



Advocates for Government Accountability

A 501(c)(3) Nonprofit Corporation

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June 2, 2016

VIA CERTIFIED MAIL

The Honorable Shaun L.S. Donovan
Director
Office of Management and Budget
The White House
725 17th Street, NW
Washington, DC 20503

Re: PETITION FOR RULEMAKING

Director Donovan:

Pursuant to section 553(e) of the Administrative Procedure Act (“APA”), 5 U.S.C. § 553(e), Cause of Action Institute (“CoA Institute” or “Petitioner”) hereby petitions the Office of Management and Budget (“OMB”) to issue updated guidance to agencies on how to make Freedom of Information Act (“FOIA”) fee determinations in compliance with binding statutory and judicial authorities. Despite Congress amending the FOIA several times during the last twenty-nine years and courts interpreting those changes, OMB has not updated its fee guidance since 1987.¹ Federal agencies, however, continue to rely on OMB for guidance when issuing FOIA fee regulations.² CoA Institute also petitions OMB to update its own FOIA fee regulations, which conflict with statutory definitions.³

I. Petitioner

CoA Institute is an “interested party” under section 553(e) of the APA and is statutorily afforded the “right to petition [OMB] for the issuance, amendment, or repeal of a rule.”⁴ CoA Institute is a non-profit, nonpartisan government accountability organization. CoA Institute’s pro bono legal representation of organizations and individuals helps to educate the public about government abuse, wasteful spending, and corruption. CoA Institute is a frequent requester of

¹ Office of Mgmt. & Budget, Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10012 (Mar. 27, 1987) [hereinafter “OMB Guidelines”].

² See Dep’t of State, Public Access to Information, 81 Fed. Reg. 19863, 19863 (Apr. 6, 2016) (refusing to implement judicial standard because OMB “has policy-making responsibility for issuing fee guidance. For this reason, the [State] Department defers to OMB with regard to this suggestion”).

³ 5 C.F.R. § 1303.30(j).

⁴ 5 U.S.C. § 553(e).

information through FOIA, is regularly categorized as a representative of the news media,⁵ and its requests often qualify for public interest fee waivers. CoA Institute also litigates FOIA cases, including FOIA fee issues.⁶

II. The 1987 OMB Guidelines and OMB FOIA Regulations Conflict with the Statute

In 1986, Congress passed, and President Reagan signed into law, the Freedom of Information Reform Act of 1986.⁷ Section 1803 of the Act directed OMB to provide a uniform schedule of fees for all federal agencies and guidelines for how to apply that schedule.⁸ On March 28, 1987, OMB finalized those guidelines.⁹ Although Congress has amended the FOIA several times since 1986, OMB has never updated the guidance.

The failure by OMB to update its guidelines has resulted in costly, time-consuming litigation between agencies and requestors. For example, in 2011 and 2012, CoA Institute sent a series of FOIA requests to the Federal Trade Commission (“FTC”) requesting access to records, to be classified as a representative of the news media, and for a public interest fee waiver.¹⁰ The FTC refused the CoA Institute requests for fee classification and waiver by relying on its outdated FOIA fee regulations, which in turn relied on the outdated OMB guidance.¹¹ After the district court refused to apply the statutory standard, CoA Institute appealed the case to the D.C. Circuit, which ruled that many of the regulatory and judicial standards that had built up over time were in conflict with the FOIA statute, as amended by the Open Government Act of 2007.¹² The FTC has since updated its FOIA fee regulations and granted CoA Institute a public interest fee waiver for the request underlying the litigation.¹³

⁵ See, e.g., FOIA Request 2015-HQFO-00691, Dep’t of Homeland Sec. (Sept. 22, 2015); FOIA Request F-2015-12930, Dept. of State (Sept. 2, 2015); FOIA Request 14-401-F, Dep’t of Educ. (Aug. 13, 2015); FOIA Request HQ-2015-01689-F, Dep’t of Energy (Aug. 7, 2015); FOIA Request 2015-OSEC-04996-F, Dep’t of Agric. (Aug. 6, 2015); FOIA Request OS-2015-00419, Dep’t of Interior (Aug. 3, 2015); FOIA Request 780831, Dep’t of Labor (Jul 23, 2015); FOIA Request 15-05002, Sec. & Exch. Comm’n (July 23, 2015); FOIA Request 145-FOI-13785, Dep’t of Justice (Jun. 16, 2015); FOIA Request 2015-26, Fed. Energy Regulatory Comm’n (Feb. 13, 2015); FOIA Request F-2015-106, Fed. Commc’ns Comm’n (Dec. 12, 2014); FOIA Request LR-2015-0115, Nat’l Labor Relations Bd. (Dec. 1, 2014); FOIA Request CFPB-2015-049-F, Consumer Fin. Prot. Bureau (Nov. 19, 2014); FOIA Request DOC-OS-2014-000304, Dep’t of Commerce (Dec. 30, 2013).

⁶ See, e.g., *Cause of Action v. Fed. Trade Comm’n*, 799 F.3d 1108 (D.C. Cir. 2015) [hereinafter “*CoA Inst. v. FTC*”]; *Cause of Action Inst. v. Dep’t of Justice*, No. 15-1184 (D.D.C. filed July 22, 2015) (litigating to compel production of documents relating to FOIA memo by White House Counsel Greg Craig); *Cause of Action v. Internal Revenue Serv.*, 125 F. Supp. 3d 145 (D.D.C. 2015) (partially prevailing on adequacy-of-the-search argument); *Cause of Action v. Treasury Inspector Gen. for Tax Admin.*, 70 F. Supp. 3d 45 (D.D.C. 2014) (prevailing on Glomar, Exemption 3, and waiver issues); *Cause of Action v. Internal Revenue Serv.*, No. 14-1407 (D.D.C. filed Aug. 18, 2014) (litigating with twelve agencies over production of records of consultations with the White House).

⁷ The Freedom of Information Reform Act of 1986, Pub. L. 99-570, 100 Stat. 3207 (1986).

⁸ *Id.* § 1803; 5 U.S.C. § 552(a)(4)(A)(i).

⁹ OMB Guidelines, *supra* note 1.

¹⁰ See *CoA Inst. v. FTC*, 799 F.3d at 1111–12.

¹¹ *Id.*

¹² *Id.* at 1120–25; Open Government Act of 2007, Pub. L. 110-170, 121 Stat. 2524 (2007).

¹³ See Fed. Trade Comm’n, Freedom of Information Act; Miscellaneous Rules, 79 Fed. Reg. 15680, 15684 (Mar. 21, 2014) (codified at 16 C.F.R. pt. 4) (bringing FTC FOIA fee regulations into compliance with the statute); Letter from Dione J. Sterns, Assistant Gen. Counsel, Fed. Trade Comm’n, to Aram Gavoor, CoA Inst. (Apr. 19, 2016) (on file with CoA Inst.) (granting public interest fee waiver for request FOIA-2012-687).

Despite the OMB fee guidance conflicting with both the Open Government Act of 2007 and the D.C. Circuit opinion, agencies continue to rely upon OMB for policy making. For example, CoA Institute recently submitted regulatory comments to agencies that were updating their fee regulations.¹⁴ On April 6, 2016, the Department of State finalized its new FOIA regulations, including its fee provisions.¹⁵ In response to the CoA Institute comment regarding the so-called “middleman standard,” the Department of State replied that OMB “has policy-making responsibility for issuing fee guidance. For this reason, the Department [of State] defers to OMB with regard to this suggestion”¹⁶ It is crucial, thus, that OMB update its guidance to bring it in line with the FOIA.

III. Legal Authority

Section 553(e) of the APA requires “[e]ach agency” to “give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”¹⁷ Here, (1) OMB is an “agency” under the rulemaking provisions of the APA for the purposes of this petition; (2) Petitioner is an “interested person,” as described above; and, (3) each of the OMB guidance and FOIA fee regulations are a “rule.”

OMB is an “agency” within the meaning of the APA because it is an independent authority of the United States Government and is not otherwise excepted as, *inter alia*, a legislative, judicial, military, or non-federal entity.¹⁸ OMB, moreover, has “substantial independent authority in the exercise of specific functions.”¹⁹ These functions are described in statutes that concern OMB responsibilities in federal information policy.²⁰

The issuance of guidance constitutes the issuance of a “rule” because it is a “statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.”²¹ Here, guidance to all executive departments and agencies would provide clarity on what OMB believes is the proper standard to apply when adjudicating fee status and waiver determinations. OMB FOIA fee regulations also constitute a “rule” because they are a statement

¹⁴ See, e.g., Letter from R. James Valvo, III, CoA Inst., to Marianne Manheim, Office of Info. Programs & Servs., Dep’t of State (Sept. 21, 2015) (commenting on DOS RIN 1400-AD44), *available at* <http://goo.gl/MQyQui>; Letter from R. James Valvo, III, CoA Inst., to Karen Neuman, Office of the Chief Privacy Officer, Dep’t of Homeland Sec. (Sept. 21, 2015) (commenting on DHS RIN 1601-AA00), *available at* <http://goo.gl/tJD6Yq>; Letter from Ryan P. Mulvey, CoA Inst., to James P. Hogan, FOIA Public Liaison, Dep’t of Def. (Sept. 21, 2015) (supplement comment on DOD-2007-OS-0086-0005), *available at* <http://goo.gl/hsQbFX>.

¹⁵ Dep’t of State, Public Access to Information, 81 Fed. Reg. 19863, 19863 (Apr. 6, 2016).

¹⁶ *Id.* at 19863.

¹⁷ 5 U.S.C. § 553(e).

¹⁸ 5 U.S.C. § 551(1).

¹⁹ *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971).

²⁰ 5 U.S.C. § 552(a)(4)(A)(i) (providing OMB “shall provide for a uniform schedule of [FOIA] fees for all agencies”); *id.* § 552(e)(5) (describing OMB’s role to consult with the Attorney General on annual FOIA reports); 44 U.S.C. § 3504(a)(1)(A) (OMB shall “develop, coordinate and oversee the implementation of Federal information resources management policies, principles, standards, and guidelines”); *see also Media Access Project v. Fed. Comm’n Comm’n*, 883 F.2d 1063, 1069–70 (D.C. Cir. 1989) (holding the “express mandate [for OMB] to establish fee schedule guidelines is broad enough to encompass guidelines for determining the assessment of fees for statutory categories”).

²¹ 5 U.S.C. § 551(4).

of general applicability for the future adjudication of FOIA requester fee status and waiver determinations.

IV. Proposed Action

Petitioner hereby petitions OMB to update both its FOIA fee guidance and fee regulations to reflect statutory changes and recent judicial decisions. OMB should also provide guidance on the difference between fee waivers and fee status categories, as this remains an area of confusion for some agencies, courts, and requesters.

1. Representative of the News Media

The FOIA requires agencies to furnish documents to requesters at a reduced cost if the requester qualifies as one of several statutory categories of requesters.²² Since these categories were added to the statute, the “representative of the news media” fee status has been the most contentious. In its 1987 guidance, OMB issued its interpretation of that term, which was, at that time, not defined in the statute.²³ This guidance stated that the term “refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public.”²⁴ This became known as the “organized and operated” standard, and agencies across the federal government adopted it in their respective FOIA fee regulations.

In 2007, Congress amended the FOIA and provided a statutory definition that differed in meaningful ways from the OMB definition.²⁵ Despite Congress providing a statutory definition, the “organized and operated” standard still appears more than seventy times in agency FOIA regulations, including eleven cabinet-level agencies²⁶ and numerous other important agencies.²⁷ OMB itself still employs the anachronistic standard nearly nine years after Congress provided a statutory definition.²⁸

OMB should update both its guidance and its fee regulations to reflect the statutory definition of “a representative of the news media.” In doing so, OMB should clarify that, while a fee waiver may focus on the substance of a particular request, the news media fee status analysis “focus[es] on requesters, rather than requests[.]”²⁹ OMB should also include a non-exhaustive list of a methods of dissemination that a requester may use to disseminate its work to the public,

²² See 5 U.S.C. § 552(a)(4)(A)(ii)(II).

²³ 52 Fed. Reg. at 10018.

²⁴ *Id.*

²⁵ Open Government Act of 2007, Pub. L. 110-175, § 3; 121 Stat. 2524 (2007); 5 U.S.C. § 552(a)(4)(A)(ii).

²⁶ 6 C.F.R. § 5.11(b)(6) (Dep’t of Homeland Sec.); 7 C.F.R. pt. 1, subpt. A, app. A, § 5(c)(1) (Dep’t of Agric.); 10 C.F.R. § 1004.2(m) (Dep’t of Energy); 15 C.F.R. § 4.11(b)(6) (Dep’t of Commerce); 24 C.F.R. § 15.106(b) (Dep’t of Housing & Urban Dev.); 28 C.F.R. § 16.10(b)(6) (Dep’t of Justice); 29 C.F.R. § 70.38(i) (Dep’t of Labor); 31 C.F.R. § 1.5(b)(2)(iv) (Dep’t of the Treasury); 32 C.F.R. § 286.28(e)(7)(i) (Dep’t of Def.); 40 C.F.R. § 2.107(b)(6) (Env’tl. Prot. Agency); 45 C.F.R. § 5.5 (Dep’t of Health & Human Servs.).

²⁷ 10 C.F.R. § 9.13 (Nuclear Regulatory Comm’n); 11 C.F.R. § 4.1(n) (Fed. Election Comm’n); 14 C.F.R. § 1206.507(c)(3)(ii) (Nat’l Aeronautics & Space Admin.); 18 C.F.R. § 388.109(b)(1)(iv) (Fed. Energy Regulatory Comm’n); 29 C.F.R. § 102.117(d)(1)(vii) (Nat’l Labor Relations Bd.); 32 C.F.R. § 1900.02(h)(3) (Cent. Intelligence Agency); 36 C.F.R. § 1250.3(q) (Nat’l Archives & Records Admin.).

²⁸ 5 C.F.R. § 1303.30(j).

²⁹ *CoA Inst. v. FTC*, 799 F.3d at 1121.

including “newsletters, press releases, press contacts, a website, and planned reports[.]”³⁰ As information technology has rapidly advanced since the 1987 OMB guidance, the updated version should expressly embrace electronic means of disseminating information.

CoA Institute further petitions OMB to clarify that agencies should no longer apply the so-called “middleman standard” when adjudicating fee status determinations. In its comment on the Department of State proposed fee regulations, CoA Institute urged the agency to make this clarification as well; instead, the Department of State deferred to the OMB policy-making role on FOIA fee issues.³¹ The D.C. Circuit stated that it “disagree[s] with the suggestion that a public interest advocacy organization cannot satisfy the statute’s distribution criterion because it is more like a middleman for dissemination to the media than a representative of the media itself. . . . [T]here is no indication that Congress meant to distinguish between those who reach their ultimate audiences directly and those who partner with others to do so[.]”³² The OMB fee guidance and fee regulations should draw a distinction between those who market FOIA information for direct economic benefit and public interest advocacy organizations that “partner with others” to disseminate their distinct works.

2. Public Interest Fee Waiver

The FOIA requires agencies to furnish documents to requesters “without any charge or at a [reduced] charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”³³ This is commonly known as a public interest fee waiver. Last year, the D.C. Circuit provided significant clarification on how broad a segment of the public a requester needs to disseminate information to in order to meet this test.³⁴

In response to comments on its proposed rule in 1987, OMB eliminated from its guidance all references to and discussions of the public interest fee waiver as it decided that the FOIA committed the issue to individual agencies.³⁵ Petitioner agrees with OMB that the FOIA requires individual agencies to promulgate rules explaining the public interest waiver. OMB should, nonetheless, include the statutory definition of the public interest fee waiver test in its updated guidance in order to properly contrast it with the fee status issue, which is within OMB statutory responsibilities.

³⁰ *Id.* at 1124.

³¹ 81 Fed. Reg. at 19865.

³² *CoA Inst. v. FTC*, 799 F.3d at 1125 (quotation marks omitted).

³³ 5 U.S.C. § 552(a)(4)(A)(iii).

³⁴ *CoA Inst. v. FTC*, 799 F.3d at 1115–18.

³⁵ 52 Fed. Reg. at 10016 (“A number of commentators pointed out that OMB’s role is limited by the plain wording of the statute to developing guidelines and a fee schedule. In looking carefully at this requirement, OMB has determined that developing a schedule providing for the charging of fees and issuing guidance on when fees should be reduced or waived are separate issues and that OMB’s role does not involve the latter consideration.”).

V. Conclusion

The FOIA is a crucial tool for public interest advocacy organizations, the news media, and the general public to provide oversight and hold the federal government accountable. Congress has acknowledged the role fees play in preventing access to information through the FOIA and has thus provided mechanisms for lower cost access. When agencies rely on OMB guidance that is outdated and no longer complies with the statute, however, organizations like CoA Institute are required to engage in lengthy litigation to enforce the statute. OMB should update both its FOIA fee guidelines and its own FOIA fee regulations to ensure the fee mechanisms are serving their statutory purpose.

Thank you for your attention to this matter. If you have any questions about this petition, you may contact me at james.valvo@causeofaction.org or (202) 417-3576.

Sincerely,



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