



May 17, 2013

VIA CERTIFIED MAIL

Mr. Michael Getler, Ombudsman
Public Broadcasting Service
2100 Crystal Drive
Arlington, VA 22202

RE: Freedom of Information Act Request

Dear Mr. Getler:

I write on behalf of Cause of Action, a nonprofit, nonpartisan government accountability organization that fights to protect economic opportunity when federal regulations, spending and cronyism threaten it.

In a recent *NewsHour* piece concerning a legal battle between the Drakes Bay Oyster Company and the U.S. Department of Interior, which aired on May 1, 2013, and its accompanying online article, entitled *Strange Bedfellows Join Fight to Keep California Oyster Farm in Operation*,¹ our Executive Director, Dan Epstein, was described as “an attorney who once worked for a foundation run by one of the conservative activist Koch brothers,”² yet despite a long track record in Democratic politics and lobbying, by contrast, Tom Strickland was simply described as a “former Assistant Secretary of the Interior” who has “joined the fight.” Amy Trainer has worked with a litany of left-leaning organizations and clients, yet she is simply described as the head of an environmental group.

Environmental activist Phyllis Faber is described as “not happy to be on the same side as Cause of Action.” In the May 1, 2013 *NewsHour* broadcast, Ms. Faber is quoted as stating, “I am very disturbed by that and I don’t agree with it at all. I think what they’re headed for is trying to use a commercial operation in a park – they want to establish that in other public, on other public lands and I think that’s terribly unfortunate.”

¹ *Strange Bedfellows Join Fight to Keep California Oyster Farm in Operation*, PBS Newshour, (May 1, 2013), available at http://www.pbs.org/newshour/bb/north_america/jan-june13/oyster_05-01.html; see also Spencer Michels, *Conflict of Lease and Legacy Provokes Controversy on the Half Shell*, PBS Newshour, (May 1, 2013), available at <http://www.pbs.org/newshour/rundown/2013/05/conflict-of-lease-and-legacy-provokes-controversy-on-the-half-shell.html>.

² *Id.*

I am concerned that Mr. Michels may have misrepresented Cause of Action to Ms. Faber as “part of a right-wing effort to privatize public land”³ despite the fact that on April 2, 2013, when Dan Epstein was interviewed by David Coles of PBS, Mr. Coles was explicitly told that Cause of Action became involved with the Lunny family and Drakes Bay Oyster Company due to questions about agency use of scientific data. Cause of Action’s representation of Drakes Bay Oyster Company was initially limited to the filing of an Information Quality Act petition against the National Park Service, which was filed on August 7, 2012 on behalf of Kevin and Nancy Lunny and Dr. Corey Goodman.⁴ The complaint states, “[a]fter substantial inaccuracies were identified in the [Draft Environmental Impact Statement] and Atkins Peer Review Report and the National Academy of Sciences (NAS) (of which Dr. Goodman is an elected member) initiated a review of the DEIS, the Lunnys and Dr. Goodman retained Cause of Action for the purposes of drafting and submitting this Complaint.”⁵

Cause of Action is concerned that the *NewsHour* piece misconstrued key facts, withheld material information, and misled the audience and an interviewee. In the interests of public education, Cause of Action believes that PBS must release the full video recordings involved in the preparation of the May 1, 2013 *NewsHour* story so that the public may understand the full factual picture of the issues involved and judge the facts and questions raised by the content of the video.

PBS publicly states that it “is committed to serving the public interest by providing content of the highest quality that enriches the marketplace of ideas[.]”⁶ PBS prides itself on editorial integrity, stating “PBS content should embrace the highest commitment to excellence, professionalism, intellectual honesty and transparency. In its news and information content, accuracy should be the cornerstone.”⁷ As the PBS governing documents make clear:

The Public Broadcasting Act (47 U.S.C. § 396 et seq.) authorizes CPB to ‘facilitate the full development of public telecommunications in which programs of high quality, diversity, creativity, excellence, and innovation, which are obtained from diverse sources, will be made available to public telecommunications entities, with strict adherence to objectivity and balance in

³ Robert Gammon, *Drakes Bay Oyster Company Turns to Koch Brothers-Linked Group*, East Bay Express (Dec. 5, 2012), available at <http://www.eastbayexpress.com/SevenDays/archives/2012/12/05/drakes-bay-oyster-company-turns-to-koch-brothers-linked-group>.

⁴ See Complaint About Information Quality, available at <http://www.nps.gov/policy/IQ-Cause-Complaint-08-07-12.pdf>.

⁵ *Id.* at 2.

⁶ Editorial & Funding Standards, PBS, <http://www.pbs.org/about/editorial-standards/>. See also PBS Editorial Standards and Policies, available at http://www-tc.pbs.org/about/media/about/cms_page_media/35/PBS%20Editorial%20Standards%20and%20Policies.pdf (“Primary responsibility for content necessarily rests with the producer; generally, producers create the content, particularly on television, and are uniquely positioned to control its elements. Not only would it be impractical for PBS to second-guess the producer’s decisions at each step of the production process, but respect for that process demands that producers be allowed the freedom required for creativity to flourish. **Thus, in selecting content for distribution, PBS must rely heavily on the producer’s honesty, integrity, talent, skill, and good faith**”).

[emphasis added].

⁷ *Id.*

all programs or series of programs of a controversial nature.’ CPB is governed by a Board of Directors whose members are appointees selected by the President of the United States and confirmed for six-year terms by the U.S. Senate. To shield public television producers and distributors from political influence, the Public Broadcasting Act prohibits CPB from owning or operating public television stations and from producing or distributing public television programs. In addition, the Act requires CPB to ‘carry out its purposes and functions and engage in its activities . . . in ways that will most effectively assure the maximum freedom of [public television] from interference with, or control of, program content or other activities.’⁸

PBS’s Editorial Standards and Policies reflect a commitment to fairness, accuracy, objectivity, and balance.⁹ Under these standards, PBS describes “unacceptable production practices” to include two prohibitions: “Never invent or add elements that were not originally there; and [n]ever make choices that mislead or deceive the audience.”¹⁰ Moreover, “[d]uping a source would include when a producer misleads an interviewee concerning the purpose of the interview. Honesty, candor, and common courtesy must govern producers’ behavior.”¹¹

Therefore, and pursuant to the provisions of the Freedom of Information Act (FOIA),¹² Cause of Action hereby requests that PBS produce, within the next twenty (20) business days, the full video and sound recordings, including but not limited to interviews of Kevin Lunny, Amy Trainer, Neal Desai, Dan Epstein, Tom Strickland, Phyllis Faber, Doris Ober, Cathy Davis, and Susan Prince, from which the May 1, 2013 *NewsHour* piece was taken.

The Public Broadcasting Service Should Produce the Requested Documents.

The Freedom of Information Act (FOIA) applies to federal agency records.¹³ While records produced by a *NewsHour* affiliate are not typically thought to be agency records,¹⁴ several factors exist that motivate disclosure.

First, PBS has a moral and mission-related obligation to produce the requested documents. According to PBS’s Editorial Standards and Policies, “PBS is committed to providing a nonsectarian, nonpolitical, noncommercial educational program service, in accordance with PBS’s membership policies. Although it is expected that a wide range of views and opinions will find expression in various ways across all PBS Content platforms, note that federal funding cannot be used to advocate for political action.”¹⁵ Each year, the Corporation for Public Broadcasting (CPB) distributes congressionally appropriated funds to local public

⁸ *Id.* [emphasis added].

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² 5 U.S.C. § 552.

¹³ *Id.* at (a)(4)(B).

¹⁴ *Kissinger v. Reporters Comm. for Freedom of Press*, 445 U.S. 136, 145 (U.S. 1980).

¹⁵ See PBS Editorial Standards and Policies, note 4, *supra*.

broadcasting stations, PBS, and other public television distributors and producers. CPB is a major source of funding for public broadcasting, and provides content funding directly to PBS.¹⁶

Second, PBS is a federal corporation, subject to FOIA.¹⁷ The Public Broadcasting Act of 1967 established the Corporation for Public Broadcasting (CPB) as a private, non-profit corporation managed by a nine-member board appointed by the President and approved by the Senate to “funnel government support to public stations and producers nationwide.”¹⁸ The first official meeting of the nine-member CPB board was held on April 26, 1968.¹⁹ In 1969, the CPB formed the Public Broadcasting System (PBS), a private non-profit corporation comprising 171 noncommercial licensees who operate 347 member stations across the country.²⁰ 5 U.S.C. § 551 defines “agency” negatively, stating that an agency “means each authority of the Government of the United States, whether or not it is within or subject to review by another agency but does not include—(A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia;” —PBS does not meet any of these categories. 5 U.S.C. § 552 construes “agency” to include “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency[.]”

Third, as a congressionally-created, federally-funded news organization, PBS should uphold a presumption of public disclosure as a servant of the federal government. According to the CPB’s website, “[s]ince 1968, CPB has been the steward of the federal government’s investment in public broadcasting . . . [f]or approximately \$1.35 per American per year, CPB provides essential operational support for the nearly 1,300 locally-owned and -operated public television and radio stations, which reach virtually every household in the country.”²¹ “CPB also makes available some of the most entertaining, informative, educational, and culturally-relevant programming—including . . . *PBS NewsHour* . . .—through the Public Broadcasting Service (PBS) [.]”²² The CPB is “[f]unded by the federal government” and PBS is “[f]unded by CPB and member stations.”²³ In legislative debates concerning FOIA, the Act was described as ensuring “access to the information possessed by [Government] servants.”²⁴

Fourth, PBS’s parent organization has publicly stated it complies with FOIA. According to the Reporters Committee for Freedom of the Press, a nonprofit association dedicated to providing free legal assistance to journalists since 1970, while the “Corporation for Public

¹⁶ *Id.*

¹⁷ FOIA Basics, Who can I send a FOIA request to? The National Security Archive, <http://www.gwu.edu/~nsarchiv/nsa/foia/guide.html>.

¹⁸ Website, Corporation for Public Broadcasting, PBS.org, <http://www.pbs.org/johngardner/chapters/4d.html>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ About CPB, CPB website, <http://www.cpb.org/aboutcpb/>.

²² *Id.* (emphasis in original).

²³ What is the difference between CPB, PBS & NPR?, CPB Website, <http://www.cpb.org/aboutpb/faq/cpbpbsnpr.html>.

²⁴ 112 Cong. Rec. 13652 (1966), reprinted in Freedom of Information Act Source Book, S. Doc. No. 93-82, p. 69 (1974) (remarks of Rep. Monagan) (emphasis added).

Broadcasting claims it is not covered By FOIA. . . . corporation spokespersons say FOIA requests received by the corporation are voluntarily processed in accordance with FOIA.”²⁵

Fifth, the public has a right to know whether *NewsHour* is obligated to make certain disclosures that nevertheless were not made. According to the PBS manual for producers, “all programs funded in whole or in part by PBS must be identified in audio as having been ‘Made possible by contributions to your PBS station from viewers like you. Thank you.’ In addition, ‘Viewers Like You’ must be fonted on screen, then transition to a ‘Thank you’ font on screen.”²⁶ These disclosures do not appear on the *NewsHour* online video.

Cause of Action Is Entitled to a Complete Waiver of Fees (Public-Interest Purpose).

Cause of Action requests a waiver of both search and review fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). This statute provides that the requested information and/or documents shall be furnished without or at reduced charge if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” Cause of Action, in the present matter, satisfies all of the required elements for a fee waiver.

A. Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.

First and foremost, “obtaining information to act as a ‘watchdog’ of the government is a well-recognized public interest in the FOIA context.”²⁷ It is for this reason that Cause of Action, a nonprofit, nonpartisan organization that uses investigative, legal and communications tools to educate the public on how government accountability and transparency protects taxpayer interests and economic opportunity, seeks disclosure of the requested documents. Disclosure of the information requested by Cause of Action in this instance is likely to contribute significantly to the understanding by the public at large of the operations and activities of a federally-funded nonprofit. The information requested will benefit the public at large as opposed to the individual understanding of the requester or a narrow segment of interested persons. Disclosure would undoubtedly be of value to members of the public, who fund, in part, CPB and PBS.

B. Disclosure of the requested information is not in the commercial interest of Cause of Action.

Cause of Action does not seek this information to benefit commercially. Cause of Action is a nonprofit organization as defined under § 501(c)(3) of the Internal Revenue Code. Our

²⁵ *Which agencies are covered?* Reporters Committee for Freedom of the Press, available at <http://www.rcfp.org/federal-open-government-guide/federal-freedom-information-act/which-agencies-are-covered>.

²⁶ See Rule 4: Treatment of PBS and CPB Funding, Producing For PBS: A How To Manual For Producers, http://www.pbs.org/producers/guidelines/uwcredits_4.html.

²⁷ *Balt. Sun v. U.S. Marshals Serv.*, 131 F. Supp. 2d 725, 729-30 (D. Md. 2001); see also *Ctr. to Prevent Handgun Violence v. U.S. Dep't of the Treasury*, 981 F. Supp. 20, 24 (D.D.C. 1997) (“This self-appointed watchdog role is recognized in our system.”).

organization is committed to protecting the public's right to be aware of the activities of the federal government and to ensuring the lawful and appropriate use of government funds by recipients. Cause of Action will not make a profit from the disclosure of this information.

C. Cause of Action has an ability to disseminate the requested information to the public and specifically intends to do so.

Cause of Action intends to make the results of this request available to the public in various medium forms. Cause of Action uses a combination of research, litigation, advocacy and regularly disseminated publications to advance its mission. Our staff has a combined forty-five (45) years of expertise in government oversight, investigative reporting and federal public interest litigation. These professionals will analyze the information responsive to this request, use their editorial skills to turn raw materials into a distinct work and share the resulting analysis with the public, whether through Cause of Action's regularly published online newsletter, memoranda, reports or press releases. In addition, Cause of Action will disseminate any relevant information it acquires from this request to the public through its frequently visited website, www.causeofaction.org, which also includes links to thousands of pages of documents Cause of Action acquired through its previous FOIA requests, as well as documents related to Cause of Action's litigation and agency complaints. Lastly, after the production of the requested information, Cause of Action intends to produce a report on the matter of any prohibited political activity at DOE. This report may be published, distributed to the news media and sent to interested persons through our regular periodicals, including "Agency Check" and "Cause of Action News." An ability to show the presence of a website with occasional, consistent traffic is enough to show that a requester has an ability to disseminate information.²⁸ As with the other two (2) outlined above, Cause of Action has also met this element, thus justifying a fee waiver.

Cause of Action Is Entitled to News Media Requester Category Status.

Cause of Action also asks that it not be charged search or review fees for this request because it qualifies as a "representative of the news media, or news media requester," under 5 U.S.C. § 552(a)(4)(A)(ii)(II).²⁹ In *National Security Archive v. U.S. Dep't of Defense*, the U.S. Court of Appeals for the District of Columbia Circuit noted that FOIA's legislative history demonstrates that "it is critical that the phrase 'representative of the news media' be broadly interpreted if the act is to work as expected . . . In fact, *any person or organization which*

²⁸ See *Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 203 (D.D.C. 2009).

²⁹ Other agencies of the federal government have granted Cause of Action "representative of the news media" category status. See, e.g., FOIA Request HQ-2012-00752-F, Dep't of Energy (Feb. 15, 2012); FOIA Request No. 12-00455-F, Dep't of Educ. (Jan. 20, 2012); FOIA Request 12-267, Fed. Emergency Mgmt. Agency (Feb. 9, 2012); FOIA Request 2012-RMA-02563F, Dep't of Agric. (May 3, 2012); FOIA Request 2012-078, Dep't of Homeland Sec. (Feb. 15, 2012); FOIA Request 2012-00270, Dep't of Interior (Feb. 17, 2012); FOIA Request, Dep't of Labor (Apr. 20, 2012); FOIA Request CRRIF 2012-00077, Dep't of Commerce (Mar. 1, 2012). As the U.S. Court of Appeals for the District of Columbia noted in *Oglesby v. U.S. Dep't of the Army*, agencies should grant news media requestor status when other agencies have done so because of "the need for uniformity among the agencies in their application of FOIA." 920 F.2d 57, 66 n.11 (D.C. Cir. 1990).

*regularly publishes or disseminates information to the public . . . should qualify for waivers as a 'representative of the news media.'"*³⁰

Cause of Action is organized and operated, *inter alia*, to publish and broadcast news, *i.e.*, information that is about current events or that would be of current interest to the public. Cause of Action routinely and systematically disseminates information to the public through various medium forms. Cause of Action maintains a frequently visited website, www.causeofaction.org. Additionally, since September 2011, Cause of Action has published an e-mail newsletter. This newsletter provides subscribers with regular updates regarding Cause of Action's activities and information the organization has received from various government entities. Cause of Action also disseminates information via Twitter and Facebook. Cause of Action also produces a newsletter titled "Agency Check," which informs interested persons about actions of federal agencies, and another periodical, "Cause of Action News."³¹

Cause of Action gleans the information it regularly publishes in its newsletters from a wide variety of sources, including FOIA requests, government agencies, universities, law reviews and even other news sources. Cause of Action researches issues on government transparency and accountability, the use of taxpayer funds and social and economic freedom; regularly reports on this information; analyzes relevant data; evaluates the newsworthiness of the material; and puts the facts and issues into context. Cause of Action uses technology, including but not limited to the Internet, Twitter and Facebook, in order to publish and distribute news about current events and issues that are of current interest to the general public. These activities are hallmarks of publishing, news and journalism. Based on these extensive publication activities, Cause of Action qualifies for a fee waiver as a "representative of the news media, or news media requester," under FOIA and agency regulations.³²

³⁰ 880 F.2d 1381, 1386 (D.C. Cir. 1989) (citing 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986)) (omissions in original).

³¹ Newsletters, Cause of Action, *available at* <http://causeofaction.org/newsletters/>.

³² See, e.g., Paul Streckfus, *Accountability Group Seeks IRS Investigation of ACORN Affiliates*, EO TAX JOURNAL, Ed. 2011-173, Oct. 24, 2011; Patrick Reis and Darren Goode, *Senators hedge bets ahead of CSAPR vote - Second anti-reg bill to get vote - Perry's debate gaffe - Acrimony hits new heights in Solyndra spat*, POLITICO (Nov. 10, 2011), <http://www.politico.com/morningenergy/1111/morningenergy374.html>; Conn Carroll, *Labor board broke federal law on Boeing suit*, WASH. EXAMINER, Nov. 27, 2011, *available at* <http://campaign2012.washingtonexaminer.com/article/labor-board-broke-federal-law-boeing-suit>; Matthew Vadum, *Obama uses taxpayer cash to back ACORN Name changes used to dodge the law*, WASH. TIMES, Nov. 28, 2011, *available at* <http://www.washingtontimes.com/news/2011/nov/28/obama-uses-taxpayer-cash-to-back-acorn-name-change/>; Perry Chiamonte, *ACORN Misused Federal Grant Funds, Report Says*, FOX NEWS (Nov. 30, 2011), <http://www.foxnews.com/politics/2011/11/30/acorn-misused-federal-grant-funds-report-says/>; *Acorn lives: Meet AHCOA*, PITTSBURGH TRIBUNE-REVIEW, Dec. 5, 2011, *available at* http://www.pittsburghlive.com/x/pittsburghtrib/opinion/s_770135.html; Benjamin Wallace, *The Virgin Father*, N.Y. MAGAZINE, Feb. 5, 2012, *available at* <http://nymag.com/news/features/trent-arsenault-2012-2/>; Charles C. W. Cooke, *ACORN Is Up to Its Old Tricks*, NAT'L REVIEW ONLINE (Feb. 6, 2012), <http://www.nationalreview.com/articles/289948/acorn-its-old-tricks-charles-c-w-cooke>; John Hayward, *Justice Department asked to investigate abuse of stimulus funds for lobbying*, HUMAN EVENTS (Mar. 3, 2012), <http://www.humanevents.com/article.php?id=50328>; Pete Kasperowicz, *GSA fallout: Watchdog group probes 28 federal agencies for wasteful spending*, THE HILL, Apr. 5, 2012, *available at* <http://thehill.com/blogs/floor-action/house/220119-gsa-fallout-watchdog-group-probes-28-federal-agencies-for-wasteful-spending>; Timothy R.

Cause of Action's activities clearly fall within the statutory definition of this term. 5 U.S.C. § 552(a)(4)(A)(ii)(III) defines "representative[s] of the news media" broadly to include organizations that disseminate news through electronic communications, including "*publishers of periodicals . . . who make their products available for purchase by or subscription by or free distribution to the general public.*"³³ Moreover, the FOIA statute itself, as amended in 2007, explicitly defines "representative of the news media"—a term that had previously been undefined in the statute—to specifically include organizations, such as Cause of Action, that regularly publish and disseminate online periodicals, *e.g.*, newsletters.³⁴ The statutory definition unequivocally commands that organizations that electronically disseminate information and

Smith, *How much are other agencies spending on award coins? A nonpartisan group wants to know*, WASH. POST, Apr. 6, 2012, available at http://www.washingtonpost.com/blogs/federal-eye/post/how-much-are-other-agencies-spending-on-award-coins-a-nonpartisan-group-wants-to-know/2012/04/05/gIQAQpGPyS_blog.html; Andy Medici, *Scrutiny widens over GSA spending*, FED. TIMES (Apr. 6, 2012), <http://www.federaltimes.com/article/20120406/DEPARTMENTS07/204060303/>; Mickey Meece, *Durbin Calls GSA Spending 'Outrageous': Vows Congressional Hearings*, FORBES.COM (Apr. 8, 2012), <http://www.forbes.com/sites/mickeymeece/2012/04/08/durbin-calls-gsa-spending-outrageous-vows-congressional-hearings/>; Christopher Matthews, *High Tide: From a Wal-Mart Feeding Frenzy to Indian Firms' Continued Shipping of Iranian Crude*, WALL ST. J., Apr. 24, 2012, available at <http://blogs.wsj.com/corruption-currents/2012/04/24/high-tide-from-a-wal-mart-feeding-frenzy-to-indian-firms-continued-shipping-of-iranian-crude/>; Lauren Fox, *Federal Budget Office Asks All Agencies to Cut Conference, Travel Costs*, US NEWS (May 12, 2012), <http://www.usnews.com/news/blogs/washington-whispers/2012/05/14/federal-budget-office-asks-all-agencies-to-cut-conference-travel-costs>; Stephanie Lee, *Woman sues FDA for right to use donor's free sperm*, S. F. CHRON., July 9, 2012, available at <http://www.sfgate.com/bayarea/article/Woman-sues-FDA-for-right-to-use-donor-s-free-sperm-3692207.php>; Alexis Shaw, *Woman Anonymously Sues FDA for Right to Free Sperm*, ABC NEWS (July 12, 2012), <http://abcnews.go.com/US/woman-sues-fda-free-sperm/story?id=16755422>; Perry Chiaramonte, *Taxpayer watchdog calls on IRS to probe re-branded Texas ACORN branch*, FOX NEWS (July 19, 2012), <http://www.foxnews.com/politics/2012/07/19/taxpayer-watchdog-calls-on-irs-to-probe-re-branded-texas-acorn-branch/#ixzz21qTFmosA>; Nick Baumann, *National Archives Sued Over Financial Crisis Documents*, MOTHER JONES, Aug. 15, 2012, available at <http://www.motherjones.com/mojo/2012/08/watchdog-group-sues-national-archives-over-financial-crisis-documents>; Jon Hilkevitch, *Report: CTA reaped millions by over-reporting bus mileage*, CHI. TRIB., Oct. 17, 2012, available at http://articles.chicagotribune.com/2012-10-18/news/ct-met-cta-mileage-report-1018-20121018_1_cta-spokesman-cta-officials-action-report.

³³ 5 U.S.C. § 552(a)(4)(A)(ii) (emphasis added).

³⁴ The FOIA statute, as amended in 2007, defines "representative of the news media" as follows:

[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. In this clause, 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 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. These examples 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.*

Id. (emphasis added).

publications via “alternative media *shall* be considered to be news-media entities.”³⁵ As the plain language of the statute makes abundantly clear, then, an organization that regularly disseminates news via an online newsletter or periodical, such as Cause of Action, is a “representative of the news media” under FOIA.

In *Electronic Privacy Information Center v. Dep't of Defense*, the court broadly construed a Department of Defense regulation defining “representative of the news media” to include a 501(c)(3) that, like Cause of Action, maintains a frequently visited website and regularly publishes an e-mail newsletter.³⁶ Under well-established precedent, then, a 501(c)(3) requester that regularly publishes online newsletters, such as Cause of Action, is entitled to a fee waiver as a “representative of the news media,” where *Electronic Privacy Information Center* provides that “publishers of periodicals” qualify as representatives of the news media.³⁷

The information requested will be of current interest to a large segment of the general public. Cause of Action will ultimately disseminate this information that it is statutorily entitled to, *inter alia*, through its regularly published online newsletter. Additionally, Cause of Action will take the information that is disclosed, using its editorial skills and judgment, to publish news articles that will be published on our website, distributed to other media sources and distributed to interested persons through our newsletters.

As outlined above, the plain language of 5 U.S.C. § 552(a)(4)(A)(ii)(III), controlling precedent and the agency’s regulations clearly require the conclusion that Cause of Action is a representative of the news media.

Production of Information and Contact Information.

We call your attention to President Obama’s January 21, 2009 Memorandum concerning FOIA, which states in relevant part:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA . . . The presumption of disclosure should be applied to all decisions involving FOIA.³⁸

On the same day, President Obama spoke on FOIA to incoming members of the Cabinet and staff of the White House and stated in relevant part:

³⁵ *Id.* (emphasis added). See generally *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-662 (2007) (noting the well-established proposition that, as used in statutes, the word “shall” is generally imperative or mandatory).

³⁶ 241 F.Supp.2d 5, 12-15 (D.D.C. 2003). The court pointedly noted that “a ‘periodical,’ unlike a daily newspaper, has been defined simply as ‘a publication issued at regular intervals of more than one day.’” *Id.* at 13 n.4 (quoting *AMERICAN HERITAGE DICTIONARY, SECOND COLLEGE EDITION*, at 923 (2000)).

³⁷ *Id.*

³⁸ Memorandum from President Barack Obama for the Heads of Exec. Dep’ts and Agencies, *Freedom of Information Act* (Jan. 21, 2009), available at <http://www.whitehouse.gov/the-press-office/freedom-information-act>.

The old rules said that if there was a defensible argument for not disclosing something to the American people, then it should not be disclosed. That era is now over. Starting today, every agency and department should know that this administration stands on the side not of those who seek to withhold information but those who seek to make it known. To be sure, issues like personal privacy and national security must be treated with the care they demand. But the mere fact that you have the legal power to keep something secret does not mean you should always use it. The Freedom of Information Act is perhaps the most powerful instrument we have for making our government honest and transparent, and of holding it accountable. And I expect members of my administration not simply to live up to the letter but also the spirit of this law.³⁹

After the President's remarks, Attorney General Eric Holder issued a Memorandum that broadened the executive branch's FOIA disclosure policy, and he therefore urged heads of executive departments and agencies to make discretionary disclosures of information:

[A]n agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.⁴⁰

If it is your position that any portion of the requested information is exempt from disclosure, Cause of Action requests that you provide a detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.

In the event that some portions of the requested information are properly exempt from disclosure, please redact such portions and produce all remaining reasonable segregable non-exempt portions of the requested record.⁴¹ If you contend that information contains non-exempt segments, but those non-exempt segments are so dispersed throughout as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. If a request is denied in full, please outline that it is not possible to segregate portions of the record for release.

In an effort to facilitate record production within the statutory limit, Cause of Action prefers to accept information and/or documents in electronic format (*e.g.*, e-mail). When necessary, Cause of Action will accept the "rolling production" of information and/or

³⁹ President Barack Obama, *Remarks by the President in Welcoming Senior Staff and Cabinet Secretaries to the White House* (Jan. 21, 2009), available at <http://oversight.house.gov/hearing/foia-in-the-21st-century-using-technology-to-improve-transparency-in-government/>.

⁴⁰ Memorandum from Attorney Gen. Eric Holder for Heads of Exec. Dep'ts and Agencies, *The Freedom of Information Act (FOIA)* (Mar. 19, 2009), available at <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

⁴¹ See 5 U.S.C. § 552(b).

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documents, but requests that you provide prompt notification of any intent to produce information on a rolling basis.

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request or any portion thereof, please contact me (Mary.Beth@causeofaction.org) immediately at (202) 499-4232. Please note that, for the purposes of responding to this request, the attached Definition of Terms should be interpreted consistently. Thank you for your attention to this matter.



MARY BETH HUTCHINS
COMMUNICATIONS DIRECTOR

Encl. Responding to Document Requests, Definitions

cc: Leah Clapman
Managing Editor, PBS NewsHour

Linda Winslow
Executive Producer, PBS NewsHour

Kathleen McCleery
Deputy Executive Producer, PBS NewsHour

Responding to Document Requests

1. In complying with this request, you should produce all responsive documents that are in your possession, custody or control, whether held by you or your past or present agents, employees and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to Cause of Action.
2. In the event that any entity, organization or individual denoted in this request has been or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. Cause of Action's preference is to receive documents in electronic form (i.e., CD, memory stick or thumb drive) in lieu of paper productions.
4. When you produce documents, you should identify the specific document request or portion thereof in Cause of Action's request to which the documents respond.
5. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
6. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with Cause of Action staff to determine the appropriate format in which to produce the information.
7. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
8. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
9. If any document responsive to this request was, but no longer is, in your possession, custody or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody or control.
10. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is

otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.

11. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.
12. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
13. All documents shall be Bates-stamped sequentially and produced sequentially.

Definitions

1. The term "document" means any written, recorded or graphic matter of any nature whatsoever regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmation, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks and recordings) and other written, printed, typed or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases or otherwise.
3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might

otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities and all subsidiaries, affiliates, divisions, departments, branches or other units thereof.
5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.