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. THE WHITE HOUSE OFFICE OF MANAGEMENT AND BUDGET 725 17th Street, NW, Washington, DC 20503, Defendant.	Civil Action No. 17-2310

COMPLAINT
(For Declaratory and Injunctive Relief)

1. Plaintiff Cause of Action Institute ("CoA Institute") brings this action under the Administrative Procedure Act ("APA"), 5 U.S.C. chs. 5, 7, to compel agency action unlawfully withheld and unreasonably delayed based on the failure of the Defendant White House Office of Management and Budget ("OMB") to respond to two petitions for rulemaking.

2. In October 2015, CoA Institute submitted a petition for rulemaking to OMB asking it "to issue a rule ensuring the continuing force and effect of Executive Order 13457, *Protecting American Taxpayers From Government Spending on Wasteful Earmarks*[.]" Ex. 1 at 1. Executive Order 13457 directed OMB to ensure that executive-branch agencies proactively disclose congressional attempts to influence agency discretionary spending decisions.

3. In June 2016, CoA Institute submitted a second petition for rulemaking to OMB asking it "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" and "to update its own FOIA fee regulations, which conflict with statutory definitions." Ex. 2 at 1.

4. CoA Institute has not received a response from OMB on either petition and, informed by documents secured through the FOIA, it does not appear that OMB has done any substantive work on either petition. Instead, it appears that OMB has administratively closed its work on both petitions without providing the statutory notice and justification to CoA Institute.

JURISDICTION AND VENUE

5. Jurisdiction is asserted pursuant to 28 U.S.C. § 1331 (federal question), 5 U.S.C. § 706(1) (APA), and 28 U.S.C. § 2201 (declaratory judgment).

6. Venue is proper pursuant to 28 U.S.C. § 1391(e).

PARTIES

7. CoA Institute is a 501(c)(3) nonprofit 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, including the FOIA, to educate the public about the importance of government transparency and accountability. CoA Institute submitted the two petitions for rulemaking that are the subject of this Complaint to OMB and is an "interested person" under 5 U.S.C. § 553(e).

8. OMB is an agency within the meaning of 5 U.S.C. § 551(1). It received both petitions for rulemaking that are the subject of this Complaint. OMB has statutory authority and responsibility to provide and maintain a uniform schedule of FOIA fees for all agencies subject to the FOIA and guidelines on how to apply that schedule. *See* 5 U.S.C. § 552(a)(4)(A)(i). OMB has substantial authority to coordinate executive-branch agency budget and spending priorities and has been tasked with implementing and overseeing Executive Order 13457.

FACTS

I. 2015 Petition for Rulemaking: Executive Order 13457 and Disclosure of Congressional Earmark Requests

9. In February 2008, prior to the moratorium on congressional earmarks, President George W. Bush issued Executive Order 13457. *See* Exec. Order No. 13457, 73 Fed. Reg. 6417 (published Feb. 1, 2008), Ex. 3.

10. On information and belief, Executive Order 13457 has not been rescinded, nullified, or superseded by any subsequent executive order or statute and remains in effect today.

11. In Executive Order 13457, President Bush stated that to "ensure the proper use of taxpayer funds that are appropriated for Government programs and purposes, it is necessary that the number and cost of earmarks be reduced, that their origin and purposes be transparent, and that they be included in the text of the bills voted upon by the Congress and presented to the President." *Id*. § 1.

12. The order directs federal agencies not to fund 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. *Id*. § 2(b).

13. The order directed OMB to serve as the lead agency to ensure compliance with the order's requirements. *Id*. § 2(b), (c), (d).

14. After concerns that members of Congress were evading the congressional earmark moratorium by going directly to agencies and attempting to influence their discretionary spending decisions, CoA Institute undertook an investigation to determine whether agencies were complying with the Executive Order 13457's requirements. *See* Ex. 1 at 10 (providing summary of investigation).

15. During that investigation, CoA Institute established that OMB understood that Executive Order 13457 applies to both legislative and executive-branch earmarks (*i.e.*, informal congressional efforts to influence agency discretionary spending decisions). *Id.* at 5–6.

16. Concerned that OMB was not requiring agencies to adhere to the order, on October 7, 2015, CoA Institute and Demand Progress[1] filed a petition for rulemaking with OMB presenting the results of the investigation and asking OMB "to issue a rule ensuring the continuing force and effect of Executive Order 13457, *Protecting American Taxpayers From Government Spending on Wasteful Earmarks*[.]" *Id.* at 1 [hereinafter the 2015 Petition].

17. To date, CoA Institute has not received any communication from OMB regarding the 2015 Petition.

II. 2016 Petition for Rulemaking: OMB's Outdated FOIA Fee Guidance and Fee Regulations

18. In 1986, Congress passed, and President Reagan signed into law, the Freedom of Information Reform Act of 1986. *See* Pub. L. 99-570, 100 Stat. 3207 (1986).

19. Section 1803 of that act directed OMB to provide a uniform schedule of FOIA fees for all federal agencies and guidelines for how to apply that schedule. *Id*. § 1803; 5 U.S.C. § 552(a)(4)(A)(i).

20. Entities subject to the FOIA are required to promulgate their own FOIA fee regulations, which "shall conform to the guidelines . . . promulgated" by OMB. 5 U.S.C. § 552(a)(4)(A)(i).

[1] Demand Progress is a nonprofit organization that "work[s] to win progressive policy changes for ordinary people through organizing and grassroots lobbying. . . . [It believes] [a]n open and accountable government is essential for a well-functioning democracy, and smart use of technology is key to making our modern democracy work." Demand Progress, *About*, https://demandprogress.org/about/ (last accessed Oct. 30, 2017).

21. On March 27, 1987, OMB finalized the fee schedule and guidelines. *See* Office of Mgmt. & Budget, Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10012 (Mar. 27, 1987) [hereinafter "OMB Guidelines"], Ex. 4.

22. Although Congress has amended the FOIA several times since 1987, OMB has never updated its guidelines, which now conflict with the FOIA statute and judicial authorities.

23. One important way that the OMB Guidelines conflict with the FOIA statute is in its definition of a "representative of the news media."

24. 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. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

25. Since these categories were added to the statute, the "representative of the news media" fee status has been the most contentious.

26. In its 1987 guidance, OMB issued its interpretation of that term, which was, at that time, not defined in the statute. *See* Ex. 4 at 7.

27. The OMB Guidelines state 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." *Id*.

28. This became known as the "organized and operated" standard, and agencies across the federal government adopted it in their respective FOIA fee regulations.

29. In 2007, Congress amended the FOIA and provided a statutory definition of a "representative of the news media" that differed in meaningful ways from the definition in the OMB Guidelines. *See* Open Government Act of 2007, Pub. L. 110-175, § 3; 121 Stat. 2524 (2007); 5 U.S.C. § 552(a)(4)(A)(ii).

30. Despite Congress providing a statutory definition that does not include the "organized and operated" standard, that standard still appears in dozens of agency FOIA regulations, including numerous cabinet-level and other important agencies. *See* Ex. 2 at 4 nn.26 & 27 (collecting list of agencies that employed outdated "organized and operated" standard in regulatory definitions as of June 2016).

31. OMB itself still employs the anachronistic standard nearly nine years after Congress provided a statutory definition. *See* 5 C.F.R. § 1303.30(j).

32. In 2015, the D.C. Circuit held, *inter alia*, that it was no longer proper for agencies to use the "organized and operated" standard because it conflicts with the FOIA statute. *See Cause of Action v. Fed. Trade Comm'n*, 799 F.3d 1108, 1125 (D.C. Cir. 2015).

33. In April 2016, the FOIA Federal Advisory Committee recommended to David Ferriero, the Archivist of the United States, that he urge OMB to update the guidelines. *See* Letter from James V.M.L. Holzer, Chair, FOIA Fed. Advisory Comm., *et al*., to David S. Ferriero, Archivist of the U.S., Nat'l Archives and Records Admin. (Apr. 19, 2016), *available at* http://bit.ly/2eQFkeR.

34. As of October 2016, Archivist Ferriero had "sent the committee's recommendations . . . to [OMB] [but he was] still waiting for a response." Tr. of Oct. 25, 2016 FOIA Fed. Advisory Comm. Meeting at 2–3, *available at* http://bit.ly/2hv9frq.

35. Although the OMB Guidelines are out of date and conflict with the statute in important ways, agencies continue to rely on the document and use it to resist regulatory comments asking them to update their policies.

36. For example, on April 6, 2016, the Department of State finalized new FOIA regulations, including at update to its fee provisions. *See* Dep't of State, Public Access to Information, 81 Fed. Reg. 19863 (Apr. 6, 2016).

37. In response to a comment[2] by CoA Institute regarding the so-called "middleman standard,"[3] the Department of State replied that OMB "has policymaking responsibility for issuing fee guidance. For this reason, the Department [of State] defer[ed] to OMB with regard to this suggestion." 81 Fed. Reg. at 19863.

38. In addition to the above-mentioned example, the OMB Guidelines are also out of step with other jurisprudential developments, such as which requesters qualify as educational institutions, and new statutory limitations on agencies' ability to charge fees when they fail to comply with statutory time limits.

39. Thus, it is crucial that OMB update its guidelines to bring them in line with the current FOIA statute and relevant jurisprudence.

40. On June 2, 2016, in an effort to encourage OMB to update its guidelines, CoA Institute filed a petition for rulemaking asking OMB "to issue updated guidance to agencies on how to make [FOIA] fee determinations in compliance with binding statutory and judicial authorities." Ex. 2 at 1 [hereinafter the 2016 Petition].

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[2] *See* 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) (on file with CoA Inst.).

[3] The "middleman standard" is an argument agencies use to deny FOIA requesters preferable fee treatment by claiming the requester is a middleman or information broker and is not in the practice of releasing information to the public itself. The D.C. Circuit has found this argument lacking. *See Cause of Action*, 799 F.3d at 1125 ("We also disagree 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[.]").

41. CoA Institute also petitioned "OMB to update its own FOIA fee regulations, which conflict with statutory definitions." *Id.*

42. To date, CoA Institute has not received any communication from OMB regarding the 2016 Petition.

III. FOIA Request to Determine Whether OMB was processing either Petition

43. On March 10, 2017, in an effort to secure records revealing OMB's progress in reviewing both the 2015 Petition and 2016 Petition, CoA Institute sent a FOIA request to OMB seeking "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 . . . 2015 Petition." Ex. 5 at 1.

44. CoA Institute's FOIA request sought the same information regarding the 2016 Petition. *Id*. at 2.

45. OMB did not respond substantively to the FOIA request, but during litigation seeking to compel production, OMB located and disclosed four records evidencing its work on the two petitions. *See* Ex. 6.

46. The first record is a June 13, 2016 email from Melanie Pustay, director of the Department of Justice Office of Information Policy, who CoA Institute had copied on the 2016 Petition, forwarding the petition to Thomas Hitter at OMB. *Id*. at 1.

47. The second record is a June 15, 2016 email from Mr. Hitter to Sharon Mar at OMB asking if she had seen the 2016 Petition, and a brief reply from Ms. Mar noting that she had not yet seen the 2016 Petition. *Id*. at 2.

48. The third record appears to be from a request tracking system that confirms OMB received and logged the 2016 Petition. An entry in the tracking system shows that the "Workflow Status" on the 2016 Petition is "CLOSED." *Id*. at 3–4.

49. The fourth record appears to be from a request tracking system that confirms OMB received and logged the 2015 Petition. The entry in the tracking system shows that the "Workflow Status" on the 2015 Petition is "CLOSED." *Id*. at 5–6.

50. OMB did not identify or disclose any other records revealing that the agency is still processing either petition or intends to respond to CoA Institute in any way.

COUNT 1

Violation of the APA: Failure to Act on Petitions for Rulemaking or Provide a Reasoned Denial

51. CoA Institute repeats all of the above paragraphs.

52. The APA affords interested persons the right to petition an agency for the issuance, amendment, or repeal of a rule. 5 U.S.C. § 553(e).

53. The APA requires agencies to process such petitions "within a reasonable time[.]" 5 U.S.C. § 555(b).

54. The APA requires agencies to provide prompt notice of any denial of a petition made by an interested person and a statement explaining the grounds for the denial. 5 U.S.C. § 555(e).

55. OMB therefore has an obligation to respond to CoA Institute's petitions for rulemaking, either by initiating the appropriate rulemaking or by denying the petitions and providing a reasoned statement explaining the grounds for the denial.

56. The APA authorizes this Court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

57. CoA Institute is an "interested person" within the meaning of the APA. 5 U.S.C. § 553(e).

58. On October 7, 2015, CoA Institute petitioned OMB to "issue a rule ensuring the continuing force and effect of Executive Order 13457, *Protecting American Taxpayers From Government Spending on Wasteful Earmarks*[.]" Ex. 1 at 1.

59. On June 2, 2016, CoA Institute petitioned OMB "to issue updated guidance to agencies on how to make [FOIA] fee determinations in compliance with binding statutory and judicial authorities" and "to update its own FOIA fee regulations, which conflict with statutory definitions." Ex. 2 at 1.

60. OMB has not responded to either petition, either by initiating a rulemaking or by providing a reasoned denial, and has not otherwise communicated with CoA Institute regarding the two petitions.

61. On information and belief, OMB has closed all administrative work on both petitions.

62. OMB's failure to respond to the two petitions, either by initiating a rulemaking or by providing a reasoned statement explaining the grounds for denial, constitutes agency action unlawfully withheld or unreasonably delayed within the meaning of the APA.

RELIEF REQUESTED

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

a. Declare that OMB's failure to respond to CoA Institute's two petitions for rulemaking constitutes agency action unlawfully withheld or unreasonably delayed;

b. To the extent that OMB's actions constitute a denial of the two petitions for rulemaking, declare that OMB has unlawfully failed to provide CoA Institute with notice of and a statement supporting its denial;

c. Order OMB to respond to both petitions for rulemaking, either by initiating the appropriate rulemaking process or by providing a reasoned statement explaining the grounds for denial;

d. Award CoA Institute its costs and reasonable attorney fees incurred in this action, pursuant to 28 U.S.C. § 2412; and

e. Grant such other relief as the Court may deem just and proper.

Date: November 2, 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)
John J. Vecchione (D.C. Bar No. 431764

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
john.vecchione@causeofaction.org

Counsel for Plaintiff

EXHIBIT

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CAUSE of ACTION
Advocates for Government Accountability
A 501(c)(3) Nonprofit Corporation

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.

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

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[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/lLG39h.
[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.

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[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]

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[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

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[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.

> 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]

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[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.

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/jmd/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.

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.

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.

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/X0rHte (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)

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 2010[49] 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 page[52] 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

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[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;

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[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).

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;

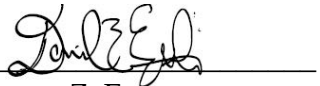
4. Requires executive departments and agencies to make available to the public, in searchable form on the Internet, records of all written and oral communications from any source (*e.g.*, federal elected officials, White House staff, congressional officers and staff, Executive Branch officials, state 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

CAUSE of ACTION INSTITUTE
Advocates for Government Accountability
A 501(c)(3) Nonprofit Corporation

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).

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]

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[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

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[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. Commc'ns 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 agencies[26] 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,

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[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) (Envtl. 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.

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[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,

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

3

Federal Register
Vol. 73, No. 22
Friday, February 1, 2008

Presidential Documents

Title 3—

The President

Executive Order 13457 of January 29, 2008

Protecting American Taxpayers From Government Spending on Wasteful Earmarks

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy*. It is the policy of the Federal Government to be judicious in the expenditure of taxpayer dollars. To ensure the proper use of taxpayer funds that are appropriated for Government programs and purposes, it is necessary that the number and cost of earmarks be reduced, that their origin and purposes be transparent, and that they be included in the text of the bills voted upon by the Congress and presented to the President. For appropriations laws and other legislation enacted after the date of this order, executive agencies should not commit, obligate, or expend funds on the basis of earmarks included in any non-statutory source, including requests in reports of committees of the Congress or other congressional documents, or communications from or on behalf of Members of Congress, or any other non-statutory source, except when required by law or when an agency has itself determined a project, program, activity, grant, or other transaction to have merit under statutory criteria or other merit-based decisionmaking.

Sec. 2. *Duties of Agency Heads*. (a) With respect to all appropriations laws and other legislation enacted after the date of this order, the head of each agency shall take all necessary steps to ensure that:

(i) agency decisions to commit, obligate, or expend funds for any earmark are based on the text of laws, and in particular, are not based on language in any report of a committee of Congress, joint explanatory statement of a committee of conference of the Congress, statement of managers concerning a bill in the Congress, or any other non-statutory statement or indication of views of the Congress, or a House, committee, Member, officer, or staff thereof;

(ii) agency decisions to commit, obligate, or expend funds for any earmark are based on authorized, transparent, statutory criteria and merit-based decision making, in the manner set forth in section II of OMB Memorandum M–07–10, dated February 15, 2007, to the extent consistent with applicable law; and

(iii) no oral or written communications concerning earmarks shall supersede statutory criteria, competitive awards, or merit-based decisionmaking.

(b) An 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, to facilitate consideration in accordance with section 2(a)(ii) above. All written communications from the Congress, or a House, committee, Member, officer, or staff thereof, recommending that funds be committed, obligated, or expended on any earmark shall be made publicly available on the Internet by the receiving agency, not later than 30 days after receipt of such communication, unless otherwise specifically directed by the head of the agency, without delegation, after consultation with the Director of the Office of Management and Budget, to preserve appropriate confidentiality between the executive and legislative branches.

(c) Heads of agencies shall otherwise implement within their respective agencies the policy set forth in section 1 of this order, consistent with such instructions as the Director of the Office of Management and Budget may prescribe.

(d) The head of each agency shall upon request provide to the Director of the Office of Management and Budget information about earmarks and compliance with this order.

Sec. 3. *Definitions.* For purposes of this order:

(a) The term ''agency'' means an executive agency as defined in section 105 of title 5, United States Code, and the United States Postal Service and the Postal Regulatory Commission, but shall exclude the Government Accountability Office; and

(b) the term ''earmark'' means funds provided by the 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.

Sec. 4. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to an agency or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budget, administrative, or legislative proposals.

(b) This order shall be implemented in a manner consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its agencies, instrumentalities, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,

January 29, 2008.

[FR Doc. 08–483

Filed 1–31–08; 9:02 am]

Billing code 3195–01–P

EXHIBIT

4

OFFICE OF MANAGEMENT AND BUDGET

The Freedom of Information Reform Act of 1986; Uniform Freedom of Information Act Fee Schedule and Guidelines

AGENCY: Office of Management and Budget.

ACTION: Final publication of Fee Schedule and Guidelines implementing certain provisions of the Freedom of Information Reform Act of 1986 (Pub. L. 99–570).

SUMMARY: These Guidelines implement certain provisions of the Freedom of Information Reform Act of 1986 which require the Office of Management and Budget (OMB) to promulgate guidelines containing a uniform schedule of FOIA fees applicable to all agencies that are subject to the FOIA.

EFFECTIVE DATE: April 27, 1987. Agencies are required to promulgate regulations pursuant to notice and comment implementing the provisions of this schedule and guidelines by April 25, 1987. They should develop and publish proposed rules as soon as possible after publication of this OMB Fee Schedule and Guidelines. Agencies will have met the statutory deadline if they promulgate final versions of such implementing regulations in the **Federal Register** on or before that date, even though their regulations will not be effective until 30 days after the date of publication.

FOR FURTHER INFORMATION CONTACT: Robert N. Veeder, Office of Management and Budget, Office of Information and Regulatory Affairs, Information Policy Branch, Telephone (202) 395–4814.

SUPPLEMENTARY INFORMATION: The Freedom of Information Reform Act of 1986 (Pub. L. 99–570) amended the Freedom of Information Act (5 U.S.C. 552) by modifying the terms of exemption 7 and by supplying new provisions relating to the charging and waiving of fees. The Reform Act specifically required the Office of Management and Budget to develop and issue a schedule of fees and guidelines, pursuant to notice and comment.

On January 16, 1987, OMB published a proposed fee schedule and guidelines explaining how to implement the schedule. The notice invited public comment especially on the definitions of "commercial," "representative of the news media," "educational institution," "non-commercial scientific institution," "search," and "review."

At the end of the comment period, February 17, 1987, OMB had received 80 comments from 6 identifiable categories of commentator:

- The Congress (1)
- The Federal Agencies (11)
- Publishers of Newsletters (41)
- Public interest groups affiliated with the news media (11)
- Other public interest groups (12)
- Individual members of the public (4)

Although many of the commentators focused exclusively on OMB's proposed definition of "representative of the news media," a significant number provided substantive comments on other aspects of the guidelines and schedule. These comments are discussed in the sectional analysis that follows.

Several commentators urged OMB to publish a revised schedule and guidance for a second round of public comment, while acknowledging the problems presented by the statutory deadline requiring agencies to promulgate their own fee regulations by April 25, 1987. OMB has carefully considered this suggestion, but declines to adopt it. Since agencies' regulations must be published not only pursuant to (and thus following) OMB's issuance and also for notice and comment, a second round of comment would make it impossible for agencies to meet the statutory deadline. It should be noted, however, that OMB intends to follow agencies' implementation of the schedule and guidelines closely and will issue clarifications when needed.

Section-by-Section Analysis

Section 1. Purpose.

Many commentators suggested that OMB's emphasis on collecting FOIA fees was contrary to the intent of the FOIA amendment which they insisted was to make information more widely and cheaply available, and they urged that we emphasize this intention. While it is true that many of the provisions of the FOIA amendments will have this effect, OMB's role in this process is limited to that of providing guidance on charging fees under the FOIA. Moreover, given OMB's budgetary responsibilities, it is quite appropriate for it to require agencies to develop and diligently carry out programs that charge, collect and deposit fees for FOIA services where such activities are clearly permitted by statute. Accordingly, no changes were made to this section.

Section 5. Authorities.

One commentator objected to the citation of statutory authorities other than the Freedom of Information Reform Act: specifically, the Paperwork Reduction Act of 1980 and the Budget and Accounting Act and Budget and Accounting Procedures Act. It was not OMB's intention to enlarge the scope of its authority or responsibilities in developing FOIA fee guidance by citing these Acts. Nevertheless, these Acts do provide a framework for the development and issuance of OMB policies relating to information access and dissemination policies and the collecting and disposition of fees. The Paperwork Reduction Act, for example, makes the Director of OMB responsible for developing and implementing "Federal information policies, principles, standards, and guidelines" (44 U.S.C. 3504(a)). Among these responsibilities are those for issuing guidance on the Privacy Act of 1974. These FOIA fee guidelines rely on that authority to remind agencies that the fee schedule provided herein does not apply to individuals seeking access to their own records which are filed in Privacy Act systems of records. Similarly, the budgetary authorities cited mandate that funds agencies receive for providing FOIA services are to be deposited in the general revenues of the United States rather than individual agency accounts. OMB has made one change to this section and that is to add a reference to the Privacy Act of 1974.

Section 6. Definitions:

Section 6b. "Statute Specifically Providing for Setting the level of fees for particular types of records."

A few commentators addressed this definition and suggested that it was too broad and general and could permit agencies, on a discretionary basis, to "circumvent the general FOIA policy of minimal fees for statutory access to agency records." The commentators urged that we include in the definition that a qualifying statute would have to specifically establish a level of fees and specifically identify a particular type of records for which the fees could be charged.

It was not OMB's intention to have this provision read broadly, since the legislative history relating to this provision is unambiguous in stating that it is not intended to change existing law. We have therefore revised the section to meet the concerns of the commentators. We would note only, however, that a number of commentators misquoted the plain wording of the provision by insisting that a qualifying statute must set a specific level of fees rather than specifically providing for the setting of fees by an agency. Our guidance makes it clear that a qualifying statute must require, not merely permit, an agency to establish fees for particular documents.

The commentators also objected to the first subparagraph in the definition

which refers to statutes that "serve both the general public and private sector organizations by conveniently making available government information . . .," and urged its elimination on the basis that it is "so vague and meaningless that it could probably be applied to any statute allowing disclosure of information." The objectionable paragraph is taken from the legislation establishing the National Technical Information Service (albeit somewhat condensed) and we have left it unchanged, but note that it is to be read in conjunction with the other subparagraphs in providing a generic description of such fee statutes.

Section 6c. "Direct Costs."

Two categories of commentators addressed the issue of charging a percentage of an employee's salary to cover benefits. Non-federal commentators thought that such charges were improper because they represented agency overhead costs rather than direct costs. Federal agency commentators, on the other hand, pointed out that the 16 percent rate the guidance attributed to benefits was inconsistent with OMB's own guidance in Circular No. A–76 which uses a much higher percentage.

As to the first point, the Freedom of Information Act permits agencies to charge only for allowable reasonable direct costs of providing certain FOIA services. Employee salaries are clearly a direct cost of providing FOIA services. The cost to the agency of conducting, for example, a search for a document is the salary that must be paid to the employee performing the search multiplied by the time he or she spends searching.

The elements used to calculate an employee's total salary are the pay grade of the employee and any fringe benefits. Because the agency is permitted to charge only "reasonable" direct costs, the inclusion of some kinds of fringe benefits would be clearly unreasonable. For example, an agency that maintains recreational facilities for employees and their families could not count the cost of operating the facility as a reasonable direct cost for FOIA fee purposes. But, an employer's contribution to a retirement system and to health and life insurance programs are concrete identifiable costs directly associated with the salary of the employee and should be counted as part of the direct costs of providing FOIA services.

As to the second point, the figure cited in OMB Circular No. A–76 was developed for a different purpose and on a different basis. The circular uses a figure, for example, of 27.9 percent as a cost factor in determining agency costs for employee retirement. The figure includes not only the direct 7 percent agency contribution, but other governmental sources of funds for the Civil Service Retirement System. While 27.9 percent may be an appropriate figure for purposes of Circular No. A–76, the "direct reasonable cost" restriction of the Freedom of Information Act precludes using more than the 7 percent agency contribution. OMB arrived at the 16 percent figure in consultation with the Office of Personnel Management, and it is retained in the final version of our guidance.

Some readers noted that the 16 percent figure was rendered 16.1 in Section 7a of the guidelines. That was a typographical error.

Section 6d. "Search."

Several commentators objected to the inclusion of line-by-line searches as an example of search. It is not often that an agency would need to read a document line-by-line to locate records responsive to a request, and agencies should not artificially raise search costs by unnecessarily spending time reading a document for responsive records when it would be cheaper and faster simply to reproduce the entire document. Our intention was to provide guidance on the *scope* of what constitutes FOIA search and we were careful to distinguish line-by-line search from review. We have accordingly modified the section to make it clear that agencies should not conduct line-by-line searches when whole document reproduction would be cheaper and faster.

Section 6f. "Review."

Several Federal agency commentators suggested that we provide greater detail on what constitutes review of documents for which agencies may charge commercial use requesters. We have therefore expanded the explanation.

Section 6g. "Commercial Use Request."

Athough the legislative history is in conflict on the precise meaning of this provision, it seems clear that the Congress intended to distinguish between requesters whose use of the information was for a use that furthered their business interests, as opposed to a use that in some way benefited the public. The amendment shifts some of the burden of paying for the FOIA to the former group and lessens it for the latter.

As opposed to the other fee categories created by the amendment, inclusion in this one is determined not by the identity of the requester, but the use to which he or she will put the information obtained. Because "use" is the exclusive determining criterion, it is possible to envision a commercial enterprise making a request that is not for a commercial use. It is also possible that a non-profit organization could make a request that is for a commercial use. Moreover, because "use," not identity, controls, agencies will have to spend more time than they do now in determining what the requester intends to do with the records sought.

Both the legislative history and the comments on OMB's proposed fee guidance contain suggestions that agencies can look to the identities of requesters and automatically assign them to or exclude them from this category. Indeed, the original OMB proposal instructed agencies that a request, without further explanation, submitted on corporate letterhead could be presumed to be for a commercial use. Commentators urged that we also include a presumption that requests submitted on the letterhead of a non-profit organization be for a non-commercial purpose. We no longer think either presumption should be made automatically since both would be based upon the identity of the requester as opposed to the use to which he or she intended to put the records sought. We have therefore revised the definition to eliminate the example.

Many commentators were troubled by the breadth of OMB's proposed definition of "commercial use," arguing that by defining such a use as one which is "related to" commerce, OMB was providing too tenuous a connection to be meaningful. OMB has revised the definition to attempt to provide a more meaningful linkage. "Commercial use" is therefore defined as a use that "furthers the commercial, trade or profit interests of the requester or person on whose behalf the request is made."

Section 6h. "Educational Institution."

Many commentators were concerned about our definition of "educational institution." One Federal agency, for example, pointed out that it would exclude high schools from this category of FOIA requesters. The legislative history is unhelpful on this point, nowhere defining the term. One commentator recommended the definition found in Webster's *New Twentieth Century Dictionary of the English Language* (2nd. ed. 1968) in which the word "education" means providing instruction or information; an "educational institutional" is an entity organized to provide instruction or information. The problem with this suggestion is that it is not sufficiently discriminating. There are very few

ganizations that do not in some way "provide information" and who would not qualify as "an entity organized to provide information."

Other commentators recommended the definition of educational institution used by the Internal Revenue Service in its regulations implementing Section 501(c)(3) of the Tax Code. Institutions meeting this definition qualify for tax exempt treatment. The commentators pointed out that since the task the FOIA Reform Act set OMB was to develop a uniform fee schedule, looking to an existing definition would be consistent with the statutory intent. After some consideration, OMB agrees that while it would be appropriate to incorporate an existing and well understood definition, neither the Tax Code nor the IRS regulations implementing the Code serve that purpose well. The statute merely provides that "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for . . . educational purposes . . .," qualify for exemption from taxation. The IRS regulations interpreting this somewhat vague statutory provision are themselves too general to be useful to the agencies in determining an institution's eligibility under the FOIA fee schedule. Moreover, OMB does not think it is appropriate to tie eligibility for inclusion in the "educational institution" fee category to an IRS interpretation of the institution's eligibility for tax exempt status.

Rather than using the IRS definition, OMB thinks it more appropriate to look to the Department of Education definition found in 20 U.S.C. 1681(c). Accordingly, the terms of that statutory definition have been adapted for use in a revised definition, but it is intended that they be given their plain meaning in the FOIA context. Moreover, these terms must be applied in conjunction with the FOIA's "scholarly research" requirement. Thus, the definition has been revised to read " 'educational institution' refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education and an institution of vocational education, which operates a program or programs of scholarly research."

As a practical matter, it is unlikely that a preschool or elementary or secondary school would be able to qualify for treatment as an "educational" institution since few preschools, for example, could be said to conduct programs of scholarly research. But, agencies should be prepared to evaluate requests on an individual basis when requesters can demonstrate that the request is from an institution that is within the category, that the institution has a program of scholarly research, and that the documents sought are in furtherance of the institution's program of scholarly research and not for a commercial use.

Agencies should ensure that it is apparent from the nature of the request that it serves a scholarly research goal of the institution, rather than an individual goal. Thus, for example, a request from a professor of geology at a State university for records relating to soil erosion, written on letterhead of the Department of Geology, could be presumed to be from an educational institution. A request from the same person for drug information from the Food and Drug Administration in furtherance of a murder mystery he is writing would not be presumed to be an institutional request, regardless of whether it was written on institutional stationary. Indeed, such a request could reasonably be construed to be a request that is for a commercial use.

The institutional versus individual test would apply to student requests as well. A student who makes a request in furtherance of the completion of a course of instruction is carrying out an individual research goal and the request would not qualify, although the student in this case would certainly have the opportunity to apply to the agency for a reduction or waiver of fees.

One commentator suggested that OMB should read the phrase "scholarly or scientific research" conjunctively in association with the term "educational institution" so that a request from an educational institution in furtherance of either scholarly or scientific research would qualify. OMB rejected this suggestion; the statute and the legislative history recite the formula "educational or scientific institution/scholarly or scientific research," and it seems clear that the phrase was meant to be read disjunctively so that scholarly applies to educational institution and scientific applies to non-commercial scientific institution.

Section 6i. "Non-Commercial Scientific Institution."

A number of Federal agencies commented on this definition. Several suggested that qualifying institutions be limited to those conducting research in the natural sciences. OMB rejected this suggestion; there is no support in either the statute, the legislative history, or the plain meaning of the term to permit such a narrow reading.

Other agency commentators suggested that the word "non-commercial" be more fully defined so that an institution whose purpose was to further a specific product or industry would be excluded from this category. OMB has accepted this suggestion and modified the definition accordingly.

OMB has also revised the definition to ensure consistency with the definition of "commercial" in Section 6g.

Section 6j. "Representative of the News Media."

This definition drew the most comments of any section. Commentators generally fell into two classes. The first consisted of newsletter publishers and their representatives who were concerned that the guidelines could be read to exclude them from qualifying as "representatives of the news media." The second class had broader concerns about the definition, and were especially concerned about its perceived narrowness.

Many of the newsletter commentators pointed to their accreditation to the House and Senate press galleries as evidence of their membership in the news media category. It was not OMB's intention to exclude the publishers of newsletters from this category. The examples provided in the definition were not intended to be all-inclusive. Certainly newsletters, if they meet all of the other criteria, would qualify as "representatives of the news media" for purposes of this definition. To avoid implying any such limitation, OMB has replaced the references to "newspaper" and "magazine" in the definition with the word "periodical."

The other class of commentators criticized the narrowness of OMB's proposed definition, pointing to the words of Senator Leahy in the legislative history that "[i]t is critical that the phrase 'representative of the news media' be broadly interpreted if the Act is to work as expected." Cong. Rec. S.14298 (daily ed. September 30, 1986). They asserted that including the words "established," "general circulation," "working for," and "regularly," all served to unnecessarily limit what they perceived to be the breadth of the definition's coverage.

OMB has carefully considered these comments. Our intention in this section was to provide the agencies and the public with a workable definition. We used the word "established" not to limit eligibility only to those organizations in being at the time of the issuance of the guidance, but simply to indicate that a qualifying organization must be able to show some evidence of its identity

beyond the mere assertion that it is a member of the news media. Press accreditation, guild membership, a history of continuing publication, business registration, Federal Communications Commission licensing, for example, would suffice. The word "regularly" which the legislative history shows Senator Leahy using in precisely this context, was meant to indicate that a qualifying organization would have to show that it was a continuing venture that was publishing or broadcasting news to the public. Thus, a newly established newspaper would be able to do so by demonstrating that it had held itself out for subscription and had in fact enrolled subscribers.

The phrase "general circulation" was misinterpreted by many commentators: members of the public and Federal agencies as well. OMB intended the phrase to refer to a newsworthy product that was broadcast or published in a manner that made it *available* to the general public, not that it had to have an exclusively general content or that it had to be circulated exclusively to a general audience.

In any case, OMB has sought to address these concerns by redrafting the section so that "news media" is defined generically as "an entity that is organized and operated to publish or broadcast news to the public." *The American Heritage Dictionary* (Second College Edition, 1982) defines the word "news" as ". . . Recent events and happenings, esp. those that are unusual or notable. . . . Information about recent events of general interest, esp. as reported by newspapers, periodicals, radio or television . . . A presentation or broadcast of such information: newscast. . . . Newsworthy material."

Thus, "news media" is further limited to purveyors of information that is current or would be of current interest. The Congress could easily have drafted the section to read "representative of the media" rather than "news media," but it did not; therefore, OMB thinks it is reasonable to give some weight to the term "news" when constructing a definition. The examples given cite the traditional models—radio and television stations as well as publishers of periodicals that disseminate "news,"—but also look to evolving non-traditional distributors, such as videotext. While these examples are not meant to be all-inclusive, they *are* meant to be limiting, and to give meaning to the phrase "publish or broadcast news" so that it implies something more than merely "make information available." The news media perform an active rather than passive role in dissemination. Thus, they can be distinguished, for example, from an entity such as a library which stores information and makes it available on demand.

The provision for freelancer eligibility, especially the term "solid basis for expecting publication" also drew comments. OMB's aim was to incorporate legitimate freelance representatives of the news media into the categorical definition without opening the door to anyone merely calling himself or herself a freelance journalist. Many commentators noted that while it was quite reasonable to require freelancers to show some evidence that they could expect their work to be published before granting them access to this category of requester, they were troubled by the use of the phrase "solid basis." OMB has attempted to address these concerns by adding to this section examples amplifying what solid basis means, e.g., a publication contract would be the clearest basis, but freelancer's past publication history could also be considered. In any case, freelancers who do not qualify for inclusion in the "representatives of the news media" category because they cannot demonstrate a solid basis for expecting publication could be eligible to seek a reduction or waiver of fees if they meet the statutory waiver criteria.

Section 7. "Fees to be Charged."

A number of commentators expressed frustration that OMB was not issuing a unitary schedule of fees which would establish one government-wide charge for each FOIA service performed. OMB is sympathetic to this position, but does not believe that the FOIA Reform Act gives it the authority to do so. Because the FOIA Reform Act requires each agency's fees to be based upon its direct reasonable operating costs of providing FOIA services, OMB is precluded from establishing a government-wide fee schedule.

Commentators urged OMB to emphasize in this section that the effect of the FOIA amendment was to minimize costs by creating categorical limitations on what fees could be charged. They asserted that OMB's direction to the agencies to "charge fees that recoup the full direct costs they incur . . .," was at the least misleading, given the statutory limitations. OMB agrees and has revised the sentence to read "full allowable direct costs" to make it clear that agencies must look to the categorical limitations in the statute and charge fees accordingly.

Commentators pointed out that OMB's encouragement of agencies to use private sector services to locate, reproduce and disseminate records in response to FOIA requests, while consistent with the policy articulated in OMB Circular No. A–130, needed some limitations. Commentator specifically wanted OMB to make it clear that the ultimate costs for requesters serviced by private sector contractors should be no different than if serviced by an agency. They also suggested that OMB clarify that there are some services that agencies may not contract out: e.g., reviewing records for the application of an exemption or the waiving of a fee. OMB has accordingly redrafted the section to accommodate these concerns.

Section 7b. "Computer Searches for Records."

At the suggestion of a Federal agency commentator, OMB has added a provision permitting agencies to establish agency-wide average computer processing unit operating costs and operator/programmer salaries for purposes of determining fees for computer searches where they can reasonably do so because these costs are relatively uniform across the agency. This provision is meant to encourage agencies to minimize FOIA costs by reducing the administrative steps necessary to establish a fee for a particular search. It is not meant to allow agencies to raise the prices of such searches by including in the average expensive but seldom-used equipment.

OMB has also revised this section to make it clear that agencies may only charge search costs for that portion of the operation of the central processing unit (CPU) and operator salary that is directly attributable to the FOIA search.

Section 7c. "Review of Records."

Several Federal agency commentators requested additional clarification of when review costs could be charged, i.e., at what point in the processing of a request were review charges permitted and could charges be made for subsequent review of materials. OMB has revised this section to address these concerns and clarify that charges may only be assessed the first time an agency reviews a record for the application of an exemption and not at the administrative appeal level of an exemption already applied.

At the suggestion of a Federal agency commentator, OMB has added a provision permitting agencies to establish an agency-wide average cost for review when review is performed by a single class of employee. The intent is to minimize agency administrative costs.

Section 7d. "Duplication of Records."

One commentator objected to the salary of the employee operating the duplicating machinery being included as a reasonable direct cost of duplication. Since the operation of a duplicating machine is necessary to produce a copy of a document, OMB considers this a reasonable direct cost and has not changed the section.

Section 7e. "Other Charges."

Several commentators objected to the inclusion of fees for normal packaging and mailing of records in this section, arguing that mailing records was a reasonable interpretation of the FOIA requirement that agencies "make . . . records promptly available . . ." They argued that an agency requiring a requester to come from Alaska to Washington, D.C. to obtain records responsible to his request could hardly be said to be making records available. Upon reflection, OMB concurs and has deleted charges for ordinary packaging and mailing as examples of allowable other charges.

Section 7f. "Restrictions on Assessing Fees."

OMB has revised this section to provide greater detail on how agencies should develop costs relating to the 100 free pages of reproduction and two hours of free search time the FOIA Reform Act permits certain classes of requesters. The revision also reminds agencies of the consequences of these restrictions for the use of contractors to perform search and duplication services: specifically, that contracts must incorporate free search and reproduction services when appropriate.

OMB also added an explanation of how agencies should determine what constitutes two hours of free computer search time. Since most computer searches are accomplished in seconds and fractions of seconds, it would be unreasonable to interpret the statutory free search time to mean that an individual would be entitled to require an agency to operate a computer for two hours. The cost and the disruption of an agency's normal ADP activities would be prohibitively expensive. OMB has therefore developed a formula based upon the concept of manual search, i.e., search done by an agency employee who examines records to find those that are responsive to a request. The employee performing the computer search who is most nearly like the clerical searcher is the operator. The guidance, therefore, tells agencies that a requester is entitled to two hours of operator salary translated into computer search costs (computer search consists of operator salary plus CPU operating time cost for the duration of the search).

Section 7g. "Waiving or Reducing Fees."

OMB has dropped this section. 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. In developing a fee schedule and guidance on its implementation that the statute clearly contemplates, it was necessary for OMB to carefully define the categories or classes of requester and explain to the agencies what fees to charge them. Thus, for example, OMB discussed the exclusion of search fees for educational/scientific institutional requesters and representatives of the news media. This discussion was about the establishment and limitation of fees for a particular category of requester. It was not about waiving search fees since the statute gives agencies no discretion about what search fees to charge this class of requester. OMB considers the development of such definitions as required by the statute and thus squarely within its proper responsibilities.

Section 8. "Fees to be Charged."

OMB has added the phrase "requesters must reasonably describe the records sought" to all categories of requesters to accommodate some commentators' concerns that OMB was creating a new requirement for a particular class of requester by applying this requirement to educational/scientific institutional requesters and representatives of the news media alone.

Section 8d. "All Other Requesters."

OMB has revised this section to explain that the requests of record subjects asking for copies of records about themselves filed in agencies' systems of records must be processed under the Privacy Act's fee schedule.

Section 8a. "Commercial Use Requesters."

OMB has removed the reference to fee waivers, based upon the discussion in Section 7g. above.

Section 9a. "Charging Interest."

OMB has revised this section to specify that interest will accrue from the date the bill was mailed if fees are not paid by the 30th day following the billing date. To ensure that agencies do not bill interest because of defects in their own administrative procedures, the section has been revised to provide that agencies should ensure their accounting procedures are adequate to properly credit a requester who has remitted the fee within the time period. To guard against inadequate processing procedures, the guidelines require that receipt of a fee by the agency, whether processed or not, will stay the accrual of interest.

Section 9b. "Charges for Unsuccessful Search."

Many requesters urged OMB to delete this section. Some argued that it could be used by an agency to surprise and unwary requester with an unexpected and potentially ruinous bill. OMB thinks that an agency should be entitled to charge for unsuccessful search, but agrees that it should be done with the knowledge and consent of the requester. Thus the section has been revised to require agencies to notify requesters who have not agreed to pay fees as high as those anticipated when charges are likely to exceed $25.

Section 9c. "Aggregating Requests."

Requesters generally agreed that agencies should not permit a requester to make multiple requests merely to avoid paying fees. There was disagreement about what standard to use in such cases and many requesters urged that OMB adopt a 30-day limit.

The 30-day limit, while providing certainty for both the requester and the agency, does not achieve the goal of allowing an agency to identify requesters who are attempting to circumvent the fee provisions of the statute and charge accordingly. Therefore, OMB has declined to change its original proposal, a "reasonable belief" standard, but has provided examples to help agencies understand what "reasonable" means in this context. Thus, agencies could presume that multiple requests for documents that could reasonably have been the subject of a single request and which occur within a 30-day period are made to avoid paying fees. Agencies may make that presumption for requests occurring over a longer period, but should have a solid basis for doing so.

Commentators also suggested that agencies should not be able to aggregate requests from a single requester for records on unrelated subjects nor from different requesters for records about the same subject. As to the first, OMB

agrees and has revised this section to reflect this concern. As to the second, OMB does not agree that agencies should in no circumstances be able to aggregate requests from multiple users. However, such aggregation should occur rarely and only when the agency has solid evidence that multiple requesters are colluding to avoid paying FOIA fees. OMB has included cautions to this effect in the section.

Section 9d. "Advance Payments."

The Amendments clearly permit agencies to charge and collect advance payments in two specific circumstances: (1) When fees will exceed $250; or when a requester has previously failed to pay fees in a timely fashion. Non-federal commentators generally argued that this provision should be read as a limitation rather than an authorization: i.e., "agencies may only charge advance fees when. . . ." OMB has accordingly revised this section to incorporate the fee limitation concept and also to ensure that agencies use this provision fairly. Thus, when agencies determine the estimated fee is likely to exceed $250, they should seek satisfactory assurances of payment if the requester has a record of prompt payment. If the requester has no history of payment, they may ask for an advance payment of an amount up to the estimated cost. For requesters who have failed to pay in a timely fashion in the past, however, or who are currently delinquent, agencies are encouraged to require full prepayment of the estimated amount.

Uniform Freedom of Information Act Fee Schedule and Guidelines

To the Heads of Executive Departments and Establishments

1. *Purpose*—This Fee Schedule and Guidelines implement certain provisions of the Freedom of Information Reform Act of 1986 (Pub. L. 99-570) which require the Office of Management and Budget to promulgate guidelines containing a uniform schedule of FOIA fees applicable to all agencies that are subject to the FOIA.

Data from agencies' annual FOIA reports to the Congress as well as studies by the General Accounting Office and others indicate that inconsistent application of the Act's fee provisions has sometimes resulted in inequitable treatment of users of the Act as well as substantial loss of revenues to the Treasury. While the legislative history of the 1974 amendments to the Freedom of Information Act shows that the Congress did not intend that fees be erected as barriers to citizen access, it is quite clear that the Congress did intend that agencies recover of their costs. The 1986 Amendments to the Act clarify that congressional intention further by creating specific categories of requesters and prescribing fees for each category. Therefore, these Guidelines provide a schedule of fees and related administrative procedures in order to establish a consistent government-wide framework for assessing and collecting FOIA fees.

2. *Scope*—This Fee Schedule and Guidelines apply to all agencies subject to the Freedom of Information Act (see 5 U.S.C. 552(f)).

3. *Effective Date*—This Fee Schedule and Guidelines are effective April 27, 1987.

4. *Inquires*—Inquiries should be directed to Robert N. Veeder at the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503. Telephone: (202) 395-4814.

5. *Authorities*—The Freedom of Information Act (5 U.S.C. 552), as amended; the Paperwork Reduction Act (44 U.S.C. 35); the Privacy Act of 1974 (5 U.S.C. 552a); the Budget and Accounting Act of 1921 (31 U.S.C. 1 et. seq.); the Budget and Accounting Procedures Act (31 U.S.C. 67 et seq.).

6. *Definitions*—For the purpose of these Guidelines:

a. All the terms defined in the Freedom of Information Act apply.

b. A "statute specifically providing for setting the level of fees for particular types of records" (5 U.S.C. 552(a)(4)(A)(vi)) means any statute that specifically requires a government agency, such as the Government Printing Office (GPO) or the National Technical Information Service (NTIS), to set the level of fees for particular types of records, in order to:

(1) Serve both the general public and private sector organizations by conveniently making available government information;

(2) Ensure that groups and individuals pay the cost of publications and other services which are for their special use so that these costs are not borne by the general taxpaying public;

(3) Operate an information dissemination activity on a self-sustaining basis to the maximum extent possible; or

(4) Return revenue to the Treasury for defraying, wholly or in part, appropriated funds used to pay the cost of disseminating government information.

Statutes, such as the User Fee Statute, which only provide a general discussion of fees without explicitly requiring that an agency set and collect fees for particular documents do not supersede the Freedom of Information Act under section (a)(4)(A)(vi) of that statute.

c. The term "direct costs" means those expenditures which an agency actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

d. The term "search" includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. Agencies should ensure that searching for material is done in the most efficient and least expensive manner so as to minimize costs for both the agency and the requester. For example, agencies should not engage in line-by-line search when merely duplicating an entire document would prove the less expensive and quicker method of complying with a request. "Search" should be distinguished, moreover, from "review" of material in order to determine whether the material is exempt from disclosure (see subparagraph 6f below). Searches may be done manually or by computer using existing programming.

e. The term "duplication" refers to the process of making a copy of a document necessary to respond to an FOIA request. Such copies can take the form of paper copy, microform, audio-visual materials, or machine readable documentation (e.g., magnetic tape or disk), among others. The copy provided must be in a form that is reasonably usable by requesters.

f. The term "review" refers to the process of examining documents located in response to a request that is for a commercial use (see subparagraph 6g below) to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, e.g., doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

g. The term "'commercial use' request" refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of

the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, agencies must determine the use to which a requester will put the documents requested. Moreover, where an agency has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, agencies should seek additional clarification before assigning the request to a specific category.

h. The term "educational institution" refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

i. The term "non-commercial scientific institution" refers to an institution that is not operated on a "commercial" basis as that term is referenced in 6g above, and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.

j. The term "representative of the news media" refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of "freelance" journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but agencies may also look to the past publication record of a requester in making this determination.

7. *Fees To Be Charged—General.* Agencies should charge fees that recoup the full allowable direct costs they incur. Moreover, they shall use the most efficient and least costly methods to comply with requests for documents made under the FOIA.

Agencies are encouraged to contract with private sector services to locate, reproduce and disseminate records in response to FOIA requests when that is the most efficient and least costly method. When doing so, however, agencies should ensure that the ultimate cost to the requester is no greater than it would be if the agency itself had performed these tasks. In no case may an agency contract out responsibilities which the FOIA provides that it alone may discharge, such as determining the applicability of an exemption, or determining whether to waive or reduce fees.

In addition, agencies should ensure that when documents that would be responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs (see definition in paragraph 6b above), such as the NTIS, they inform requesters of the steps necessary to obtain records from those sources.

a. Manual Searches for Records—Whenever feasible, agencies should charge at the salary rate(s) (i.e. basic pay plus 16 percent) of the employee(s) making the search. However, where a homogeneous class of personnel is used exclusively (e.g., all administrative/clerical, or all professional/executive), agencies may establish an average rate for the range of grades typically involved.

b. Computer Searches for Records—Agencies should charge at the actual direct cost of providing the service. This will include the cost of operating the central processing unit (CPU) for that portion of operating time that is directly attributable to searching for records responsive to a FOIA request and operator/programmer salary apportionable to the search. When agencies can establish a reasonable agency-wide average rate for CPU operating costs and operator/programmer salaries involved in FOIA searches, they may do so and charge accordingly.

c. Review of Records—Only requesters who are seeking documents for commercial use may be charged for time agencies spend reviewing records to determine whether they are exempt from mandatory disclosure. It should be noted that charges may be assessed only for the *initial* review; i.e., the review undertaken the first time an agency analyzes the applicability of a specific exemption to a particular record or portion of a record. Agencies may not charge for review at the administrative appeal level of an exemption already applied. However, records or portions of records withheld in full under an exemption which is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review would be properly assessable. Where a single class of reviewers is typically involved in the review process, agencies may establish a reasonable agency-wide average and charge accordingly.

d. Duplication of Records—Agencies shall establish an average agency-wide, per-page charge for paper copy reproduction of documents. This charge shall represent the reasonable direct costs of making such copies, taking into account the salary of the operators as well as the cost of the reproduction machinery. For copies prepared by computer, such as tapes or printouts, agencies shall charge the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction or duplication, agencies should charge the actual direct costs of producing the document(s). In practice, if the agency estimates that duplication charges are likely to exceed $25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with agency personnel with the object of reformulating the request to meet his or her needs at a lower cost.

e. Other Charges—It should be noted that complying with requests for special services such as those listed below is entirely at the discretion of the agency. Neither the FOIA nor its fee structure cover these kinds of services. Agencies should recover the full costs of providing services such as those enumerated below to the extent that they elect to provide them:

(1) Certifying that records are true copies;

(2) Sending records by special methods such as express mail, etc.

f. Restrictions on Assessing Fees—With the exception of requesters seeking documents for a commercial use, Section (4)(A)(iv) of the Freedom of Information Act, as amended, requires agencies to provide the first 100 pages of duplication and the first two hours of search time without charge. Moreover, this section prohibits agencies from charging fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself. These

provisions work together, so that except for commercial use requesters, agencies would not begin to assess fees until after they had provided the free search and reproduction. For example, for a request that involved two hours and ten minutes of search time and resulted in 105 pages of documents, an agency would determine the cost of only 10 minutes of search time and only five pages of reproduction. If this cost was equal to or less than the cost to the agency of billing the requester and processing the fee collected, no charges would result.

The elements to be considered in determining the "cost of collecting a fee," are the administrative costs to the agency of receiving and recording a requester's remittance, and processing the fee for deposit in the Treasury Department's special account (or the agency's account if the agency is permitted to retain the fee). The per-transaction cost to the Treasury to handle such remittances is negligible and should not be considered in the agency's determination.

For purposes of these restrictions on assessment of fees, the word "pages" refers to paper copies of a standard agency size which will normally be "8½ x 11" or "11 by 14." Thus, requesters would not be entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or 100 pages of computer printout, however, might meet the terms of the restriction.

Similarly, the term "search time" in this context has as its basis, *manual search.* To apply this term to searches made by computer, agencies should determine the hourly cost of operating the central processing unit and the operator's hourly salary plus 16 percent. When the cost of the search (including the operator time and the cost of operating the computer to process a request) equals the equivalent dollar amount of two hours of the salary of the person performing the search, i.e., the operator, agencies should begin assessing charges for computer search.

8. *Fees to be Charged—Categories of Requesters.* There are four categories of FOIA requesters: commercial use requesters; educational and non-commercial scientific institutions; representatives of the news media; and all other requesters. The Act prescribes specific levels of fees for each of these categories:

a. Commercial use requesters—When agencies receive a request for documents for commercial use, they should assess charges which recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Requesters must reasonably describe the records sought. Commercial use requesters are not entitled to two hours of free search time nor 100 free pages of reproduction of documents. Agencies are reminded that they may recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records (see section 9b below).

b. Educational and Non-commercial Scientific Institution Requesters—Agencies shall provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that the request is being made as authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research. Requesters must reasonably describe the records sought.

c. Requesters who are Representatives of the News Media—Agencies shall provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in Section 6j above, and his or her request must not be made for a commercial use. In reference to this class of requester, a request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use. Thus, for example, a document request to the Department of Justice by a newspaper for records relating to the investigation of a defendant in a current criminal trial of public interest could be presumed to be request from an entity eligible for inclusion in this category and entitled to records for the cost of reproduction alone. Requesters must reasonably describe the records sought.

d. All Other Requesters—Agencies shall charge requesters who do not fit into any of the categories above fees which recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished without charge. Moreover, requests from record subjects for records about themselves filed in agencies' systems of records will continue to be treated under the fee provisions of the Privacy Act of 1974 which permit fees only for reproduction. Requesters must reasonably describe the records sought.

9. *Administrative Actions to Improve Assessment and Collection of Fees*—Agencies shall ensure that procedures for assessing and collecting fees are applied consistently and uniformly by all components. To do so, agencies should amend their agency-wide FOIA regulations to conform to the provisions of this Fee Schedule and Guidelines, especially including the following elements:

a. *Charging Interest—Notice and Rate.* Agencies may begin assessing interest charges on an unpaid bill starting on the 31st day following the day on which the billing was sent. Agencies should ensure that their accounting procedures are adequate to properly credit a requester who has remitted the full amount within the time period. The fact that the fee has been received by the agency, even if not processed, will suffice to stay the accrual of interest. Interest will be at the rate prescribed in Section 3717 of Title 31 U.S.C. and will accrue from the date of the billing.

b. *Charges for Unsuccessful Search.* Agencies should give notice in their regulations that they may assess charges for time spent searching, even if the agency fails to locate the records or if records located are determined to be exempt from disclosure. In practice, if the agency estimates that search charges are likely to exceed $25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer the requester the opportunity to confer with agency personnel with the object of reformulating the request to meet his or her needs at a lower cost.

c. *Aggregating Requests.* Except for requests that are for a commerical use, an agency may not charge for the first two hours of search time or for the first 100 pages of reproduction. However, a requester may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When an agency reasonably believes that a requester or, on rare occasions, a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the agency may aggregate any such requests and charge accordingly. One element to be considered in determining whether a belief would be reasonable is the time period in which the requests have occurred. For example, it would be

reasonable to presume that multiple requests of this type made within a 30-day period had been made to avoid fees. For requests made over a longer period, however, such a presumption becomes harder to sustain and agencies should have a solid basis for determining that aggregation is warranted in such cases. Agencies are cautioned that before aggregating requests from more than one requester, they must have a concrete basis on which to conclude that the requesters are acting in concert and are acting specifically to avoid payment of fees. In no case may agencies aggregate multiple requests on unrelated subjects from one requester.

d. *Advonce Payments.* Agencies may not require a requester to make an advance payment, i.e., payment before work is commenced or continued on a request, unless:

(1) The agency estimates or determines that allowable charges that a requester may be required to pay are likely to exceed $250. Then, the agency should notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees, or require an advance payment of an amount up the full estimated charges in the case of requesters with no history of payment; or

(2) A requester has previously failed to pay a fee charged in a timely fashion (i.e., within 30 days of the date of the billing), the agency may require the requester to pay the full amount owed plus any applicable interest as provided above or demonstrate that he has, in fact, paid the fee, and to make an advance payment of the full amount of the estimated fee before the agency begins to process a new request or a pending request from that requester.

When an agency acts under subparagraphs (1) or (2) above, the administrative time limits prescribed in subsection (a)(6) of the FOIA (i.e., 10 working days from receipt of initial requests and 20 working days from receipt of appeals from initial denial, plus permissible extensions of these time limits) will begin only after the agency has received fee payments described above.

e. *Effect of the Debt Collection Act of 1982* (Pub. L. 97–365). Agencies' FOIA regulations should contain procedures for using the authorities of the Debt Collection Act, including disclosure to consumer reporting agencies and use of collection agencies, where appropriate, to encourage repayment.

10. *Agencies' Required Implementing Actions*—Section 1804(b)(1) of the Freedom of Information Reform Act requires agencies to promulgate final regulations in conformance with OMB's schedule and guidelines no later than the 180th day following enactment: April 25, 1987.

James C. Miller III,

Director.

[FR Doc. 87–6951 Filed 3–26–87; 8:45 am]

BILLING CODE 3110–01–M

EXHIBIT

5

CAUSE of ACTION INSTITUTE
Advocates for Government Accountability
A 501(c)(3) Nonprofit Corporation

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*, emails[6] 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

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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/2apTwqP; 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

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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

6

Hitter, Thomas

From: Hitter, Thomas
Sent: Monday, June 13, 2016 7:43 AM
To: Pustay, Melanie A (OIP)
Subject: RE: Petition for Rulemaking: OMB FOIA Fee Guidance

Thanks. I wasn't aware that this came in.

-----Original Message-----
From: Pustay, Melanie A (OIP) [mailto:Melanie.A.Pustay@usdoj.gov]
Sent: Monday, June 13, 2016 7:32 AM
To: Hitter, Thomas <Thomas_E._Hitter@omb.eop.gov>
Subject: Fwd: Petition for Rulemaking: OMB FOIA Fee Guidance

FYI

Begin forwarded message:

From: James Valvo <james.valvo@causeofaction.org<mailto:james.valvo@causeofaction.org>>
Date: June 9, 2016 at 2:28:13 PM EDT
To: "melanie.a.pustay@usdoj.gov<mailto:melanie.a.pustay@usdoj.gov>"
<melanie.a.pustay@usdoj.gov<mailto:melanie.a.pustay@usdoj.gov>>
Subject: Petition for Rulemaking: OMB FOIA Fee Guidance

Ms. Pustay,

Please find attached a copy of a petition for rulemaking that Cause of Action Institute submitted to the White House Office of Management Budget asking it to update its FOIA fee guidance and its own FOIA fee regulations. We attempted to copy your office on this petition via certified mail but, for some reason, it came back undeliverable.

Best,

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

Click here<>http://eepurl.com/fFmYo<> to subscribe to our alerts!
<>http://causeofaction.org/<>

Hitter, Thomas

From: Mar, Sharon
Sent: Thursday, June 16, 2016 9:42 AM
To: Hitter, Thomas
Cc: Hunt, Alex
Subject: RE: Petition for Rulemaking: OMB FOIA Fee Guidance

Hey Tom,

Sorry for the delay in responding---no I have not seen this.

(b) (5) [redacted]

Sharon Mar
Policy Analyst
OMB|Office of Information and Regulatory Affairs
Tel: 202.395.6466|Fax: 202.395.5167|smar@omb.eop.gov

-----Original Message-----
From: Hitter, Thomas
Sent: Wednesday, June 15, 2016 8:36 AM
To: Mar, Sharon <Sharon_Mar@omb.eop.gov>
Subject: Petition for Rulemaking: OMB FOIA Fee Guidance

Hi Sharon - Hope you're doing well. Have you seen the attached?

Controlled and Uncontrolled Request Tracking - 143001 - R. James Valvo III*
This workflow is CLOSED and is assigned to Arnette White

Workflow Status:	CLOSED	**Created**: 6/8/2016	**Priority:** 9
Created By:	Arnette White	**Due Date:**	

Primary Person:
R. James Valvo III*
Counsel & Senior Policy Advisor
Cause of Action Institute
1875 Eye Street, NW Suite 800
Washington, DC 20006

People (associated with this workflow):
R. James Valvo III
Counsel & Senior Policy Advisor
Cause of Action Institute
1875 Eye Street, NW Suite 800
Washington, DC 20006

Agency Contacts:

Workflow Codes:

Workflow User Defined Fields:

Document Number:	74694
	CONTROLLED
Date:	06/02/2016
Sender Type:	PUBLIC
Correspondence Type:	LETTER
House:	
Subject:	CoA Institute FOIA Updated Guidance Request
Cross Reference:	
Comments:	
Lead to:	General Counsel
Response due to PAD by:	
Coordinate With:	
Information Copy:	
Signed By:	Appropriate Action
Signed Date:	
Short Summary	
Handling:	Regular
Handling Instructions:	

Comments:

Workflow Notes:

Step Notes:

Step #1 - Request Received

Arnette White	6/8/2016 4:37 PM	This Step was Completed on 6/8/2016 4:37 PM by Arnette White and Queued to User(s): Arnette White.
Arnette White	6/8/2016 4:37 PM	Acquired Ownership.
Arnette White	6/8/2016 4:36 PM	Reassigned Ownership to Carla Stone, Bess Weaver.
Arnette White	6/8/2016 4:36 PM	Attached File -
Arnette White	6/8/2016 4:36 PM	Field 'Lead to' changed from 'Nothing' to 'General Counsel'.
Arnette White	6/8/2016 4:36 PM	Field 'Signed By' changed from 'Nothing' to 'Appropriate

Action'.

Arnette White	6/8/2016 4:36 PM	Field 'Date' changed from 'Nothing' to '06/02/2016'.
Arnette White	6/8/2016 4:36 PM	Field 'Sender Type' changed from 'Nothing' to 'PUBLIC'.
Arnette White	6/8/2016 4:36 PM	Field 'Correspondence Type' changed from 'Nothing' to 'LETTER'.
Arnette White	6/8/2016 4:36 PM	Field 'Subject' changed from 'Nothing' to 'CoA Institute FOIA Updated Guidance Request'.
Arnette White	6/8/2016 4:33 PM	Field 'Document Number' changed from 'Nothing' to '74694'.
Step #2 - Close Out		
Arnette White	6/8/2016 4:37 PM	This Workflow was Closed with the 'CLOSED' Status Code on 6/8/2016 4:37 PM by Arnette White.
Arnette White	6/8/2016 4:37 PM	Acquired Ownership.

Controlled and Uncontrolled Request Tracking - 140545 - Dan Epstein*

This workflow is CLOSED and is assigned to Arnette White

Workflow Status: CLOSED **Created**: 10/28/2015 **Priority:** 9
Created By: Arnette White **Due Date:**

Primary Person:
Dan Epstein*
Executive Director
Cause of Action Institute
1919 Pennsylvania Ave, NW Suite 650
Washington, DC 20006

People (associated with this workflow):
Dan Epstein
Executive Director
Cause of Action Institute
1919 Pennsylvania Ave, NW Suite 650
Washington, DC 20006

Agency Contacts:

Workflow Codes:

Workflow User Defined Fields:

Document Number:	74269
	CONTROLLED
Date:	10/07/2015
Sender Type:	PUBLIC
Correspondence Type:	LETTER
House:	
Subject:	Petition for Rulemaking Concern
Cross Reference:	
Comments:	
Lead to:	Office of Information and Regulatory Affairs
Response due to PAD by:	
Coordinate With:	
Information Copy:	
Signed By:	Appropriate Action
Signed Date:	
Short Summary	
Handling:	Regular
Handling Instructions:	

Comments:

Workflow Notes:

Step Notes:

Step #1 - Request Received

Arnette White 10/28/2015 11:59 AM This Step was Completed on 10/28/2015 11:59 AM by Arnette White and Queued to User(s): Arnette White.
Arnette White 10/28/2015 11:59 AM Acquired Ownership.
Arnette White 10/28/2015 11:59 AM Information Copies Sent to: Lois Altoft.
Subject: Information Copy from Arnette White for Controlled and Uncontrolled Request Tracking # 140545
Message:
fyi
Arnette White 10/28/2015 11:58 AM Reassigned Ownership to Lisa Jones.
Arnette White 10/28/2015 11:58 AM Attached File -

Arnette White	10/28/2015 11:58 AM	Field 'Date' changed from 'Nothing' to '10/07/2015'.
Arnette White	10/28/2015 11:58 AM	Field 'Sender Type' changed from 'Nothing' to 'PUBLIC'.
Arnette White	10/28/2015 11:58 AM	Field 'Correspondence Type' changed from 'Nothing' to 'LETTER'.
Arnette White	10/28/2015 11:58 AM	Field 'Subject' changed from 'Nothing' to 'Petition for Rulemaking Concern '.
Arnette White	10/28/2015 11:58 AM	Field 'Lead to' changed from 'Nothing' to 'Office of Information and Regulatory Affairs'.
Arnette White	10/28/2015 11:58 AM	Field 'Signed By' changed from 'Nothing' to 'Appropriate Action'.
Arnette White	10/28/2015 11:56 AM	Field 'Document Number' changed from 'Nothing' to '74269'.
Step #2 - Close Out		
Arnette White	10/28/2015 11:59 AM	This Workflow was Closed with the 'CLOSED' Status Code on 10/28/2015 11:59 AM by Arnette White.
Arnette White	10/28/2015 11:59 AM	Acquired Ownership.