
MEMORANDUM

Date: October 23, 2014

To: Ginger McCall, Marc Rotenberg

From: [REDACTED], [REDACTED]

RE: Representative of News Media

D.C Circuit case law defining what is a “representative of the news media” as stated in 5 USC § 552(a)(4).

Cases Before Addition of “Representative of the News Media” Definition to FOIA

National Sec. Archive v. U.S. Dep't of Defense, 880 F.2d 1381 (D.C. Cir.1989):

The National Security Archive (“Archive”) requested that the Department of Defense (“DoD”) classify it as either “an educational...institution” or a “representative of the news media.”¹ The United States Court of Appeals for the District of Columbia held that “the Archive is not an educational institution, but that it is a representative of the news media.”²

In reaching this conclusion, the court turned to the legislative history of FIRA.³ The court noted that Senator Leahy, a sponsor of FIRA, stated that “[i]t is critical that the phrase ‘representative of the new media’ be broadly interpreted if the act is to work as expected....In fact, any person or organization which regularly publishes or disseminates information to the public...should qualify for waivers as a ‘representative of the news media.’”⁴ The court went on to note that the Archive’s “intended distribution of document sets entails the kind of initiative we associate with ‘publishing or otherwise disseminating’ that information.”⁵ This initiative involved obtaining raw material for its document sets by Freedom of Information Act (“FOIA”) requests and other sources, the culling of material by the Archive’s staff from these materials (editorial discretion), and the creation of cross-referencing systems to facilitate the accessibility of these materials.⁶

The court rejected the DoD’s assertion that the Archive fell into either of Senator Hatch’s two disqualified groups: the first group being private libraries or private repositories and the second group being intermediaries.⁷ The court elaborated that the Archive does not “make FOIA requests as an agent for others who want access to government documents” but that “it gets the documents for its own purpose, which is to assemble them, along with documents from other sources, into an encyclopedia work that it will then offer to the public.”⁸

¹ Nat’l Sec. Archive v. U.S. Dep’t of Defense, 880 F.2d 1381, 1382 (D.C. Cir.1989).

² *Id.*

³ *Id.* at 1385.

⁴ *Id.* at 1386.

⁵ *Id.*

⁶ See *Id.*

⁷ *Id.* at 1387.

⁸ *Id.*

In this case, the court’s definition of a “representative of the news media” is “a 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.”⁹ A note of caution the court stated at the end of its opinion that “[i]f the Archive’s intention to publish works derived from the documents it requests does not pan out, it will be open to DoD to argue that the Archive is no longer a representative of the news media.”¹⁰

After *National Security Archive v. Department of Defense*, there were a series of cases involving Judicial Watch, which used *National Security Archive v. Department of Defense* as the foundation for analyzing the representative of news media status. Each of the cases involved different FOIA requests made by Judicial Watch; however, the court followed the same line of reasoning as articulated in *National Security Archive v. Department of Defense*.

Judicial Watch v. United States DOJ, 2000 U.S. Dist. LEXIS 19789 (D.D.C.Aug. 16, 2000):

The court stated that Judicial Watch, a public interest law firm, is plainly not “organized and operated to publish or broadcast news to the public.”¹¹ Furthermore, the court rejected Judicial Watch’s argument that it qualified as a representative of the news media because “it let reporters view the materials it uncovers, prepares press releases, faxes them to newspapers and broadcast stations, maintains the press releases on its website, and appears on television and radio through its chairman and other employees.”¹² Instead, the court stated that these characteristics stood for the opposite proposition, and that Judicial Watch “had to rely on its contacts with news media representatives” instead of publishing or broadcasting news to the public itself.¹³ The court also rejected Judicial Watch’s assertion that it had a “firm intention.” While a firm intention entails a “detailed and clear publication plan,” Judicial Watch “simply expressed a broad intent to publish works similar to the single previous report it described in its administrative appeals.”¹⁴ The court noted that Judicial Watch’s “vague intentions” (such as a failure to pinpoint a particular topic to be addressed in future works or a failure to explain why the topic is of current interest) could not satisfy FOIA’s requirements.¹⁵

Judicial Watch, Inc. v. United States DOJ, 133 F. Supp. 2d 52, 53 (D.D.C.2000):

The court accepted Judicial Watch’s contention that its web site and radio show manifested its ongoing effort to disseminate news.¹⁶ The website, a non-traditional news medium, was “the product of an organization that seeks to *make* news and to generate publicity for itself” and contained few, if any, editorial elements.¹⁷ However, the court noted that “[n]either *National Security Archive* nor Senator Leahy apparently anticipated the evolution of the Internet or the morphing of the ‘news media’ into its present indistinct form”¹⁸ The court states

⁹ *Id.*

¹⁰ *Id.* at 1388.

¹¹ *Judicial Watch v. United States Dep’t of Justice*, 2000 U.S. Dist. LEXIS 19789 (D.D.C.Aug. 16, 2000).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Judicial Watch, Inc. v. United States Dep’t of Justice*, 133 F. Supp. 2d 52, 53 (D.D.C.2000).

¹⁷ *Id.*

¹⁸ *Id.* at 53-54.

that if regular publication/dissemination of information to the public is enough to qualify as a representative of the news media, then anyone with a website could be entitled to demand free search services under FOIA; furthermore, if such a result is intolerable, then the remedy lies with Congress.¹⁹

Judicial Watch, Inc. v. United States DOJ, 185 F. Supp. 2d 54, 59 (D.D.C.2002):

The court concluded that Judicial Watch is at best a “type of middleman or vendor of information that representatives of the news media can utilize when appropriate.”²⁰ To be considered a representative of the news media, a requester must establish that it has a firm intent to disseminate, rather than merely make available, the requested information.²¹

Electronic Privacy Information Center v. Department of Defense, 241 F. Supp. 2d 5 (D.D.C. 2003):

The Electronic Privacy Information Center (“EPIC”) sued the DoD, challenging the DoD's denial of its request for preferred fee status under FOIA as a representative of the news media.²² Reviewing the DoD's decision, the court concluded that EPIC fit the description of a representative of the news media.²³

In analyzing EPIC’s claim, the court relied primarily on *National Security Archive v. Department of Defense*, 880 F.2d 1381 (D.C. Cir. 1989). The NSA court found that a plaintiff who had published one book and had plans to publish a set of documents on politics and nuclear policy fit the definition of “representative of the news media”.²⁴ In comparison, EPIC had compiled and published seven books on national and international policies relating to privacy and civil rights.²⁵ Those books addressed issues of “current interest to the public” -- DoD's definition of news.²⁶ Moreover, EPIC gathered information of potential interest from a wide variety of sources, researched issues on privacy and civil liberties, reported on that information, analyzed relevant data, evaluated the newsworthiness of material, put the facts and issues into context, and published and distributed that news through the sale of its books to the public.²⁷ The court held that these activities established EPIC as “a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience”.²⁸

The court also examined EPIC’s newsletter publication as basis for “representative of the news media” status. EPIC published a bi-weekly internet newsletter which had a circulation of approximately 15,000 subscribers.²⁹ While the DoD claimed that activity did not bring EPIC within Office of Management and Budget (“OMB”) guidelines for what constitutes a representative of the news media, the court held that OMB comments on its guidelines indicate that publishers of newsletters do fall within OMB’s “representatives of the

¹⁹ *Id.* at 54.

²⁰ *Judicial Watch, Inc. v. United States Dep't of Justice*, 185 F. Supp. 2d 54, 59 (D.D.C.2002).

²¹ *Id.* at 60 (D.D.C.2002) (citing *Judicial Watch II*, 122 F. Supp. 2d at 13).

²² *Elec. Privacy Info. Cent. v. Dep't. of Def.*, 241 F. Supp. 2d 5 (D.D.C. 2003).

²³ *Id.* at 6.

²⁴ *Nat'l. Sec. Archive*, 880 F. 2d at 1381.

²⁵ *EPIC.*, 241 F. Supp 2d at 11.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

news media”.³⁰ Further, the court found that DoD regulations cover EPIC under the phrase “publishers of periodicals”.³¹

Finally, the court rejected DoD’s assertion that that EPIC’s identity as a public interest research center and its tax-exempt status prevent it from also being a representative of the news media.³² The court held that how EPIC chooses to label itself does not govern its fee status, but rather that “the organization’s substantive activities control”.³³ It also held that nothing in FIRA or DoD regulations precludes a tax-exempt organization from receiving news media status.³⁴

Hall v. Central Intelligence Agency, 2005 U.S. Dist. LEXIS 6638 (D.D.C. Apr. 13, 2005):

Plaintiffs Hall and Accuracy in Media (“AIM”) commenced an action against the Central Intelligence Agency (“CIA”) challenging the CIA’s denial of “representative of the news media” fee status of both as well as other determinations. The court concluded that neither plaintiff had established that they were representatives of news media.³⁵

To establish his qualifications for “representative of the news media” status, Plaintiff Hall cited to “research contributions” which were reprinted in newsletters and magazines, an appearance on talk radio, “public presentations” and briefings, and a single magazine or newsletter article.³⁶ Without further analysis, the court stated that while the pleadings showed that Hall acted as a “middleman or vendor of information that representatives of the news media can utilize when appropriate”,³⁷ they failed to meet the standard articulated in *National Security Archive*. The court noted that the most notable failure of Hall’s pleadings was not showing that he “uses...editorial skills to turn the raw materials into a distinct work”.³⁸

As for AIM, the court concluded that its pleading stating “CIA has not, and cannot, deny that plaintiff Accuracy in Media, Inc., is a representative of the news media” amounted to a conclusory assertion that “mentioned no specific activities AIM conducts which would entitle it to representative of the news media status”.³⁹ The court restated the standard established in *Judicial Watch II*, requiring a requester to “establish that it has a firm intent to disseminate, rather than merely make available, the requested information”⁴⁰ to avoid having every FOIA requester circumvent fees through making declarations not based in evidence.⁴¹

Case Since Addition of “Representative of the News Media” Definition to FOIA

Cause of Action v. Federal Trade Commission, 961 F. Supp. 2d 142 (D.D.C. 2013):

Cause of Action (“COA”), a non-partisan, non-profit organization challenged the Federal Trade Commission’s (“FTC”) denial of its request of “representative of the news media” fee status for two FOIA

³⁰ *Id.* at 13.

³¹ *Id.* at 12.

³² *EPIC*, 241 F. Supp 2d at 12.

³³ *Id.*

³⁴ *Id.*

³⁵ at 21

³⁶ *Hall v. Cent. Intelligence Agency*, 2005 U.S. Dist. LEXIS 6638, at *21 (D.D.C. Apr. 13, 2005).

³⁷ *Id.* at *21-22.

³⁸ *Id.* at *22. (quoting *Judicial Watch II*, 185 F. Supp. 2d at 59).

³⁹ *Id.*

⁴⁰ *Id.* at *23 (quoting *Judicial Watch II*, 185 F. Supp. 2d at 60).

⁴¹ *Id.* at *23.

requests. The court performed a three prong analysis following *National Security Archive* and held that while COA does “gather information of potential interest to a segment of the public”, it did not establish that it “uses its editorial skills to turn the raw materials into a distinct work” or “distributes that work to an audience”.⁴² Thus, the court upheld FTC’s denial of the status request.⁴³

The court found that COA had established the first element of *National Security Archive* for both FOIA requests. According to the court, the first request was related to “gathering information on social media authors and blogger’s First Amendment rights” and the second involved “gathering information on government decisions that can affect parts of the population”.⁴⁴ The court provided no further analysis, but held that both of these satisfied the requirement that COA “gather information of potential interest to a segment of the public”.⁴⁵

Next, the court held that COA did not show that it uses its editorial skills to turn raw material into a distinct work. To satisfy the element COA would have to “demonstrate that it would use information from a range of sources to independently produce a unique product”⁴⁶. The court differentiated COA from the plaintiffs in *National Security Archive* and *EPIC* on the basis that it had only published unspecified information on its website, social media, and a newsletter which it started after its first FOIA request.⁴⁷ It also found that COA had failed to “indicate any distinct work it planned to create based on the requested information”.⁴⁸

The final requirement that the court analyzed was whether COA had shown “that it has an intent and ability to disseminate its work”. To make this showing COA had to establish both that it had the intent and ability to disseminate its work rather than merely make it available, and that “its operational activities are especially organized around doing so”.⁴⁹ The court found that the plaintiff had not made either showing.⁵⁰

For the first showing, COA had pointed to its newsletter, website, social media, and relationships with media contacts to prove its intent and ability to disseminate its work. However, the court noted that COA’s newsletter had not yet been created at the time of the first FOIA request, and that COA had not indicated how many people it would reach via its websites.⁵¹ Further, it restated that having media relationships was insufficient to qualify as a “representative of the news media”.⁵² As to whether COA was organized especially around dissemination, the court held that COA was much closer to the plaintiff in the *Judicial Watch* cases in that COA was a non-profit engaged in activities to promote government accountability, rather than an “educational institution engaged in publishing books” like the plaintiff in *EPIC* who qualified as a representative of the news media.⁵³

⁴² Cause of Action v. Fed. Trade Comm’n, 961 F. Supp. 2d 142, 161-162 (D.D.C. 2013).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Cause of Action*, 961 F. Supp. 2d at 162.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 163.

⁵² *Id.* at 163.

⁵³ *Id.* at 163-4.