

# THE CENTER FOR PUBLIC INTEGRITY

910 17<sup>th</sup> Street, N.W., 7<sup>th</sup> Floor  
Washington, DC 20006-2606  
April 15, 2009

**By Certified Mail, Return Receipt Requested**

FOIA Appeals Office  
Office of Management  
U.S. Department of Education  
400 Maryland Ave., S.W., LBJ 2W311  
Washington, DC 20202-4500

Re: FOIA Appeal  
FOIA Request No. 09-00930-F

Dear Sir or Madam:

I am an attorney and represent the requester, the Center for Public Integrity, in this matter.

By this letter, the Center appeals the decision of Robert Wehausen, FOIA Public Liaison, dated March 26, 2009, denying the Center's request for fee classification as a representative of the news media (see enclosed file named "determination letter"). Mr. Wehausen's determination also denied the Center's request for a fee waiver, but the Center chooses not to appeal that portion of the decision at this time.<sup>1</sup>

Copies of documents and webpages referred to in this letter, as well as a copy of this letter (titled "appeal letter"), are contained on the enclosed computer disk, in PDF format. Please consider this information in determining this appeal and include this information in the administrative record. If you have any difficulty accessing these files, I will upon request provide them in another format, or on paper if necessary.

The reasons cited in the determination letter are, in full:

The Center for Public Integrity has been determined to be a commercial requester based on a review of your website where membership is required to receive the full benefits of your organization. Additionally, information available on The Center for Public Integrity website is copyright protected and the public would not be legally able to further disseminate the information to further the public's understanding of the Department's operations. Additionally, you have not

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<sup>1</sup> If the Center is classified as a media requester, only certain duplication fees would apply to this request. At this time, it seems likely that the Department will be able to produce all or most of the requested records in electronic form, incurring minimal duplication costs, if any. If so, and if this appeal is granted, the fee waiver would be essentially moot.

demonstrated how the documents you requested rise to the level of contributing any new significant information to the public's understanding of the Department's operations.

I will address only the claims in the first sentence, as the latter two relate only to the fee waiver issue. Contrary to the determination, the Center for Public Integrity is a representative of the news media for FOIA fee classification purposes, and not a commercial requester.

The determination letter's characterization of the relationship between the Center and its members – the sole reason cited for classifying the Center as a commercial requester – is completely mistaken. The letter claims that “membership is required to receive the full benefits of [the] organization,” but does not specify any benefit that is withheld from nonmembers.<sup>2</sup> In fact, the Center is a nonprofit organization (as stated in the initial FOIA request), and its “members” are simply its donors, who receive only premiums such as the opportunity to join quarterly briefing conference calls and occasional invitations to events. Members also receive a newsletter, *The Public i*, twice yearly, synthesizing the Center's recent projects. The Center's investigative findings are released on our website, or on occasion as a published book,<sup>3</sup> and are therefore available to members and nonmembers alike. Nonmembers have the same access as members to all the information on the Center's website, including electronic copies of *The Public i* newsletter, linked from this page: [http://www.publicintegrity.org/about/our\\_work/publici/](http://www.publicintegrity.org/about/our_work/publici/) (see enclosed file “Public i”). Nonmembers (and members) may also receive a more frequent electronic newsletter, delivered by e-mail (see [https://secure2.convio.net/cpi/site/SPageServer?pagename=get\\_newsletter&Custom\\_QS\\_Email=](https://secure2.convio.net/cpi/site/SPageServer?pagename=get_newsletter&Custom_QS_Email=), or enclosed file “electronic newsletter”).<sup>4</sup>

As noted in our initial FOIA request, other federal agencies have routinely classified the Center as a representative of the news media under FOIA. In the only instance where it has been necessary to litigate this issue, the District Court for the District of Columbia also held that the Center “is entitled to treatment as a representative of the news media for purposes of FOIA.” Center for Public Integrity v. HHS, No. 06-1818 (D.D.C. Aug. 3, 2007) ([https://ecf.dcd.uscourts.gov/cgi-bin/show\\_public\\_doc?2006cv1818-15](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2006cv1818-15) or enclosed file “CPI v HHS court opinion”). Since that case, there has been no change in the mission or operations of the Center that would change the applicability of that decision.

The Office of Management and Budget, in its Uniform Freedom of Information Act Fee Schedule Guidelines (52 Fed. Reg. 10,012, 10,018 (Mar. 27, 1987)), has defined a representative

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<sup>2</sup> If, upon consideration of this appeal letter and the supporting information, the Department of Education still believes that the Center is a commercial requester because of benefits conferred upon its members – benefits which, at this writing, have not been specified – please allow me an opportunity to respond before this appeal is finally decided. I believe that due process requires such an opportunity to respond, and the Center has not yet had such an opportunity because we do not know the specifics of the claim to which we must respond.

<sup>3</sup> To be perfectly clear: the planned report based on the records currently requested from the Department of Education will be released on the Center's website, free of charge.

<sup>4</sup> Please note that, while the determination letter's factual premise is faulty, its legal premise is as well. There is no basis in law for the notion that a FOIA requester that disseminates its publications only to paying “members” (or “subscribers”) is therefore a commercial requester rather than a media requester. Indeed, it is commonplace for media organizations, especially newspapers and newsmagazines, to charge a subscription fee or to sell copies of their publications.

of the news media as “any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public.” The Center’s stated mission – “to produce original investigative journalism about significant public issues to make institutional power more transparent and accountable” (<http://www.publicintegrity.org/about/> or enclosed file “about the Center for Public Integrity”) – places it squarely within OMB’s definition.

In addition, the D.C. Circuit has held that, under FOIA, a “representative of the news media is, in essence, 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.” Nat’l Sec. Archive v. Dep’t of Defense, 880 F.2d 1381, 1387 (D.C. Cir. 1989). This is precisely what the Center for Public Integrity does. I invite you to review a sampling of our recent publications, listed below, to satisfy yourself of this fact. While the Center’s reports span a broad range of subjects and employ a variety of journalistic methods, many are based on government records or data (often obtained via FOIA requests). The Center analyzes the records it has obtained, highlights the most significant findings, and conducts additional reporting to explain what the results mean and to examine individual cases. The reports listed below are available on our website and on the enclosed computer disk, in the folder titled “Reports”.

- “Undermined,” Jan. 12, 2009, <http://www.publicintegrity.org/investigations/longwall/assets/pdf/CPI-Longwall1lr.pdf>.
- “The Big Seep,” Jan. 12, 2009, <http://www.publicintegrity.org/investigations/longwall/assets/pdf/CPI-Longwall2lr.pdf>.
- “Coal Ash: The Hidden Story,” Feb. 19, 2009, <http://www.publicintegrity.org/articles/entry/1144/>.
- “The Climate Change Lobby Explosion,” Feb. 25, 2009, [http://www.publicintegrity.org/investigations/climate\\_change/articles/entry/1171/](http://www.publicintegrity.org/investigations/climate_change/articles/entry/1171/).
- “The ‘Soft Underbelly’ of Development?” Feb. 26, 2009, <http://www.publicintegrity.org/articles/entry/1173/>.
- “Painkiller Trial Raises Questions for FDA, Pfizer,” Mar. 11, 2009, <http://www.publicintegrity.org/articles/entry/1203/>.
- “Canada’s Boom in Smuggled Cigarettes,” Mar. 27, 2009, <http://www.publicintegrity.org/articles/entry/1232/>.
- “Fraud Cases Fell While Pentagon Contracts Surged,” Apr. 1, 2009, <http://www.publicintegrity.org/articles/entry/1243/>.
- “The Appraisal Bubble,” Apr. 14, 2009, <http://www.publicintegrity.org/articles/entry/1265/>.

Finally, please note the numerous journalism awards that the Center has won, conferred on us by other representatives of the news media who consider us to be one of their own. In 2008, the Center’s *Perils of the New Pesticides* project was awarded first place for public service in online journalism by the Society of Professional Journalists and first place in the outstanding online category by the Association of Health Care Journalists. The Center’s *Wasting Away: Superfund’s Toxic Legacy* project won first place in the outstanding online reporting category by the Society of Environmental Journalists. In 2007, the Center’s *Collateral Damage: Human Rights and U.S. Military Aid after 9/11* project was awarded first place in the online category by Investigative Reporters & Editors. Dozens of additional awards are listed on our website at [http://www.publicintegrity.org/about/our\\_work/awards/](http://www.publicintegrity.org/about/our_work/awards/) (or enclosed file “awards”).

For these reasons, I ask that you grant the Center for Public Integrity the fee reductions due to a representative of the news media under the Freedom of Information Act.

Sincerely,

/s/

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