

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CAUSE OF ACTION INSTITUTE)	
1875 Eye St., NW, Suite 800)	
Washington, DC 20006,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 17-1601
)	
THE WHITE HOUSE OFFICE OF)	
MANAGEMENT AND BUDGET)	
725 17th Street, NW)	
Washington, DC 20503,)	
)	
Defendant.)	

COMPLAINT

1. Plaintiff Cause of Action Institute (“CoA Institute”) brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeking access to records relating to the White House Office of Management and Budget’s (“OMB”) processing of two petitions for the rulemaking that CoA Institute submitted in 2015 and 2016, respectively.

2. The first petition for rulemaking sought implementation of Executive Order 13457, an order directed at disclosing congressional attempts to influence agency decisions on the allocation of discretionary spending.

3. The second petition for rulemaking requested that OMB update its outdated FOIA fee guidance document, which agencies across the federal government continue to rely on when issuing FOIA regulations and making FOIA fee determinations.

4. CoA Institute submitted a FOIA request seeking access to records revealing how OMB has been processing these two petitions. Ex. A at 1–2. OMB has not complied with FOIA’s statutory deadlines.

JURISDICTION AND VENUE

5. Jurisdiction is asserted pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).
6. Venue is proper pursuant to 28 U.S.C. § 1391(e) and 5 U.S.C. § 552(a)(4)(B).

PARTIES

7. CoA Institute is a non-profit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair. In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability. It regularly requests access, under the FOIA, to the public records of federal agencies, entities, and offices, and disseminates its findings, analysis, and commentary to the general public.

8. OMB is an agency within the meaning of 5 U.S.C. § 552(f)(1). It has possession, custody, and control of records to which CoA Institute seeks access and that are the subject of this Complaint.

FACTS

9. By letter, dated March 10, 2017, CoA Institute sent a FOIA request to OMB seeking access to records related to OMB's processing of two petitions for rulemaking that CoA Institute had previously submitted to the agency. Ex. A at 1–2.

10. CoA Institute sought to be classified as a representative of the news media for fee purposes. *Id.* at 2–3.

11. By email, dated March 10, 2017, OMB acknowledged receipt of the FOIA request and assigned it case number 2017-097. Ex. B.

12. Despite two requests from CoA Institute for updates on the processing of the request, OMB has provided no further communication to CoA Institute. Ex. C.

COUNT 1

Violation of the FOIA: Failure to Comply with Statutory Deadlines

13. CoA Institute repeats all of the above paragraphs.
14. The FOIA requires agencies to respond to requests within twenty (20) business days or, in “unusual circumstances,” within thirty (30) business days. 5 U.S.C. §§ 552(a)(6)(A)–(B).
15. More than twenty (20) business days have passed since OMB received the FOIA request at issue in this suit.
16. OMB has not issued a final determination on or produced any records responsive to the FOIA request at issue within the applicable statutory time limits. OMB, therefore, has failed to comply with the FOIA’s statutory deadline to issue a final determination.
17. CoA Institute has exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C).

RELIEF REQUESTED

WHEREFORE, Plaintiff CoA Institute respectfully requests and prays that this Court:

- a. order OMB to issue a final determination within twenty (20) business days of the date of the Order;
- b. order OMB to produce all responsive, non-exempt records promptly after issuing the final determination;
- c. award CoA Institute its costs and reasonable attorney fees incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- d. grant such other relief as the Court may deem just and proper.

Date: August 9, 2017

Respectfully submitted,

/s/ R. James Valvo, III

R. James Valvo, III (D.C. Bar No. 1017390)

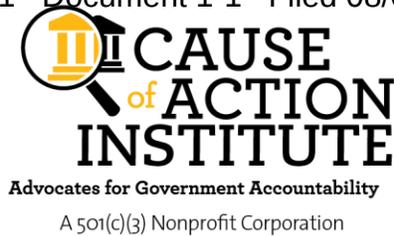
Lee A. Steven (D.C. Bar No. 468543)

CAUSE OF ACTION INSTITUTE
1875 Eye St., NW, Suite 800
Washington, DC 20006
Telephone: (202) 499-4232
Facsimile: (202) 330-5842
james.valvo@causeofaction.org
lee.steven@causeofaction.org

Counsel for Plaintiff

EXHIBIT

A



March 10, 2017

VIA EMAIL

Dionne Hardy
Office of Management and Budget
The White House
725 17th Street, NW
Washington, DC 20503

Re: Freedom of Information Act Request

Ms. Hardy:

I write on behalf of Cause of Action Institute (“CoA Institute”), a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.¹ In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability.

In 2015, we sent a petition for rulemaking to the White House Office of Management and Budget (“OMB”) asking the agency “to issue a rule ensuring the continuing force and effect of Executive Order 13457, *Protecting American Taxpayers From Government Spending on Wasteful Earmarks*[.]”² In 2016, we sent a petition for rulemaking to OMB asking the agency to update its outdated Freedom of Information Act (“FOIA”) fee guidelines and its own regulations, which conflict with the statutory definitions.³ We have not received a response to either petition.

Therefore, pursuant to FOIA, 5 U.S.C. § 552 (“FOIA”), CoA Institute hereby requests access to the following records:

1. All records that relate in any way (*e.g.*, receipt, forwarding, assignment to staff, transmission to other agencies or offices, meetings, memos, *etc.*) to the above-referenced 2015 Petition. The time period for this Item is October 7, 2015 until the present.⁴

¹ See CAUSE OF ACTION INSTITUTE, *About*, www.causeofaction.org/about/.

² See Ex. 1.

³ See Ex. 2.

⁴ For purposes of this request, the term “present” should be construed as the date on which the agency begins its search for responsive records. See *Pub. Citizen v. Dep’t of State*, 276 F.3d 634 (D.C. Cir. 2002). The term “record” means the entirety of the record any portion of which contains responsive information. See *Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, N830 F.3d 667, 677–78 (D.C. Cir. 2016) (admonishing agency for withholding information as “non-responsive” because “nothing in the statute suggests that the agency

2. All records that relate in any way (*e.g.*, receipt, forwarding, assignment to staff, transmission to other agencies or offices, meetings, memos, *etc.*) to the above-referenced 2016 Petition. The time period for this Item is June 2, 2016 until the present.⁵

CoA Institute specifically requests that OMB search for, *inter alia*, emails⁶ and text messages.

Request To Be Classified as a Representative of the News Media

For fee status purposes, CoA Institute qualifies as a “representative of the news media” under FOIA.⁷ As the D.C. Circuit recently held, the “representative of the news media” test is properly focused on the requester, not the specific FOIA request at issue.⁸ CoA Institute satisfies this test because it gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience.⁹ Although it is not required by the statute, CoA Institute gathers the news it regularly publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. It does not merely make raw information available to the public, but rather distributes distinct work products, including articles, press releases,¹⁰ blog posts, investigative reports, newsletters, and congressional testimony and statements for the record.¹¹ These distinct

may parse a responsive record to redact specific information within it even if none of the statutory exemptions shields that information from disclosure”).

⁵ See *supra* note 4.

⁶ As it relates to all Items of this request, if OMB’s search uncovers email records responsive to this request, CoA Institute specifically requests access to the entirety of any email chain, any portion of which contains an individual email message responsive to this request, *i.e.*, the entire email chain is responsive to the request.

⁷ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 5 C.F.R. § 1303.50(c).

⁸ See *Cause of Action v. Fed. Trade Comm’n*, 799 F.3d 1108, 1121 (D.C. Cir. 2015).

⁹ CoA Institute notes that the agency’s definition of “representative of the news media” (5 C.F.R. § 1303.30(j)) is in conflict with the statutory definition and controlling case law. The agency has improperly retained the outdated “organized and operated” standard that Congress abrogated when it provided a statutory definition in the OPEN Government Act of 2007. See *Cause of Action*, 799 F.3d at 1125 (“Congress . . . omitted the ‘organized and operated’ language when it enacted the statutory definition in 2007. . . . [Therefore,] there is no basis for adding an ‘organized and operated’ requirement to the statutory definition.”). Under either definition, however, CoA Institute qualifies as a representative of the news media.

¹⁰ See also *Cause of Action*, 799 F.3d at 1125-26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

¹¹ See, *e.g.*, COA INSTITUTE, *Sec. Vilsack followed ethics guidelines when negotiating his future employment*, (Feb. 3, 2017), <http://coainst.org/2mJlJJe>; COA INSTITUTE, INVESTIGATIVE REPORT: PRESIDENTIAL ACCESS TO TAXPAYER INFORMATION (Oct. 2016), available at <http://coainst.org/2d7qTRY>; James Valvo, *There is No Tenth Exemption*, COA INSTITUTE (Aug. 17, 2016), <http://coainst.org/2doJhBt>; COA INSTITUTE, *CIA too busy for transparency* (Aug. 11, 2016), <http://coainst.org/2mtzhHP>; *Cause of Action Testifies Before Congress on Questionable White House Detail Program* (May 19, 2015), available at <http://coainst.org/2aJ8UAA>; COA INSTITUTE, 2015 GRADING THE GOVERNMENT REPORT CARD (Mar. 16, 2015), available at <http://coainst.org/2as088a>; *Cause of Action Launches Online Resource: ExecutiveBranchEarmarks.com* (Sept. 8, 2014), available at <http://coainst.org/2aJ8sm5>; COA INSTITUTE, GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), available at <http://coainst.org/2aFWxUZ>; COA INSTITUTE, GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM (Sept. 23, 2013), available at <http://coainst.org/2apTwpP>; COA INSTITUTE, POLITICAL

works are distributed to the public through various media, including the Institute's website, Twitter, and Facebook. CoA Institute also provides news updates to subscribers via e-mail. In addition, as CoA Institute is a non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code, it has no commercial interest in this request.

The statutory definition of a "representative of the news media" contemplates that organizations such as CoA Institute, which electronically disseminate information and publications via "alternative media[,] shall be considered to be news-media entities."¹² In light of the foregoing, numerous federal agencies have appropriately recognized the Institute's news media status in connection with its FOIA requests.¹³

Record Preservation Requirement

CoA Institute requests that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and any administrative remedies for appeal have been exhausted. It is unlawful for an agency to destroy or dispose of any record subject to a FOIA request.¹⁴

Record Production and Contact Information

In an effort to facilitate document review, please provide the responsive documents in electronic form in lieu of a paper production. If a certain portion of responsive records can be

PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), *available at* <http://coainst.org/2aJh901>.

¹² 5 U.S.C. § 552(a)(4)(A)(ii)(II).

¹³ *See, e.g.*, FOIA Request 2016-11-008, Dep't of the Treasury (Nov. 7, 2016); FOIA Requests OS-2017-00057 & OS-2017-00060, Dep't of Interior (Oct. 31, 2016); FOIA Request 2017-00497, Office of Personnel Management (Oct. 21, 2016); FOIA Request 092320167031, Centers for Medicare & Medicaid Services (Oct. 17, 2016); FOIA Request 17-00054-F, Dep't of Educ. (Oct. 6, 2016); FOIA Request DOC-OS-2016-001753, Dept. of Commerce (Sept. 27, 2016); FOIA Request 2016-366-F, Consumer Fin. Prot. Bureau (Aug. 11, 2016); FOIA Request F-2016-09406, Dept. of State (Aug. 11, 2016); FOIA Request 2016-00896, Bureau of Land Mgmt., Dep't of the Interior (Aug. 10, 2016); FOIA Request 1355038-000, Fed. Bureau of Investigation, Dep't of Justice (Aug. 2, 2016); FOIA Request 2016-HQFO-00502, Dept. of Homeland Security (Aug. 1, 2016); FOIA Request 796939, Dep't of Labor (Mar. 7, 2016); 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 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'n Comm'n (Dec. 12, 2014); FOIA Request LR-2015-0115, Nat'l Labor Relations Bd. (Dec. 1, 2014); FOIA Request 201500009F, Exp.-Imp. Bank (Nov. 21, 2014); FOIA Request GO-14-307, Dep't of Energy (Nat'l Renewable Energy Lab.) (Aug. 28, 2014); FOIA Request 14F-036, Health Res. & Serv. Admin. (Dec. 6, 2013).

¹⁴ *See* 36 C.F.R. § 1230.3(b) ("Unlawful or accidental destruction (also called unauthorized destruction) means . . . disposal of a record subject to a FOIA request, litigation hold, or any other hold requirement to retain the records."); *Chambers v. Dep't of the Interior*, 568 F.3d 998, 1004-05 (D.C. Cir. 2009) ("[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under the FOIA or the Privacy Act."); *Judicial Watch, Inc. v. Dep't of Commerce*, 34 F. Supp. 2d 28, 41-44 (D.D.C. 1998).

produced more readily, CoA Institute requests that those records be produced first and the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions about this request, please contact me by telephone at (202) 417-3576 or by e-mail at james.valvo@causeofaction.org. Thank you for your attention to this matter.



R. JAMES VALVO, III
COUNSEL & SENIOR POLICY ADVISOR

EXHIBIT

1



October 7, 2015

VIA CERTIFIED MAIL

Honorable Shaun Donovan, Director
Office of Management and Budget
725 17th Street, NW
Washington, D.C. 20503

Re: PETITION FOR RULEMAKING

Director Donovan:

Pursuant to Section 553(e) of the Administrative Procedure Act, 5 U.S.C. § 553(e) (“APA”), Cause of Action Institute (“CoA”) and Demand Progress (“Petitioners”) hereby petition the Office of Management and Budget (“OMB”) to issue a rule ensuring the continuing force and effect of Executive Order 13457, *Protecting American Taxpayers From Government Spending on Wasteful Earmarks* (the “Order”).¹

Since August 2011, CoA has examined federal discretionary spending through Freedom of Information Act (“FOIA”) records and federal databases. These records reveal OMB’s efforts to ensure discretionary grant decision-making is transparent and merit-based are ineffective. Instead, federal agencies have struggled to combat abusive administrative earmarking practices.² An earmark, generally speaking, is a provision associated with legislation that specifies certain congressional spending priorities or applies to a very limited number of individuals or entities.³ Earmarks historically have appeared in either the legislative text or report language, although Executive Order 13457 encompasses communications from or on behalf of Members of Congress and other non-statutory sources requests.

¹ Exec. Order No. 13457, 73 Fed. Reg. 6417 (published Feb. 1, 2008) [hereinafter “E.O. 13457”], available at <http://goo.gl/Cvn9tJ>.

² See Stephen Dinan, *House bans earmarks for next Congress*, WASH. TIMES (Nov. 16, 2012), <http://goo.gl/nWOf58> (enforcing 2010 earmark ban in 113th Congress); Eric Lichtblau, *New Earmark Rules Have Lobbyists Scrambling*, N.Y. TIMES (Mar. 11, 2010), <http://goo.gl/55a9l3>.

³ See COMPARISON OF SELECTED SENATE EARMARK REFORM PROPOSALS, Congressional Research Service (March 6, 2006), <http://goo.gl/JHSq0G>, for a discussion on the different ways earmarks have been defined. The House of Representatives defined a “congressional earmark” in Rule XXI(8), RULES OF THE HOUSE OF REPRESENTATIVES: ONE HUNDRED FOURTEENTH CONGRESS.

October 7, 2015

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On November 5, 2011, President Obama acknowledged, in a draft memorandum, that agency decision-making has come under pressure to favor special interests.⁴ However, less than four months later, on February 21, 2012, former White House Press Secretary Jay Carney stated he was “confident that the issuance of grants through agencies . . . is done . . . in a merit-based way.”⁵

The current earmarking regime, where Congress has issued a moratorium on earmarks, shifts some pork-spending determinations from Congress to Executive Branch agencies. Earmark decisions that were once made by statute, tying an agency’s hands, are now made as a matter of agency discretion, hampering transparency and accountability.⁶ Other earmark requests, which were once written into committee reports and given great deference by agencies, are now made in secret by letter, phone, or in person. Altogether, “Executive Branch Earmarks,” which allow political appointees and others to use federal monies to reward political allies, appease powerful interests, and/or engage in insider deal-making, demonstrates the need for OMB to act.⁷ Therefore, CoA and Demand Progress petition OMB to issue, at a minimum, a memorandum that:

1. Confirms the Order binds discretionary agency spending;
2. Affirms that the allocation of discretionary funds in response to congressional requests outside of a transparent, merit-based decision-making process is prohibited under the Order’s definition of “earmark” and that agencies are not obligated to fund such requests;
3. Recognizes that congressional and non-congressional entities and individuals such as Executive Branch officials, state and local politicians, registered lobbyists, and donors can and do exert pressure on discretionary spending decision-making on federal projects, programs, contracts, and grants;
4. Requires executive departments and agencies to make available to the public, in searchable form on the Internet, records of all written and oral communications from any source (*e.g.*, federal elected officials, White House staff, congressional officers and staff, Executive Branch officials, state and local politicians, or lobbyists) that reference: (1) earmarks previously enacted into law, (2) earmarks referenced in congressional reports or materials, or (3) discretionary funds not yet awarded, if the agency is “pressured informally to show special favor to certain parties or interests in the course of agency decision-making;”⁸ and
5. Directs executive departments and agencies to make records of these communications publicly available through their respective websites within 30 days of receiving such communications, and that this practice be memorialized in their Open Government Plans. To

⁴ WHITE HOUSE, TEXT OF DRAFT EXECUTIVE MEMORANDUM: PROMOTING MERIT-BASED AND COMPETITIVE ALLOCATION OF FEDERAL FUNDS (Nov. 5, 2011), *available at* <https://goo.gl/vs6lG0>.

⁵ Press Release, Office of the Press Sec’y, The White House, Daily Press Briefing by Press Secretary Jay Carney (Feb. 21, 2012), *available at* <http://goo.gl/62cCr7>.

⁶ See Steven C. LaTourette, *The Congressional Earmark Ban: The Real Bridge to Nowhere*, ROLL CALL (July 30, 2014), <http://goo.gl/ILG39h>.

⁷ Cause of Action Institute defines an “Executive Branch Earmark” as any non-competitive expenditure – including Presidential budget requests, Administration-requested appropriations, and other presidential efforts to influence agency-based discretionary spending – that is meant to achieve political gain through the rewarding of political supporters, campaign contributors, or Members of Congress who have provided support to legislation that furthers presidential priorities. See generally <http://www.ExecutiveBranchEarmarks.com>.

⁸ See *supra* note 4.

the extent independent agencies are encouraged and choose to comply with OMB's guidance concerning the Order, they should also comply with the publication requirement.

As President Obama has acknowledged, agencies are politically pressured when making discretionary spending decisions, yet these agencies are universally neglecting their obligations under the Order. And OMB has not provided the necessary direction to hold agencies accountable for their noncompliance.⁹ Therefore, OMB action is needed to enforce the policy mandate of the Order and the President's own draft memorandum, to increase spending transparency and to ensure that agencies are held accountable for their discretionary spending of taxpayer dollars.

I. PETITIONERS

CoA is an "interested party" under § 553(e) of the APA and is statutorily afforded the "right to petition [OMB] for the issuance, amendment, or repeal of a rule."¹⁰ CoA is a non-profit, nonpartisan government accountability organization. CoA's pro bono legal representation of organizations and individuals helps to educate the public about government abuse, wasteful spending, and corruption.

Demand Progress is an "interested party" under § 553(e) of the APA and is statutorily afforded the "right to petition [OMB] for the issuance, amendment, or repeal of a rule."¹¹ Demand Progress is a non-profit, nonpartisan government accountability organization. Demand Progress is a national grassroots group with more than two million affiliated activists who fight for basic rights and freedoms needed for a modern democracy.

II. FACTUAL BACKGROUND

Unlike legislative earmarks, Executive Branch Earmarks have generally escaped significant public scrutiny. However, Congress has identified cases of waste and abuse engendered by Executive Branch Earmarks and urged greater oversight.¹² Good-government advocates have begun to follow suit.¹³ Disappointingly, this Administration has acted inconsistently. Though it has repeatedly expressed great concern for transparency and openness,¹⁴ the Administration has not actually taken the steps needed to provide adequate transparency for discretionary spending decisions, much less prevent non-meritorious Executive Branch Earmarking. As a result, OMB should provide greater clarity and guidance to agencies so that taxpayer dollars are used appropriately for the common good and not to reward partisan interests.

⁹ See *infra* Part II.B.-D.

¹⁰ 5 U.S.C. § 553(e).

¹¹ *Id.*

¹² See, e.g., 156 CONG. REC. S8227 (daily ed. Nov. 29, 2010) (statement of Sen. Harkin) ("Let's consider how the executive branch--the President--directs spending to States and local communities. Make no mistake about it, the executive branch earmarks funding, but there is very little sunshine when it comes to those decisions."); 154 CONG. REC. H977 (daily ed. Feb 14, 2008) (statement of Rep. Wolf) ("[E]xecutive branch earmarks [should] also be studied . . . because I think the Congress has ignored some of this and I think the general public doesn't understand.").

¹³ See, e.g., Howard Husock, *The Americorps Anniversary: What the White House--and New York Times--Don't Get*, FORBES.COM (Sept. 9, 2014), <http://goo.gl/En2247> ("[T]he White House is directing federal funds to hundreds of non-profit organizations . . . without explicit Congressional approval. Such grants can . . . be properly understood as Executive Branch earmarks.").

¹⁴ See, e.g., *Transcript of CNN Democratic presidential debate in Texas*, CNN.COM (Feb. 21, 2008), <http://goo.gl/7k1fCw> (Then-Senator Obama stating: we need "to make sure that we create transparency in our government so that we know where federal spending is going . . . I've been consistently in favor of more disclosure around earmarks.").

A. Agency Grant Spending Is Susceptible To Political Influence.

With the end of congressional earmarking, agency grant spending remains susceptible to political influence and non-meritorious adjudication from the White House, Executive Branch agencies and from Congress as well. Some allocations of pork have shifted from Congress to the discretionary spending of Executive Branch agencies to further Presidential electoral interests.¹⁵ Of course, Congress still retains control to influence discretionary grant spending,¹⁶ and often uses tax policy to achieve the same ends.¹⁷ Even with the congressional moratorium on earmarks, agency grant spending allocations remain at risk for inappropriate politicization.

B. OMB Has Not Clarified The Order's Continuing Force Of And Prior Guidance On The Disclosure Of Earmarks Despite Agency Confusion.

On January 29, 2008, prior to the moratorium on congressional earmarks, President Bush signed the Order, *Protecting American Taxpayers from Government Spending on Wasteful Earmarks*.¹⁸ The Order defines "earmark" as:

[F]unds provided by Congress for projects, programs, or grants where the purported congressional direction (whether in statutory text, report language, or other communication) circumvents otherwise applicable merit-based or competitive allocation processes, or specifies the location or recipient, or otherwise curtails the ability of the executive branch to manage its statutory and constitutional responsibilities pertaining to the funds allocation process.¹⁹

The Order requires agency heads to take "all necessary steps to ensure" agency funding for "any earmark" is "based on authorized, transparent, statutory criteria, and merit-based decision making."²⁰ The Order also requires federal agencies to reject non-statutory earmarks (*i.e.*, any earmark not explicitly authorized by legislation) and – perhaps most importantly – to make all congressional communications regarding earmarks "publicly available on the Internet by the receiving agency" within 30 days.²¹

¹⁵ See generally JOHN HUDAK, *PRESIDENTIAL PORK* 126 (Brookings Institution Press) (2014).

¹⁶ See, e.g., *Lawmakers finance pet projects without earmarks*, *The New York Times* (Dec. 21, 2010), <http://goo.gl/gCxEjC> ("Lettermarking, which takes place outside the Congressional appropriations process, is one of the many ways that legislators who support a ban on earmarks try to direct money back home. In phonemarking, a lawmaker calls an agency to request financing for a project. More indirectly, members of Congress make use of what are known as soft earmarks, which involve making suggestions about where money should be directed, instead of explicitly instructing agencies to finance a project. Members also push for increases in financing of certain accounts in a federal agency's budget and then forcefully request that the agency spend the money on the members' pet project.").

¹⁷ See, e.g., *Even Without Earmarks, Tax Breaks And Special Deals Fill Bills*, *National Public Radio* (Feb. 8, 2013), <http://goo.gl/dp96Pf>.

¹⁸ E.O. 13457, *supra* note 1. Prior to E.O. 13457, OMB provided agencies with a memorandum directing them not to fund non-statutory earmarks and that oral or written communications regarding earmarks should not influence merit-based decision-making. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-07-10, *GUIDANCE ON OBLIGATING FY2007 FUNDS* (2007), available at <http://goo.gl/2JgVjF>.

¹⁹ *Id.* § 3(b).

²⁰ *Id.* § 2(a)(ii).

²¹ *Id.* § 2(b).

Eight months after issuing the Order, President Bush signed a large appropriations bill into law.²² Shortly thereafter, OMB released Memorandum M-09-03, instructing agencies how to reconcile the Order with the recent appropriations law.²³ OMB Director Jim Nussle directed that “agencies are legally obligated to fund an earmark only if” it meets criteria explained in the memorandum, providing agencies with the necessary framework to resolve potential discrepancies between the Order and appropriations legislation.²⁴

Despite OMB’s guidance, there was still uncertainty regarding its interpretation of the Order’s requirement that agency decisions to “commit, obligate, or expend funds for any earmarks [should be] based on authorized, transparent, statutory criteria and merit-based decision making[.]”²⁵ The Order dictates that “[a]n agency shall not consider the views of a House, committee, Member, officer, or staff of the Congress with respect to commitments, obligations, or expenditures to carry out any earmark unless such views are in writing[.]”²⁶ For instance, “earmark” could be broadly interpreted to include any non-merit-based agency decision; alternatively, if a Member of Congress made a request to the President and that request was forwarded to an agency procurement official or his or her Secretary, such a request can be interpreted to involve “the views of . . . Congress.” Likewise, if the President or his political appointees make direct requests for agency expenditures to benefit a Member of Congress, whether those requests constitute an “earmark” are open to interpretation.

Because of the vagueness of the term, CoA concluded that determining how OMB conducted a FOIA search for the term “earmark” would reveal how OMB interpreted the term. CoA’s theory was that OMB would construe an Executive Branch Earmark as any non-competitive expenditure – including Presidential budget requests, Administration-requested appropriations, and other presidential efforts to influence agency-based discretionary spending – that is meant to achieve political gain through the rewarding of political allies, campaign contributors, or Members of Congress who have provided support to legislation that furthers presidential priorities.²⁷

On September 9, 2011, CoA filed a FOIA request with OMB seeking documents showing that Members of Congress “recommend[ed] that funds should be committed, obligated, or expended on any earmark from January 2009.”²⁸ OMB was not responsive to CoA’s FOIA request, and on March 7, 2012, CoA sued OMB to comply with its obligations under FOIA.²⁹ As part of the settlement of the litigation, OMB produced the documents featured in this Petition. CoA was wary of whether OMB conducted an adequate search for responsive records and sent OMB a letter requesting that it detail its search. In response to CoA’s letter, OMB disclosed that the employees who processed CoA’s FOIA request were:

[S]pecifically advised to look in particular for any written communication from Congress to an agency recommending that funds be committed, obligated, or expended

²² Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009, Pub. L. No. 110 -329, 122 Stat. 3574 (2008).

²³ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-09-03, GUIDANCE ON IMPLEMENTING P.L. NO. 110-329 IN ACCORDANCE WITH EXECUTIVE ORDER 13457 (2008), *available at* <http://goo.gl/Gw8Fqr>.

²⁴ *Id.* at 1 (emphasis in original).

²⁵ E.O. 13457, § 1, *supra* note 1.

²⁶ *Id.* § 2(b).

²⁷ *See supra* note 7.

²⁸ Freedom of Information Act Request from CoA to Office of Mgmt. & Budget (Sept. 9, 2011), *available at* <http://goo.gl/AsQKbi>.

²⁹ Complaint, *Cause of Action v. Zients*, No. 12-379 (D.D.C. Mar. 7, 2012), *available at* <http://goo.gl/0WCYVP>.

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on any earmark, as well as any consultations by the agency with OMB about whether the agency head should decline to publish the communication.³⁰

The documents produced by OMB to CoA therefore confirm CoA's theory that the Order applies to both legislative and Executive Branch Earmarks.

OMB provided updated guidance on the Order's application to appropriations legislation in FY2008 and 2009.³¹ However, it has not done so since. This has resulted in an environment of agency confusion. For example, on March 3, 2009, OMB Program Examiner Adam Zeller e-mailed his colleague Robin McLaughry, OMB Budget Preparation Specialist, asking whether "the new Administration has any plans to rescind Executive Order 13457."³² Ms. McLaughry responded, "[The] administration has not finalized any decisions on earmark policy."³³

From: Zeller, Adam J.
Sent: Tuesday, March 03, 2009 11:21 AM
To: McLaughry, Robin J.
Subject: Earmarks Executive Order

Robin,

My agency would like to know if the new Administration has any plans to rescind Executive Order 13457, "Protecting American Taxpayers from Government Spending on Wasteful Earmarks." Have you heard about any such change of policy with regards to earmarks? Thank you.

Adam

Adam Zeller
Office of Management and Budget
Environment Branch
725 17th Street NW, Room 8026
Washington, DC 20503
202.395.6824

From: McLaughry, Robin J.
Sent: Tuesday, March 03, 2009 11:29 AM
To: Zeller, Adam J.
Cc: Jones, Bryant A.
Subject: RE: Earmarks Executive Order

Adam:

The administration has not finalized any decisions on earmark policy (Bryant, please jump with additional information).

Robin
BRB: 5-3025

In early August 2009, OMB staffers recognized the Order was still in place and applied its prohibition on funding earmarks. In an e-mail exchange about how to designate which earmarks the Administration would fund, Ms. McLaughry urged her colleagues to "come to an agreement about what type of earmarks" they are discussing and how to designate them in OMB's database.³⁴

³⁰ Letter from Jonathan E. Rackoff, Assistant Gen. Counsel, Office of Mgmt. & Budget to Lee Reeves, Dep't of Justice, at 6 (Nov. 29, 2012), *available at* <http://goo.gl/YbPFBh> (regarding litigation over CoA's FOIA request).

³¹ See OMB MEM. M-09-03, *supra* note 23.

³² Office of Mgmt. & Budget FOIA Production to CoA, at 0004 (July 13, 2012), *available at* <http://goo.gl/4WM16b>.

³³ *Id.*

³⁴ *Id.* at 0008.

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From: McLaughry, Robin J.
Sent: Wednesday, August 05, 2009 11:46 AM
To: McDonald, Christine A.; Karwoski, Jenifer L.
Subject: RE: Status of Earmarks/Reconciliation Report

Christine:

This distinction (between Statutory, Statutory by Reference, and Report Language) is actually pretty critical. Executive Order 13457 prohibits agencies from funding Report Language earmarks. Eventually, we will be using this database to pull out which earmarks are Report Language to make sure they were not funded per the E.O. Therefore, it is important that this designation is correct and that both the RMO and agency agree on it.

I have moved the account back to Agency/RMO Collaboration. Please discuss with the agency and come to an agreement about what type of earmarks these are. Let me know if there are any questions!

Robin
BRB: 5-3025

Later that month, OMB staff participated in a similar e-mail exchange in which they acknowledged the Order was still in force. Dianne Shaughnessy, OMB Deputy Chief for Budget Review, insisted the “order remains in effect unless rescinded.”³⁵ She directed staff to internal OMB guidance on how to apply the Order, referencing the Department of Justice’s website as an example of an agency that was actively posting communications.³⁶

From: Shaughnessy, Dianne M.
Sent: Friday, August 21, 2009 8:36 AM
To: 'O'Connor, Niall'; Lee, Courtney; Karwoski, Jenifer L.
Cc: McLaughry, Robin J.; Jones, Bryant A.; Meter, Erin M.; Vaeth, Matthew; Carroll, J. Kevin
Subject: Follow-Up From Yesterday's Meeting

Jenifer/Niall/Courtney:

There were a couple things I said I would send following yesterday's meeting.

Executive Order on Earmarks. This order remains in effect unless rescinded. We actually have this on our Guidance page, under guidance materials on the main Earmark Page in the community. <https://max.omb.gov/community/x/AwCpEG> One thing you may find insightful is DOJ's website where they post Congressional Communications they are required to post. <http://www.usdoj.gov/imd/ccre/>

Yet, despite these directions, it does not appear OMB took further steps to require agency compliance.

Another example of this confusion can be found in a December 2010 e-mail from Joanne Hoff, OMB Program Examiner in the National Security Division, in which she relayed that the Department of Defense was unsure whether to disregard committee and report language earmarks in FY2010 and whether to apply the guidance from the Bush-era memorandum.³⁷

³⁵ *Id.* at 0006-07.

³⁶ *Id.*

³⁷ *Id.* at 0003.

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From: Hoff, Joanne Cianci
Sent: Thursday, December 02, 2010 9:13 PM
To: Aitken, Steven D.; Luczynski, Kimberley S.; Walsh, Heather V.
Cc: Cancian, Mark F.; Klay, Benjamin W.; Henry, Gregory G.; McClelland, John "Ace"
Subject: Question on earmarks

DOD also asked how OMB 09-03, "Guidance on implementing P.L. No. 110-329 in accordance with Executive Order 13457 on 'Protecting American Taxpayers From Government Spending on Wasteful Earmarks'", and the underlying EO interacts with the proposed general provision on earmarks. Does the provision's statement that the "explanatory statement, conference report, committee report or statement of managers accompanying an appropriations Act for fiscal year 2010 shall have no legal effect with respect to funds appropriated by this division" mean that these Congressional directions would not apply under the CR, and therefore the direction in the prior guidance is not an "issue?"

Thanks,
Joanne

The same problem occurred again in January 2011 when Jon Kraft, Comptroller at the Army National Guard, asked OMB Program Examiner Edna Falk Curtin whether the Bush-era "guidance is relevant to our current CR?"³⁸

From: Kraft, Jon E COL MIL NG NGB ARNG [mailto:Jon.Kraft@(b)(6)]
Sent: Thursday, January 13, 2011 9:07 AM
To: Falk Curtin, Edna F.
Subject: More CR issues (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: FOUO

Hi Edna,

I received a copy of the attached OMB memo referencing earmarks. The document references Pres Ex Order 13457. Do you know if this guidance is relevant to our current CR?

thx

COL Jon Kraft
Comptroller, ARNG
111 S. George Mason Dr.
Arlington, VA 22204

(b)(6)

³⁸ *Id.* at 0001.

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By September 2011, despite numerous instances of agencies asking for guidance, OMB had still neither resolved the confusion nor developed an internal mechanism for advising agencies on how to apply the Order. On September 1, 2011, Daphne Dador, Legislative Affairs Specialist at NASA, contacted OMB seeking “clarity regarding” the Order.³⁹ Dador sought information on how long an agency must “post on-line any written communications from Congress that is related to earmark funding.”⁴⁰ What followed was a flurry of e-mails between OMB staffers, none of whom knew how to answer Dador’s question.⁴¹

From: DADOR, DAPHNE (HQ-VA040) [mailto:daphne.dador@(b)(6)]
Sent: Thursday, September 01, 2011 10:15 AM
To: Owens, D. Brooke
Subject: Executive Order 13457

Good Morning Brooke,

I hope this finds you well. I am writing to see if you would be able to point me to a POC in OMB who can provide some clarity regarding an Executive Order.

Specifically, we are looking at EO 13457 dated Jan. 29, 2008 that directs agencies to post on-line any written communications from Congress that is related to earmark funding. The EO says when we need to post, but it does not provide guidance on how long to keep that communication posted.

If you have any thoughts on who can shed some light on this we would greatly appreciate it!

Thanks and take care!

Daphne

Daphne Dador
Legislative Affairs Specialist
Office of Legislative and Intergovernmental Affairs
National Aeronautics and Space Administration

E: (b)(6)

P:

These e-mails from agencies seeking guidance demonstrate OMB has consistently failed to take the appropriate steps to enforce the Order and dispel agency confusion by issuing further guidance for its application.

C. Federal Agencies Are Not Complying With the Order.

Beyond agency confusion, it also appears that no federal agency actually complies with the Order. Only 5 of 17 agencies have a page dedicated to posting congressional communications and only one has been updated since 2009:

³⁹ *Id.* at 0012.

⁴⁰ *Id.* at 0013.

⁴¹ *See id.* at 00012, 00011.

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AGENCY	WEB PAGE FOR EO 13457
DEPARTMENT OF AGRICULTURE	NOT FOUND ON WEBSITE
DEPARTMENT OF COMMERCE	NOT FOUND ON WEBSITE
DEPARTMENT OF HEALTH & HUMAN SERVICES	NOT FOUND ON WEBSITE
DEPARTMENT OF HOMELAND SECURITY	NOT FOUND ON WEBSITE
DEPARTMENT OF HOUSING & URBAN DEVELOPMENT	NOT FOUND ON WEBSITE
DEPARTMENT OF THE INTERIOR	NOT FOUND ON WEBSITE
DEPARTMENT OF LABOR	NOT FOUND ON WEBSITE
DEPARTMENT OF STATE	NOT FOUND ON WEBSITE
DEPARTMENT OF THE TREASURY	NOT FOUND ON WEBSITE
DEPARTMENT OF VETERANS AFFAIRS	NOT FOUND ON WEBSITE
DEPARTMENT OF TRANSPORTATION	NOT FOUND ON WEBSITE
ENVIRONMENTAL PROTECTION AGENCY	NOT FOUND ON WEBSITE
DEPARTMENT OF DEFENSE	Links to subagencies that are not up to date ⁴²
DEPARTMENT OF EDUCATION	One joint letter from September 26, 2008 ⁴³
DEPARTMENT OF ENERGY	720 page PDF for January 1, 2008 through November 14, 2008. No other documents found on the website ⁴⁴
DEPARTMENT OF JUSTICE	28 letters ranging from March 2009 through July 2012; last updated August 2014 ⁴⁵
NATIONAL AERONAUTICS & SPACE ADMINISTRATION	Two letters from 2009 ⁴⁶

⁴² *Earmarks*, OFFICE OF THE UNDER SEC’Y OF DEF. (COMPTROLLER), <http://goo.gl/tYB10H> (last visited Sept. 24, 2015).

⁴³ Letter from Hon. Steve Kagen, U.S. H.R., and Hon. Herb Kohl, U.S. S., to Hon. Margaret Spellings, Sec’y, Dep’t of Educ. (Sept. 26, 2008), *available at* <http://goo.gl/XOrHte> (last visited Sept. 24, 2015).

⁴⁴ DEP’T OF ENERGY, COMPILATION OF CONGRESSIONAL CORRESPONDENCE RECEIVED IN THE U.S. DEPARTMENT OF ENERGY JANUARY 1, 2008 THROUGH NOVEMBER 14, 2008 (2008), *available at* <http://goo.gl/lu6ici> (last visited Sept. 24, 2015).

⁴⁵ *Congressional Communications*, DEP’T OF JUSTICE, <http://goo.gl/wHK5Vy> (last visited Sept. 24, 2015).

⁴⁶ Office of Legislative & Intergovernmental Affairs, *Congressional Communications*, NAT’L AERONAUTICS & SPACE ADMIN., <http://goo.gl/l5iPqx> (last visited Sept. 24, 2015)

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The Department of Energy has posted the most comprehensive compilation of congressional correspondence with 720 pages dating from January 1, 2008 through November 14, 2008, but has not posted anything since 2008.⁴⁷ The Department of Justice has a woefully incomplete posting of only 28 letters ranging from March 2009 through July 2012, and its website was last updated in August 2014.⁴⁸ The site is missing letters from members of Congress sent in 2010⁴⁹ and 2012,⁵⁰ which have been obtained by CoA.

The Department of Education has one letter from Representative Steve Kagen and Senator Herb Kohl regarding unobligated funds.⁵¹ NASA has one page⁵² with a single letter and its response from 2009.⁵³ The Department of Defense has some links to program offices that have a dedicated page, but most of them are non-working links or have no letters posted.⁵⁴

D. The President Has Acknowledged The Need To Reinforce The Order In A Draft Memorandum.

In November 2011, the White House circulated a draft memorandum to Capitol Hill that “would [have] require[d] executive branch agencies to make public any letter from a member of Congress seeking special consideration for any project or organization vying for government funding.”⁵⁵ The memorandum suggests that President Obama is aware of the Order’s interpretive problems and understands the need to provide clear guidance for achieving earmark transparency. The draft memorandum states, in part:

Earmarks written into law or otherwise referenced in legislative materials are not the only threat to merit-based and competitive criteria for the use of government funds, however. Too often, federal agencies are pressured informally to show special favor to certain parties or interests in the course of agency decision-making concerning federal projects, programs, contracts, and grants. According to some reports, such pressures have increased over the past year. Like legislated earmarks, these pressures on agency decision-making also undermine the neutral application of merit-based and competitive criteria for the allocation of federal resources.⁵⁶

The White House’s acknowledgment that “federal agencies are pressured informally to show special favor to certain parties or interests in the course of agency decision-making” is exactly the problem requiring further attention from OMB. While the President has not finalized this draft

⁴⁷ DEP’T OF ENERGY, *supra* note 44.

⁴⁸ DEP’T OF JUSTICE, *supra* note 45.

⁴⁹ Letter from Hons. Jeffrey Merkley & Ron Wyden, U.S. S., and Hon. Kurt Schrader, U.S. H.R., to Hon. Eric Holder, Att’y Gen., Dep’t of Justice (Sept. 7, 2010), *available at* <http://goo.gl/WqgPTX>.

⁵⁰ Letter from Hon. Harry Reid, U.S. S., to Mr. Bernard K. Melekian, Dir., Office of Cmty. Oriented Policing Servs., Dep’t of Justice (Apr. 17, 2012), *available at* <http://goo.gl/vpe3fn>.

⁵¹ KAGEN, *supra* note 43.

⁵² NASA, *supra* note 46.

⁵³ Letter from Hon. Chaka Fattah, U.S. H.R., to Gen. Charles F. Bolden, Jr., Adm’r, Nat’l Aeronautics & Space Admin (July 23, 2009), *available at* <http://goo.gl/ENZkAw>; Response Letter from Ms. Mary D. Kerwin, Acting Assistant Adm’x, Office Legislative & Intergovernmental Affairs, Nat’l Aeronautics & Space Admin, to Hon. Chaka Fattah, U.S. H.R. (Sept. 22, 2009), *available at* <http://goo.gl/vvqKx3>.

⁵⁴ *Earmarks*, *supra* note 42.

⁵⁵ Reid Wilson, *Name and Shame? Obama May Go Public with Lawmakers’ Funding Requests*, NAT’L J. (Nov. 5, 2011), <http://goo.gl/xgMXvD>.

⁵⁶ WHITE HOUSE, TEXT OF DRAFT EXECUTIVE MEMORANDUM: PROMOTING MERIT-BASED AND COMPETITIVE ALLOCATION OF FEDERAL FUNDS, *supra* note 4.

memorandum, or otherwise publicly directed OMB to enforce earmark disclosure requirements, he is aware of the phenomenon and knows how to require agencies to disclose the sort of behavior prohibited under the Order.⁵⁷

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.” Here, (1) OMB is an “agency” under the rulemaking provisions of the APA for the purposes of this petition; (2) CoA and Demand Progress are an “interested person,” as described above; and, (3) a guidance memorandum qualifies as 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.⁵⁸ Moreover, OMB has “substantial independent authority in the exercise of specific functions.”⁵⁹ These functions are described in numerous statutes that concern OMB’s responsibility in establishing government-wide financial management policies; providing overall direction to procurement policies; directing grant programs, cooperative agreements, and assistance management systems; and, promoting economy, efficiency, and effectiveness in the federal government.⁶⁰

The issuance of guidance in the form of a memorandum constitutes the issuance of a “rule” because such an OMB memorandum is an OMB “statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.”⁶¹ Here, a guidance memorandum to all executive departments and agencies would provide instructions for applying the Order to current circumstances and assist in reconciling conflicts with current and future legislation.

IV. PROPOSED ACTION

The current earmarking regime shifts some of the allocation of discretionary spending from Congress to Executive Branch agencies, hampering transparency and accountability. These “Executive Branch Earmarks” allow political appointees and others to use federal monies as a reward for political allies, appease powerful interests, and demonstrate the need for OMB to act. Therefore, CoA and Demand Progress petition OMB to issue, at a minimum, a memorandum that:

1. Confirms the Order binds discretionary agency spending;
2. Affirms that the allocation of discretionary funds in response to congressional requests outside of a transparent, merit-based decision-making process is prohibited under the Order’s definition of “earmark” and that agencies are not obligated to fund such requests;

⁵⁷ See OFFICE OF THE PRESS SEC’Y, WHITE HOUSE, MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: ENSURING RESPONSIBLE SPENDING OF RECOVERY ACT FUNDS (2009), available at <http://goo.gl/7KJrPT>; see also Paul Blumenthal, *Agencies Begin to Post Recovery Lobbying Contacts*, SUNLIGHT FOUND. (Apr. 15, 2009), <http://goo.gl/kQFJby>.

⁵⁸ 5 U.S.C. § 551(1).

⁵⁹ *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971).

⁶⁰ 31 U.S.C. §§ 503, 1101(b)(2), 1111; 41 U.S.C. § 1125(a); see 2 C.F.R. §§ 1.300, 1.205; 5 C.F.R. § 1310.1.

⁶¹ 5 U.S.C. § 551(4).

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3. Recognizes that congressional and non-congressional entities and individuals such as Executive Branch officials, state and local politicians, registered lobbyists, and donors can and do exert pressure on discretionary spending decision-making on federal projects, programs, contracts, and grants;
4. Requires executive departments and agencies to make available to the public, in searchable form on the Internet, records of all written and oral communications from any source (*e.g.*, federal elected officials, White House staff, congressional officers and staff, Executive Branch officials, state and local politicians, or lobbyists) that reference: (1) earmarks previously enacted into law, (2) earmarks referenced in congressional reports or materials, or (3) discretionary funds not yet awarded, if the agency is “pressured informally to show special favor to certain parties or interests in the course of agency decision-making;”⁶² and
5. Directs executive departments and agencies to make records of these communications publicly available through their respective websites within 30 days of receiving such communications, and that this practice be memorialized in their Open Government Plans. To the extent independent agencies are encouraged and choose to comply with OMB’s guidance concerning the Order, they should also comply with the publication requirement.

V. CONCLUSION

For the foregoing reasons, OMB should issue, at a minimum, a memorandum providing updated guidance on the Order that forbids executive agencies from funding Executive Branch Earmarks unless they are merit-based and transparent, and requires them to disclose when they are “pressured informally to show special favor to certain parties or interests in the course of agency decision-making.” Further, OMB should consider recommending that agencies issue their own respective policy directives embracing the petitioned guidance and putting Members of Congress and politicizing influencers on notice that requests for Executive Branch Earmarks will be disclosed and subject to public scrutiny.

Respectfully submitted,



DANIEL Z. EPSTEIN
EXECUTIVE DIRECTOR
CAUSE OF ACTION INSTITUTE



DAVID SEGAL
EXECUTIVE DIRECTOR
DEMAND PROGRESS

⁶² See *supra* note 4.

cc:

Ms. Aviva Aron-Dine, Acting Deputy Director

Mr. David Mader, Acting Deputy Director for Management

EXHIBIT

2



1875 Eye Street, NW, Suite 800, Washington, DC 20006

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).

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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 Gavoov, CoA Inst. (Apr. 19, 2016) (on file with CoA Inst.) (granting public interest fee waiver for request FOIA-2012-687).

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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).

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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.

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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.”).

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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,



R. JAMES VALVO, III
COUNSEL & SENIOR POLICY ADVISOR
CAUSE OF ACTION INSTITUTE

c:

Ms. Melanie Ann Pustay
Director
Office of Information Policy
Department of Justice
1425 New York Avenue, NW
Suite 11050
Washington, DC 20530

EXHIBIT

B

James Valvo

From: FN-OMB-FOIA <OMBFOIA@omb.eop.gov>
Sent: Friday, March 10, 2017 5:27 PM
To: James Valvo
Subject: RE: FOIA Request

Good Afternoon:

This email acknowledges receipt of your Freedom of Information Act (FOIA) request to the Office of Management and Budget (OMB) dated and received in OMB's FOIA office on March 10, 2017. Your request has been logged in and is being processed. For your reference, the OMB FOIA number is 2017-097.

Sincerely,
Dionne Hardy

From: James Valvo [mailto:james.valvo@causeofaction.org]
Sent: Friday, March 10, 2017 11:01 AM
To: FN-OMB-FOIA <OMBFOIA@omb.eop.gov>
Subject: FOIA Request

OMB,

Please see FOIA request attached.

James Valvo | Counsel & Senior Policy Advisor | Cause of Action Institute
1875 Eye Street, NW, Suite 800
Washington, DC 20006
james.valvo@causeofaction.org
202-417-3576

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EXHIBIT

C

James Valvo

From: James Valvo
Sent: Tuesday, June 06, 2017 3:53 PM
To: 'FN-OMB-FOIA'
Subject: RE: FOIA Request

I'm following up on this request. Do you have any updates for me?

From: James Valvo
Sent: Monday, May 15, 2017 1:32 PM
To: 'FN-OMB-FOIA' <OMBFOIA@omb.eop.gov>
Subject: RE: FOIA Request

Ms. Hardy,

I am emailing to check on the status of request no. 2017-097. Do you have any updates for me on the processing of this request?

Thank you,

James Valvo | Counsel & Senior Policy Advisor
1875 Eye Street, NW, Suite 800
Washington, DC 20006
james.valvo@causeofaction.org
202-417-3576

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