CAUSE of ACTION
Advocates for Government Accountability
A 501(c)(3) Nonprofit Corporation

September 21, 2015

U.S. Department of Homeland Security
Office of the Chief Privacy Officer
Attention: Karen Neuman
245 Murray Lane, SW
Washington, DC 20528-0655

Re: Comment on DHS RIN 1601-AA00 Freedom of Information Act Regulations

Dear Ms. Neuman,

On July 29, 2015, the Department of Homeland Security ("DHS") published a proposed Freedom of Information Act ("FOIA") rule in the Federal Register.[1] In that rule, DHS proposed to revise its definition of a representative of the news media.[2] 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 test for a representative of the news media.[3] Cause of Action urges DHS to take this opinion into consideration while finalizing its proposed rule.

In the proposed rule, DHS retains the outdated standard that requires an "entity [to be] organized and operated to publish or broadcast news to the public."[4] The Court clarified that, because Congress provided a statutory definition of representative of the news media in the OPEN Government Act of 2007, this standard is no longer applicable. The Court wrote, "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."[5] Cause of Action requests DHS remove this anachronistic standard from its regulation definition.

In the proposed rule, DHS stated it will require requestors seeking news media status to "make their products available through a variety of means to the general public." The Court provided a non-exhaustive list of the "variety of means" an agency must consider when analyzing this element of the test, including: "newsletters, press releases, press contacts, a

[1] Freedom of Information Act Regulations, 80 Fed. Reg. 45101 (proposed July 29, 2015) (to be codified at 6 C.F.R. pt. 5; 19 C.F.R. pt. 103; 44 C.F.R. pt. 5) [hereinafter "DHS Proposed Rule"].
[2] *Id*. at § 5.11(b)(6); 80 Fed. Reg. at 45111.
[3] *Cause of Action v. Fed. Trade Comm'n*, No. 13-5335, 2015 U.S. App. LEXIS 14934 (D.C. Cir. Aug. 25, 2015).
[4] DHS Proposed Rule § 5.11(b)(6); 80 Fed. Reg. at 45111.
[5] *Cause of Action*, 2015 U.S. App. LEXIS 14934, at *42-43.

website, and planned reports."[6] Cause of Action requests DHS add this non-exhaustive list of dissemination methods to its regulatory definition.

In the proposed rule, DHS correctly states that a "request for records that supports the news-dissemination function of the requester shall not be considered to be for a commercial use."[7] The Court reaffirmed this longstanding principle by requiring agencies to "focus[] on the nature of the *requester*, not its request.[8] By way of illustration, 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."[9] Cause of Action applauds DHS for including this standard in its regulation and urges DHS to retain it.

Finally, in the proposed rule, DHS discusses the so-called "middleman standard" by stating "data brokers or others who merely compile and market government information for direct economic return shall not be presumed to be news media entities."[10] The Court briefly touched on this issue by clarifying that it "disagree[s] with the suggestion that a public interest advocacy organization cannot satisfy the statute's distribution criterion because it is 'more like a middleman for dissemination to the media than a representative of the media itself' . . . [T]here is no indication that Congress meant to distinguish between those who reach their ultimate audiences directly and those who partner with others to do so[.]"[11] Cause of Action believes DHS's proposed regulation draws an appropriate distinction between those middlemen that market FOIA information "for direct economic return" and the Court's direction that "public interest advocacy organizations" can "partner with others" to disseminate distinct works they create. However, Cause of Action urges DHS to bear the Court's ruling in mind and not to overextend the middleman standard in its analyses of requestors' ability to disseminate information.

If you have any questions about this comment, please contact us by telephone at (202) 499-4232 or by email at james.valvo@causeofaction.org. Thank you for the opportunity to comment on this important proposed rule.

R. JAMES VALVO, III
COUNSEL & SENIOR POLICY ADVISOR

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[6] *Id.* at *41; *see also id.* at *20 (providing non-exhaustive list of dissemination methods under public interest fee waiver test, including "newsletter, periodicals, website, social media presence, planned reports, and press releases to media contacts").
[7] DHS Proposed Rule § 5.11(b)(6); 80 Fed. Reg. at 45111.
[8] *Cause of Action*, 2015 U.S. App. LEXIS 14934, at *30.
[9] *Id.*; *but see id.* at *30 n.10 ("There is a caveat: If a news-media entity makes the request in its corporate rather than journalistic capacity, the request does not qualify for a fee waiver because it founders on the additional requirement that the records not be 'sought for commercial use.'").
[10] DHS Proposed Rule § 5.11(b)(6); 80 Fed. Reg. at 45111.
[11] *Cause of Action*, 2015 U.S. App. LEXIS 14934, at *43-44.