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August 29, 2022

VIA ELECTRONIC MAIL

Christian M. Curtis
Mendocino County Counsel
501 Low Gap Road, Room 1030
Ukiah, CA 95482

Email: curtisc@mendocinocounty.org

Re: Resolution No. 22-181

Dear Mr. Curtis:

The First Amendment Coalition ("FAC") is a nonprofit public interest organization dedicated to advancing free speech, more open and accountable government, and public participation in civic affairs. I am writing on behalf of FAC to discuss Resolution No. 22-181, in which the Mendocino County Board of Supervisors directed "the creation of a local media organization public records grant program and fund" to cover fees for public record requests imposed by Mendocino County Ordinance No. 4507 ("Ordinance"). Joining in this letter are the California News Publishers Association and the Society of Professional Journalists Northern California Chapter's Freedom of Information Committee.

As an initial matter, our position is that the Ordinance is unlawful because the California Public Records Act ("CPRA") does not authorize fees for locating, reviewing, and redacting records and no statute authorizes a county to impose fees not otherwise allowed by the CPRA. To charge up to $150 per hour for responding to record requests creates a financial barrier that deprives many people of transparency rights guaranteed by the CPRA and California Constitution. The grant program cannot cure the defects of an ordinance unlawful on its face.

Reserving the right to address those issues separately and without conceding the Ordinance is lawful, we submit this letter to explain that any definition of "media organization" the County might adopt must comport with strict First Amendment standards.

As you correctly noted at the August 16, 2022, Board of Supervisors meeting, the First Amendment prohibits the government from discriminating based on the content or viewpoint of speech. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). But the First Amendment's protections are not so limited, especially as to the press.

The First Amendment prohibits "abridging the freedom of ... the press." U.S. Const. amend. I, cl. 4. To "preserve an untrammeled press as a vital source of public information," *Grosjean v. Am.*

Press Co., 297 U.S. 233, 250 (1936), the Free Press Clause protects the media as "the only organized private business that is given explicit constitutional protection." *Scheetz v. Morning Call, Inc*., 747 F. Supp. 1515, 1528 (E.D. Pa. 1990) (quoting Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631, 633 (1975)), ***aff'd***, 946 F.2d 202 (3d Cir. 1991).

In particular, the Free Press Clause prohibits the imposition of disparate financial burdens on the press or any portion thereof. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 591 (1983) ("Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers."). For example, a tax may not be imposed only on publications of a certain size or circulation, regardless of any benign motive. *Id.* at 592 ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.").

That principle is not limited to taxation. If the County were to subsidize the public record requests of some but not all media, the financial burden on those ineligible for the subsidy would be tantamount to disparate taxation of disfavored portions of the press. Selective taxation and selective subsidy are two sides of the same coin. *See Regan v. Taxation with Representation of Wash*., 461 U.S. 540, 544 (1983) ("A tax exemption has much the same effect as a cash grant."); *Grosjean*, 297 U.S. at 244 (tax on "gross receipts derived from advertisements" in newspapers "curtail[s] the amount of revenue realized from advertising").

To avoid First Amendment problems, any definition of "media" must include not only "the institutionalized print or broadcast media" but also any person "gathering news for dissemination to the public," regardless of circulation, audience size, longevity, business model, corporate status, or employment status. *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993). The definition must include individuals such as freelance reporters or "investigative book authors" as well as "more traditional print and broadcast journalists." *Id.* One's "prior experience as a professional journalist" cannot be "the sine qua non" of "present intent to gather for the purpose of dissemination," which can be shared "by one who is a novice in the field." *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987).

As settled by the Supreme Court long ago, "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets.… The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938). Therefore, "it makes no difference whether the intended manner of dissemination [was] by newspaper, magazine, book, public or private broadcast medium, [or] handbill." *Shoen*, 5 F.3d at 1293 (quotation marks omitted). The same is true for any form of digital publication. *See O'Grady v. Superior Court*, 139 Cal. App. 4th 1423, 1467-68 (2006).

The First Amendment also prohibits any discrimination against non-"local" media in eligibility for the "public records grant program and fund" contemplated by Resolution No. 22-181. Regardless of any benign motive to support local media, the First Amendment does not permit the government to favor one segment of the press over another, whether based on geography, circulation, medium of publication, or any other characteristic.

For all these reasons, the only appropriate definition of "media" is a person who is gathering information for the purpose of dissemination to the public. *See, e.g.,* 5 U.S.C. § 552(a)(4)(A)(ii) (federal Freedom of Information Act definition of "representative of the news media" as "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," including but not limited to "television or radio stations … publishers of periodicals … alternative media … [and] freelance journalist[s]"). To look beyond that definition to other factors such as location, circulation, longevity, business model, corporate status, employment status, medium of publication, or the like would amount to impermissible discrimination between segments of the press.

Moreover, the only purpose into which the government may inquire for purposes of establishing "media" status is the requester's general purpose – whether they are gathering information for the purpose of dissemination to the public. The government may not inquire into the specific purpose for which the requester intends to use the records, including the potential focus of a journalist's coverage, their reporting strategy, or their intended use of specific records. *Cf.* Govt. Code § 6257.5 (prohibiting "limitations on access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure").

Thank you for your attention to these matters.

Sincerely,

FIRST AMENDMENT COALITION

David Loy
Legal Director

Also on behalf of:

California News Publishers Association;
Society of Professional Journalists Northern California Chapter's Freedom of Information Committee

cc: Board of Supervisors (bos@mendocinocounty.org)
Chief Executive Officer (antled@mendocinocounty.org)