



**BEFORE THE  
U.S. DEPARTMENT OF DEFENSE  
OFFICE OF THE SECRETARY**

Washington, D.C.

*Proposed Rule: DoD Freedom of Information Act (FOIA) Program* )  
)

**Docket No. DOD-2007-OS-0086-0005**

**COMMENTS OF CAUSE OF ACTION**

November 3, 2014

**I. Introduction**

Pursuant to Section 552(c) of the Administrative Procedure Act, 5 U.S.C. § 553(c) (“APA”), Cause of Action (“CoA”) hereby comments on the Department of Defense’s (“DoD”) proposed rule implementing new Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), regulations.<sup>1</sup>

CoA is a non-profit, non-partisan education and government accountability organization that fights to protect economic opportunity from the threat of federal regulation, spending, and cronyism. In pursuit of its mission, CoA routinely requests records under FOIA and disseminates its analysis of those records to the public by various means, including a frequently-visited website, newsletters, press releases, news articles, Twitter, and Facebook. CoA also engages in extensive FOIA litigation and many of its employees have specific expertise with respect to FOIA’s history, purpose, and application. CoA routinely confronts issues regarding consultation, Exemption 5, and news media status – the issues upon which it comments here. Therefore, CoA respectfully requests that DoD consider these comments and amend the proposed rule accordingly.

**II. Comments**

a. § 286.3 – Definitions: Consultation

DoD proposes to define “consultation” as the “process whereby a federal agency transfers a FOIA responsive document to another federal agency or non-government entity, in certain situations, to obtain recommendations on the releasability of the document.” Unfortunately, this definition fails to set parameters for determining *when* “consultation” is appropriate.

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<sup>1</sup> 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).

CoA believes “consultation” should occur only when another agency, agency component, or non-government entity has a “substantial interest” in any of the responsive records or portions thereof.<sup>2</sup> While FOIA is silent as to the meaning of the term “substantial interest,” the Office of Information Policy (“OIP”) suggests a “substantial interest” exists when records either “originate[] with another agency ” or the records contain “information that is of interest to another agency or component.”<sup>3</sup> For its part, the Department of Justice’s FOIA regulations provide that “consultation” (or “referral”) is appropriate when another agency originated the record or, more generally, is “better able to determine whether the record is exempt from disclosure.”<sup>4</sup>

Therefore, CoA proposes that DoD redefine “consultation” accordingly:

*Consultation.* The process whereby a federal agency transfers a FOIA responsive record to another federal agency, agency component, or non-government entity, when such party has a substantial interest in the responsive record, in order to obtain recommendations on the releasability of the record. After review, the record is returned to the original agency for response to the FOIA requester or further review.

DoD also should also introduce a definition of “substantial interest” as follows:

*Substantial interest.* Another agency, agency component, or non-government entity possesses a “substantial interest” in a FOIA responsive record, such that consultation may be appropriate, whenever (1) the responsive record originates with that same agency, agency component, or non-government entity, or (2) when the agency, agency component, or non-government entity is better positioned to judge the proper application of the FOIA exemptions, given the circumstances of the request or its familiarity with the facts necessary to judge the proper withholding of exempt material.

b. § 286.3 – Definitions: *Deliberative information*

DoD’s proposed definition is problematic because it states that records upon which an agency “relies” in its decision-making can be deliberative without defining what “relies” means. Moreover, DoD’s definition does not incorporate relevant judicial decisions limiting “deliberative information” to recommendations for policy changes or internal deliberations on

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<sup>2</sup> 5 U.S.C. § 552(a)(6)(B)(iii)(III).

<sup>3</sup> Dep’t of Justice, Office of Info. Policy, FOIA Guidance: Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest in Them (2011) [hereinafter “OIP Guidance”], available at <http://www.justice.gov/oip/blog/foia-guidance-13>.

<sup>4</sup> 28 C.F.R. § 16.4(c).

the advisability of any particular course of action.<sup>5</sup> Thus, CoA recommends that the definition be amended as follows:

*Deliberative information.* Internal advice, recommendations, or subjective evaluations that are reflected in records that have been created as part of a deliberative process and that are substantially related to the process of reaching a final decision on a particular course of action, whether within or among agencies.

c. § 286.3 – Definitions: *Representative of the news media*

CoA commends DoD on its proposed definition of “representative of the news media” because it tracks the new statutory definition codified by the OPEN Government Act of 2007<sup>6</sup> and explicitly abandons the outdated “organized and operated” standard proposed in guidance by the Office of Management and Budget in 1987.<sup>7</sup> Yet, FOIA also instructs agencies to consider evolving “methods of news delivery” and alternative media formats when defining a news media entity.<sup>8</sup> In this respect, DoD’s proposed definition could be improved by explaining the manner in which “alternative media shall be considered to be news-media entities.”<sup>9</sup>

CoA requests that DoD amend the proposed definition of “representative of the news media” by incorporating the entirety of the statutory standard or by adding some short indication of the application of the fee category to non-traditional news media forms and requesters. While this issue is addressed in some detail at Section 286.33(b)(3)(ii)(C), CoA believes that the proposed definition itself should refer to the important role of technology vis-à-vis the news media requester fee category, potentially utilizing as a starting point the examples provided in the statute.

d. § 286.25(e)(2)(ii) – *Exemption 5/Attorney-client privilege*

DoD’s proposed language is ambiguous and prone to misinterpretation because it refers to “confidential communications . . . relating to legal matters for which the client has sought professional advice.” The terms “legal matters” and “professional advice” are vague and undefined. Further, the proposed section does not address the attorney-client relationship itself, *i.e.*, when and with which lawyers an agency enters into such a relationship.

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<sup>5</sup> *Public Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F. 3d 865, 875 (D.C. Cir. 2010) (concluding that “[t]o the extent the documents at issue in this case neither make recommendations for policy change nor reflect internal deliberations on the advisability of any particular course of action, they are not predecisional and deliberative despite having been produced by an agency that generally has an advisory role”); *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980) (“deliberative” records must reflect the “give-and-take of the consultative process”); *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975) (“deliberative” records must constitute “a direct part of the deliberative process in that [they] make[] recommendations or express[] opinions on legal or policy matters”).

<sup>6</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(III).

<sup>7</sup> Office of Mgmt. & Budget, Freedom of Information Fee Guidelines, 52 Fed. Reg. 10,012, 10,015 (Mar. 27, 1987) [hereinafter “FOIA Fee Guidelines”].

<sup>8</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(III).

<sup>9</sup> *Id.*

Case law states that the attorney-client privilege only protects confidential communications made by a client to an attorney “for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding.”<sup>10</sup> In the governmental context, an agency is the “client” and its departmental counsel is the “attorney.”<sup>11</sup> The privilege properly applies only to communications created in the context of an *actual* attorney-client relationship, and not whenever agencies communicate with other entities composed of lawyers.<sup>12</sup> Indeed, the privilege “must be ‘strictly confined within the narrowest possible limits consistent with the logic of its principle.’”<sup>13</sup>

For these reasons, CoA proposes Section 286.25(e)(2)(ii) be amended as follows:

*Attorney-client privilege.* This privilege protects confidential communications between an attorney and a client (or multiple clients that share a common interest) for the purpose of securing an opinion on law, legal services, or assistance in some legal proceeding. In the governmental context, an agency is the client and its departmental counsel is the attorney; the privilege properly applies to communications created in the context of this relationship and not whenever agencies communicate with other entities composed of lawyers, though such communications may be withheld pursuant to other privileges or exemptions. Unlike the deliberative process privilege, with the attorney-client privilege, all information should be withheld, including the facts, unless the client waives the privilege.

e. § 286.30 – Referrals and consultations

As discussed in reference to the definition of “consultation” under proposed Section 286.3, CoA is concerned about the absence of “substantial interest” in the discussion of consultations with and referrals to other agencies, agency components, or non-government entities. In this regard, the proposed rule contains varying references to “substantial interest,”<sup>14</sup> “equity interest,”<sup>15</sup> and “interest or equity.”<sup>16</sup> CoA recommends that DoD standardize its language by using “substantial interest” to avoid confusion. It also should provide a clear statement that consultation ought never to occur with an entity that does not possess a substantial interest in responsive records (*e.g.*, consultation conducted solely because of politically-sensitive records should be prohibited).<sup>17</sup>

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<sup>10</sup> *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984).

<sup>11</sup> *See Tax Analysts v. Internal Revenue Serv.*, 117 F.3d 607, 618 (D.C. Cir. 1997).

<sup>12</sup> *See Brinton v. Dep’t of State*, 636 F.2d 600, 603 (D.C. Cir. 1980) (“[T]he attorney-client privilege applies only when information is the product of an attorney-client relationship and is maintained as confidential between attorney and client.”).

<sup>13</sup> *In re Lindsey*, 148 F.3d 1100, 1108 (D.C. Cir. 1998) (citation omitted).

<sup>14</sup> § 286.28(b)(1)(i)(C).

<sup>15</sup> § 286.30(a)(2).

<sup>16</sup> § 286.30(b).

<sup>17</sup> 5 U.S.C. § 552(a)(6)(b)(iii)(III).

In addition, CoA recommends that DoD alter its decision not to advise FOIA requesters that the consultative process has been undertaken “unless information is withheld by the consulted agency.” Transparency and an open government – hallmarks of FOIA – mandate that agencies provide requesters with this information.

With respect to subsection (d), which concerns White House information, CoA recommends various revisions. First, DoD should replace “National Security Staff (NSS)” and all instances of “NSS” with “National Security Council Staff (NSCS)” and “NSCS,” respectively. On February 10, 2014, President Obama issued an Executive Order effecting this name change.<sup>18</sup> Second, DoD should clarify which DoD White House component is intended by the phrase “the White House” immediately prior to the reference to the White House Military Office and later in the subsection. Third, DoD should change its usage of “agencies” to refer to these components. Fourth, as previously proposed, DoD should replace “equity interest” with “substantial interest” and provide a definition for that term in proposed Section 286.3.

Finally, CoA requests that DoD rephrase its directions on how OFOI will “coordinate” its responses. The term “coordinate” refers to the partial referral of records to avoid compromising sensitive law enforcement information, personal privacy interests, or national security interests.<sup>19</sup> If DoD intends to refer to this particular procedure, a definition should be provided in Section 286.3, otherwise a different word should be chosen to avoid confusion. CoA also recommends that DoD replace the phrase “originating agency” with “originating component.”

f. § 286.33(b)(3)(ii)(C) – Representative of the news media

CoA once again commends DoD on its proposed treatment of the “representative of the news media” fee category.<sup>20</sup> However, CoA proposes two further clarifications, in addition to its proposed Section 286.3 recommendations.

First, CoA requests that DoD elaborate on the meaning of “alternative media” in Section 286.33(b)(3)(ii)(C)(1). While DoD has followed FOIA’s instruction to consider evolving “methods of news delivery” and “alternative media” formats when defining a news media entity,<sup>21</sup> the proposed section would benefit from some examples that could provide guidance to FOIA officers when considering fee category requests. Specifically, CoA is concerned that nascent news media organizations, which have yet to demonstrate a large readership or a history of reporting and dissemination, could be excluded.

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<sup>18</sup> President Barack Obama, Executive Order: Changing the Name of the National Security Staff to the National Security Council Staff (Feb. 10, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/02/10/executive-order-changing-name-national-security-staff-national-security->.

<sup>19</sup> OIP Guidance, *supra* note 3 (“To avoid inadvertently invading an individual’s personal privacy or inadvertently revealing protected national security information, the agency in receipt of a request involving unacknowledged law enforcement or national security records that originated with another agency or another component should not automatically follow the standard referral procedures.”).

<sup>20</sup> See *supra* notes 6 and 7 and accompanying text.

<sup>21</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(III).

Ensuring an expanded definition of “alternative media” is entirely consistent with judicial precedent. For example, the U.S. Court of Appeals for the District of Columbia Circuit has noted that FOIA’s legislative history demonstrates “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 . . . as a ‘representative of the news media.’”<sup>22</sup> The U.S. District Court for the District of Columbia has similarly construed DoD’s current fee category regulation, 32 C.F.R. 286.28(e)(7)(i), to include, for example, regular publishers of periodicals, even when those periodicals are simply disseminated by e-mail or posted on a frequently visited website.<sup>23</sup>

The legislative history of FOIA also suggests the need for improvement in the treatment of “alternative media.” Senator Patrick Leahy, co-sponsor of the OPEN Government Act, stated that the changes to the definition of “representative of the news media” would “ensur[e] that anyone who gathers information to inform the public, including . . . bloggers, may seek a fee waiver[.]”<sup>24</sup> He also stated that the new definition covered “Internet blogs and other Web-based forms of media . . . free newspapers and individuals performing a media function who do not necessarily have a prior history of publication.”<sup>25</sup> Co-sponsor Senator John Cornyn affirmed Senator Leahy’s view that the new definition “grants the same privileged FOIA fee status currently enjoyed by traditional media outlets to bloggers and others who publish reports on the Internet.”<sup>26</sup>

Accordingly, CoA requests that DoD expand the proposed definition of “representative of the news media” by incorporating the entirety of the statutory standard<sup>27</sup> and by adding some short indication of the application of fee category to non-traditional news media forms and requesters.

Second, CoA requests that DoD provide further explanation of how it will determine whether potential news media requesters possess the editorial skill to use responsive records to create a “distinct work” and the sufficient intent to “distribute[] that work to an audience.”<sup>28</sup> News media requesters often prove this skill and intent with varying levels of specificity. DoD should clarify the standard of proof it will apply to these requests. Moreover, it should clarify the extent to which information about the requester that is not contained in the request will be used to determinate the veracity of a requester’s claims. For example, DoD should explain whether it is appropriate to examine the history of an organization, its past practices with regard to FOIA records, and the detail of its planned use of responsive records, subject to editorial considerations and the content of the production. CoA recommends that DoD permit after-the-fact factual considerations, but that it remind FOIA offices that news media requester status is

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<sup>22</sup> *Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1386 (D.C. Cir. 1989) (citing 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy)).

<sup>23</sup> *Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 12-15 (D.D.C. 2003) (recognizing that the FOIA “anticipates technological advancements” with regard to news media and forms of dissemination).

<sup>24</sup> 153 Cong. Rec. S10987 (statement of Sen. Leahy).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at S10990 (statement of Sen. Cornyn).

<sup>27</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(III).

<sup>28</sup> *See id.*

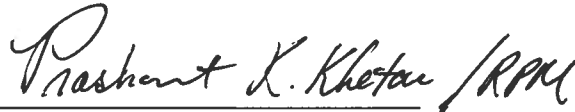
not static, so as to accommodate nascent news media persons or entities and others transitioning into news reporting.

### III. Conclusion

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

CAUSE OF ACTION

BY:

Handwritten signature in black ink, appearing to read "Prashant K. Khetan / RPM". The signature is written in a cursive style and is positioned above a horizontal line.

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