



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

June 29, 2018

GENERAL COUNSEL

R. James Valvo, III
Cause of Action Institute
1875 Eye Street, NW
Suite 800
Washington, DC
20006

Dear Mr. Valvo:

This letter is issued in response to the Cause of Action Institute's ("COA") letter, dated June 2, 2016, requesting that the Office of Management and Budget ("OMB") "issue updated guidance to agencies on how to make Freedom of Information Act ("FOIA") fee determinations."¹ OMB respectfully acknowledges COA's letter and provides this reply.²

For the below discussed reasons, OMB declines to adopt COA's proposed changes to its Fee Guidance. Regarding OMB's own FOIA regulations, OMB is in the process of updating its FOIA regulations, including fee regulations, to reflect statutory changes and recent judicial decisions.

**COA's Proposal that OMB Update the
Definition of "Representative of the News Media"**

COA's first item under the "Proposed Action" section of its letter is that OMB should promulgate a change to its Fee Guidance that would revise the definition of "representative of the news media." In support of this proposal, COA refers to instances in 2011 and 2012 in which the Federal Trade Commission ("FTC") relied on the OMB's fee guidance rather than the FOIA statute, as amended by the Open Government Act of 2007, and denied COA a fee waiver in connection with FOIA requests submitted to it. While OMB acknowledges that the FTC relied on OMB's guidance in the instances cited in COA's letter, since that time the FTC has updated its regulations to comply with the FOIA statute.

OMB is not aware of any agency that is currently relying on this portion of its Fee Guidance. Although COA's letter listed eleven agencies whose regulations contained a definition of the term "representative of the news media" that COA states has been overridden by the Open Government Act of 2007,³ COA did not provide, nor is OMB aware of, any recent instance of an agency relying on an outdated

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

² Although OMB has chosen to issue a response to COA's June 2, 2016, letter, its decision to do so is voluntary and not done pursuant to any legal requirement, because OMB's Uniform Freedom of Information Act Fee Schedule and Guidelines (hereafter, "Fee Guidance") is not subject to the mandatory reply requirement of section 553(e) of the APA. See 5 U.S.C. § 553(e). The Fee Guidance is a matter relating to agency management, which is exempt from the requirements of Section 553 of the APA. See 5 U.S.C. § 553(a)(2).

³ COA's letter listed the following agency FOIA regulations: 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

definition of this term instead of relying on the definition contained in the 2007 amendments to the FOIA. Consequently, it is not evident that revising OMB's Fee Guidance would alleviate or prevent any of the alleged substantial harms that COA alludes to in its letter.

Furthermore, every agency subject to the FOIA is instructed by the FOIA Improvement Act of 2016 to revise its regulations to comply with the statute, including removing noncomplying definitions of "representative of the news media."⁴ It is OMB's understanding that the majority of agencies have either completed such a revision or are in the process of doing so, as is OMB. Therefore, such an update of the "representative of the news media" definition in OMB's guidance would be redundant with the statutorily mandated government-wide effort that is already underway.

COA's June 2, 2016, letter also requested that, in addition to including the statutory definition of "representative of the news media" in its Fee Guidance, OMB should add an additional statement regarding its interpretation for the purpose of clarification. COA proposes that OMB add comments reflecting the prevailing opinion in *Cause of Action Inst. v. Fed. Trade Comm'n*, 799 F.3d 1108 (D.C. Cir. 2015), a FOIA case in which COA was the plaintiff, which stated that the preferred method of analysis of a representative of the news media "focus[es] on requesters, rather than requests."⁵ OMB acknowledges that FOIA requestors may benefit by agencies being advised to adhere to this principle; however, OMB does not believe that, in this instance, the issuance of a court decision discussing interpretation of the phrase "representative of the news media" is an appropriate basis upon which to issue new Fee Guidance. The FOIA statute and, in particular, its provisions regarding assessment of FOIA fees, have been and will continue to be interpreted numerous times by courts; consequently, it would be impractical – and an unreasonable and substantial use of the OMB's limited resources – for OMB to attempt to repeatedly update its Fee Guidance to reflect the voluminous and ever-growing case law interpreting the FOIA statute. In addition, nothing prevents requesters from themselves citing relevant case law when submitting individual FOIA requests to agencies. For these reasons, OMB declines to adopt this proposal.

COA's Proposal that OMB include the Statutory Definition of the Public Interest Fee Waiver Test

COA's second proposal item in its June 2, 2016, letter is that OMB's Fee Guidance should be amended to include the statutory requirements of the public interest fee waiver under FOIA.⁶ COA asserts that inclusion of the public interest fee waiver requirements would allegedly provide clarity to OMB's Fee Guidance by drawing a contrast within the guidance between the issue of fee waivers and the issue of fee status. COA's letter appears to suggest that the benefit of taking this action is that it would allegedly improve Federal agencies' ability to interpret the Fee Guidance. OMB does not agree, as OMB does not know of any examples of agencies, either in their regulations or FOIA practice, confusing the issue of fee status with the issue of fee waivers. Additionally, issuing the Fee Guidance would exceed OMB's responsibility pursuant to the FOIA to provide guidance regarding fees.

Bd.); 32 C.F.R. § 1900.02(h)(3) (Cent. Intelligence Agency); 36 C.F.R. § 1250.3(q) (Nat'l Archives & Records Admin). Open Government Act of 2007, Pub. L. 110-175.

⁴ Pub. L. 114-185, Sec. 3, Review and Issuance of Regulations.

⁵ COA letter at 4 (citing *CoA Inst. v. FTC*, 799 F.3d 1108).

⁶ 5 U.S.C. § 552(a)(4)(A)(iii).

For these reasons, OMB declines to adopt this proposal.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Mark R. Paoletta', written in a cursive style.

Mark R. Paoletta
General Counsel