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VIA REGULATIONS.GOV

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Re: Comment on Proposed FOIA Regulations, Docket ID: AID FRDOC 0001-0266

I. Introduction

Pursuant to Section 553(c) of the Administrative Procedure Act (“APA”), Cause of Action Institute (“CoA Institute”) hereby comments on the U.S. Agency for International Development (“USAID”) proposed Freedom of Information Act (“FOIA”) 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 its lawyers 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. It therefore respectfully requests that USAID consider these comments and amend its proposed rule accordingly.

II. Comments

a. § 212.7(c)(1) – Consultation

USAID proposes to permit “consultation” whenever “records originate[] with USAID, but contain within them information of interest to another agency, or other Federal Government Office.” This limited guidance fails to set parameters for determining when, in fact, consultation

¹ U.S. Agency for Int’l Dev., Freedom of Information Act Regulations, 81 Fed. Reg. 66,227 (proposed Sept. 27, 2016) (to be codified at 22 C.F.R. pt. 212).

² See CAUSE OF ACTION INST., *About*, <http://www.causeofaction.org/about> (last accessed Sept. 29, 2016).

is appropriate. It is unclear, for example, what an “interest” is and when an interest is sufficient enough to require consultation on the part of USAID.

Under the FOIA, consultations should occur only when another agency, component, or government office has a “substantial interest” in responsive records or portions thereof.³ Although the FOIA does not define the term “substantial interest,” the Department of Justice (“DOJ”) Office of Information Policy (“OIP”) explains that a substantial interest exists when records “originate[] with another agency” not subject to the FOIA.⁴ DOJ FOIA regulations provide that consultation is appropriate when another entity is “better able to determine whether the record is exempt from disclosure.”⁵

CoA Institute believes consultation should occur only when disclosure would harm the interests of another agency or office protected by an exemption.⁶ For example, consultation with the White House would be necessary to apply the presidential communications privilege. As a second example, consultation with another agency to protect its deliberative processes under Exemption 5 may be appropriate. Consultation need not and should not be undertaken with another agency or office that is simply interested in a particular FOIA request or record, or when disclosure would not harm the interests of that agency or office.

In the interests of transparency and customer service, USAID also should revise its proposed consultation procedures to include a requirement that it notify a requester when a request is subject to consultation, identify the entity with which the consultation is taking place, and provide an estimated date of completion for the consultation. Consultations often delay responses beyond the statutory deadlines. By proactively providing these details, USAID can alleviate the concern borne by requesters when final determinations are significantly delayed.

Accordingly, CoA Institute requests that the proposed regulations be revised as follows:

§ 212.7 Processing of request.

[. . .]

(c) *Consultation, referral, and coordination.* When reviewing records located by the Agency in response to a request, USAID shall determine whether another agency, component, or office of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA and, if so, whether it should be released as a matter of discretion. As to any such record, USAID shall proceed in one of the following ways:

³ 5 U.S.C. § 552(a)(6)(B)(iii)(III).

⁴ Dep’t of Justice, Office of Info. Pol’y, FOIA Guidance: Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest in Them (Aug. 15, 2014), *available at* <http://bit.ly/29Oa2lJ>. In some cases, if another entity is subject to the FOIA and originated the responsive records under the control of USAID, consultation may still take place in lieu of referral. *Id.* (“[W]hile the typical practice should be to refer records when they originated with another agency, if the agencies jointly agree that the records can be handled as a consultation, that is permissible.”).

⁵ 28 C.F.R. § 16.4(c).

⁶ *Cf.* 5 U.S.C. § 552(a)(8)(A)(i)(I).

(1) *Consultation.* (i) USAID should only consult with another agency, agency component, or other Federal Government office prior to making a release determination when records responsive to a request contain information of substantial interest to another agency, agency component, or other Federal Government office.

(ii) An agency, agency component, or other Federal Government office only has a substantial interest in a record when the record, or a portion thereof, (A) originated with the agency, component, or office; or (B) when disclosure would harm the interests of another agency, component, or office protected by an exemption.

(iii) Whenever USAID consults with another entity over the releasability of a record, it should notify the requester of such consultation and inform the requester of the name(s) of the agency, component, or office with which the consultation is taking place. Whenever possible, USAID should provide the requester with an estimated date of completion for the consultation.

(2) *Referral.* (i) When USAID locates a responsive record that originated with another agency, USAID usually should refer the record and the underlying FOIA request to the originating agency for processing and direct response to the requester. Referrals may only be made to an agency that is subject to the FOIA. If USAID and the originating agency jointly agree that USAID is in the best position to respond regarding the record, then the record may be handled as a consultation, as detailed above.

(ii) Whenever USAID refers any part of the responsibility for responding to a request to another agency, it shall document the referral, maintain a copy of the record that it refers, and notify the requester of the referral and inform the requester of the name(s) of the agency to which the record was referred, including that agency's FOIA contact information.

b. § 212.25(b)(6) – Representative of the News Media

Although revisions contained in the proposed rule are to be commended, USAID has failed to address its outdated definition of “representative of the news media,”⁷ which is now in conflict with the statute.⁸ In 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.⁹ It is inappropriate for USAID to amend its FOIA regulations without bringing its definitions into conformance with statutory and judicial authorities.

⁷ 22 C.F.R. § 212.35(a)(8).

⁸ 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.”).

⁹ 799 F.3d 1108 (D.C. Cir. 2015).

Specifically, the proposed regulations improperly retain an outdated definition that requires a news media requester to be a “person or entity organized and operated to publish or broadcast news to the public[.]”¹⁰ This so-called “organized and operated” standard was created in guidance issued by the White House Office of Management and Budget in 1987.¹¹ 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.”¹²

CoA Institute therefore requests USAID remove the “organized and operated” standard from its proposed rule and to include the following definition, which tracks the FOIA definition:

§ 212.25 Fees to be charged—general.

[. . .]

(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 DC Circuit’s *Cause of Action* decision that also should be considered with respect to the news media requester fee category. First, USAID should incorporate the direction that the news media requester fee category determination focus “on the nature of the *requester*, not its request.”¹³ 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.”¹⁴ Although 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 (*i.e.*, 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.”¹⁵ The proposed regulations should reflect this focus.

Second, with respect to the requirement that a news media requester use “editorial skills” to turn “raw materials” into a “distinct work,” CoA Institute directs USAID 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.’”¹⁶ Although the mere dissemination of raw records would not meet the “distinct work” standard,

¹⁰ 81. Fed. Reg. at 66,234.

¹¹ Office of Mgmt. & Budget, Freedom of Information Fee Guidelines, 52 Fed. Reg. 10,012, 10,015 (Mar. 27, 1987).

¹² *Cause of Action*, 799 F.3d at 1125.

¹³ *Id.* at 1121.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 1122.

even a simple press release commenting on records would satisfy this criterion. USAID regulations should embrace this standard.¹⁷

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.¹⁸ 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[.]”¹⁹ Although “[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.”²⁰ With this in mind, USAID should indicate that the examples of news media entities it may include in its regulations are non-exhaustive.

c. § 212.29 – Glossary

In light of the proposed changes to the consultation procedures set forth in Section 212.7 of the proposed rule, USAID should modify its definitions section as follows to maintain consistency:

§ 212.29 Glossary

[. . .]

Consultation is when USAID locates a record that contains information of substantial interest to another agency, agency component, or other Federal Government office, and USAID asks for the views of that other entity on disclosability of the record before any final determination is made. An agency, agency component, or Federal Government office has a substantial interest in a record under the control of USAID when it originated the record, or material contained therein, or when disclosure would harm an interest protected by an exemption.

¹⁷ 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 that 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.* USAID should consider incorporating these important clarifications.

¹⁸ *Id.* at 1123; *see also* 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.”).

¹⁹ *Cause of Action*, 799 F.3d at 1123.

²⁰ *Id.* at 1124.

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III. Conclusion

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



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