



Advocates for Government Accountability

A 501(c)(3) Nonprofit Corporation

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**VIA E-MAIL**

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FOIA Public Liaison  
Department of Defense  
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**Re: *Proposed Rule: DoD Freedom of Information Act (FOIA) Program*  
Docket No. DOD-2007-OS-0086-0005**

Dear Mr. Hogan:

On November 3, 2014, Cause of Action submitted comments to the Department of Defense (“DOD”) concerning DOD’s proposed rulemaking implementing new Freedom of Information Act (“FOIA”) regulations.<sup>1</sup> I write to supplement Cause of Action’s submission in light of the recent opinion of the U.S. Court of Appeals for the District of Columbia Circuit in *Cause of Action v. Federal Trade Commission*. This groundbreaking ruling in the area of FOIA fees should prove useful in the finalization of DOD’s proposed rule.

With respect to proposed Sections 286.3 and 286.33(b)(3)(ii)(C), Cause of Action again commends DOD for incorporating the statutory definition of representative of the news media codified by the OPEN Government Act of 2007.<sup>2</sup> Yet, there remains room to improve on the proposed regulations, and the decision in *Cause of Action v. Federal Trade Commission* highlights four areas for such improvement.

First, DOD should incorporate the Court’s direction that the news media requester fee category determination “focuses on the nature of the *requester*, not its request.”<sup>3</sup> To illustrate

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<sup>1</sup> Comments of Cause of Action (Nov. 3, 2014), Docket ID# DOD-2007-OS-0086-0009, available at <http://goo.gl/osnNxa>; see generally DoD Freedom of Information Act (FOIA Program), 79 Fed. Reg. 52,500 (proposed Sept. 3, 2014) (to be codified at 32 C.F.R. pt. 286), available at <http://goo.gl/4Axj7v>.

<sup>2</sup> *Cause of Action v. Fed. Trade Comm’n*, No. 13-5335, 2015 U.S. App. LEXIS 14934, at \*27 (D.C. Cir. Aug. 25, 2015) (“In 2007, Congress again amended FOIA, this time to provide an express statutory definition of the news-media category.”) (citation omitted); *id.* at \*42 (“Congress, however, omitted the ‘organized and operated’ language when it enacted this court’s definition in *National Security Archive*, which did not include such a requirement.”). The new statutory definition replaces the Office of Management and Budget’s “organized and operated standard.” Office of Mgmt. & Budget, Freedom of Information Fee Guidelines, 52 Fed. Reg. 10,012, 10,015 (Mar. 27, 1987).

<sup>3</sup> 2015 U.S. App. LEXIS 14934, at \*30.

this principle: “[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.”<sup>4</sup> 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 “the statute’s focus on requesters, rather than [their] requests.”<sup>5</sup> DOD’s FOIA regulations should reflect this proper focus in its news media requester provisions.

Second, with respect to proposed Section 286.33(b)(3)(ii)(C)(4) and the discussion of using “editorial skills” to turn “raw materials” into a “distinct work,” Cause of Action directs DOD to the Court’s 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.’”<sup>6</sup> While the mere dissemination of raw records would not meet the “distinct work” standard, even a press release commenting on records would satisfy this criterion. DOD should clarify this liberalized standard in the final rule.<sup>7</sup>

Third, with respect to proposed Section 286.33(b)(3)(ii)(C)(1), Cause of Action reiterates its request that DOD ensure an expanded definition of representative of the news media that captures “alternative media” and evolving news media formats. The Court provided a useful clarification about the interplay between evolving media and the fee category’s dissemination requirement when it affirmed *National Security Archive v. Department of Defense*’s rule that “posting content to a public website can qualify as a means of distributing it[.]” 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.”<sup>8</sup> DOD’s proposed rule provides examples of news media entities, and indicates that these examples are not exhaustive, but the language characterizing them as disseminating to the “public at large,” or to the “general public,” may cause confusion and result

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<sup>4</sup> *Id.* (emphasis added).

<sup>5</sup> *Id.* at \*31.

<sup>6</sup> *Id.* at \*33 (citation omitted).

<sup>7</sup> The Court also addressed three related issues that are not addressed in DOD’s proposed regulations, but which are nevertheless important. First, the Court articulated that FOIA does not “require that a requester gather[] information ‘from a range of sources’ or a ‘wide variety of sources.’” *Id.* at \*34. Thus, “nothing 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’s 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 \*41; *cf. id.* at \*20 (providing non-exhaustive list of dissemination methods under the public interest fee waiver test, including “newsletter[s], periodicals, website[s], social media presence, planned reports, and press releases to media contacts”). Finally, the Court addressed the so-called “middleman standard,” rejecting the government’s 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 \*43-44. The Court rejected this argument because “there 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[.]” *Id.* DOD may wish to incorporate these important clarifications in the final rule, too.

<sup>8</sup> *Id.* at \*38.

in eligible news media requesters with small or developing audiences being denied proper fee categorization. Cause of Action requests that DOD clarify this matter.<sup>9</sup>

Finally, Cause of Action recommends an amendment to the proposed treatment of public interest fee waiver requests – an issue Cause of Action did not address in its initial comments. Proposed Section 286.33(d)(1)(i)(C) would require requesters to demonstrate that the disclosure of requested information will likely contribute to an understanding of the subject by the general public. DOD proposes to apply this factor by assessing “whether disclosure will inform, or have the potential to inform, the public rather than simply the individual FOIA requester or a small segment of interested persons.” Moreover, DOD would assess the “identity of the FOIA requester” to determine its “capability and intention to dissemination the [requested] information to the public.”

Yet, this proposed language is ambiguous. FOIA “requires only that the disclosure be likely to contribute significantly to “public” understanding.”<sup>10</sup> While the Court noted this factor “defies easy explication,” it stated that the factor’s application “may well require assessment along two dimensions: the degree to which ‘understanding’ of government activities will be advanced by seeing the information; and the extent of the ‘public’ that the information is likely to reach.”<sup>11</sup> Considering the former dimension, it is important that “FOIA does not require that a requester be able to reach a ‘wide audience,’” but, as the Court stated, only a “*reasonably broad audience of persons interested in the subject.*”<sup>12</sup> Section 286.33(d)(1)(i)(C) should be modified to incorporate this proper construction of “public understanding.”

In addition to the foregoing, Cause of Action requests that DOD modify proposed Section 286.14 to ensure the proper preservation of “agency records,” as that term is understood under FOIA, during the pendency of a request. DOD possesses and controls materials that qualify as records under FOIA, but which are not records for the purposes of the Federal Records Act, and which are not disposed in accordance with National Archives and Records Administration (“NARA”) guidelines or NARA-approved schedules. It is unclear whether proposed Section 286.14 would apply to these records, and no other provision in the proposed rulemaking addresses this concern. Cause of Action proposes the following text for Section 286.14:

**§ 286.14 – Records management.**

All records concerning requests received under the FOIA, including correspondence relating to requests and responsive records, must be maintained and disposed of in accordance with the National Archives and Records Administration, General Records Schedule 14, and DoD Component records schedules. Agency records, as that phrase is understood in the FOIA context, shall not be disposed of or destroyed while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

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<sup>9</sup> *Id.* at \*36.

<sup>10</sup> *Id.* at \*16 (citing 5 U.S.C. § 552(a)(4)(A)(iii)).

<sup>11</sup> *Id.* at \*17.

<sup>12</sup> *Id.* at \*18 (citing *Carney v. Dep’t of Justice*, 19 F.3d 807, 815 (2d Cir. 1994)) (emphasis added).

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Thank you for your consideration of these additional comments and the inclusion of this supplementary submission into the docket. Please feel free to contact me with any questions at (202) 499-4232 or [ryan.mulvey@causeofaction.org](mailto:ryan.mulvey@causeofaction.org).

Sincerely,



RYAN P. MULVEY  
COUNSEL