

# CAUSE of ACTION

## INSTITUTE

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

June 11, 2018

### VIA REGULATIONS.GOV

U.S. Department of Agriculture  
Office of the Chief Information Officer  
ATTN: Alexis R. Graves, Department FOIA Officer  
1400 Independence Avenue, S.W., South Bldg., Rm. 4101  
Washington, D.C. 20250

**Re: U.S. Dep't of Agric., Proposed FOIA Regulations, 83 Fed. Reg. 26,865  
(June 11, 2018) (to be codified at 7 C.F.R. pt. 1) (RIN 0503-AA61)**

Dear Ms. Graves,

I write on behalf of Cause of Action Institute (“CoA Institute”)<sup>1</sup> with respect to the Department of Agriculture’s (“USDA”) proposed rule implementing revised Freedom of Information Act (“FOIA”) regulations.<sup>2</sup> Although the rule includes revisions to enact changes required by the FOIA Improvement Act of 2016 and the OPEN Government Act of 2007, the agency also has proposed revisions to “streamline USDA’s FOIA processing procedures, includ[ing] current cost figures to be used in calculating fees[.]”<sup>3</sup> CoA Institute accordingly offers the following comments on an important deficiency in USDA’s proposed rule and respectfully requests the agency to revise its rulemaking to ensure its regulations accurately reflect statutory and judicial authorities.

### **I. Comments**

#### **a. App. A § 2(b)(4)(i)–Representatives of the News Media**

USDA has failed to implement a definition of “representative of the news media” that is consistent with the FOIA statute.<sup>4</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> U.S. Dep’t of Agric., USDA Departmental Freedom of Information Act Regulations, 83 Fed. Reg. 26,865 (June 11, 2018) (to be codified at 7 C.F.R. pt. 1), *available at* <http://bit.ly/2JFiDIq>.

<sup>3</sup> *Id.* at 26,865.

<sup>4</sup> *Id.* at 26,873 (Proposed 7 C.F.R. App. A § 2(b)(4)(i): “*Representatives of the news media* are persons or entities organized and operated to publish or broadcast news to the public that actively gather information of potential interest to a segment of the public, uses [sic] their editorial skills to turn the raw materials into a distinct work, and distribute that work to an audience.”). 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>5</sup> USDA 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 be “organized and operated to publish or broadcast news.”<sup>6</sup> The so-called “organized and operated” standard was created in guidance issued by the White House Office of Management and Budget (“OMB”) in 1987.<sup>7</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>8</sup> CoA Institute accordingly requests that USDA adopt the following definition of “representative of the news media,” which tracks the statutory definition:

**7 C.F.R. pt. 1, App. A § 2(b)(4) *Representatives of the news media.***

(i) *Representatives of the news media, or news media requesters, include 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. § 1.12 General Fee Provisions**

USDA proposes to introduce 7 C.F.R. § 1.12(b) to direct agency components to “charge [fees] for processing requests under the FOIA in accordance with the provisions of . . . the *Uniform Freedom of Information Fee Schedule and Guidelines* published by the Office of Management and Budget (OMB Guidelines).”<sup>9</sup> USDA also proposes to introduce Section 1.12(e) to require notification of estimated fees, when calculated in accordance with the OMB fee guidelines.<sup>10</sup> CoA Institute requests that this language be stricken from the final rule.

For the reasons already set forth with respect to the definition of a “representative of the news media,” the OMB fee guidelines are unreliable and no longer authoritative. Since having been finalized over thirty years ago, and despite Congress amending the FOIA several times in the

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<sup>5</sup> 799 F.3d 1108 (D.C. Cir. 2015).

<sup>6</sup> 83 Fed. Reg. at 26,873. Indeed, USDA appears merely to have combined its current, outdated regulatory definition with the statutory definition. See 7 C.F.R. pt. 1, App. A § 5(c)(1).

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

<sup>8</sup> *Cause of Action*, 799 F.3d at 1125. The Department of Justice’s (“DOJ”) model FOIA regulations reject the old OMB standard. See *Template for Agency FOIA Regulations*, DEP’T OF JUSTICE, <http://bit.ly/2oG7tKf> (last visited June 11, 2018). USDA claims to have based its proposed rule on DOJ’s template, see, e.g., 83 Fed. Reg. at 26,865, which makes the retention of the “organized and operated” standard even more perplexing.

<sup>9</sup> 83 Fed. Reg. at 11,922 (Proposed 7 C.F.R. § 1.12(b)). A similar reference to the OMB fee guidelines exists in the current USDA FOIA regulations. See 7 C.F.R. pt. 1, App. A § 1.

<sup>10</sup> 83 Fed. Reg. at 11,922 (Proposed 7 C.F.R. § 1.12(e)).

interim, OMB has never updated its guidance.<sup>11</sup> OMB's failure in this respect is the subject of ongoing litigation. In November 2017, CoA Institute filed a lawsuit against OMB for failing, in relevant part, to act on a petition for rulemaking that sought revised fee guidelines.<sup>12</sup> The Archivist of the United States and the FOIA Advisory Committee have likewise called on OMB to provide a much-needed overall of the 1987 fee guidelines.<sup>13</sup>

Were USDA to retain the proposed language directing component FOIA officials to the OMB fee guidelines, it could cause confusion and would give a false impression of current law. As the FOIA Advisory Committee has described, "much of the confusion surrounding fee issues is a result of the technological changes in the public's ability to disseminate information."<sup>14</sup> Yet it is precisely these technological innovations that the outdated OMB guidelines fail to address.<sup>15</sup> USDA can avoid such confusion by removing all references to the outdated OMB fee guidelines.

c. Additional Matters

In addition to the proper definition of a news media requester, USDA should consider other elements of the D.C. Circuit's decision in *Cause of Action v. Federal Trade Commission*. First, USDA should incorporate the Court's direction that the news media requester fee category determination focus "on the nature of the requester, not its request."<sup>16</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>17</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 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), still "the [FOIA] statute's focus [is] on requesters, rather than [their] requests."<sup>18</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 USDA 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—

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<sup>11</sup> See, e.g., *Cause of Action Institute Petitions OMB to Update FOIA Fee Guide*, COA INST. (June 2, 2016), <http://coainst.org/2prLZy2>.

<sup>12</sup> See Press Release, CoA Inst., Cause of Action Institute Sues White House OMB Over Failure to Act on Transparency Rules (Nov. 2, 2017), [available at http://coainst.org/2lHTke7](http://coainst.org/2lHTke7); see generally Compl., *Cause of Action Inst. v. Office of Mgmt. & Budget*, No. 17-2310 (D.D.C. filed Nov. 2, 2017), [available at http://coainst.org/2pnWrHD](http://coainst.org/2pnWrHD).

<sup>13</sup> See Letter from David S. Ferriero, Archivist of the U.S., to Shaun Donovan, Dir., Office of Mgmt. & Budget (Aug. 26, 2016), [available at http://bit.ly/2lAbW77](http://bit.ly/2lAbW77); see also NAT'L ARCHIVES & RECORDS ADMIN., FREEDOM OF INFO. ACT (FOIA) ADVISORY COMM., FINAL REPORT & RECOMMENDATIONS: COMM. TERM 2014–2016 at 9–10 (Apr. 19, 2016) [hereinafter FOIA COMM. REPORT], [available at http://coainst.org/2IyhT4q](http://coainst.org/2IyhT4q).

<sup>14</sup> FOIA COMM. REPORT, *supra* note 13, at 9.

<sup>15</sup> See *id.* ("Updated guidance would incorporate congressional intent, nearly 30 years of case law on the issue, and advances in technology to eliminate some of the subjectivity that agencies must exercise to make fee issue determinations.").

<sup>16</sup> *Cause of Action*, 799 F.3d at 1121.

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

<sup>18</sup> *Id.*

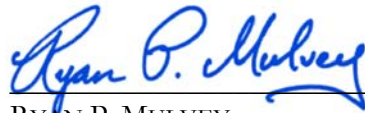
and its composition can involve ‘a significant degree of editorial discretion.’”<sup>19</sup> Although the mere dissemination of raw records would not meet the “distinct work” standard, even a simple press release commenting on records would satisfy this criterion. USDA’s regulations should embrace this standard.<sup>20</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>21</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>22</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>23</sup> With this in mind, USDA should indicate that any examples of news media entities it may include in its regulations are non-exhaustive.

## 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,



RYAN P. MULVEY  
COUNSEL

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<sup>19</sup> *Id.* at 1122.

<sup>20</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>21</sup> *Id.* at 1123; *see* 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>22</sup> *Cause of Action*, 799 F.3d at 1123.

<sup>23</sup> *Id.* at 1124.