

CAUSE of ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

October 10, 2018

VIA ELECTRONIC MAIL

Council of the Inspectors General on Integrity and Efficiency
ATTN: Atticus J. Reaser, General Counsel
1717 H Street, N.W., Ste. 825
Washington, D.C. 20006
E-mail: comments@cigie.gov

Re: Revision of FOIA Regulations, 83 Fed. Reg. 49,769 (Oct. 3, 2018)
(to be codified at 5 C.F.R. pt. 9800) (RIN 3219-AA01)

Dear Mr. Reaser,

I write on behalf of Cause of Action Institute (“CoA Institute”)¹ to comment on the Council of the Inspectors General on Integrity and Efficiency’s (“CIGIE”) interim final rule to revise its Freedom of Information Act (“FOIA”) regulations.² That rule includes changes required by the Inspector General Empowerment Act of 2016 and the FOIA Improvement Act of 2016.³ CIGIE also is “restructuring its regulations . . . to more closely conform to the format recommended by the Department of Justice Office of Information Policy.”⁴ CoA Institute respectfully submits the following comments and requests that CIGIE revise its rulemaking accordingly.

I. Comments

In two sections of the proposed rule, CIGIE refers to the White House Office of Management and Budget’s (“OMB”) *Uniform Freedom of Information Fee Schedule and Guidelines* (“OMB Guidelines”) as an authority for interpreting the FOIA and CIGIE’s implementing regulations. Specifically, CIGIE cites to the 1987 OMB Guidelines at proposed §§ 9800.101⁵ and 9800.109.⁶ Although the FOIA requires an agency to promulgate a schedule of fees that “conforms” to the OMB Guidelines,⁷ those guidelines are no longer authoritative because they conflict with the

¹ 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>.

² Revision of Freedom of Info. Act Regulations., 83 Fed. Reg. 49,769 (Oct. 3, 2018) (to be codified at 5 C.F.R. pt. 9800).

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 49,770 (“These rules should be read in conjunction with the text of FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget[.]”).

⁶ *Id.* at 49,773 (“CIGIE will charge for processing requests under FOIA in accordance with the provisions of this section and with the OMB Guidelines.”).

⁷ 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.”).

statutory text. Indeed, as explained below, the OMB Guidelines have been statutorily superseded, in part, by Congress's passage of the OPEN Government Act of 2007. The OMB Guidelines also conflict with other jurisprudential developments and revisions to the FOIA. CIGIE should therefore remove any reference 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."⁸ But the OMB Guidelines restrict the same fee category to requesters "organized and operated to publish or broadcast news to the public."⁹

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, 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 applied 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."¹⁰ (CoA Institute applauds CIGIE for recognizing this development in the interim final rule.¹¹)

Since finalizing them over thirty years ago, and despite multiple amendments to the FOIA in the interim, OMB has *never* updated the fee guidelines.¹² 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.¹³ Although OMB has agreed to update its own regulations—and eliminate the "organized and operated" standard—no related rulemaking to address the fee guidelines is underway.¹⁴ The Archivist of the United States and the FOIA Advisory Committee have similarly called on OMB to provide a much-needed overall of the 1987 fee guidelines.¹⁵

⁸ *Id.* § 552(a)(4)(A).

⁹ Office of Mgmt. & Budget, Freedom of Information Fee Guidelines, 52 Fed. Reg. 10,012, 10,015 (Mar. 27, 1987).

¹⁰ 799 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 Oct. 10, 2018). For this reason alone, CIGIE should revise its rule. See 83 Fed. Reg. at 49,769 ("CIGIE is restricting its regulations . . . to more closely conform to the format recommended by [DOJ's] Office of Information Policy.").

¹¹ Compare 83 Fed. Reg. at 49,774 (Proposed § 9800.109(b)(6)), with 5 C.F.R. § 9800.15(e)(1) (current definition).

¹² See, e.g., *Cause of Action Institute Petitions OMB to Update FOIA Fee Guide*, COA INST. (June 2, 2016), <http://coainst.org/2prLZy2>.

¹³ 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/2IHtke7>; 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>.

¹⁴ OMB Freedom of Info. Act Regulation, 83 Fed. Reg. 42,610, 42, 616 (Aug. 23, 2018) (to be codified at 5 C.F.R. p. 1303) (RIN 0348-AB42) (Proposed § 1303.90(h)(i)); see also OMB Grants CoA Institute Petition for Rulemaking, Begins Work to Update Its FOIA Regulations, COA INST. (Aug. 22, 2018), <https://coainst.org/2RHW5Ir>.

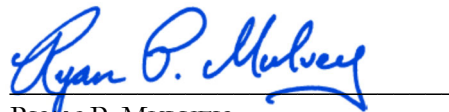
¹⁵ See Letter from David S. Ferriero, Archivist of the U.S., to Shaun Donovan, Dir., Office of Mgmt. & Budget (Aug. 26, 2016), available at <http://bit.ly/2IAbW77>; see also NAT'L ARCHIVES & RECORDS ADMIN., FREEDOM OF INFO. ACT

If CIGIE were to retain language directing its officials to consult the OMB Guidelines as somehow authoritative, 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.”¹⁶ Yet it is precisely these technological innovations that the outdated OMB Guidelines fail to address.¹⁷ CIGIE can avoid such confusion by removing references to the outdated OMB fee guidelines at proposed §§ 9800.101 and 9800.109.

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.

Sincerely,



RYAN P. MULVEY
COUNSEL

(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>.

¹⁶ FOIA COMM. REPORT, *supra* note 15, at 9.

¹⁷ *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.”).