

CAUSE *of* ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

February 22, 2018

VIA CERTIFIED MAIL

Department of Housing & Urban Development
Office of the Inspector General
ATTN: Maura Malone, Deputy Counsel
451 7th Street, S.W., Rm. 8260
Washington, D.C. 20410

Re: Dep't of Housing & Urban Dev. FOIA Rule, 83 Fed. Reg. 7,388 (Feb. 21, 2018)

Dear Ms. Malone,

I write on behalf of Cause of Action Institute (“CoA Institute”) with respect to the Department of Housing and Urban Development (“HUD”) Office of Inspector General’s (“OIG”) recent final rule implementing revised Freedom of Information Act (“FOIA”) regulations.¹ These new regulations, which were implemented to incorporate changes required by the FOIA Improvement Act of 2016 and to explain current OIG FOIA practices, are effective on March 23, 2018. Although the OIG has not solicited public comment, CoA Institute offers its feedback on an important deficiency in the direct final rule and the underlying HUD regulations cross-referenced by the OIG.

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 respectfully requests that the OIG consider these comments and re-issue its rulemaking to ensure that its FOIA regulations accurately reflect the statutory language.

I. Background

HUD’s agency-wide FOIA regulations are codified at 24 C.F.R. part 15. The OIG, however, as an independent component, maintains its own FOIA regulations at 24 C.F.R. part 2002. These OIG-specific provisions govern public access to OIG records subject to the FOIA. In certain important respects, the regulations differ from those governing HUD as a whole. Yet, in other in-

¹ Dep’t of Housing & Urban Dev., Streamlining the Office of Inspector General’s Freedom of Information Act Regulations and Implementing the FOIA Improvement Act of 2016, 83 Fed. Reg. 7,388 (Feb. 21, 2018) (to be codified at 24 C.F.R. pt. 2002), *available at* <http://bit.ly/2EMGdgN>.

² See CAUSE OF ACTION INST., *About*, <http://www.causeofaction.org/about> (last visited Feb. 22, 2018).

stances, they cross-reference and overlap with those implemented by HUD. One example of such cross-referencing, relevant here, is the OIG's incorporation of the departmental provisions on fees.³

On January 12, 2017, HUD promulgated a direct final rule to update its agency-wide FOIA regulations.⁴ This rule failed to correct an important deficiency in the agency's FOIA fee category definitions. To wit, HUD did not revise its definition of "representative of the news media" to coincide with the FOIA statute and reflect recent judicial decisions. The agency instead retained the outdated "organized and operated" standard. CoA Institute submitted a public comment to HUD to express its concern and request that the final rule be re-issued.⁵ Although this letter was received by the agency,⁶ CoA Institute never received a response. To date, HUD has not corrected its regulations, nor has the agency indicated that intends to issue another rule to further update the departmental FOIA regulations.

II. Comments

The OIG's recent rule amends 24 C.F.R. § 2002.13 to cross-reference and incorporate the fee schedule, definitions, and related provisions implemented by HUD at 24 C.F.R. § 15.106.⁷ But, as discussed below, Section 15.106 contains at least one provision—the definition of a news media requester—that is in severe conflict with authoritative statutory and judicial authorities. The OIG should therefore revoke its final rule and revise Section 2002.13 to include OIG-specific fee provisions, or at the least, provide an OIG-specific definition of "representative of the news media."

a. 24 C.F.R. § 15.106(b) – Representative of the news media

Section 15.106(b) does not define "representative of the news media" in a manner consistent with the FOIA 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 correct application of this statutory definition.⁹ HUD failed to withdraw or revise its direct final rule to bring its fee definitions into conformity with the law; the OIG should not follow the same path.

³ 24 C.F.R. § 2002.1(a)–(b) (cross-referencing, *inter alia*, 24 C.F.R. § 15.110).

⁴ Dep't of Housing & Urban Dev., Revision of Freedom of Information Act Regulation, 82 Fed. Reg. 3,619 (Jan. 12, 2017) (to be codified at 24 C.F.R. pt. 15).

⁵ Letter from CoA Inst. to Helen Foster, Deputy Chief Admin. Officer, Office of Admin., Dep't of Housing & Urban Dev. (Jan. 12, 2017) (attached as Exhibit 1).

⁶ U.S. Postal Serv. Delivery Confirmation for Tracking No. 9415-5118-9956-4926-6946-54 (on file with CoA Inst.) (indicating delivery on Jan. 17, 2017).

⁷ 83 Fed. Reg. at 7,392.

⁸ 24 C.F.R. § 15.106(b) ("*Representative of the news media, or news media requester, means any person actively gathering news for an entity that is organized or operated to publish or broadcast news to the public, uses its editorial skill to turn the raw materials into a distinct work, and distributes that work to an audience.*"). The statutory definition does not include an "organized or operated" standard. *See* 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).

The HUD fee regulations cross-referenced by the OIG rule fail to correct the outdated fee category definition that still requires a news media requester to be “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 D.C. Circuit in the *Cause of Action* case 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 accordingly requests that the OIG provide its own fee category provisions or supply a definition of “representative of the news media” that does not contain the “organized and operated” standard. Such a definition should, for example, simply track the FOIA definition:

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.

Multiple agencies have corrected their FOIA regulations in response to CoA Institute’s comments on this matter.¹³ The OIG should do likewise.

b. Additional Matters

There are other elements of the DC Circuit’s *Cause of Action* decision that also should have been considered with respect to the news media requester fee category, but were ignored by HUD. First, agencies should try to incorporate the direction that the news media requester fee category determination focus “on the nature of the *requester*, not its request.”¹⁴ 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.”¹⁵ 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

¹⁰ 24 C.F.R. § 15.106(b).

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 See, e.g., CoA Inst., *Consumer Product Safety Commission Revises FOIA Rule in Response to CoA Institute Comments* (Aug. 8, 2017), <http://coainst.org/2EUPtCR>; CoA Inst., *Office of Special Counsel accepts CoA Institute’s FOIA regulation recommendations* (Mar. 31, 2017), <http://coainst.org/2op3oa1>; CoA Inst., *DOD revises FOIA policies incorporating CoA Institute recommendations* (Jan. 6, 2017), <http://coainst.org/2GzzBmf>; CoA Inst., *USAID Adopts CoA Institute’s Proposals in New FOIA Regulations* (Dec. 22, 2016), <http://coainst.org/2Bllqfu>; CoA Inst., *CoA Institute Influences New DHS FOIA Regulations* (Nov. 22, 2016), <http://coainst.org/2CDiBsZ>.

¹⁴ *Cause of Action*, 799 F.3d at 1121.

¹⁵ *Id.*

track record), nevertheless “the [FOIA] statute’s focus [is] on requesters, rather than [their] requests.”¹⁶ FOIA 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,” should consider the *Cause of Action* 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.’”¹⁷ Although the mere dissemination of raw records would not meet the “distinct work” standard, even a simple press release commenting on records would satisfy this criterion. FOIA regulations should embrace this standard.¹⁸

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.¹⁹ 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[.]”²⁰ 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.”²¹ With this in mind, agencies should indicate that the examples of news media entities they included in their regulations are non-exhaustive.

¹⁶ *Id.*

¹⁷ *Id.* at 1122.

¹⁸ 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.* These important clarifications should be considered by agencies when revising FOIA fee provisions.

¹⁹ *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.”).

²⁰ *Cause of Action*, 799 F.3d at 1123.

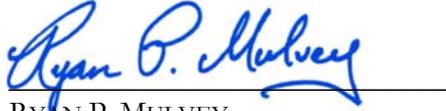
²¹ *Id.* at 1124.

Ms. Maura Malone
February 22, 2018
Page 5

III. Conclusion

Thank you for your consideration of the foregoing comments and proposed changes. If you have any questions, please do not hesitate to contact me at ryan.mulvey@causeofaction.org.

Sincerely,



RYAN P. MULVEY
COUNSEL

EXHIBIT

1



January 12, 2017

VIA CERTIFIED MAIL

Department of Housing & Urban Development
Office of Administration
ATTN: Helen Foster, Deputy Chief Administrative Officer
451 7th Street, S.W., Rm. 10139
Washington, D.C. 20410-0500

Re: Dep't of Housing & Urban Dev. FOIA Regulations, 82 Fed. Reg. 3,619 (Jan. 12, 2017)

Dear Ms. Foster,

I write on behalf of Cause of Action Institute (“CoA Institute”) with respect to the Department of Housing and Urban Development’s (“HUD”) recent final rule implementing revised Freedom of Information Act (“FOIA”) regulations.¹ These new regulations, which are being implemented to incorporate changes required by the FOIA Improvement Act of 2016, are effective on February 13, 2017. Although HUD did not solicit public comment, CoA Institute offers its feedback on an important deficiency in HUD’s final rulemaking.

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 HUD consider these comments and re-issue its final rule so as to ensure that its regulation more accurately reflect the statutory language.

I. Comments

a. 24 C.F.R. § 15.106(b) – Representative of the news media

HUD has failed to implement a definition of “representative of the news media” that is consistent with the FOIA statute.³ In 2015, the U.S. Court of Appeals for the District of

¹ Dep’t of Housing & Urban Dev., Revision of Freedom of Information Act Regulation, 82 Fed. Reg. 3,619 (Jan. 17, 2017) (to be codified at 24 C.F.R. pt. 15).

² See CAUSE OF ACTION INST., *About*, <http://www.causeofaction.org/about> (last accessed Jan. 12, 2017).

³ 24 C.F.R. § 15.106(b) (“*Representative of the news media*, or *news media requester*, means any person actively gathering news for an entity that is organized or operated to publish or broadcast news to the public, uses its editorial

Columbia Circuit issued an opinion in *Cause of Action v. Federal Trade Commission* that clarified the application of this statutory definition.⁴ HUD should withdraw or revise its recent rule to bring its fee category definitions into conformity with statutory and judicial authorities.

Specifically, the finalized rule fails to address an outdated definition that requires a news media requester to be “organized and operated to publish or broadcast news to the public[.]”⁵ The so-called “organized and operated” standard was created in guidance issued by the White House Office of Management and Budget in 1987.⁶ The D.C. Circuit in the *Cause of Action* case 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.”⁷

CoA Institute accordingly requests that HUD remove the “organized and operated” standard from its regulations and include the following definition of “representative of the news media,” which tracks the FOIA definition:

§ 15.106 Fees.

[. . .]

(b) *Definitions.* For the purposes of this section:

[. . .]

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. [. . .]

b. Additional Matters

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, HUD should incorporate the direction that the news media requester fee category determination focus “on the nature of the *requester*, not its request.”⁸ 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.”⁹ 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

skill to turn the raw materials into a distinct work, and distributes that work to an audience.”). The statutory definition does not include an “organized or operated” standard. *See* 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.”).

⁴ 799 F.3d 1108 (D.C. Cir. 2015).

⁵ 24 C.F.R. § 15.106(b).

⁶ Office of Mgmt. & Budget, Freedom of Information Fee Guidelines, 52 Fed. Reg. 10,012, 10,015 (Mar. 27, 1987).

⁷ *Cause of Action v. Fed. Trade Comm’n*, 799 F.3d at 1125.

⁸ *Id.* at 1121.

⁹ *Id.*

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), nevertheless “the [FOIA] statute’s focus [is] on requesters, rather than [their] requests.”¹⁰ HUD’s 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 HUD to the *Cause of Action* 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.’”¹¹ Although the mere dissemination of raw records would not meet the “distinct work” standard, even a simple press release commenting on records would satisfy this criterion. HUD’s regulations should embrace this standard.¹²

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.¹³ 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[.]”¹⁴ 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.”¹⁵ With this in mind, HUD should indicate that the examples of news media entities it has included in its regulations are non-exhaustive.

¹⁰ *Id.*

¹¹ *Id.* at 1122.

¹² 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.* These important clarifications should be considered for incorporation into a revised rule.

¹³ *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.”).

¹⁴ *Cause of Action v. Fed. Trade Comm’n*, 799 F.3d at 1123.

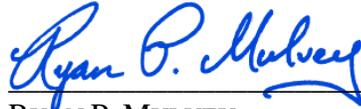
¹⁵ *Id.* at 1124.

Helen Foster
January 12, 2017
Page 4

II. Conclusion

Thank you for your consideration of the foregoing comments and proposed changes. If you have any questions, please do not hesitate to contact me at ryan.mulvey@causeofaction.org.

Sincerely,



RYAN P. MULVEY
COUNSEL