing because I don't believe any occurred. But to the extent an argument could be made that any sort of de minimis forwarding of internal government material might have occurred, it is de minimis and not something that should be the subject of an investigation. You know investigative activity even by an IG or the Department of Justice or anybody else has a chilling effect on a person's activities and creates a lot of anxiety. And my suggestion is that there is, like I said, no predicate for this one. And that it should be closed down.

MR. BERRY: Okay. Well, I respectfully disagree with you. And we will be issuing a report.¹⁷

Based on your response, Mr. Flynn's counsel asked you, "What's the predicate for looking at all of [Mr. Flynn's] e-mails was [sic] as opposed to looking at somebody else's e-mails? . . . And has this been a fair and universal look at e-mails in the NLRB or is it just focusing on one or two individuals?"¹⁸ Following this inquiry, you responded:

MR. BERRY: This came up as the result of another investigation. So this is not that we just went and pulled his e-mail account and decided to look at him. It came up in the course of a different investigation. And, actually, it came up because of his – got initiated because of his communications with Peter Kirsanow.

MR. FINE: But have you done this with others as well or is this just simply focused on him? Because I think –

MR. BERRY: Well, I'm not –

MR. FINE: . . . [T]he kinds of things that we're seeing here are the kinds of things that I would venture to say happens quite frequently. And that if you're looking at one, are you going to also look at others as well.

¹⁶ *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988).

¹⁷ Flynn Deposition at 69, *available at*

<http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/112/pdf/IE%2054%20Part%20D%2069-75.pdf>.

¹⁸ *Id.* at 69-70.

MR. BERRY: If I have evidence other people are engaging in this type of conduct, we would look at other individuals. But I'm not going to go look at everyone's e-mail account without some basis for doing so. We looked at Mr. Flynn's e-mail account because we had a basis for doing so. We don't routinely just go look at e-mail accounts.

MR. FINE: Well, but if you see that it is happening on one or what you believe is happening in one instance, wouldn't you want to go look and see whether it is happening in others as well?

MR. BERRY: Well, I think you would have to have some basis to believe that it is happening with other individuals. We haven't.¹⁹

Despite the fact that on November 22, 2011 Cause of Action sent you a letter suggesting *ex parte* communications occurred via e-mail between Wilma Liebman, then-Chair of the NLRB, and Acting General Counsel Lafe Solomon, on March 15, 2012 you stated in response to the inquiry of Glenn Fine – the former Inspector General for the United States Department of Justice – concerning whether other instances of *ex parte* communications were occurring at the NLRB that you had no basis for believing “that it is happening with other individuals.”

We would like to know what actions have been taken in response to our earlier request for investigation into this matter, as well as those of Congressman Kline and others. Therefore, and pursuant to the provisions of the FOIA, 5 U.S.C. § 552, Cause of Action hereby requests that the NLRB OIG produce, within twenty (20) business days, for the time period of September 1, 2011 until the present, the following:

- 1) All records, including e-mails, referring or relating to Cause of Action's November 22, 2011 request for an NLRB OIG investigation.
- 2) All records referring to or related to Congressman Kline's letter of April 13, 2012.
- 3) Any and all investigative reports or documents submitted to Congress regarding the substance of Chairman Kline's April 13, 2012 letter.
- 4) All records referring to or related to allegations of *ex parte* communications from officials of the NLRB pertaining to the Boeing matter referenced above.
- 5) All records pertaining to concluded investigations or determinations made regarding Cause of Action's November 22, 2011 request for investigation.

¹⁹ *Id.* at 70-71.

- 6) All records of any concluded investigations, both criminal and administrative, into NLRB *ex parte* communications regarding the Boeing matter referenced above.
- 7) All records referring or relating to why investigative reports such as Reports concerning OIG-I-467 and OIG-I-468 are not publicly posted by the NLRB OIG.
- 8) All documents referring or relating to the procedures used by the NLRB OIG to determine whether information or allegations are sufficiently “credible” to warrant the launching of an investigation.
- 9) Any and all records concerning referrals by the NLRB OIG to the U.S. Department of Justice.

Cause of Action Is Entitled to a Complete Waiver of Fees (Public-Interest Purpose).

Cause of Action requests a waiver of both search and review fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). This statute provides that the requested information and/or documents shall be furnished without or at reduced charge if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” Cause of Action, in the present matter, satisfies all of the required elements for a fee waiver.

- 1) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.

First and foremost, “obtaining information to act as a ‘watchdog’ of the government is a well-recognized public interest in the FOIA.”²⁰ It is for this reason that Cause of Action, a nonprofit, nonpartisan organization that uses public advocacy and legal reform strategies to ensure greater transparency in government and protect taxpayer interests and economic freedom, seeks disclosure of the requested documents. Disclosure of the information requested by Cause of Action in this instance is likely to contribute significantly to the understanding by the public at large of the operations and activities of the federal government as the documents requested concern the performance of the statutory and regulatory duties and responsibilities of the NLRB and the NLRB OIG, federal government agencies. More specifically, the information Cause of Action requests concerns identifiable “operations or activities of the government” because it relates to the operations of the NLRB and the NLRB OIG and their ability to manage labor relations in a transparent manner at a time of great national concern over employment.

²⁰ *Baltimore Sun v. United States Marshals Serv.*, 131 F. Supp. 2d 725, 729 (D. Md. 2001); see also *Center to Prevent Handgun Violence v. United States Dep’t of the Treasury*, 981 F. Supp. 20, 24 (D.D.C. 1997) (“This self-appointed watchdog role is recognized in our system.”).

The NLRB is charged with investigating and remedying unfair labor practices, including union-related situations, and thus has a strong impact on the labor market as a whole. As a result, the public at large has a moral and financial interest in knowing whether the NLRB is effectively and appropriately executing its duties and responsibilities. Because of this, the information requested will benefit the public as opposed to the individual understanding of the requester or a narrow segment of interested persons. Disclosure would undoubtedly be of value to members of the public. Thus, this element is met.

2) Disclosure of the requested information is not in the commercial interest of Cause of Action.

Cause of Action does not seek this information to benefit commercially. Cause of Action is a nonprofit organization as defined under section 501(c)(3) of the Internal Revenue Code. Our organization is committed to protecting the public's right to be aware of the activities of government agencies and to ensuring the lawful and appropriate use of government funds by those agencies. This request covers the activities and operations of the NLRB. Cause of Action will not make a profit from the disclosure of this information. This information will be used to further the knowledge and interests of the general public regarding the NLRB while providing an opportunity for the public to evaluate the policies of the NLRB in the highly-publicized Boeing case. This will also allow the public to further their insight on the operations of the NLRB. In the event the disclosure of this information creates a profit motive, it is not dispositive for the commercial interest test; media or scholars could have a profit motive, as long as the dissemination of the information is in their professional capacity and would further the public interest.²¹ Therefore, Cause of Action satisfies this element.

3) Cause of Action has an ability to disseminate the requested information to the public and specifically intends to do so.

Cause of Action intends to make the results of this request available to the public in various medium forms. Cause of Action uses a combination of research, litigation, advocacy, and regularly disseminated publications to advance its mission. Our staff has a combined forty-five (45) years of expertise in government oversight, investigative reporting, and federal public interest litigation. These professionals will analyze the information responsive to this request, use their editorial skills to turn raw materials into a distinct work, and share the resulting analysis with the public, whether through Cause of Action's regularly published online newsletter, memoranda, reports, or press releases. In addition, Cause of Action will disseminate any relevant information it acquires from this request to the public through its frequently visited website, www.causeofaction.org, which also includes links to thousands of pages of documents Cause of Action acquired through its previous FOIA requests, as well as documents related to Cause of Action's litigation and agency complaints. Lastly, after the production of the requested

²¹ See *Campbell v. Department of Justice*, 164 F.3d 20, 38 (D.C. Cir. 1998).

information, Cause of Action intends to produce a report on the matter of *ex parte* communications from the NLRB regarding the Boeing matter. This report may be published at, distributed to the news media, and sent to interested persons through our regular periodicals, including “Agency Check” and “Cause of Action News.” An ability to show the presence of a website with occasional, consistent traffic is enough to show that a requester has an ability to disseminate information.²² As with the other two (2) outlined above, Cause of Action has also met this element, in effect, justifying a fee waiver.

Cause of Action Is Entitled to News Media Requester Category Status.

Cause of Action also asks that it not be charged search or review fees for this request because it qualifies as a “representative of the news media, or news media requester,” under 5 U.S.C. § 552(a)(4)(A)(ii)(II).²³ In *National Security Archive v. U.S. Dep’t of Defense*,²⁴ the U.S. 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 public . . . should qualify for waivers as a ‘representative of the news media.’*”²⁵

Cause of Action is organized and operated, *inter alia*, to publish and broadcast news, i.e., information that is about current events or that would be of current interest to the public. Cause of Action routinely and systematically disseminates information to the public through various medium forms. Cause of Action maintains a frequently visited website, www.causeofaction.org. Additionally, since September 2011, Cause of Action has published an e-mail newsletter. This newsletter provides subscribers with regular updates regarding Cause of Action’s activities and information the organization has received from various government entities. Cause of Action also disseminates information via Twitter and Facebook. Cause of Action also produces a

²² See *FedCURE v. Lappin*, 602 F. Supp. 2d 197, 203 (D.D.C. 2009).

²³ Other agencies of the federal government have granted Cause of Action “representative of the news media” category status. See, e.g., FOIA Request HQ-2012-00752-F (Department of Energy), news media status granted on Feb. 15, 2012; FOIA Request No. 12-00455-F (Department of Education), news media status granted on Jan. 20, 2012; FOIA Request 12-267 (Federal Emergency Management Agency), news media status granted on Feb. 9, 2012; FOIA Request 2012-RMA-02563F (Department of Agriculture), news media status granted on May 3, 2012; FOIA Request 2012-078 (Department of Homeland Security), news media status granted on Feb. 15, 2012; FOIA Request 2012-00270 (Department of Interior), news media status granted on Feb. 17, 2012; FOIA Request (Department of Labor), news media status granted on April 20, 2012; FOIA Request CRRIF 2012-00077 (Department of Commerce), interim rolling production of documents on Mar. 1, 2012 without charge. As the U.S. Court of Appeals for the District of Columbia noted in *Oglesby v. United States Dep’t of Army*, agencies should grant news media requestor status when other agencies have done so because of “the need for uniformity among the agencies in their application of FOIA.” 920 F.2d 57, 66 (D.C. Cir. 1990).

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

²⁵ *Id.* (citing 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986)) (emphasis in original).

newsletter titled “Agency Check,” which informs interested persons about actions of federal agencies, and another periodical, “Cause of Action News.”²⁶

Cause of Action gleans the information it regularly publishes in its newsletters from a wide variety of sources, including FOIA requests, government agencies, universities, law reviews, and even other news sources. Cause of Action researches issues on government transparency and accountability, the use of taxpayer funds, and social and economic freedom; regularly reports on this information; analyzes relevant data; evaluates the newsworthiness of the material; and puts the facts and issues into context. Cause of Action uses technology, including but not limited to the Internet, Twitter, and Facebook, in order to publish and distribute news about current events and issues that are of current interest to the general public. These activities are hallmarks of publishing, news, and journalism. Based on these extensive publication activities,²⁷ Cause of Action qualifies for a fee waiver as a “representative of the news media, or news media requester,” under FOIA and agency regulations.

²⁶ CAUSE OF ACTION WEBSITE, Newsletters, available at <http://causeofaction.org/newsletters/>.

²⁷ See, e.g., Matthew Boyle, *Report: ACORN-affiliated group gets \$300,000 more in taxpayer money*, THE DAILY CALLER, (Sept. 16, 2011), available at <http://dailycaller.com/2011/09/16/report-acorn-affiliated-group-gets-300000-more-in-taxpayer-money/>; Matthew Boyle, *Long-time ACORN affiliate secures \$350,000 in new taxpayer funding*, THE DAILY CALLER, (Sept. 19, 2011), available at <http://dailycaller.com/2011/09/19/long-time-acorn-affiliate-secures-350000-in-new-taxpayer-funding/>; Paul Streckfus, *Accountability Group Seeks IRS Investigation of ACORN Affiliates*, EO TAX JOURNAL, Ed. 2011-173, (Oct. 24, 2011); Bobby McMahon, *EPA Stalls Utility MACT Until December, Fights Industry Bid For Year Delay*, INSIDE EPA, (Oct. 24th, 2011), available at <http://insideepa.com/201110212379934/EPA-Daily-News/Daily-News/epa-stalls-utility-mact-until-december-fights-industry-bid-for-year-delay/menu-id-95.html>; Paul Streckfus, *More Commentary on NCPL's Annual Conference*, EO TAX JOURNAL, Ed. 2011-185, (Nov. 9, 2011); Patrick Reis and Darren Goode, *Senators hedge bets ahead of CSAPR vote - Second anti-reg bill to get vote - Perry's debate gaffe - Acrimony hits new heights in Solyntra spat*, POLITICO, (Nov. 10, 2011), available at <http://www.politico.com/morningenergy/1111/morningenergy374.html>; Paul Streckfus, *More Commentary on NCPL's Annual Conference*, EO TAX JOURNAL, Ed. 2011-187, (Nov. 15, 2011); Frank Maisano, *Nov 14 Energy Update: Chu'd Out in Congress*, ENERGYNOW!, (Nov. 15, 2011), available at <http://www.energynow.com/energypanel/2011/11/15/nov-14-energy-update-chud-out-congress>; Conn Carroll, *Labor board broke federal law on Boeing suit*, WASHINGTON EXAMINER, (Nov. 27, 2011), available at <http://campaign2012.washingtonexaminer.com/article/labor-board-broke-federal-law-boeing-suit>; Matthew Vadum, *Obama uses taxpayer cash to back ACORN Name changes used to dodge the law*, WASHINGTON TIMES, (Nov. 28, 2011), available at <http://www.washingtontimes.com/news/2011/nov/28/obama-uses-taxpayer-cash-to-back-acorn-name-change/>; Matthew Boyle, *Obama administration, GAO appear to have ignored group's ACORN affiliation to award \$700K*, THE DAILY CALLER, (Nov. 28, 2011), available at <http://dailycaller.com/2011/11/28/obama-administration-gao-appear-to-have-ignored-groups-acorn-affiliation-to-award-700k/>; WORLDNETDAILY, *See which radicals got more taxpayer dollars: Support maintained despite organization's accounting 'problems,'* (Nov. 29, 2011), available at <http://www.wnd.com/index.php?fa=PAGE.view&pageId=372685>; Perry Chiamonte, *ACORN Misused Federal Grant Funds, Report Says*, FOX NEWS, (Nov. 30, 2011), available at <http://www.foxnews.com/politics/2011/11/30/acorn-misused-federal-grant-funds-report-says/>; Marsha Shuler, *Group challenges La. contribution limit*, THE ADVOCATE, (Nov. 30, 2011), available at <http://theadvocate.com/news/1437637-123/group-challenges-la.-contribution-limit>; Margaret Menge, *Justice Audit Alleges ACORN Spin-Off in New York Misused Money*, NEWSMAX, (Dec. 1, 2011), available at <http://www.newsmax.com/US/ACORN-justice-audit-funds/2011/12/01/id/419672>; PITTSBURGH TRIBUNE-REVIEW,

Cause of Action's activities clearly fall within the statutory definition of this term. 5 U.S.C. § 552(a)(4)(A)(ii)(III) defines "representative[s] of the news media" broadly to include organizations that disseminate news through electronic communications, including "*publishers of periodicals . . . who make their products available for purchase by or subscription by or free distribution to the general public.*"²⁸ Moreover, the FOIA statute itself, as amended in 2007, explicitly defines "representative of the news media"—a term that had previously been undefined in the statute—to specifically include organizations, such as Cause of Action, that regularly publish and disseminate online periodicals, *e.g.*, newsletters.²⁹ The statutory definition unequivocally commands that organizations that electronically disseminate information and publications via "alternative media *shall* be considered to be news-media entities."³⁰ As the plain language of the statute makes abundantly clear, then, an organization that regularly disseminates news via an online newsletter or periodical, such as Cause of Action, is a "representative of the news media" under the FOIA.

In *Electronic Privacy Information Center v. Dep't of Defense*,³¹ the court broadly construed a Department of Defense regulation defining "representative of the news media" to include a 501(c)(3) that, like Cause of Action, maintains a frequently visited website and

Acorn lives: Meet AHCOA, (Dec. 5, 2011), available at http://www.pittsburghlive.com/x/pittsburghtrib/opinion/s_770135.html; Tom Fitton, *Obama Administration Violating ACORN Funding Ban According to New Audit*, BIG GOVERNMENT, (Dec. 5, 2011), available at <http://biggovernment.com/tfitton/2011/12/05/obama-administration-violating-acorn-funding-ban-according-to-new-audit/>; NATIONAL RIGHT TO WORK COMMITTEE, *NLRB: Law Breakers?*, (Dec. 10, 2011), available at <http://www.nrtwc.org/nlr-law-breakers/>.

²⁸ 5 U.S.C. § 552(a)(4)(A)(ii)(III) (emphasis added).

²⁹ The FOIA statute, as amended in 2007, defines "representative of the news media" as follows:

[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. 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.*

5 U.S.C. § 552(a)(ii)(III) (emphasis added).

³⁰ *Id.* (emphasis added). See generally *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-662 (2007) (noting the well-established proposition that, as used in statutes, the word "shall" is generally imperative or mandatory).

³¹ 241 F. Supp. 2d. 5, 12-15 (D.D.C. 2003). The court pointedly noted that "a 'periodical,' unlike a daily newspaper, has been defined simply as 'a publication issued at regular intervals of more than one day.'" *Id.* at 14 n.4 (quoting American Heritage Dictionary, Second College Edition, at 923 (2000)).

regularly publishes an e-mail newsletter. Under well-established precedent, then, a 501(c)(3) requester that regularly publishes online newsletters, such as Cause of Action, is entitled to a fee waiver as a “representative of the news media,” where *Electronic Privacy Information Center* provides that “publishers of periodicals” qualify as representatives of the news media.³²

The information requested regarding *ex parte* communications pertaining to the Boeing case will be of current interest to a large segment of the general public. Cause of Action will ultimately disseminate this information that it is statutorily entitled to, *inter alia*, through its regularly published online newsletter. Additionally, Cause of Action will take the information that is disclosed, using its editorial skills and judgment, to publish news articles that will be published on our website, distributed to other media sources, and distributed to interested persons through our newsletters.

As outlined above, the plain language of 5 U.S.C. § 552(a)(4)(A)(ii)(III), controlling precedent, and the agency’s regulations clearly require the conclusion that Cause of Action is a representative of the news media.

Production of Information and Contact Information.

We call your attention to President Obama’s January 21, 2009, Memorandum concerning the FOIA, which states in relevant part:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA . . . The presumption of disclosure should be applied to all decisions involving FOIA.³³

On the same day, President Obama spoke on the FOIA to incoming members of the Cabinet and staff of the White House and stated in relevant part:

The old rules said that if there was a defensible argument for not disclosing something to the American people, then it should not be disclosed. That era is now over. Starting today, every agency and department should know that this administration stands on the side not of those who seek to withhold information but those who seek to make it known. To be sure, issues like personal privacy and national security must be treated with the care they demand. But the mere fact that you have the legal power to keep something secret does not mean you should always use it. The Freedom of Information Act is perhaps the most powerful

³² *Supra* at note 17.

³³ PRESIDENT BARACK OBAMA, *Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act*, Jan. 21, 2009, available at <http://www.whitehouse.gov/the-press-office/freedom-information-act>.

instrument we have for making our government honest and transparent, and of holding it accountable. And I expect members of my administration not simply to live up to the letter but also the spirit of this law.³⁴

If it is your position that any portion of the requested information is exempt from disclosure, Cause of Action requests that you provide a detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.

In the event that some portions of the requested information are properly exempt from disclosure, please redact such portions and produce all remaining reasonable segregable non-exempt portions of the requested record.³⁵ If you contend that information contains non-exempt segments, but those non-exempt segments are so dispersed throughout as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. If a request is denied in full, please outline that it is not possible to segregate portions of the record for release.

In an effort to facilitate record production within the statutory limit, Cause of Action prefers to accept information and/or documents in electronic format (*e.g.*, e-mail, .pdf). When necessary, Cause of Action will accept the “rolling production” of information and/or documents, but requests that you provide prompt notification of any intent to produce information on a rolling basis.

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request or any portion thereof, please contact me (Adam.Butschek@causeofaction.org) or Jack Thorlin, Staff Attorney, (Jack.Thorlin@causeofaction.org) immediately, at (202) 507-5880. Please note that, for the purposes of responding to this request, the attached Definition of Terms should be interpreted consistently. We look forward to receiving the requested information and a waiver of both search and duplication costs within 20 business days. Thank you for your attention to this matter.

³⁴ PRESIDENT BARACK OBAMA, *Remarks by the President in Welcoming Senior Staff and Cabinet Secretaries to the White House*, Jan. 21, 2009, available at <http://oversight.house.gov/hearing/foia-in-the-21st-century-using-technology-to-improve-transparency-in-government/>.

³⁵ See 5 U.S.C. § 552(b).

Mr. David P. Berry
September 10, 2012
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Sincerely,

A handwritten signature in blue ink that reads "Adam Butschek". The signature is written in a cursive style with a horizontal line underneath the name.

ADAM BUTSCHEK
DEPUTY DIRECTOR OF INVESTIGATIONS AND
INVESTIGATIVE COUNSEL

Encl: Letter from Will Hild, Associate Attorney, Cause of Action, to David Berry, Inspector General, National Labor Relations Board (Nov. 22, 2011).

Responding to Document Requests

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy, or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to Cause of Action.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by, any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. Cause of Action's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. When you produce documents, you should identify the paragraph in Cause of Action's request to which the documents respond.
5. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
6. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with Cause of Action Foundation staff to determine the appropriate format in which to produce the information.
7. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
8. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
9. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

10. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents that would be responsive as if the date or other descriptive detail were correct.
11. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from September 1, 2011 to the present.
12. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
13. All documents shall be Bates-stamped sequentially and produced sequentially.

Definitions

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmation, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or

otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.

3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural numbers, and vice versa. The masculine includes the feminine and neutral genders.
4. The terms “person” or “persons” mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is pertinent to that subject in any manner whatsoever.