

# CAUSE of ACTION

## INSTITUTE

Pursuing Freedom & Opportunity through Justice & Accountability<sup>SM</sup>

March 6, 2018

### VIA E-MAIL

The Presidio Trust  
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**Re: Presidio Trust, Proposed FOIA Regulations, 83 Fed. Reg. 9,459 (Mar. 6, 2018)**  
**(RIN 3212-AA08) (to be codified at 36 C.F.R. pt. 1007)**

Dear Mr. Carp,

I write on behalf of Cause of Action Institute (“CoA Institute”)<sup>1</sup> with respect to the Presidio Trust’s proposed rule implementing revised Freedom of Information Act (“FOIA”) regulations.<sup>2</sup> Although the Trust primarily intends its revisions to enact changes required by the FOIA Improvement Act of 2016, the agency also has indicated that it seeks, as a general matter, to comply with the Department of Justice’s “model” FOIA regulations,<sup>3</sup> and to update fee provisions last visited in December 1998.<sup>4</sup> CoA Institute accordingly offers the following comments on an important deficiency in the Trust’s proposed rule and respectfully requests the Trust to revise its rulemaking to ensure that its FOIA regulations accurately reflect statutory and judicial authorities.

### **I. Comments**

a. § 1007.9(a)(5)(vi) – Representative of the News Media

The Trust has failed to implement a definition of “representative of the news media” that is consistent with the FOIA statute.<sup>5</sup> 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

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<sup>1</sup> CoA Institute is a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair. 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, engages in extensive FOIA litigation, and has specific expertise with respect to the history, purpose, and application of the FOIA. See CAUSE OF ACTION INST., *About*, <http://www.causeofaction.org/about>.

<sup>2</sup> Presidio Trust, Freedom of Information Act; Privacy Act; Federal Tort Claims Act; Debt Collection, 83 Fed. Reg. 9,459 (Mar. 6, 2018) (to be codified at 17 C.F.R. pts. 1007–09, 1011), *available at* <http://bit.ly/2D2bdHZ>.

<sup>3</sup> See, e.g., *Template for Agency FOIA Regulations*, DEP’T OF JUSTICE, <http://bit.ly/2oG7tKf> (last visited Mar. 8, 2018).

<sup>4</sup> 83 Fed. Reg. at 9,459.

<sup>5</sup> *Id.* at 9,466 (Proposed 36 C.F.R. § 1007.9(a)(5)(vi): “*Representative of the news media* is any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public.”). The statutory definition does not include an “organized or operated” standard. 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.”).

this statutory definition.<sup>6</sup> The Trust should revise its proposed rule to ensure that its fee definitions conform to statutory and judicial authorities.

Specifically, the proposed rule fails to eliminate the outdated requirement that a news media requester “actively gather news for an entity organized and operated to publish or broadcast news to the public.”<sup>7</sup> This so-called “organized and operated” standard was created in guidance issued by the White House Office of Management and Budget (“OMB”) in 1987.<sup>8</sup> In *Cause of Action*, the D.C. Circuit clarified that the outdated OMB standard no longer applies because Congress provided a complete 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.”<sup>9</sup> CoA Institute accordingly requests that the Trust adopt the following definition of “representative of the news media,” which tracks the statutory definition:

**§ 1007.9 Fees.**

(a) *Policy.*

[. . .]

(2) The following definitions shall apply to this part:

[. . .]

(vi) A *representative of the news media* or *news media requester* is 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

In addition to the definition provided above, the Trust should also consider other elements of the *Cause of Action* decision. First, the Trust should incorporate the D.C. Circuit’s direction that the news media requester fee category determination focus “on the nature of the *requester*, not its request.”<sup>10</sup> 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.”<sup>11</sup> Although a case-by-case inquiry into the articulated purpose of a request, the potential public interest in requested material, or even the ability of a requester to disseminate sought-after records

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<sup>6</sup> 799 F.3d 1108 (D.C. Cir. 2015).

<sup>7</sup> 83 Fed. Reg. at 9,466.

<sup>8</sup> Office of Mgmt. & Budget, Freedom of Information Fee Guidelines, 52 Fed. Reg. 10,012, 10,015 (Mar. 27, 1987).

<sup>9</sup> *Cause of Action*, 799 F.3d at 1125. Interestingly, even the Department of Justice template for agency FOIA regulations—upon which the Trust explicitly relies—rejects the old OMB standard. *See Template, supra* note 3.

<sup>10</sup> *Cause of Action*, 799 F.3d at 1121.

<sup>11</sup> *Id.*

rather than information in general may be appropriate in determining the eligibility of nascent news media requesters (*i.e.*, new entities that lack a track record), nevertheless “the [FOIA] statute’s focus [is] on requesters, rather than [their] requests.”<sup>12</sup>

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 the Trust 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.’”<sup>13</sup> 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. The Trust’s regulations should embrace this standard.<sup>14</sup>

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.<sup>15</sup> 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[.]”<sup>16</sup> 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.”<sup>17</sup> With this in mind, the Trust should indicate that any examples of news media entities it may include in its regulations are non-exhaustive.

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 1122.

<sup>14</sup> 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.

<sup>15</sup> *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.”).

<sup>16</sup> *Cause of Action*, 799 F.3d at 1123.

<sup>17</sup> *Id.* at 1124.

The Presidio Trust

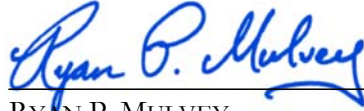
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## II. Conclusion

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](mailto:ryan.mulvey@causeofaction.org).

Sincerely,



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RYAN P. MULVEY

COUNSEL