

# CAUSE of ACTION

## INSTITUTE

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

January 8, 2019

### VIA ELECTRONIC MAIL

Institute of Museum and Library Services  
National Foundation on the Arts and the Humanities  
ATTN: Susan B. Gerson, Associate General Counsel  
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**Re: Proposed FOIA Regulations, 83 Fed. Reg. 66,163 (Dec. 26, 2018)  
(to be codified at 2 C.F.R. pt. 3187; 4 C.F.R. pts. 1181, 82, 84) (RIN 3137-AA25)**

Dear Ms. Gerson,

I write on behalf of Cause of Action Institute (“CoA Institute”)<sup>1</sup> to comment on the Institute of Museum and Library Services’s (“IMLS”) proposed rule for revisions to its Freedom of Information Act (“FOIA”) regulations.<sup>2</sup> The IMLS’s rule includes changes required by the FOIA Improvement Act of 2016, as well as other “minor technical amendments.”<sup>3</sup> CoA Institute respectfully submits these comments and requests that the IMLS revise its rulemaking accordingly.

### **I. Comments**

#### **a. Removing References to the Outdated OMB Fee Guidelines**

In two sections of the proposed rule, the IMLS 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 the IMLS’s implementing regulations. Specifically, the IMLS cites to the 1987 OMB Guidelines at proposed §§ 1184.1(b)<sup>4</sup> and 1184.2(c).<sup>5</sup>

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<sup>1</sup> CoA Institute is a 501(c)(3) oversight group advocating for economic freedom and individual opportunity advanced by honest, accountable, and limited government. In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public on how government transparency and accountability protect economic opportunity for American taxpayers. CoA Institute routinely requests records under the FOIA, engages in extensive FOIA litigation, and its staff 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> (last visited Jan. 8, 2019).

<sup>2</sup> Freedom of Info. Act Regulations & Additional Incidental Technical Amendments to Other IMLS Regulations., 83 Fed. Reg. 66,163 (Dec. 26, 2018) (to be codified at 2 C.F.R. pt. 3187; 4 C.F.R. pts. 1181, 82, 84).

<sup>3</sup> *Id.* at 66,163.

<sup>4</sup> *Id.* at 66,165 (“The rules in this part 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[.]”).

<sup>5</sup> *Id.* (“For purposes of this part, IMLS adopts all of the terms defined in the Freedom of Information Act, and the OMB Guidelines, unless otherwise defined in this part.”).

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. 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. The IMLS should therefore remove any 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, 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.”<sup>9</sup>

Since finalizing them over thirty years ago, and despite multiple amendments to the FOIA in the interim, OMB has *never* updated the fee guidelines.<sup>10</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>11</sup> 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.<sup>12</sup> The Archivist of the United States and the

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<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.”).

<sup>7</sup> *Id.* § 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 model FOIA regulations reject the old OMB standard. *Template for Agency FOIA Regulations*, DEP’T OF JUSTICE, <http://bit.ly/2oG7tKf> (last visited Jan. 8, 2019). For this reason alone, the IMLS should revise its rule.

<sup>10</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>11</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/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>.

<sup>12</sup> 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/2RHW51r>.

FOIA Advisory Committee have similarly called on OMB to provide a much-needed overall of the 1987 fee guidelines.<sup>13</sup>

If the IMLS 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.”<sup>14</sup> Yet it is precisely these technological innovations that the outdated OMB Guidelines fail to address.<sup>15</sup> The IMLS can avoid such confusion by removing references to the outdated OMB fee guidelines at proposed §§ 1184.1(b) and 1184.2(c).

**b. Correcting the Regulatory Definition of a “Representative of the News Media”**

For the same reasons, the IMLS should revise its own regulatory definition of a news media requester, which was not addressed in the proposed rule. At present, the agency’s FOIA regulations explicitly incorporate the “organized and operated” standard.<sup>16</sup> This outdated definition should be replaced with the following definition, which tracks the relevant statutory language:

**45 C.F.R. § 1184.2 What are IMLS’s general policies with respect to FOIA?**

[. . .]

(c) *Definitions.* [. . .]

[. . .]

(8) *Representative of the news media.* 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.

[. . .]

**c. Additional Fee Definition Matters**

In addition to the proper definition of a news media requester, the IMLS should consider other elements of the D.C. Circuit’s decision in *Cause of Action v. Federal Trade Commission*. First, the IMLS should incorporate the Court’s direction that the news media requester fee category determination focus “on the nature of the *requester*, not its request.”<sup>17</sup> To illustrate, “[a] newspaper reporter . . . is a representative of the news media regardless of how much interest there is in the

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<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.

<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.”).

<sup>16</sup> 45 C.F.R. § 1184.2(c)(8).

<sup>17</sup> *Cause of Action*, 799 F.3d at 1121.

story for which he or she is requesting information.”<sup>18</sup> Although a case-by-case inquiry into the articulated purpose of a request, the potential public interest in requested material, or even the ability of a requester to disseminate sought-after records rather than information in general may be appropriate in determining the eligibility of nascent news media requesters (*i.e.*, new entities that lack a track record), still “the [FOIA] statute’s focus [is] on requesters, rather than [their] requests.”<sup>19</sup>

*Second*, with respect to the requirement that a news media requester use “editorial skills” to turn “raw materials” into a “distinct work,” CoA Institute directs the IMLS to the *Cause of Action* court’s clarification that “[a] substantive press release or editorial comment can be a distinct work based on the underlying material, just as a newspaper article about the same document would be—and its composition can involve ‘a significant degree of editorial discretion.’”<sup>20</sup> Although the mere dissemination of raw records would not meet the “distinct work” standard, even a simple press release commenting on records would satisfy this criterion. The IMLS’s regulations should embrace this standard.<sup>21</sup>

Third, the *Cause of Action* court insisted that the statutory definition of “representative of the news media” captures “alternative media” and evolving news media formats.<sup>22</sup> The Court thereby provided a useful clarification about the interplay between evolving media and the news media dissemination requirement when it affirmed the *National Security Archive v. Department of Defense* rule that “posting content to a public website can qualify as a means of distributing it[.]”<sup>23</sup> Although “[t]here is no doubt that the requirement that a requester distribute its work to ‘an audience’ contemplates that the work is distributed to more than a single person,” “the statute does not specify what size the audience must be.”<sup>24</sup> With this in mind, the IMLS should indicate that any examples of news media entities it may include in its regulations are non-exhaustive.

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1122.

<sup>21</sup> The *Cause of Action* court also addressed three related issues. First, the court articulated that the FOIA does not “require that a requester gather[] information ‘from a range of sources’ or a ‘wide variety of sources.’” *Id.* at 1122. “[N]othing in principle prevents a journalist from producing ‘distinct work’ that is based exclusively on documents obtained through FOIA.” *Id.* Second, with respect to the news media requester category dissemination requirement, the court provided a non-exhaustive list of the methods an agency must consider, including: “newsletters, press releases, press contacts, a website, and planned reports.” *Id.* at 1124. Finally, the court addressed the so-called “middleman standard,” rejecting the government argument that “a public interest advocacy organization cannot satisfy the [FOIA] statute’s distribution criterion because it is ‘more like a middleman for dissemination to the media than a representative of the media itself[.]’” *Id.* at 1125. The *Cause of Action* court rejected that argument because “there is no indication that Congress meant to distinguish between those who reach their ultimate audiences and those who partner with others to do so[.]” *Id.* These important clarifications should be considered for incorporation into a revised rule.

<sup>22</sup> *Id.* at 1123; *see* 5 U.S.C. § 552(a)(4)(A) (“These examples [of news-media entities] are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities.”).

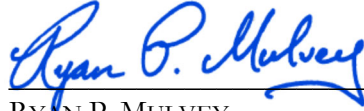
<sup>23</sup> *Cause of Action*, 799 F.3d at 1123.

<sup>24</sup> *Id.* at 1124.

## 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,



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RYAN P. MULVEY

COUNSEL