

CAUSE of ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

May 28, 2019

VIA REGULATIONS.GOV

National Aeronautics and Space Administration
ATTN: Nikki N. Gramian, Chief FOIA Public Liaison
MS 5-L19, 300 E Street, S.W.
Washington, D.C. 20546

**Re: Proposed FOIA Regulations, 84 Fed. Reg. 14,628 (Apr. 11, 2019)
(to be codified at 14 C.F.R. pt. 1206) (RIN 2700-AE47)**

Dear Ms. Gramian,

I write on behalf of Cause of Action Institute (“CoA Institute”)¹ to comment on the National Aeronautics and Space Administration’s (“NASA”) proposed rule for revisions to its Freedom of Information Act (“FOIA”) regulations.² NASA’s rule includes changes required by the FOIA Improvement Act of 2016. CoA Institute respectfully submits these comments and requests that NASA revise its rulemaking accordingly.

I. Comments

a. Proposed Section 1206.504(a)—Reference to the OMB Guidelines

In its proposed rule, NASA refers to the White House Office of Management and Budget’s (“OMB”) *Uniform Freedom of Information Fee Schedule and Guidelines* (“OMB Guidelines”) as an authority for interpreting the FOIA and NASA’s implementing regulations. Specifically, NASA cites to the 1987 OMB Guidelines at proposed section 1206.504(a).³

Although the FOIA requires an agency to promulgate a fee schedule that “conforms” to the OMB Guidelines,⁴ those guidelines are no longer authoritative because they conflict with the statutory text. Indeed, as explained below, the OMB Guidelines have been statutorily superseded, in part, by Congress’s passage of the OPEN Government Act of 2007. They also conflict with other

¹ CoA Institute is a 501(c)(3) oversight group advocating for economic freedom and individual opportunity advanced by honest, accountable, and limited government. In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public on how government transparency and accountability protect economic opportunity for American taxpayers. CoA Institute routinely requests records under the FOIA, engages in extensive FOIA litigation, and its staff has specific expertise with respect to the history, purpose, and application of the FOIA. *See About*, CAUSE OF ACTION INST., <http://www.causeofaction.org/about> (last visited May 28, 2019).

² Procedures for Disclosure of Records Under the Freedom of Information Act (FOIA), 84 Fed. Reg. 14,628 (Apr. 11, 2019) (to be codified at 14 C.F.R. pt. 1206).

³ *Id.* at 14,631 (“NASA shall charge for processing requests under the FOIA in accordance with the provisions of this section and the OMB Guidelines.”).

⁴ 5 U.S.C. § 552(a)(4)(A)(i) (“[An agency’s fee] schedule shall conform to the guidelines which shall be promulgated . . . by [OMB] and which shall provide for a uniform schedule of fees for all agencies.”).

jurisprudential developments and revisions to the FOIA. NASA should remove its reference to the OMB Guidelines or at least delimit the scope of their relevance for NASA's FOIA processes.

One important example of how the OMB Guidelines conflict with current law involves the definition of a “representative of the news media.” Under the FOIA, as amended, a news media requester includes “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.”⁵ But the OMB Guidelines restrict the same fee category to requesters “organized and operated to publish or broadcast news to the public.”⁶

OMB's outdated definition of a “representative of the news media” has long been one of the more contentious aspects of its fee guidelines. 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* clarifying that the “organized and operated” standard no longer applied because Congress provided a complete statutory definition 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

Since finalizing them over thirty years ago, and despite multiple amendments to the FOIA in the interim, OMB has not updated its guidelines,⁸ even though it has eliminated the “organized and operated” standard in its own FOIA regulations.⁹ Both the Archivist of the United States and the FOIA Advisory Committee have called on OMB to remedy this defect and provide a much-needed overhaul of its fee guidelines.¹⁰ OMB's failure in this respect also is the subject of ongoing litigation. In November 2017, CoA Institute filed a lawsuit against OMB for failing to act on a petition for rulemaking that sought revised fee guidelines.¹¹

If NASA retains language directing its FOIA staff to consult the OMB Guidelines as authoritative, it will engender confusion and give a false impression of the 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.”¹² Yet it is precisely these

⁵ *Id.* § 552(a)(4)(A).

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

⁷ 799 F.3d 1108, 1125 (D.C. Cir. 2015).

⁸ See, e.g., *Cause of Action Institute Petitions OMB to Update FOIA Fee Guide*, COA INST. (June 2, 2016), <http://coainst.org/2prLZy2>.

⁹ See Freedom of Information Act, 84 Fed. Reg. 22,947 (May 21, 2019) (to be codified at 5 C.F.R. pt. 1303).

¹⁰ 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/2IAbW77>; 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>.

¹¹ 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/2IHtke7>; 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>.

¹² FOIA COMM. REPORT, *supra* note 10, at 9.

technological innovations that the outdated OMB Guidelines fail to address.¹³ NASA can avoid potential confusion by removing any reference to the outdated fee guidelines in proposed section 1206.504.

b. Proposed Section 1206.507(c)(3)—“Representative of the News Media”

Although NASA adopts the current statutory definition of a “representative of the news media,” and intends to eliminate the outdated “organized and operated” standard from its regulations, the agency seeks to impose additional novel and atextual requirements that news media requesters must satisfy to qualify for the fee category. Specifically, NASA would force news media requesters to demonstrate (1) their “intended dissemination,” (2) “[w]hether the information [they seek] is current news and/or of public interest,” and (3) “[w]hether the information sought will shed new light on agency statutory operations.”¹⁴ Each of these additional requirements should be eliminated and removed from the final rule.

First, the requirement that a requester demonstrate “intended dissemination” blurs the proper focus of the news media requester fee category determination, which ought to be “on the nature of the requester, not its request.”¹⁵ As the *Cause of Action* court explained, “[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,”¹⁶ and regardless of whether he is able to prove that his story will solicit widespread attention. Any inquiry into the intended use of records, or the intended means of dissemination, is inappropriate.

To the extent a “case-by-case” examination of the articulated purpose of a request, the potential public interest in requested material, or the ability of a requester to disseminate sought-after records rather than information in general is appropriate, it must be limited to those rare cases when NASA either is determining the eligibility of a nascent news media requester (*i.e.*, a new entity that lacks a track record) or clarifying whether a request has been filed for a commercial use (*i.e.*, not in support of a news-dissemination purpose). Thus, NASA’s proposal to grant news media status “on a case-by-case basis based upon . . . intended use” is similarly infirm for the same reasons.¹⁷

Second, the requirement that requested records concern “information [that] is current and/or of public interest,” is vague and its application is uncertain. Under the FOIA, “the term ‘news’ means information that is about current events or that would be of current interest to the public.”¹⁸ The inclusion of this definition, however, was intended to provide guidance to agencies in determining whether an organization, as a matter of course, is involved in news dissemination. The

¹³ *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.”).

¹⁴ 84 Fed. Reg. at 14,633 (Proposed Section 1206.507(c)(3)(i)(A)–(C)).

¹⁵ *Cause of Action*, 799 F.3d at 1121.

¹⁶ *Id.*

¹⁷ 84 Fed. Reg. at 14,633 (Proposed Section 1206.507(c)(3)(ii)).

¹⁸ 5 U.S.C. § 552(a)(4)(A)(ii).

FOIA does *not* require a news media requester to show that the records it seeks are *already* newsworthy. That sort a requirement may appropriate if a requester applies for a public interest fee waiver, but agencies should not assess the newsworthiness of records in determining a fee category request. That would violate the D.C. Circuit's directive that the fee category inquiry focus "on the nature of the requester, not its request."¹⁹

Third, the requirement that requested records contain "information . . . [that] will shed new light on agency statutory operations" also is vague and improper. There is no requirement in the FOIA statute that a news media requester seek records concerning an agency's "statutory operations." Although this may be appropriate, once again, in determining a request for a public interest fee waiver,²⁰ a news media requester's proper categorization does *not* depend on the intended purpose of any given request or the potential newsworthiness of responsive materials. Further, it unclear whether records concerning government wrongdoing, for example, would be considered to shed "new light on agency statutory operations." The proposed language grants NASA too much discretion in making value judgments about the newsworthiness of requested records and their relevance to agency functions. The FOIA does not permit such an added hurdle for news media entities to obtain a fee reduction.

For the foregoing reasons, Proposed Section 1206.507(c)(3)(i)(A)–(C), and the final sentence of Proposed Section 1206.507(c)(3)(ii), should be rejected and eliminated from the final rule.²¹

c. Additional Fee Category Considerations

In addition to the proper definition of a news media requester, NASA should consider other elements of the D.C. Circuit's decision in *Cause of Action v. Federal Trade Commission*. With respect to the requirement that a news media requester use "editorial skills" to turn "raw materials" into a "distinct work," CoA Institute directs NASA 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.'"²² Although mere dissemination of raw records would not meet the "distinct work" standard, even a simple press release commenting on records would satisfy this criterion. NASA's regulations should embrace this standard.²³

¹⁹ *Cause of Action*, 799 F.3d at 1121.

²⁰ 5 U.S.C. § 552(a)(4)(A)(iii) (public interest fee waiver appropriate when "disclosure . . . is likely to contribute significantly to public understanding of the operations or activities of the government").

²¹ NASA may wish simply to duplicate the "representative of the news media" provisions from the Department of Justice's model FOIA regulations, as it has done for other fee category definitions. See *Template for Agency FOIA Regulations*, DEP'T OF JUSTICE, <http://bit.ly/2oG7tKf> (last visited May 28, 2019).

²² *Cause of Action*, 799 F.3d at 1122.

²³ 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. *Third*, the court addressed the so-called "middleman standard," rejecting the government argument that "a public interest advocacy organization cannot satisfy the [FOIA]

Further, the *Cause of Action* court insisted that the statutory definition of “representative of the news media” captures “alternative media” and evolving news media formats.²⁴ The D.C. Circuit 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[.]”²⁵ 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.”²⁶ With this in mind, NASA should indicate that any examples of news media entities it may include in its regulations are non-exhaustive.

d. Proposed Section 1206.307(a)(2)—Records Under Agency Control

In describing the contents of an adverse determination letter—that is, the denial of a request—NASA proposes that it will “advise the requester in writing,” when applicable, if “[r]ecords do not exist, cannot be located, or are not in the Agency’s *possession*[.]”²⁷ The word “possession” misstates the law and should be replaced with the word “control.”

Whether a record qualifies as an “agency record” for purposes of the FOIA is dependent upon two factors. *First*, an agency must have “either create[d] or obtain[ed]” the record.²⁸ *Second*, it must have “control” of it “at the time [a] FOIA request is made.”²⁹ In most cases, “control” is analyzed through the four-factor *Burka* test, which considers “(1) the intent of the document’s creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document [is] integrated into the agency’s record systems of files.”³⁰

Courts recognize that “control” exists in cases of “constructive possession,” including when records have been transferred out of the physical possession of an agency or when they never were housed in official agency recordkeeping systems. The D.C. Circuit, for example, has found that work-related records maintained in the private e-mail account of an agency official or employee are

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.

²⁴ *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.”).

²⁵ *Cause of Action*, 799 F.3d at 1123.

²⁶ *Id.* at 1124.

²⁷ 84 Fed. Reg. at 14,630 (Proposed Section 1206.307(a)(2)) (emphasis added).

²⁸ *Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144 (1989) (citation omitted).

²⁹ *Id.* at 145.

³⁰ *Burka v. Dep’t of Health & Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996) (citation omitted).

subject to agency control and, therefore, qualify as records subject to the FOIA.³¹ The FOIA itself also clarifies that records maintained on behalf of an agency, but which are not in the agency's physical possession, can still qualify as "agency records" subject to disclosure.³² NASA's reference to "possession" is therefore underinclusive. Certainly, "a strong presumption exists that when a record is in an agency's possession, it is an 'agency record' for FOIA purposes."³³ But that is not enough. NASA must ensure there are no potentially responsive records under its legal control, regardless of the physical location of such records, before denying a request based on the failure to locate responsive records.

e. Implementing the "Foreseeable Harm" Standard

NASA has indicated that the instant rulemaking is being undertaken to amend the agency's FOIA regulations "in accordance with the FOIA Improvement Act of 2016." Yet there is an important part of the 2016 amendments that is not included in the proposed rule, namely, the "foreseeable harm" standard. NASA should include an implementing provision for this important standard in its final rule.

The FOIA mandates that agency records be produced unless they fall under a specifically enumerated statutory exemption. Yet "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant object of the Act[.]"³⁴ With the passage of the FOIA Improvement Act of 2016, Congress introduced significant amendments to the FOIA, including changes that raise the standard by which an agency must evaluate its withholding. Indeed, Congress sought to "[b]uild[] on the [Obama] Administration's efforts to introduce a "presumption of openness,"³⁵ and turn that "presumption" into a "permanent requirement" that would "prohibit agencies" from the mere technical application of exemptions.³⁶

As the law now stands, an agency may only "withhold information" under the FOIA "if [it] *reasonably foresees* that disclosure would harm an interest protected by an exemption," or if "disclosure is prohibited by law[.]"³⁷ In other words, an agency must articulate precise reasons why the disclosure of specific records, or portions of records, could be reasonably foreseen to harm a

³¹ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Pol'y*, 827 F.3d 145, 150 (D.C. Cir. 2016); see also *id.* at 149 ("[A]n agency always acts through its employees and officials. If one of them possesses what would otherwise be agency records, the records do not lose their agency character just because the official who possesses them takes them out the door.").

³² 5 U.S.C. § 552(f)(2)(B) (The term "record" includes "any information . . . maintained for an agency by an entity under Government contractor, for the purposes of records management."); see *OIP Guidance: Treatment of Agency Records Maintained for an Agency by a Government Contractor for Purposes of Records Management*, DEP'T OF JUSTICE, <http://bit.ly/30vxvyN> (last visited May 28, 2019).

³³ *FOIA Update: What is an "Agency Record"?*, DEP'T OF JUSTICE, <http://bit.ly/2HEMSfC> (last visited May 28, 2019).

³⁴ *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7–8 (2001) (internal citations omitted).

³⁵ See Att'y Gen. Mem. for Exec. Dep'ts. & Agencies Concerning the FOIA, 74 Fed. Reg. 51,879 (Oct. 8, 2009).

³⁶ H.R. Rep. No. 114-391 at 9 (2016); see *id.* ("An inquiry into whether an agency has reasonably foreseen a specific, identifiable harm . . . require[s] the ability to articulate both the nature of the harm and the link between the specified harm and the specific information contained in the material withheld."); see also S. Rep. No. 114-4 at 8 (2016) ("[M]ere 'speculative or abstract fears,' or fear of embarrassment, are an insufficient basis for withholding information.").

³⁷ 5 U.S.C. § 552(a)(8)(A)(i)(I)–(II).

cognizable interest.³⁸ The foreseeable harm standard manifests Congress's intent to require something more of an agency when it defends its withholdings,³⁹ and federal courts are increasingly recognizing that this development is incontrovertible.⁴⁰

NASA should therefore modify the following regulatory provision and include the amended language, which is underlined, in its final rule:

14 C.F.R. § 1206.307 – Denying a request.

[. . .]

(b) The denial notification must include:

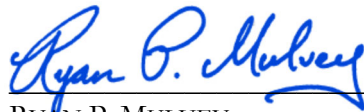
[. . .]

(2) A brief statement of the reasons for the denial, including a reference to any FOIA exemption(s) applied by the FOIA office to withhold records in full or in part, except that no record, or portion of a record, may be withheld unless the Agency reasonably foresees that disclosure would harm an interest protected by an exemption or if disclosure is otherwise prohibited by law.

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 by telephone at (202) 400-2729 or by e-mail ryan.mulvey@causeofaction.org.

Sincerely,



RYAN P. MULVEY
COUNSEL

³⁸ See *Rosenberg v. Dep't of Def.*, 342 F. Supp. 3d 62, 73 (D.D.C. 2018) (“Stated differently, pursuant to the FOIA Improvement Act, an agency must release a record—even if it falls within a FOIA exemption—if releasing the record would not reasonably harm an exemption-protected interest and if its disclosure is not prohibited by law.”); see also 162 Cong. Rec. S1496 (daily ed. Mar. 15, 2016) (statement of Sen. Leahy) (“[C]odifying the presumption of openness will help reduce the perfunctory withholding of documents through the overuse of FOIA exemptions. It requires agencies to consider whether the release of particular documents will cause any foreseeable harm[.]”).

³⁹ *Cf. Mingo Logan Coal Co. v. Emvtl. Prot. Agency*, 714 F.3d 608, 612–614 (D.C. Cir. 2013).

⁴⁰ See generally *Crisman v. Dep't of Justice*, No. 12-1871, 2019 WL 1330587, at *3 (D.D.C. Mar. 25, 2019); *Rosenberg*, 342 F. Supp. 3d at 73; *Ecological Rights Found. v. Fed. Emergency Mgmt. Agency*, No. 16-05254, 2017 WL 5972702, at *6 (N.D. Cal. Nov. 30, 2017).