REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

1156 15th St. NW, Suite 1250
Washington, D.C. 20005
(202) 795-9300
www.rcfp.org

Bruce D. Brown
Executive Director
bbrown@rcfp.org
(202) 795-9301

Office of Management and Budget
Executive Office of the President
725 17th Street NW, Suite 9204
Washington, DC 20503

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Submitted via regulations.gov

Re: OMB Freedom of Information Act Regulation, RIN 0348-AB42

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 Office of Management and Budget ("OMB") implementing the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA" or the "Act"), which were published on August 23, 2018 (the "Proposed Rule").[1] As set forth herein, the Proposed Rule deviates in a number of ways from the express language of FOIA and caselaw interpreting it; the Proposed Rule also fails to address requirements from the 2016 FOIA Improvement Act. Accordingly, the Reporters Committee recommends that the Proposed Rule be modified to address these errors and deficiencies.

I. The Proposed Rule deviates from the definition of "representative of the news media" set forth in the Act.

A. The Proposed Rule contains an erroneous situation-specific definition of "representative of the news media."

Section 1303.90(j) of the Proposed Rule states:

> The term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only *in those instances* when they can qualify as disseminators of news) . . . .

(emphasis added). This definition suggests OMB will determine, on a case-by-case basis, whether a FOIA requester qualifies as a "representative of the news media" in individual "instances." There is no basis for such an ad-hoc assessment process found in the Act, and it has also been rejected by the U.S. Court of Appeals for the D.C. Circuit.

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

FOIA does not differentiate between "instances" when an organization is or is not acting as a "disseminator of news." *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 squarely addressed this issue in *Cause of Action v. Federal Trade Commission*, explaining that the "news-media entity" category of FOIA focuses on the nature of requester. 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 rejecting this approach, the D.C. Circuit Court 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 the individual FOIA requests does so." *Id.* at 1121. This is because the statutory definition "focuses on the nature of the *requester*, not its request." *Id.* (emphasis in original). Thus, an analysis of whether a specific FOIA request qualifies a requester as a "news-media entity," as contained in the Proposed Rule, has been expressly rejected by the D.C. Circuit.

OMB 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 OMB modify the Proposed Rule to mirror the language of the Act.

B. The Proposed Rule inexplicably alters key language in FOIA's definition of "representative of the news media."

Section 1303.90(j) of the Proposed Rule deviates from the Act in two other key ways when defining "representative of the news media." First, the Proposed Rule states that "as methods of news delivery evolve, such alternative media *would* also be included in this category" (emphasis added). However, FOIA states that "such alternative media *shall* be considered as news-media entities." 5 U.S.C. 552(a)(4)(A) (emphasis added). The Act unambiguously requires that new and evolving news-media entities be entitled to categorization as "representative[s] of the news media." By changing "shall" to "would," the Proposed Rule injects unnecessary ambiguity into the clear statutory framework.

Second, with respect to freelance journalists, the Proposed Rule states:

> Freelance journalists *may* be regarded as working for a news-media organization if the journalist can demonstrate a solid basis for expecting publication through that organization, even though the journalist is not actually employed by the organization.

Proposed Rule, § 1303.90(j) (emphasis added). FOIA clearly states that a "freelance journalist *shall* be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity." 5 U.S.C. 552(a)(4)(A) (emphasis added). The Proposed Rule's inexplicable change of the mandatory language enacted by Congress—"shall"—to permissive language—"may"—is impermissible.

The Reporters Committee recommends that OMB modify Section 1303.90(j) of the Proposed to mirror the exact language of FOIA.

C. The Proposed Rule includes an erroneous cross-reference regarding the definition of "representative of the news media."

Section 1303.92(c) of the Proposed Rule states that to qualify as a "representative of the news media" for purposes of FOIA, a requester "must meet the criteria provided in § 1303.10(j) through (k) . . . ." The referenced subsections do not exist in the Proposed Rule. The Reporters Committee recommends that OMB modify this provision to refer to the correct subsection in the final rule.

II. The Proposed Rule's instructions for issuing a "determination" are inconsistent with D.C. Circuit precedent.

Section 1303.40(a) of the Proposed Rule, which addresses what constitutes a "determination," fails to incorporate the D.C. Circuit's holding in *Citizens for Responsibility & Ethics in Washington v. FEC*, 711 F.3d 180 (D.C. Cir. 2013) ("*CREW*"). That section of the Proposed Rule provides:

> Upon receipt of any request for information or records, the FOIA Officer will determine within 20 working days . . . whether it is appropriate to grant the request and will immediately notify the requester of (1) such determination and the reasons therefore and (2) the right of such person to seek assistance from the FOIA Public Liaison.

Proposed Rule, § 1303.40(a).

The D.C. Circuit has held, however, that in order to qualify as a "determination," the agency:

> must at least: (i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the "determination" is adverse.

CREW, 711 F.3d at 188.

Section 1303.40(a) of the Proposed Rule fails to comport with the standard set forth in *CREW* in several ways: (1) it does not make clear that the agency must gather and review the records responsive to a request within the 20-working day statutory deadline; (2) it does not specify that the agency is required to inform the requester of the scope of the records it intends to produce and withhold, and the reasons for withholding any records or portions thereof, and (3) it does not mention notifying the requester of their right to file an administrative appeal as to any adverse portion of the determination. *See CREW*, 711 F.3d at 188.

The Reporters Committee recommends that OMB reformulate Section 1303.40(a) of the Proposed Rule to ensure it conforms with the requirements of a "determination" as set forth in *CREW*.

III. The appeals process reflected in the Proposed Rule does not accurately describe when requesters may seek judicial review

Section 1303.70 of the Proposed Rule mistakenly suggests that requesters must file an administrative appeal before seeking judicial review of an adverse determination, stating: "[b]efore seeking review by a court of an agency's adverse determination, a requester generally must first submit a timely administrative appeal." FOIA, however, explicitly provides that a requester "shall be deemed to have exhausted [her or his] administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions . . . ." 5 U.S.C. 552(a)(6)(C)(i). Accordingly, the Proposed Rule may give requesters an erroneous impression of their right to judicial review if the agency fails to timely respond to a request.

The Reporters Committee recommends that OMB strike this sentence or modify it to make clear that a requester does not need to file an administrative appeal before initiating court action if the agency fails to comply with the applicable time limit provisions of the Act.

IV. The Proposed Rule includes an erroneous method for calculating the date of receipt of a FOIA request.

Section 1303.40(a) of the Proposed Rule impermissibly defines when OMB is deemed to have received a request. Specifically, that section states: "[t]he 20-day period, as used herein, shall commence on the date on which the *FOIA Officer or the FOIA Public Liaison* first receives the request." Proposed Rule, § 1303.40(a) (emphasis added). FOIA, however, explicitly states that the 20-day period

> shall commence on the date on which the request is first received by the *appropriate component of the agency*, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section.

5 U.S.C. § 552(a)(6)(A)(ii).

The Proposed Rule impermissibly delays the commencement of the 20-working day limit by tying it to the receipt by a FOIA officer or public liaison. The time limit for an agency to make a determination is properly calculated by the date of the receipt of the request by the appropriate component of the agency or no more than 10 days after the request is received by any designated component. 5 U.S.C. § 552(a)(6)(A)(ii).

The Reporters Committee recommends that this section be modified to comport with FOIA's statutory language.

V. The Proposed Rule includes an overly broad standard for aggregating requests.

Section § 1303.40(d) of the Proposed Rule, which concerns aggregating requests, fails to include the restrictions on the agency's authority to do so that are set forth in FOIA. Specifically, the Proposed Rule states:

> When OMB reasonably believes that a requester, or a group of requestors acting in concert, has submitted requests that constitute a single request . . . OMB may aggregate those requests for the purposes of this section. OMB will presume that multiple requests of this type made within a 45-day period can be aggregated for the purposes of this section. For requests separated by a longer period, OMB will aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters will not be aggregated

Proposed Rule, § 1303.40(d).

FOIA, however, provides that agencies can only promulgate regulations that aggregate

> certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, *and the requests involve clearly related matters*. Multiple requests involving unrelated matters shall not be aggregated.

5 U.S.C. § 552(a)(6)(B)(iv) (emphasis added). The Proposed Rule omits the requirement that requests involve "clearly related matters," as required by FOIA.

The Reporters Committee recommends that the Proposed Rule be modified to comport with the requirements of the Act.

VI. The Proposed Rule 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. 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).

In *Ecological Rights Foundation v. FEMA*, 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 5962602, 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). Agencies cannot make categorical determinations as to foreseeable harm.

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

VII. Conclusion

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

Sincerely,
The Reporters Committee for Freedom of the Press