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The Information Society Project
Yale Law School
127 Wall Street
New Haven, CT 06511

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex V)
600 Pennsylvania Avenue NW
Washington DC 20580

To the Commission:

On behalf of the Knight Law and Media Program and the Information Society Project at Yale Law School, we are pleased to submit the following comments regarding the Federal Trade Commission's *News Media Workshop*, Project No. P091200.

The Information Society Project at Yale Law School is an intellectual center addressing the implications of the Internet and new information technologies for law and society, guided by the values of democracy, human development, and social justice.

The Knight Law and Media Program at Yale Law School promotes inquiry into developing issues in law and media by sponsoring scholarship, hosting conferences, and pursuing policy analysis, administrative advocacy, and litigation. One of the Program's initiatives is the Law & Media Practicum, through which law students under the supervision of veteran press lawyers represent journalists and other clients in support of investigative newsgathering.

We submit these comments to urge the Commission to reduce barriers to information sought by investigative newsgatherers, regardless of format or affiliation. We are concerned by the legal and information gathering costs associated with access to government information. These costs distort media markets, exacerbating market tendencies to undersupply investigative reporting and barring new media actors from entry. By addressing these costs, the Commission can both elicit a broader range of accountability journalism from existing outlets and facilitate the productive entry of new media actors into the market for investigative newsgathering.

As the media ecology continues to evolve, format-specific conclusions are premature. Though we strongly support serious regulatory inquiry into direct and indirect public subsidies of investigative newsgathering, and we believe that not-for-profit actors will become increasingly important to the dissemination of investigative reporting, structural conclusions surrounding public media, tax structures, and public subsidies are part of a larger conversation which has drawn sustained and diverse commentary elsewhere.¹

¹ See, e.g., LEONARD DOWNIE, JR. & MICHAEL SCHUDSON, COLUMBIA UNIVERSITY GRADUATE SCHOOL OF JOURNALISM, *THE RECONSTRUCTION OF AMERICAN JOURNALISM* (2009); KNIGHT LAW & MEDIA PROGRAM AT YALE LAW SCHOOL, *JOURNALISM AND THE NEW MEDIA ECOLOGY: WHO WILL PAY THE MESSENGERS?* (2009).

We do, however, adopt a premise common to all informed commentary on the future of newsgathering. Participation in newsgathering and dissemination is open to more actors than ever before. New technologies have changed utterly the newsgathering landscape, providing new ways to publish information, empowering new classes of investigative newsgatherers, and revolutionizing the nature of revenue aggregation. We can no longer expect all productive contributors to the investigative news landscape to be well-heeled, full-service incorporated entities. The newsgatherers of the new media ecology will be diffuse; the outlets through which they disseminate their reports varied. Under these changing conditions, it is critically important to keep the costs of access to information as low as possible to tap the full potential of the emerging media ecology.

Accordingly, we limit our comments to highlight an aspect of newsgathering which is fundamental to the enterprise: access to government information. By reducing the costs of access, and by ensuring that information is actively disseminated in accessible and useable formats, the following six measures will both stimulate more extensive investigative reporting by incumbent actors and encourage new media actors to engage in the accountability newsgathering essential to the health of our democracy.

To reduce the costs of accountability journalism and encourage the participation of new media actors in investigative newsgathering, we recommend that the Commission explore policy solutions which will:

- (1) *Clarify Eligibility for Newsgathering Entity Fees under the Freedom of Information Act;*
- (2) *Liberalize Eligibility for Public Interest Fee Waivers under the Freedom of Information Act;*
- (3) *Establish Administrative Mechanisms to Monitor the Utility of Fee Waiver Provisions, Evaluate Agency Compliance, and Improve Consistency.*
- (4) *Require Electronic Production of FOIA Disclosures;*
- (5) *Encourage Government Agencies to Create, Aggregate and Publish Information in Centralized, Searchable, Open-Format, and Interoperable Databases; and*
- (6) *Support Local Government Efforts to Publish Records Online.*

I. REDUCING PROHIBITIVE LEGAL COSTS WILL PROMOTE INVESTIGATIVE REPORTING

Popular and academic commentary concerning the future of news has focused intently on the higher relative costs of investigative newsgathering to other content.² We share these concerns, and draw the Commission's attention to a critical component of the cost of investigative newsgathering: the costs of asserting press entitlements in courts of law.

Flush with monopoly profits during the last third of the twentieth century, newspapers undertook expensive litigation in defense of core press entitlements. This era produced landmark articulations of access rights and countless lower-court decisions which ensured that those rights were enforced. States have passed freedom-of-information laws, creating a rich landscape of statutory entitlements to complement common-law and constitutional access doctrine. Though further progress is necessary concerning the eligibility of new media actors for traditional press entitlements, as a doctrinal matter newsgatherers are relatively well-positioned to serve the needs of the public sphere.

As a practical matter, however, the situation is less promising. The process of asserting these rights is both costly and slow.³ The monopolist conditions which enabled twentieth-century newspapers to litigate access rights where the returns on a story may not justify the expense have disappeared. News outlets face strong bottom-line pressures to abandon stories where the cost of necessary information is too high. Though it is difficult empirically to establish the social cost of these foregone investigative reports, preliminary theoretical work suggests that the toll is heaviest where public-interest, watchdog journalism—especially at the local level—is concerned.

Additionally, these costs are hardest for new media actors to bear. The newsgatherers in most serious need of representation as the legal landscape adopts to new technologies and newsgathering practices—citizen-journalists and amateur newsgatherers—are least able to afford counsel when they are preliminarily denied information or fee waivers to which they might as a matter of law and sound policy be entitled. A great deal of costly, unnecessary litigation could be precluded by greater clarity and more consistent enforcement of newsgathering rights for new media actors.

Accordingly, we propose the following measures in the context of the Freedom of Information Act to reduce the amount of litigation required to vindicate press rights, and to ensure that the cost of litigation less severely deter newsgatherers from vindicating those rights.

² C. EDWIN BAKER, *MEDIA, MARKETS AND DEMOCRACY* 44 (2002) (demonstrating that newsgathering which produces the extensive positive externalities characteristic of investigative reporting—superior voter informedness, reduced corruption, better government—is significantly underproduced by markets). *See also* PETER SHANE ET. AL., *THE KNIGHT COMMISSION ON THE INFORMATION NEEDS OF COMMUNITIES IN A DEMOCRACY, INFORMING COMMUNITIES: SUSTAINING DEMOCRACY IN A DIGITAL AGE* (2009); Paul Starr, *Goodbye to the Age of Newspapers (Hello to a New Era of Corruption)*, *THE NEW REPUBLIC* (Mar. 4, 2009).

³ Dan Christensen, *Freedom of Information Comes at a \$ 372,799 Cost*, *DAILY BUS. REV.* (Jan. 31, 2005) (“People for the American Way Foundation has been told it must pay nearly \$ 400,000 before the Department of Justice will process its Freedom of Information Act request [for records regarding post-September 11 efforts to seal detention proceedings for immigrants].”).

(1) Clarify Eligibility for Newsgathering Entity Fee Reductions under the Freedom of Information Act

The Freedom of Information Act provides a reduced fee schedule for newsgathering entities: a “representative of the news media” need only pay fees for duplication of documents.⁴ The definition of “newsgathering entity” was broadened in 2007 by the OPEN Government Act, which articulates Congressional intent to liberalize the definition of newsgathering entities and enable the statute to keep pace with the evolving media ecology.⁵ The resulting statutory definition is both broad and flexible.⁶ If expansively and consistently applied, it will preserve important newsgathering entitlements for rising classes of investigative reporters.

Unfortunately, challenges remain to faithful and consistent enforcement. Though the language of the statute permits an expansive reading, the examples provided by the statute articulate features characteristic of the newspaper era—publishing contracts,⁷ for example—which have become less common among newsgatherers in the new media ecology. Divergence between the language of the entitlements and the examples provided creates substantial risk of inconsistent application or abuse by agencies reluctant to acknowledge the changing landscape of newsgathering. Agencies exercise great discretion in determining fee waiver eligibility, and over-narrow constructions may linger through to appellate review.⁸ Deserving entities may initially be denied access to documents on account of prohibitive costs.⁹

Worryingly, if an entity relies on lowered newsgathering fee rates for access to documents, the cost of litigating its right to the lower fee schedule will likely be a similarly insuperable obstacle. Prohibitive costs defeat the pursuit of transparency: courts have ruled that an inability to pay constructively terminates a request.¹⁰ This is of particular concern to new media actors, which are both heavily reliant on niceties in the definition of newsgatherer, vulnerable to skepticism from agency decision-makers, and poorly able to afford the costs of appealing colorably improper fee determinations. It is therefore critical that agencies have clear directions to construe the newsgathering fee schedule expansively, consistent with emerging forms of newsgathering.

⁴ 5 U.S.C. § 552(a)(4)(A)(ii)(II) (2006).

⁵ 110 Pub. L. No. 175, 121 Stat. 2524, 2524 (2007) (amending 5 U.S.C. § 552(a)(4)(A)(ii)(II) (2006)) (“Congress should regularly review [the Freedom of Information Act] in order to determine whether further changes and improvements are necessary to ensure that the Government remains open and accessible to the American people and is always based not upon the “need to know” but upon the fundamental ‘right to know’.”).

⁶ 5 U.S.C. § 552(a)(4)(A)(ii)(III) (2006).

⁷ *Id.* (“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. A publication contract would present a solid basis for such an expectation . . .”).

⁸ *See, e.g., National Sec. Archive v. U.S. Dep’t of Defense*, 880 F.2d 1381 (D.C. Cir. 1989).

⁹ *See, e.g., Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 185 F. Supp. 2d 54 (D.D.C. 2002); *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807 (2d Cir. 1994).

¹⁰ *See Judicial Watch v. FBI*, 2001 U.S. Dist. LEXIS 25732 (D.D.C. 2001) (untimely payment of fees held to terminate FOIA request); *Hall v. CIA*, 2003 U.S. Dist. LEXIS 26398 (D.D.C. 2003) (failure to pay fees constitutes constructive abandonment of FOIA request).

- *We recommend that the Commission explore ways to clarify the language of 5 U.S.C. § 552(a)(4)(A)(ii)(III) to ensure that emerging forms of newsgatherers consistently receive the reduced fee schedules to which they are entitled. In light of the rapidly evolving nature of online news media and the unprecedented opportunities for new participants, we urge the broadest possible language and a clear statement with examples that newsgatherers writing for online-only outlets are eligible for reduced fees.*

We are happy to provide the Commission with supplemental analysis regarding appropriate language, examples, and interpretative guidelines.

(2) Liberalize Eligibility for Public Interest Fee Waivers under the Freedom of Information Act

The Freedom of Information Act provides for a public-interest fee waiver where a two-pronged test is satisfied. Information sought must be “likely to contribute significantly to public understanding of the operations or activities of the government” and “not primarily in the commercial interest of the requester.”¹¹

As with the newsgathering standard, however, lack of clarity surrounding this entitlement has created a substantial litigation burden in vindicating the right. Contrary to statutory intent,¹² agencies may construe the public interest prong extremely narrowly, refusing to grant a fee waiver even in the face of multiple subsequent explanatory communications until forced by court order.¹³ Agencies may simply not respond until litigation forces a response.¹⁴ Not all requestors, especially those which rely heavily on fee waivers for access to information, can afford counsel to vindicate these rights.

Currently, the burden of establishing eligibility for a public interest fee waiver rests with the requestor.¹⁵ As the changing media ecology reveals the tendency of news markets to underproduce precisely the type of newsgathering likely to merit a public-interest fee waiver—that is, newsgathering that improves the public’s understanding of the functions of government—this presumption runs the wrong way. In the absence of a primarily commercial motivation, when a member of the public solicits government information, the government should bear the

¹¹ 5 U.S.C. § 552 (a)(4)(A)(iii) (2006); *Ctr. for Medicare Advocacy, Inc. v. United States Department of Health and Human Services*, 577 F. Supp. 2d 221, 239 (D.D.C. 2008) (applying public interest test).

¹² *Electronic Privacy Information Center v. Dep’t of Defense*, 241 F. Supp. 2d 5, (D.D.C. 2003) (“Congress amended FOIA’s fee provisions . . . in an effort to “keep fees from becoming an unnecessary barrier to disclosure.”) (quoting 132 CONG. REC. H9464 (daily ed. Oct. 8, 1986) (joint statement of Reps. Kindness and English)).

¹³ In *Citizens for Responsibility and Ethics in Washington v. United States Dep’t of Education*, 593 F. Supp. 2d 261 (D.D.C. 2009), the plaintiff requested a fee waiver, and upon denial issued two subsequent informal appeals to the agency’s Freedom of Information officer challenging the adverse determination with supplemental information. Only at summary judgment before a district court did plaintiff receive vindication of its right to a fee waiver.

¹⁴ For example, in *National Resources Defense Council v. United States Environmental Protection Agency*, 2009 U.S. Dist. LEXIS 52665 (D.D.C. 2009), plaintiff received “no substantial response” to a fee waiver request from the EPA. The fee waiver was granted several weeks after the NRDC filed suit. *Id.*

¹⁵ *Citizens for Responsibility and Ethics*, 593 F. Supp. 2d at 268 (D.D.C. 2009) (“The requesting party alone bears the burden of showing, based on the administrative record, that its request satisfies the public interest prong.”); *Ctr. for Medicare Advocacy*, 577 F. Supp. 2d at 239 (D.D.C. 2008).

burden of demonstrating that the information is not likely to contribute significantly to public understanding of the activities of the government.

Fee determinations are routinely the subject of egregious delays.¹⁶ These delays can destroy the value of information to the public. A clear, though rebuttable presumption that disclosure of government information has a tendency significantly to inform the public about the operations of government would eliminate the delays created by repeated administrative appeals and resulting expenses.

This presumption is consistent both with the statutory history of the fee waiver provisions of the Freedom of Information Act¹⁷ and President Obama's memoranda.¹⁸ By requiring government agencies to adopt a presumption that a request for a public interest fee waiver from a non-commercial requester is in the public interest, agencies will have clear marching orders to construe the statutory language in a way calculated to empower new media actors and support an increasingly important role for the not-for-profit sector. Many untraditional agents in the networked public sphere can seek and publish information in the public's interest as fully as traditional outlets. The default rule for interpreting public interest fee waiver requests should not encourage agencies to remain overly conservative in acknowledging the increasing ability of new media actors, as well as more traditional not-for-profit entities, to pursue government information in the public's interest.

- *We recommend establishing a rebuttable presumption that information sought by an entity which satisfies the commercial interest prong of the public interest fee waiver test will promote public understanding of the functions of government. In making fee waiver determinations, the government agency should bear the burden of establishing that the production of information to a qualifying actor is not in the public interest for the purposes of FOIA.*

Additionally, agencies currently promulgate rules which guide internal determinations of the public understanding prong.¹⁹ Variations among these guidelines add complexity and potential inconsistency to the "public understanding" prong.²⁰ Inconsistency and narrow construction of these multi-prong guidelines increases the likelihood of imperfect vindication of statutory rights to fee waivers, impoverishing the newsgathering community.

¹⁶ THE NATIONAL SECURITY ARCHIVE, KNIGHT OPEN GOVERNMENT SURVEY: 40 YEARS OF FOIA, 20 YEARS OF DELAY (Jul. 2, 2007) (available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB224/ten_oldest_report.pdf) (last visited Nov. 2, 2009).

¹⁷ 132 CONG. REC. H9464 (daily ed. Oct. 8, 1986) (joint statement of Reps. Kindness and English) ("An agency may not conduct an extensive proceeding to determine the status of a requester. Doubts should be resolved in favor of the requester.").

¹⁸ Memorandum on the Freedom of Information Act, 74 Fed. Reg. 4,683 (Jan. 26, 2009) ("All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.").

¹⁹ See, e.g., 45 C.F.R. § 5.45 (2007) (Department of Health and Human Services' four-prong public interest test); 28 C.F.R. § 16.11(k)(2)(iv) (2007) (Department of Justice fee waiver regulations).

²⁰ See *Citizens for Responsibility and Ethics in Washington v. United States Dep't of Education*, 593 F. Supp. 2d 261, 265 (D.D.C. 2009) (cross-applying DOJ internal regulations in the context of an adverse Department of Education determination in an effort to create consistency across agencies in fee waiver determinations).

- *We further recommend that information officers of federal agencies form a working group under the supervision of the Office of Government Information Services to establish a common, consistent and reliable rubric for agency determinations of whether the public understanding prong of 5 U.S.C. § 552(a)(4)(A)(iii) is satisfied.*

(3) Establish Administrative Mechanisms to Monitor the Utility of Fee Waiver Provisions, Evaluate Agency Compliance, and Improve Consistency.

Though clarifying the rules governing eligibility for reduced or waived fees will improve matters, substantial noncompliance at the agency level will remain a possibility. As a practical matter, outlets which rely on fee waivers for access to information will not be able to afford litigation to vindicate their eligibility for reduced or waived fees. Agency determinations of newsgathering entity or public interest status can be, for all practical purposes, final.²¹

Amendments to FOIA promulgated in the OPEN Government Act of 2007 instruct the Office of Special Counsel to investigate instances in which litigation was necessary to vindicate FOIA access rights.²² Routine adverse agency determinations of eligibility, which may not ever reach litigation, pose an equally serious and poorly documented threat to emerging media actors who may be entitled to reduced or waived fees under the Freedom of Information Act.

The 2007 amendments also created the Office of Government Information Services (OGIS), charging it with reviewing agency compliance with the Freedom of Information Act and recommending policy changes.²³ The amendments also require disclosure of the number of fee waiver requests and the amount of time in which a determination is made.²⁴ However, agency determinations which never reach litigation are effectively invisible, leaving entities without the ability to vindicate their claims in federal courts poorly equipped to expose systemic definitional problems or deficient application of fee entitlements which might warrant policy solutions or sanctions.

OGIS should gather and publish information regarding the disposition of these fee waiver requests in order to ensure that policymakers can make informed decisions on the contours of fee waiver eligibility as the media ecology develops. With this information, policymakers can ensure that fee waiver regulations and definitions keep pace with new entities seeking newsgathering or public interest fee status, and academics and industry commentators can productively contribute analysis of fee waiver determinations which fail to reach litigation.

- *We recommend establishing reporting requirements which will provide the Office of Government Information Services with information concerning the nature of adverse agency determinations of fee status for newsgathering and public interest requests. We further recommend instructing the Office of Special Counsel to investigate and sanction routine agency denials, as recommended by OGIS, even where litigation never commences.*

²¹ *Judicial Watch*, *supra* note 9.

²² 110 Pub. L. No. 175, 121 Stat. 2524, 2525-6 (2007).

²³ *Id.*, 121 Stat. at 2529.

²⁴ *Id.*, 121 Stat. at 2527-8.

(4) Require Electronic Production of FOIA Disclosures

Even where newsgatherers are only charged for costs of duplication, those costs can be prohibitive when agencies refuse to disclose documents in electronic format. The function of the newsgathering fee schedule is entirely undone if the costs of duplication are prohibitive. Electronic production reduces costs for newsgatherers who may not be able to afford to pay for reams of information at per-page pricing structure.

Additionally, electronic production of FOIA documents facilitates the creation of third-party databases, which augment the ability of newsgatherers to find relevant government information.²⁵ We note that proprietary software raises access concerns, and encourage the production of documents in formats conducive to maximum interoperability.²⁶

- *We recommend that the Commission explore ways to require agencies to produce FOIA documents in electronic and non-proprietary formats.*

II. ACTIVE DISSEMINATION OF GOVERNMENT INFORMATION WILL PROMOTE INVESTIGATIVE REPORTING

Though new technologies offer unprecedented opportunities for the active dissemination of government information crucial to transparent governance, government actors at local, state, and federal levels have been both slow and ineffective in producing information in usable formats.

Government information is a critical component of investigative reporting. And yet, despite the availability of technologies which would eliminate much of the costs involved in searching information of public record, newsgatherers must spend a great deal of unnecessary time consulting paper records, poring through unsearchable files line by line, and interfacing with agencies which lack a common searchable database. Even successful results of FOIA requests are only disseminated to the requestors, rather than hosted on an online platform accessible to and searchable by the public at large. Though many state and local governments have taken the initiative to post records and minutes online, many others lag behind.

The present administration has registered the critical importance of active dissemination of government information in two memoranda released on January 21, 2009. In a memorandum outlining his position on Transparency and Open Government, President Obama declared that “Executive departments and agencies should harness new technologies to put information about their operations and decisions online and readily available to the public.”²⁷ In another memorandum detailing his administration’s approach to the Freedom of Information Act, President Obama instructed agencies to implement a presumption in favor of disclosure,

²⁵ A prominent example is the Electronic Frontier Foundation’s searchable database of FOIA requests. Electronic Frontier Foundation, FOIA Document Search Engine, <http://www.eff.org/issues/foia/search> (last visited Nov. 04, 2009).

²⁶ We are happy to provide further comment on information technology principles which should guide the electronic dissemination of government information.

²⁷ Memorandum on Transparency and Open Government, 74 Fed. Reg. 4,685 (Jan. 26, 2009) (*available at* http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/).

emphasizing that disclosure must be active: “agencies should take affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government.”²⁸

Taking affirmative steps consistent with these directives will assist the Commission in protecting consumers of news, who, as the OPEN Government Act articulated in 2007, retain a “fundamental ‘right to know’” about the functions of their government.²⁹ By actively publishing searchable information about the functions of government, the government will lower the costs of investigative reporting and ensure that newsgatherers in the emerging media ecology will contribute as fully as possible to the vital task of informing citizens about the functions of their government.

Additionally, affirmative production of useable information will empower important emerging classes of newsgatherers. Authoritative commentators are registering the increasingly important role of collaborations between professional journalists and amateur information-gatherers empowered by networked technologies.³⁰ As novel forms of newsgathering emerge, the President’s insistence that government information be promulgated in readily usable formats takes on heightened importance. Only by promulgating information in remotely searchable, collated, and centralized databases can the full potential of professional-amateur collaborations, citizen journalism, hyperlocal blogging, tweeting, and other new forms of newsgathering be realized.

In light of the present administration’s express commitment to open government, and the potential for superior dissemination to reduce the costs of investigative newsgathering and empower new classes of journalists, we strongly recommend that the Commission consider the following proposals for effectively aggregating and publishing government information online.

(5) Encourage Government Agencies to Publish Information in Common, Searchable, Open-Format, and Interoperable Databases

Government agencies can reduce the costs of investigative reporting by publishing government information in searchable, accessible formats, enabling professional-amateur collaborations and reducing the time investment required to research and remain abreast of government activities. Additionally, active production of government documents will reduce the amount of attention agencies must pay to compliance with FOIA requests.

²⁸ Memorandum on the Freedom of Information Act, 74 Fed. Reg. 4,683 (Jan. 26, 2009) (*available at* http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/).

²⁹ 110 Pub. L. No. 175, 121 Stat. 2524, 2524 (2007).

³⁰ DOWNIE & SCHUDSON, *supra* note 1; YOCHAI BENKLER, THE WEALTH OF NETWORKS 264-5 (2006); CLAY SHIRKY, HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS 55 (2008).

Though agencies routinely disclose information in electronic formats, there is no common protocol for electronic publication, resulting in databases that are extremely clumsily administered and difficult to navigate without access to expensive searchable proprietary databases. Information should be stored in open document formats that promote maximum interoperability, innovation, and vendor competition. Information should not be locked up in proprietary formats controlled by a single corporation, nor should government formats be restrictive or poorly navigable.³¹

- *We recommend that the Office of Government Information Services establish guidelines for the electronic publication government information, stipulating that such information should be published in electronic, non-proprietary formats in searchable databases accessible from a central location on the OGIS website.*

Similar initiatives with regard to FOIA requests would reduce the amount of duplication in requests and increase the effectiveness of government disclosures. As it stands, even available information regarding FOIA requests exists in disjointed, disparate online repositories. Agencies sponsor electronic reading rooms with non-searchable lists of commonly requested documents, frequently asked questions, and top searches.³² Though this effort towards transparency is commendable, it creates artificial barriers between information sources which can obscure as much as disclose.

Though advocacy groups have addressed this problem by establishing FOIA databases empowered with search systems, this is not an adequate replacement for a comprehensive, centralized government repository of requests.

- *We recommend that the Office of Government Information Services develop, host, and manage a central, searchable, and open-format FOIA database which includes requests made to agencies and productions issued in response. Agencies should be required to copy all electronic FOIA disclosures to this database.*

(6) Support Local Government Efforts to Publish Records Online

Though our comments focus extensively on the federal Freedom of Information Act, the economics of media markets dictate that investigative reporting at the local level will be most seriously impoverished by an increasingly competitive, audience-aggregation-driven media ecology. News of local interest cannot aggregate audiences in the way national news can; local media actors therefore operate with correspondingly lower resources. Additionally, new media actors can be extremely effective in local and hyperlocal spheres, so particular care must be taken to manage costs at these local levels if citizen-journalists, bloggers, and other actors in the networked public sphere are to play a productive newsgathering role.

³¹ We are happy to submit further analysis of access issues presented by PACER.

³² See, e.g., FBI Reading Room, <http://foia.fbi.gov/>; Department of Justice Reading Room <http://www.justice.gov/olp/foia.htm>; State Department Reading Room <http://www.state.gov/m/a/ips/c22790.htm>; CIA Reading Room <http://www.foia.cia.gov/>, National Archives Electronic Reading Room, <http://www.archives.gov/foia/electronic-reading-room.html>; Department of Energy Reading Room, http://management.energy.gov/FOIA/reading_room.htm (all last visited Nov. 4, 2009).

It is therefore critical that attention to government information include strategies for encouraging state and local governments to improve access to information. The proposals listed above will set an important example which may provide guidance for forward-looking states, but local court records and local government records are grossly underdigitized.

- *We recommend that the Office of Government Services solicit public comment on policies for promoting more extensive and useable electronic dissemination of government information at the state and local levels.*

CONCLUSION

It is our hope that market actors, supplemented by robust participation from interest-based not-for-profit advocacy groups, will continue to bear the costs of litigating the public's interest in press access to information, as well as continuing to navigate the cumbersome repositories of government information. However, as new business models for newsgathering struggle to be born, it is more critical than ever to ensure that the process of asserting legal rights and reviewing government documents is as inexpensive and straightforward as possible.

We recommend the following policy measures to reduce the costs of accountability journalism and encourage the participation of new media actors in investigative newsgathering.

- (1) *Clarify Eligibility for Newsgathering Entity Fees under the Freedom of Information Act;*
- (2) *Liberalize Eligibility for Public Interest Fee Waivers under the Freedom of Information Act;*
- (3) *Establish Administrative Mechanisms to Monitor the Utility of Fee Waiver Provisions, Evaluate Agency Compliance, and Improve Consistency.*
- (4) *Require Electronic Production of FOIA Disclosures;*
- (5) *Encourage Government Agencies to Create, Aggregate and Publish Information in Centralized, Searchable, Open-Format, and Interoperable Databases; and*
- (6) *Support Local Government Efforts to Publish Records Online.*

By reducing the costs associated with requesting access to government information, and ensuring that information produced by the government is actively disseminated to the public in a readily usable format, the Commission can help make the emerging media ecology welcoming to new media actors seeking to gather and publish information about government operations on networked platforms, and therefore as promising as possible for the future of newsgathering.

We are happy to provide the Commission with additional analysis on any of the matters raised in our comments.

Sincerely,

Patrick Kabat
Information Project Society Fellow
Knight Law and Media Scholar

Nabiha Syed
Information Project Society Student Fellow
Knight Law and Media Scholar