

# CAUSE of ACTION

## INSTITUTE

Pursuing Freedom & Opportunity through Justice & Accountability<sup>SM</sup>

June 20, 2018

### **VIA REGULATIONS.GOV**

General Services Administration  
Regulatory Secretariat Division (MVCB)  
ATTN: Ms. Lois Mandell  
1800 F Street, N.W., 2nd Floor  
Washington, D.C. 20405

**Re: Gen. Servs. Admin., Proposed FOIA Rule, 83 Fed. Reg. 28,592 (June 20, 2018)**  
**(to be codified at 41 C.F.R. pt. 105-60) (GSPMR Case No. 2016-105-1)**

Dear Ms. Mandell,

I write on behalf of Cause of Action Institute (“CoA Institute”)<sup>1</sup> to comment on the General Services Administration’s (“GSA”) proposed rule to revise its Freedom of Information Act (“FOIA”) regulations.<sup>2</sup> That rule includes changes required by the FOIA Improvement Act of 2016, as well as other amendments to “streamline . . . several procedural provisions,” including those related to fee issues.<sup>3</sup> CoA Institute offers the following comments on GSA’s proposed rule and respectfully requests the agency revise its rulemaking accordingly.

### **I. Comments**

In two provisions of the proposed rule, GSA refers to the Office of Management and Budget’s (“OMB”) *Uniform Freedom of Information Fee Schedule and Guidelines* (“OMB Guidelines”) as an authority for interpreting the text of the FOIA and GSA’s implementing regulations. Specifically, GSA cites to the 1987 OMB Guidelines at §§ 105-60.000<sup>4</sup> and 105-60.900(a).<sup>5</sup> Although the FOIA requires an agency to promulgate a schedule of fees that “conforms” to the OMB Guidelines,<sup>6</sup> those guidelines are no longer authoritative because they conflict with the statutory text. For example, as explained below, the OMB Guidelines have been superseded, in part, by Congress’s passage of the OPEN Government Act of 2007. The OMB Guidelines are also in conflict with other

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<sup>1</sup> CoA Institute is a 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 to educate the public about the importance of government transparency and accountability. CoA Institute routinely requests records under the FOIA, engages in extensive FOIA litigation, and has specific expertise with respect to the history, purpose, and application of the FOIA. *See CAUSE OF ACTION INST., About*, <http://www.causeofaction.org/about>.

<sup>2</sup> Gen. Servs. Admin., Proposed FOIA Rule, 83 Fed. Reg. 28,592 (June 20, 2018) (to be codified at 41 C.F.R. pt. 105-60).

<sup>3</sup> *Id.* at 28,592.

<sup>4</sup> *Id.* at 28,594 (“These rules should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget[.]”).

<sup>5</sup> *Id.* at 28,598 (“GSA shall charge for processing requests under the FOIA in accordance with the provisions of this section and with OMB Guidelines.”).

<sup>6</sup> 5 U.S.C. § 552(a)(4)(A)(i) (“[An agency’s fee] schedule shall conform to the guidelines which shall be promulgated . . . by [OMB] and which shall provide for a uniform schedule of fees for all agencies.”).

jurisprudential developments and statutory revisions to the FOIA. GSA should thus remove its references to the OMB Guidelines.

One important example of how the OMB Guidelines conflict with current law involves the definition of a “representative of the news media.” Under the FOIA, as amended, a news media requester includes “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.”<sup>7</sup> But the OMB Guidelines restrict the same fee category to requesters “organized and operated to publish or broadcast news to the public.”<sup>8</sup>

OMB’s outdated definition of a “representative of the news media” has long been one of the more contentious aspects of its fee guidelines. In 2015, however, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion in *Cause of Action v. Federal Trade Commission* clarifying that the “organized and operated” standard no longer applies because Congress provided a complete statutory definition in the OPEN Government Act of 2007: “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.”<sup>9</sup> (CoA Institute applauds GSA for recognizing this development in its proposed rule.<sup>10</sup>)

Since having finalized the fee guidelines over thirty years ago, and despite multiple amendments the FOIA in the interim, OMB has *never* updated its guidelines.<sup>11</sup> OMB’s failure in this respect is the subject of ongoing litigation. In November 2017, CoA Institute filed a lawsuit against OMB for failing to act on a petition for rulemaking that sought revised fee guidelines.<sup>12</sup> The Archivist of the United States and the FOIA Advisory Committee have likewise called on OMB to provide a much-needed overall of the 1987 guidelines.<sup>13</sup>

If GSA were to retain the language directing its officials to the OMB Guidelines, it could cause confusion and give a false impression of the law. As the FOIA Advisory Committee has described, “much of the confusion surrounding fee issues is a result of the technological changes in the public’s ability to disseminate information.”<sup>14</sup> Yet it is precisely these technological innovations

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<sup>7</sup> 5 U.S.C. § 552(a)(4)(A).

<sup>8</sup> Office of Mgmt. & Budget, Freedom of Information Fee Guidelines, 52 Fed. Reg. 10,012, 10,015 (Mar. 27, 1987).

<sup>9</sup> 799 F.3d 1108, 1125 (D.C. Cir. 2015). The Department of Justice’s (“DOJ”) model FOIA regulations reject the old OMB standard. *Template for Agency FOIA Regulations*, DEP’T OF JUSTICE, <http://bit.ly/2oG7tKf> (last visited June 20, 2018).

<sup>10</sup> Compare 83 Fed. Reg. at 28,509 (Proposed § 105-60.901(f)), with 41 C.F.R. § 105-60.305-1(i) (current definition).

<sup>11</sup> See, e.g., *Cause of Action Institute Petitions OMB to Update FOIA Fee Guide*, COA INST. (June 2, 2016), <http://coainst.org/2prLZy2>.

<sup>12</sup> See Press Release, CoA Inst., Cause of Action Institute Sues White House OMB Over Failure to Act on Transparency Rules (Nov. 2, 2017), available at <http://coainst.org/2lHTke7>; see generally Compl., *Cause of Action Inst. v. Office of Mgmt. & Budget*, No. 17-2310 (D.D.C. filed Nov. 2, 2017), available at <http://coainst.org/2pnWrHD>.

<sup>13</sup> See Letter from David S. Ferriero, Archivist of the U.S., to Shaun Donovan, Dir., Office of Mgmt. & Budget (Aug. 26, 2016), available at <http://bit.ly/2IAbW77>; see also NAT'L ARCHIVES & RECORDS ADMIN., FREEDOM OF INFO. ACT (FOIA) ADVISORY COMM., FINAL REPORT & RECOMMENDATIONS: COMM. TERM 2014–2016 at 9–10 (Apr. 19, 2016) [hereinafter FOIA COMM. REPORT], available at <http://coainst.org/2IyhT4q>.

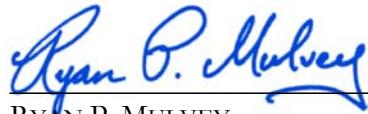
<sup>14</sup> FOIA COMM. REPORT, *supra* note 13, at 9.

that the outdated OMB Guidelines fail to address.<sup>15</sup> GSA can avoid such confusion by removing references to the outdated OMB fee guidelines.

## II. Conclusion

Thank you for your consideration of the foregoing comments and proposed changes. If you have any questions, please do not hesitate to contact me at [ryan.mulvey@causeofaction.org](mailto:ryan.mulvey@causeofaction.org).

Sincerely,



RYAN P. MULVEY  
COUNSEL

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<sup>15</sup> See id. (“Updated guidance would incorporate congressional intent, nearly 30 years of case law on the issue, and advances in technology to eliminate some of the subjectivity that agencies must exercise to make fee issue determinations.”).