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# DC Circuit Clarifies FOIA Public-Interest and News-Media Fee Waivers

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*Decision Makes It More Difficult for Agencies To Deny Fee Waivers*

**By Adrianna C. Rodriguez and Charles D. Tobin**

A three-judge panel for the U.S. Court of Appeals for the District of Columbia Circuit rejected a lower court ruling under the Freedom of Information Act (FOIA) that had imposed burdensome requirements on a fledgling nonprofit's eligibility for public-interest or news-media fee waivers.

The Court of Appeals' decision in [Cause of Action v. Federal Trade Commission](#) – the first ruling in more than two decades to address the issue – will make it more difficult for agencies to deny fee waivers to the news media and other organizations serving the public's interest.

## **FOIA Fee Waiver Provisions**

FOIA generally permits an agency to charge reasonable fees for “document search, duplication, and review, when records are requested for commercial use.” In several cases, however, including when disclosure of the information is in the public's interest or when the request is made by a representative of the news media, the requester may ask the agency to waive some or all of those fees.

## **Cause of Action's FOIA Requests**

Cause of Action, a nonprofit organization, made three FOIA requests to the Federal Trade Commission (FTC) beginning in August 2011. It sought fee waivers for each request on the grounds that it was: 1) a nonprofit education organization with no commercial purpose; or, in the alternative, 2) a representative of the news media.

In correspondence with the FTC, Cause of Action described reports that it planned to produce based on the analysis it planned to conduct with the requested records. The group also described how it would make the information available through its online newsletter, website, various social media accounts and press releases. It also pointed the FTC to its history of “extensive publication activities,” including various articles published by other media outlets.

The FTC denied Cause of Action's fee waiver applications, finding that the organization was not entitled to a public-interest fee waiver because it had failed to demonstrate that disclosure was “likely to contribute significantly to public understanding of the operations or activities of the government.” The FTC also said Cause of Action was not entitled to a fee waiver as a member of the news media because the organization had not demonstrated an ability to disseminate information it obtained through its requests.

## **Cause of Action's Lawsuit Against FTC**

In May 2012, Cause of Action filed suit in the U.S. District Court for the District of Columbia challenging the FTC's denial of the fee waiver applications. The District Court upheld the FTC's denial and the organization appealed.

In a recent opinion, the U.S. Court of Appeals for the District of Columbia Circuit reversed the District Court's decision.

## **Public-Interest Fee Waiver**

The Court of Appeals rejected the District Court's holding that to qualify for a public-interest fee waiver, a requester must demonstrate "that the requested information would increase understanding of the public at large" and "identify several methods of disseminating the information, and provide some concrete basis upon which the agency can conclude that those methods are adequate to convey the requested information to a wide audience."

The Court of Appeals held that FOIA did not require either a showing that disclosure would increase the understanding of the "public at large" or the requester's ability to widely disseminate the information. Instead, that statute required only that release of the information would likely contribute significantly to public's understanding. "There is nothing in the statute that specifies the number of outlets a requester must have, and surely a newspaper is not disqualified if it forsakes newsprint for (or never had anything but) a website."

The Court also held that a finding that the information will primarily benefit the requester – as in this case where Cause of Action's second and third requests were made in preparation for litigation challenging the FTC's fee waiver denials – will not foreclose a requester from being eligible for a public-interest fee waiver, as long as the release of the information will contribute significantly to the public's understanding.

#### ***News-Media Fee Waiver***

The Court of Appeals similarly rejected the District Court's determination that Cause of Action did not qualify for a fee waiver as a member of the news media.

A "representative of the news media" is entitled to a waiver of all but copying costs. 552(a)(4)(A)(ii)(II). To qualify, a requester must "(1) gather information of potential interest (2) to a segment of the public; (3) use its editorial skills to turn the raw materials into a distinct work; and (4) distribute that work (5) to an audience." The District Court held Cause of Action failed the last three prongs.

The Court of Appeals clarified with respect to the first two prongs that the exemption focuses on the requester, not the nature of the request, and thus, how much interest there is in a story will not prevent a requester from qualifying for a fee waiver as a representative of the news media.

With respect to the third prong, the Court of Appeals rejected the District Court's formulation, which required Cause of Action to "demonstrate that it would use information from a range of sources to independently produce a unique product." The Court held that even a press release or editorial comment based on the records obtained would suffice as a "unique product" and that FOIA did not require a requester to gather and use information beyond that obtained through the request to create its product.

With respect to the fourth and fifth criteria, the Court of Appeals held that the District Court's requirement that a requester demonstrate both "that it has the intent and ability to disseminate the requested information to the public rather than merely make it available" and "that its operational activities are especially organized around doing so" imposed greater burdens on requesters than FOIA required.

Specifically, the Court held that FOIA does not specify what size audience a requester must have, nor an established track record of publication – the firm plans of a new organization, such as Cause of Action, to publish a newsletter in the near future could suffice. "An entity with an extensive record will ordinarily qualify with only a thin recital of its plans (or perhaps none at all," the Court stated. "Conversely, an entity with little or no historical record of distributing its work ... may make up for that absence by concretely setting out its plans to do so."

Additionally, the Court of Appeals found no basis in FOIA to require organizations to show that their "activities are organized especially around dissemination" of its work. Merely distributing its work to media outlets who then reach the public could suffice.

The Court remanded the case for reconsideration of Cause of Action's entitlement to a public-interest or news-media fee waiver in light of its decision.

#### **Impact On Pending And Future FOIA Requests**

While the FOIA establishes fee waivers when disclosure of the information is in the public's interest or when the request is made by a representative of the news media, agencies have discretion, in the first instance, to determine whether a requester qualifies for those exemptions. To this end, many agencies have adopted regulations interpreting the statute and setting forth the parameters they weigh in determining whether a requester qualifies.

For example, in this case, FTC regulations required that to qualify for a public interest waiver an organization show that "disclosure is likely to contribute to the understanding of the public at large, as opposed to the understanding of the individual requester or a narrow segment of interested persons."

The FTC's regulation also narrowly defined "a representative of the news media" who could qualify for a fee waiver as only those persons who gathered news "for an entity that is organized and operated to publish or broadcast news to the public." That definition, which was amended after Cause of Action filed suit to reflect later

amendments to the FOIA, often resulted in the exclusion of new media, such as online-only publications, and so-called “middlemen” that collect information for news media organizations to disseminate.

The FOIA, itself, does not contemplate either of the limitations set forth in the FTC’s regulations.

The Court of Appeal’s decision made clear that, as written in the FOIA, the public interest and news media fee waiver provisions are meant to facilitate the dissemination of information that is in the public’s interest to access. Agencies’ interpretation of the statute cannot function as a barrier by limiting access to fee waivers for qualifying entities. The Court’s decision also made clear that the fee waiver provisions in the FOIA were not limited to traditional news outlets or organization with a brick-and-mortar presence. As a result, it will be more difficult for agencies to deny waivers to fledgling or smaller organizations that are just beginning to establish a following.

The decision will also have an important and far reaching impact on access for new media organizations and citizen journalists who have flourished in recent years. These newsgatherers often operate on shoe-string budgets and maintain a web presence as their primary – or in some cases, exclusive – outlet. Many also gather information, not to disseminate themselves, but to pass on to traditional media organizations. These newsgatherers had found it increasingly difficult in recent years to meet the restrictive qualifications set forth in agency regulations for fee waivers. As a result of the Court’s decision, these newsgatherers should find less barriers to qualifying for fee waivers in the future.

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