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Alexis R. Graves, Department FOIA Officer
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Submitted via regulations.gov

Re: USDA Departmental Freedom of Information Act Regulations, 7 CFR Part 1, RIN 0503-AA61

To Whom It May Concern:

The Reporters Committee for Freedom of the Press (the “Reporters Committee” or “RCFP”) appreciates this opportunity to comment on the proposed updates to the regulations of the United States Department of Agriculture (“USDA”) implementing the Freedom of Information Act, 5 U.S.C. §552 (“FOIA” or the “Act”), which were published on June 11, 2018 (the “Proposed Rule”).¹

These comments are addressed to two aspects of the Proposed Rule. First, the Proposed Rule’s definition of “representatives of the news media” is inconsistent with both the text of the Act and its interpretation by the U.S. Court of Appeals for the District of Columbia Circuit in *Cause of Action v. Federal Trade Commission*, 799 F.3d 1109 (D.C. Cir. 2015). Second, the Proposed Rule fails to include any language requiring compliance with the foreseeable harm standard codified in the 2016 amendments to FOIA.

I. Definition of “representatives of the news media”

FOIA defines a “representative of the news media” as:

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 U.S.C. § 552(a)(4)(A). Appendix A Section 4 (a)(4)(i) of the Proposed Rule, however, defines “representatives of the news media” as:

persons or entities organized and operated to publish or broadcast news to the public that actively gather information of potential interest to a segment

¹ The Reporters Committee takes no position on any portion of the Proposed Rule not specifically addressed herein.

of the public, uses their editorial skills to turn the raw materials into a distinct work, and distribute that work to an audience.

Proposed Rule, Appendix A Section 4 (a)(4)(i) (emphasis added). The Proposed Rule’s divergence from the statute—possibly the result of reliance on outdated 1987 Office of Management and Budget (“OMB”) Guidelines²—is unwarranted and should be revised to mirror the language of FOIA.

The D.C. Circuit has made clear that agencies cannot rely on the 1987 OMB Guidelines when they conflict with Congressional intent. In *Cause of Action*, the Court rejected the Federal Trade Commission’s (“FTC”) argument that a public interest group did not qualify as a “representative of the news media” under 5 U.S.C. § 552(a)(4)(A) because it did not show that its activities were especially organized around disseminating its work to an audience. 700 F.3d at 1124. The Court found “no basis for adding an ‘organized and operated’ requirement to the statutory definition” as Congress omitted the “organized and operated” language in enacting the statutory definition of “representative of the news media” in 2007. *Id.* at 1125. The Court further disagreed with the suggestion that a public interest organization sharing information with the media rather than directly to the public would not qualify as a “representative of the news media”:

[W]hat is distributed must independently qualify as “distinct work” produced through the exercise of “editorial skills.” But assuming that these other criteria are satisfied, there is no indication Congress meant to distinguish between those who reach their ultimate audiences directly and those who partner with others to do so, as some recognized journalistic enterprises do.

Id. (citations omitted).

The language of the Proposed Rule impermissibly narrows the scope of who may qualify as a “representative of the news media” contrary to Congressional intent, by requiring requesters to show they are a member of an entity “organized and operated” to publish news—a requirement found nowhere in FOIA. As *Cause of Action* makes clear, the definition of “representative of the news media” is not so limited. The Reporters Committee accordingly recommends that “organized and operated to publish or broadcast news to the public” in the Proposed Rule’s definition of “representative of the news media” be removed.

II. Responses to requests and the foreseeable harm standard

The Proposed Rule lacks any language regarding compliance with the foreseeable harm standard codified in the FOIA Improvement Act of 2016.³ As amended, FOIA requires that an agency may withhold information “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).

² 52 Fed. Reg. 10012 (Mar. 27, 1987)

³ Pub. L. No. 114-185 (2016).

In the only judicial opinion to date to address the foreseeable harm standard, the Northern District of California in *Ecological Rights Foundation v. FEMA* 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 harm to an interest the applicable exemption is meant to protect,” 162 Cong. Rec. 41, S1496 (Mar. 15, 2016) (statement of Sen. Leahy) (*italics added*); agencies cannot make categorical determinations as to foreseeable harm.

To comply with FOIA, the USDA should add language to the Proposed Rule to ensure (1) the foreseeable harm is complied with,⁴ and (2) that any adverse agency determination involving the assertion of an exemption also include an explanation of how the USDA reasonably foresees disclosure would result in harm or why disclosure is prohibited by law.

III. Conclusion

The Reporters Committee appreciates the USDA’s efforts to update its FOIA regulations, and urges the USDA to incorporate the comments set forth herein.

Sincerely,
The Reporters Committee for Freedom of the Press

⁴ For example, the Federal Energy Regulatory Commission (“FERC”) added the following language to its FOIA regulations:

The Director will only withhold information where it is reasonably foreseeable that disclosure would harm an interest protected by an exemption or disclosure is prohibited by law or otherwise exempted from disclosure under FOIA Exemption 3.