REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

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Re: Proposed Revisions to the National Aeronautics and Space Administration Regulations, RIN 2700-AE47/Docket No. NASA-2019-0001

To Whom It May Concern:

The Reporters Committee for Freedom of the Press (the "Reporters Committee" or "RCFP") submits these comments regarding the proposed updates to the regulations of the National Aeronautics and Space Administration ("NASA") implementing the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA" or the "Act"), which were published on April 11, 2019, 84 Fed. Reg. 14,628 (April 11, 2019) (to be codified at 14 C.F.R. 1206) (hereinafter, the "Proposed Rule").[1]

I. The Proposed Rule's definition of "representative of the news media" in Section 1206.507 is inconsistent with from FOIA's plain language and D.C. Circuit precedent interpreting that language.

FOIA limits fees for representatives of the news media to "reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii)(II). The Act includes the following definition of "representative of the news media":

> [A]ny 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. In this clause, the term "news" means information that is about current events or that would be of current interest to the public. . . . [A]s 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.

5 U.S.C. § 552(a)(4)(A)(ii).

The Proposed Rule improperly deviates in significant ways from the Act's definition of "representative of the news media," as well as the binding interpretation of that term by the U.S. Court of Appeals for the D.C. Circuit.

[1] RCFP takes no position on any portion of the Proposed Rule not specifically addressed herein.

First, the Proposed Rule's definition of a representative of the news media, while largely duplicating the Act's definition, inexplicably excises the provision requiring agencies to consider "alternative media" in this category. *Compare* Proposed Rule at § 1206.507(c)(3)(ii) *with* 5 U.S.C. § 552(a)(4)(A)(ii). NASA is required to treat such alternative media as representatives of the news media for fee purposes under the plain language of the Act, and should add this language to the Proposed Rule to avoid any ambiguity.

Second, the Proposed Rule provides that "NASA's decision to grant a requester news media status for the purposes of assessing fees *will be made on a case-by-case basis based upon the requesters* [sic] *intended use*." Proposed Rule § 1206.507(c)(3)(ii) (emphasis added). It further requires a "representative of the news media" to demonstrate "(A) [t]he requester's intended dissemination, (B) [w]hether the information is current news and/or of public interest, *and* (C) [w]hether the information sought will shed new light on agency statutory operations." Proposed Rule § 1206.507(c)(3)(i) at 14,633 (emphasis added).

FOIA does not determine whether an organization or individual is a representative of the news media based on their intended use for a particular request—under the Proposed Rule's three-pronged test or otherwise. *See* 5 U.S.C. § 552(a)(4)(A). The Act clearly states that "[e]xamples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of 'news') who make their products available for purchase by or subscription by or free distribution to the general public." *Id*. Thus, contrary to the Proposed Rule, if an entity qualifies as a "representative of the news media" it does so as a general matter; there are no "instances" where such an entity would not "qualify as [a] disseminator[] of news."

The D.C. Circuit expressly rejected such a case-by-case approach in *Cause of Action v. Federal Trade Commission*, explaining that the "news-media entity" category of FOIA focuses on the nature of *requester*, not the request itself. 799 F.3d 1108 (D.C. Cir. 2015). In that case, the district court below had assessed whether each of the plaintiff's FOIA requests concerned information that is of potential interest to a segment of the public. *Id*. at 1120. In reversing the district court, the D.C. Circuit explained that if a requester satisfies the criteria for a "representative of the news media" under the Act, "as a general matter, it does not matter whether any of [its] individual FOIA requests does so." *Id*. at 1121. It explained that the statutory definition "focuses on the nature of the *requester*, not its request." *Id*. (emphasis in original). An analysis of whether a specific FOIA request qualifies a requester as a "news-media entity," as in the Proposed Rule, fails to conform with both FOIA and relevant case law.

Moreover, the three-pronged test set forth in Proposed Rule Section 1206.507(c)(3)(i) imposes additional burdens on representatives of the news media that have no basis in the Act. *None* of the three requirements appear anywhere in FOIA's text, and they run directly contrary to FOIA's structure. Once a requester qualifies as a representative of the news media, as defined in FOIA, 5 U.S.C. § 552(a)(4)(A)(ii), NASA does not have the authority to create additional hurdles for them to benefit from the reduced fees.

In sum, NASA has no authority to modify or narrow the definition of who qualifies as a "representative of the news media" for purposes of FOIA. The Reporters Committee recommends that NASA modify the Proposed Rule to mirror the language of the Act.

II. The Proposed Rule's fails to address the foreseeable harm standard.

The Proposed Rule lacks any language regarding compliance with the foreseeable harm standard codified in the FOIA Improvement Act of 2016. Under FOIA, as amended, agencies may withhold records "*only if* the agency reasonably foresees that disclosure would harm an interest protected by an exemption" or disclosure is prohibited by law. 5 U.S.C. § 552(a)(8)(A)(i).

In *Ecological Rights Foundation v. FEMA*, the U.S. District Court for the Northern District of California made clear that agencies must justify their use of FOIA exemptions with a showing of how the interests intended to be protected by those exemptions would be harmed by disclosure:

> FEMA also does not provide any justification for how the agency would be harmed by disclosure as required by the FOIA Improvement Act of 2016. 5 U.S.C. § 552(a)(8)(A)(i). Absent a showing of foreseeable harm to an interest protected by the deliberative process exemption, the documents must be disclosed. In failing to provide basic information about the deliberative process at issue and the role played by each specific document, FEMA does not meet its burden of supporting its withholdings with detailed information pursuant to the deliberative process privilege.

No. 16-cv-05254-MEJ, 2017 WL 5972702, at *6 (N.D. Cal., Nov. 30, 2017). Moreover, the legislative history of the FOIA Improvement Act of 2016 makes clear that agencies must "consider whether the release of particular documents will cause any foreseeable harms to an interest the applicable exemption is meant to protect," 162 Cong. Rec. 41, S1496 (Mar. 15, 2016) (statement of Sen. Leahy) (italics added).

The U.S. District Court for the District of Columbia, similarly, has addressed the showing that an agency must make to satisfy the foreseeable harm standard. In *Rosenberg v. U.S. Dep't of Defense*, the district court, citing *Ecological Rights Foundation*, held that "[t]o satisfy the 'foreseeable harm' standard, DOD must explain how a *particular* Exemption 5 withholding would harm the agency's deliberative process." 342 F. Supp. 3d 62, 78 (D.D.C. 2018). The court explained that this analysis is distinct from a general declaration that any FOIA exemption is implicated. *Id*. The foreseeable harm standard requires the government to "do more than perfunctorily state that disclosure of all the withheld information—regardless of category or substance—'would jeopardize the free exchange of information between senior leaders within and outside of the [DOD].'" *Id*. at 79 (rejecting the government's attempt to explain why all the withheld documents were exempt under Exemption 5, which exempts information that would be protected by the deliberative process privilege).

To comply with FOIA, NASA should add language to the Proposed Rule to ensure that (1) the foreseeable harm standard is complied with and (2) that any adverse agency decision relying on a discretionary FOIA exemption also includes an explanation of how the agency reasonably foresees that disclosure would result in harm to the interest protected by the cited exemption.

III. Conclusion

The Reporters Committee urges NASA to incorporate the aforementioned comments into the Proposed Rule.

Sincerely,

The Reporters Committee
for Freedom of the Press