IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION INSTITUTE, Plaintiff, v. THE WHITE HOUSE OFFICE OF MANAGEMENT AND BUDGET, Defendant.	)	No. 19-cv-2784 (RBW) ORAL HEARING REQUESTED

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT

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INTRODUCTION

For over thirty years, Defendant White House Office of Management and Budget ("OMB") has maintained guidelines for the interpretation and administration of the fee provisions of the Freedom of Information Act ("FOIA"). Defendant promulgated those guidelines through notice-and-comment rulemaking. But it has never updated the guidelines or otherwise modified them in response to important technological and legal developments over the past several decades. Defendant has instead allowed its outdated guidance to calcify and persist as a testament to a bygone era in the history of the FOIA.

Defendant's failure to update its fee guidelines despite the passage of so many years and changes in the law is inexcusable. Agency rules must reflect the actual text and meaning of the statutes they implement or interpret. Congress has repeatedly amended the FOIA, and federal courts have adopted new controlling interpretations of the statute's fee provisions. Yet Defendant has done nothing to revise its guidelines to account for these many changes. That the guidelines have binding government-wide effect only aggravates an intolerable situation. Agencies parrot or cite Defendant's fee guidance in their FOIA regulations, and either ignore it when it conflicts with the current state of the law or, worse, apply it despite that conflict. Not only is this inefficient, as agencies may end up defending their reliance on Defendant's outdated rule, it also mocks the rule of law and proper administrative practice.

In June 2016, Plaintiff Cause of Action Institute ("CoA Institute") petitioned Defendant for the sorely needed update to the fee guidelines. Defendant ignored the petition. After CoA Institute filed a lawsuit to compel a decision, OMB denied the petition. Defendant's denial is unsupported, unreasonable, and arbitrary and capricious. Contrary to Defendant's assertions, many agencies across the government continue to rely on the guidelines for day-to-day FOIA administration. When CoA Institute filed the present lawsuit, at least forty-four agencies continued

to incorporate statutorily superseded provisions from the guidelines. *See* Compl. ¶ 44, ECF No. 1. As a result, requesters—including CoA Institute—must both administratively appeal and file lawsuits to resolve improper agency reliance on Defendant's outdated guidance, which clogs the system and may lead to inequitable results. Agencies—including the Department of Justice's ("DOJ") Office of Information Policy ("OIP")—also continue to refer to Defendant's fee guidelines as authoritative. *See* Compl. ¶¶ 57–60. Defendant cannot point to *any* basis to refuse to update its guidance in the face of continued statutory amendments and caselaw developments. Defendant's denial therefore does not reflect reasoned decision-making. The Court should set aside the denial and order Defendant to begin the requested rulemaking.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

In 1986, Congress passed, and President Reagan signed into law, the FOIA Reform Act of 1986, which directed Defendant to promulgate a uniform schedule of fees for all federal agencies, as well as guidelines for how to apply that schedule to FOIA requesters. Compl. ¶¶ 13–15; *see* 5 U.S.C. § 552(a)(4)(A)(i). In accordance with that directive, Defendant published its final rule on March 27, 1987. App. at 000052–60 ("OMB Guidelines").[1] As Defendant explained at the time, the OMB Guidelines "establish a consistent government-wide framework for assessing and collecting FOIA fees." App. at 000057. And "agencies' regulations must be published . . . pursuant to (and thus following) OMB's issuance" of the fee guidelines. App. at 000052.

Among other things, the OMB Guidelines provide detailed descriptions for requester fee categories that, at the time, were not defined in the FOIA statute. They also specify what kinds of agency actions count as "search," "review," and "duplication" for fee purposes. And they instruct

[1] In line with Local Civil Rule 7(n), CoA Institute intends to confer with Defendant and file an appendix containing copies of those portions of the administrative record cited by or otherwise relied on by the parties in their briefs. Appendix citations retain the original pagination from the administrative record.

agencies on the limitation of fees and detail other procedures, including the charging of interest, aggregation of requests, and collection of advanced fees. Although Congress has amended the FOIA repeatedly since 1987—at times addressing issues directly implicated by the OMB Guidelines—and despite various courts rejecting interpretations of the FOIA that rely on the OMB Guidelines, Defendant has left them as originally promulgated more than thirty years ago. As a result, they now conflict with the FOIA in significant ways. Compl. ¶ 17; *infra* pp. 7–10.

That Defendant's fee guidance is outdated has not gone unnoticed. In April 2016, for example, the FOIA Federal Advisory Committee published its recommendation that David Ferriero, the Archivist of the United States, urge Defendant to update the OMB Guidelines. App. at 000010–11; App. at 000023–24. The Advisory Committee drew special attention to the divergence between the guidelines and "technological changes in the public's ability to disseminate information," App. at 000010, as well as "statutory changes . . . relating to when FOIA fees can be charged." App. at 000011; *see* App. at 000021 ("The Fees Subcommittees [*sic*] would like the OMB to update its 1987 FOIA Fees guidance to reflect changes—especially with regard to technology—that have occurred since OMB issued its guidance."); *see also* App. at 000023 ("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."). The Archivist later explained that he had forwarded the Committee's recommendations to Defendant but was "still waiting for a response." Compl. ¶ 36.

While the Archivist and FOIA Advisory Committee were proposing that Defendant update its fee guidelines, CoA Institute took the next step of petitioning for that result. *See* App. at 000004 ("[CoA Institute] hereby petitions OMB to update its FOIA fee guidance . . . to reflect statutory changes and recent judicial decisions."); *see generally* App. at 000001–06. CoA Institute

explained that the OMB Guidelines conflict with "binding statutory and judicial authorities," App. at 000001, and lead to "costly, time-consuming litigation" and appeals because agencies continue to rely on them. App. at 000002. CoA Institute also requested that Defendant "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." App. at 000004.

After nearly one-and-a-half years of waiting for a response, CoA Institute sued Defendant to compel a determination and, during that litigation, by letter dated June 29, 2018, Defendant denied CoA Institute's petition.[2] *See* App. at 000007–09.[3] In support of its refusal to update its rule, Defendant made three broad claims: (1) that no agency subject to the FOIA "is currently relying" on outdated or superseded portions of the current fee schedule, App. at 000007; (2) that "every agency subject to the FOIA" is already responsible for maintaining its own implementing regulations, which renders updated government-wide guidance "redundant," App. at 000008; and (3) that any effort to update the guidance would be "an unreasonable and substantial use of . . . limited resources" because courts continue to "interpret[] the FOIA statute." App. at 0000008.[4]

[2] In November 2017, CoA Institute field a lawsuit to compel Defendant to consider the petition. *See Cause of Action Inst. v. Office of Mgmt. & Budget*, No. 17-2310 (D.D.C. filed Nov. 2, 2017). On September 9, 2019, the district court dismissed the case as moot and denied CoA Institute's motion to amend and supplement the Complaint to bring a substantive challenge to Defendant's denial. *See* Compl. ⁋ 39 n.2. This suit followed.

[3] The petition also included a request for Defendant to update its own FOIA regulations. *See* Compl. ⁋⁋ 2, 38. In its June 29, 2018 determination letter, Defendant explained that it was "in the process of updating its FOIA regulations, including fee regulations." Compl. ⁋ 42. The agency thus granted that portion of CoA Institute's petition and it is not implicated here. Compl. ⁋ 44.

[4] Defendant rejected CoA Institute's proposal to amend the OMB Guidelines to include guidance on the adjudication of public interest fee waiver requests, arguing that it did not believe there was enough confusion to warrant such a change and, in any case, it would "exceed OMB's responsibility pursuant to the FOIA[.]" App. at 000008. CoA Institute disputes these claims. At the least, guidance on fee waivers would fall within Defendant's purview because it would inform agencies on how "to properly contrast [waivers] with the fee status [or fee reduction] issue[.]" App. at 000005. The FOIA Advisory Committee has argued as much. *See* App. at 000024. And that line of reasoning follows the explanation provided by Defendant when it eliminated proposed guidance on public interest fee waivers from the final OMB Guidelines. *See* App. at 000056.

In September 2019, CoA Institute filed this action seeking to set aside Defendant's denial and to compel a rulemaking to update the OMB Guidelines. *See* Compl. Defendant filed its Answer in November 2019. *See* ECF No. 12. It filed a certified list of the contents of the administrative record in December 2019. *See* ECF No. 15.

STANDARD OF REVIEW

Under the Administrative Procedure Act ("APA"), a court must "set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). This includes action in response to an interested person's petition for the issuance, amendment, or repeal of a rule. *See id.* § 553(e). "The party challenging an agency's action . . . bears the burden of proof." *City of Olmsted Falls v. Fed. Aviation Admin.*, 292 F.3d 261, 271 (D.C. Cir. 2002) (cleaned up). Judicial review "is normally confined to the full administrative record before the agency at the time the decision was made." *Envtl. Def. Fund v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981). "Summary judgment is the proper mechanism for deciding, as a matter of law, whether an agency action is supported by the administrative record and consistent with the APA standard of review." *Zemeka v. Holder*, 963 F. Supp. 2d 22, 24 (D.D.C. 2013) (internal quotation marks and citation omitted).

Although "[t]he scope of review under the 'arbitrary and capricious' standard is narrow," a court must consider whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action[,] including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) [hereinafter *State Farm*] (citation omitted). Agency action fails this test if the agency (1) "has relied on factors which Congress has not intended it to consider," (2) "entirely failed to consider an important aspect of the problem," (3) "offered an explanation for its

decision that runs counter to the evidence before the agency," or (4) "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id*. at 43.

In other words, agency actions "are not spared a 'thorough, probing, in-depth review.'" *Pub. Emps. for Envtl. Responsibility v. Dep't of the Interior*, 832 F. Supp. 2d 5, 15 (D.D.C. 2011) (citing *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 145 (1971)); *see Volkswagenwerk Aktiengesellschaft v. Fed. Maritime Comm'n*, 390 U.S. 261, 272 (1968) ("'[D]eference . . . cannot be allowed to slip into a judicial inertia[.]"). Judicial review should entail careful examination of whether an agency acted outside the scope of its authority, failed to explain its decision, relied on facts outside the administrative record, or otherwise failed to consider relevant facts. *See Fulbright v. McHugh*, 67 F. Supp. 3d 81, 89 (D.D.C. 2014). A court may correct improper fact-finding if it "becomes aware . . . that the agency has not really taken a 'hard look' at the salient problems . . . and has not genuinely engaged in reasoned decision-making." *Greater Boston Television Corp. v. Fed. Commc'ns Comm'n*, 444 F.2d 841, 851 (D.C. Cir. 1970).

"[R]efusals to institute rulemaking proceedings . . . are subject to a judicial check." *Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States*, 883 F.3d 93, 96 (D.C. Cir. 1989) [hereinafter *Nat'l Customs Brokers*]. When considering the denial of a petition for rulemaking, the court examines "whether the agency employed reasoned decision-making." *Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008). An error of law requires reversal, *see WildEarth Guardians v. Envtl. Prot. Agency*, 751 F.3d 649, 653 (D.C. Cir. 2014), as does "a fundamental change in the factual premises previously considered by the agency," *Nat'l Customs Brokers*, 883 F.3d at 97, or the agency's failure to take a "hard look" at relevant issues. *WWHT, Inc. v. Fed. Commc'ns Comm'n*, 656 F.2d 807, 817 (D.C. Cir. 1981). "In making [its] assessment, the court must examine the petition for rulemaking, comments pro and con . . . and the agency's

explanation of its decision[.]" *Level the Playing Field v. Fed. Election Comm'n*, 232 F. Supp. 3d 130, 147 (D.D.C. 2017) (cleaned up). A court may order an agency to initiate a rulemaking in lieu of reconsideration on remand whenever "abnormal circumstances make that choice imperative." *Geller v. Fed. Commc'ns Comm'n*, 610 F.2d 973 (D.C. Cir. 1979). These "circumstances" include "plain errors of law," *id.*, and "blind[ness] to the source of [an agency's] delegated power" or "the nature of [its] mandate from Congress." *Am. Horse Prot. Ass'n, Inc. v. Lyng*, 812 F.2d 1, 5, 7 (D.C. Cir. 1987).

ARGUMENT

I. THE OMB GUIDELINES CONFLICT WITH THE TEXT OF THE FOIA AND AUTHORITATIVE JUDICIAL INTERPRETATIONS.

The OMB Guidelines—the subject of CoA Institute's petition for rulemaking—conflict with the FOIA, both as a textual matter and given authoritative caselaw. CoA Institute highlighted these conflicts in its petition, *see* App. at 000002–03, as did the FOIA Advisory Committee and the Archivist in their correspondence with OMB. *See, e.g.*, App. at 000023–24. Defendant, for its part, does not deny that its guidelines are out-of-date. It instead pleads a lack of "aware[ness]" about any agency "relying on an outdated" aspect of that fee guidance. *See* App. at 000007–08. Yet when Defendant denied CoA Institute's petition, it acknowledged that it was updating its own FOIA regulations to "reflect statutory changes and recent judicial decisions." App. at 000007. And the justifications that Defendant later provided for those updates belie its basis for denying CoA Institute's petition. *See* Compl. ¶ 26 n.1. Indeed, in that rulemaking, OMB "agree[d] that continued textual deviations from the statutory definition [of a 'representative of the news media'] *may add confusion and uncertainty for requesters*." Freedom of Information Act, 84 Fed. Reg. 22,947, 22,950 (May 21, 2019) (to be codified at 5 C.F.R. pt. 1303) (emphasis added). The truth is that the OMB Guidelines meaningfully depart from the FOIA. Three examples are noteworthy.

First, the OMB Guidelines conflict with the statutory definition of a "representative of the news media." Under the FOIA, several categories of requesters qualify for "favored" treatment and agencies must furnish records to them at reduced cost. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II). When Defendant promulgated its fee guidance in 1987, the FOIA did not define the "representative of the news media" category. The OMB Guidelines thus supplied a government-wide regulatory definition for fee-category determinations. That definition included a requirement that a news media requester "actively gather[] news for an entity that is *organized and operated* to publish or broadcast news to the public." App. at 000058 (emphasis added). This became known as the "organized and operated" standard, and agencies across the government adopted it in their FOIA fee regulations based on Defendant's guidance, as the statute directed them to do.

But in 2007, Congress amended the FOIA to include an explicit statutory definition of a "representative of the news media" that conflicted with (and thereby superseded) the definition in the OMB Guidelines. Congress broadened the fee category to include "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." *See* OPEN Government Act of 2007, Pub L. No. 110-175, § 3, 121 Stat. 2524, 2525 (codified at 5 U.S.C. § 552(a)(4)(A)(ii)). Despite the statutory elimination of the "organized and operated" standard, Defendant did nothing to remove that obsolete requirement from the OMB Guidelines.

Defendant's failure to update its fee guidelines, coupled with recalcitrance at other agencies, prompted litigation over the "organized and operated" standard. In 2015, the D.C. Circuit confirmed that it was no longer proper for agencies to rely on that portion of the OMB Guidelines. *See Cause of Action v. Fed. Trade Comm'n*, 799 F.3d 1108, 1125 (D.C. Cir. 2015).

Nevertheless, agencies continue to include the "organized and operated" standard in their FOIA regulations. *See* App. at 000004; Compl. ¶ 48 (collecting regulatory citations).

Second, the OMB Guidelines fail to account for new limitations on the assessment of fees that Congress introduced with the FOIA Improvement Act of 2016. *See* Pub. L. No. 114-185, § 2(1)(a), 130 Stat. 538, 538 (2016). Those changes restrict an agency's ability to charge search or duplication fees when it violates time limits, unless it can show that "unusual" or "exceptional circumstances" apply. *See* 5 U.S.C. § 552(a)(4)(A)(viii). The FOIA Advisory Committee highlighted this divergence between the law and the OMB Guidelines, *see* App. at 000011; App. at 000024, but Defendant has done nothing to address it.[5]

Third, the OMB Guidelines irreconcilably conflict with authoritative judicial interpretation of another of the FOIA's "favored" fee categories. Under Defendant's guidance, the definition of an "educational institution" depends on the application of an "institutional versus individual" test. This test excludes the possibility of a student requester qualifying for a fee reduction. App. at 000054 ("A student who makes a request in furtherance of a course of instruction is carrying out an individual research goal and the student would not qualify [for the 'educational institution' category]."). But the D.C. Circuit has rejected that aspect of the OMB Guidelines and forbade agencies from discriminating between student requesters, on the one hand, and administrators and teachers, on the other. The Circuit noted it "would be a strange reading of this broad and general statutory language . . . to exempt teachers from paying full FOIA fees but to force students with presumably fewer financial means to pay full freight." *Sack v. Dep't of Def.*, 823 F.3d 687, 691–93 (D.C. Cir. 2016). Although DOJ has adopted *Sack* as reflecting the proper approach to the

[5] The FOIA Advisory Committee explained that, notwithstanding the incorporation of the new fee limitations into the OMB Guidelines, "[c]larification [wa]s also needed as to which fees may be charged if the 20 working-day statutory limit is not met, because 'unusual or exceptional circumstances' exist." *E.g.*, App. at 000024.

"educational institution" fee category and advises agencies to do the same, Compl. ¶ 33, Defendant refuses to update its guidelines to reflect the current state of the law. Compl. ¶ 34.

As the above examples show, the OMB Guidelines diverge from the FOIA in letter and interpretation. After more than thirty years and multiple FOIA amendments, it is unreasonable for Defendant to refuse to update its government-wide fee guidance. Objectively, an update must be expected. But Defendant refuses to make *any* effort to revise the OMB Guidelines. And, here, Defendant arbitrarily and capriciously denied CoA Institute's petition for the needed update. Defendant refused to take a "hard look" at the issues at hand. *State Farm*, 463 U.S. at 43; *WWHT, Inc.*, 656 F.2d at 817. It ignored "relevant facts" about the divergence between the OMB Guidelines and the FOIA. *Fulbright*, 67 F.3d at 89. And it overlooked abundant "evidence" in the record, or available upon cursory review of agency FOIA regulations, that justify and should compel a rulemaking. *Pub. Citizen v. Heckler*, 653 F. Supp. 1229, 1240 (D.D.C. 1986).

II. DEFENDANT'S REFUSAL TO UPDATE ITS FEE GUIDELINES IS ARBITRARY AND CAPRICIOUS AND THE DENIAL OF COA INSTITUTE'S PETITION FOR RULEMAKING MUST BE SET ASIDE

The FOIA requires that agencies promulgate fee regulations and that those regulations "conform to the guidelines which shall be promulgated . . . by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies." 5 U.S.C. § 552(a)(4)(A)(i). By setting out the minimum content of individual agencies' FOIA regulations, Congress also determined, by implication, the minimum scope of Defendant's binding guidance. *See id*. § 552(a)(4)(A)(ii). Yet, for over thirty years, Defendant has neglected to maintain up-to-date guidance, despite Congress repeatedly modifying or adding fee-related provisions to the FOIA. Defendant has instead chosen to ignore legislative developments and the evolution of FOIA caselaw. The OMB Guidelines are thus hopelessly outdated. By itself, Defendant's neglect is unreasonable. Considered together with its brusque denial of CoA

Institute's petition, Defendant's refusal to engage in rulemaking suggests its prejudgment of the issues and failure to engage substantively with the arguments raised by CoA Institute and others.

Defendant's denial depends on three broad claims: (1) that no agency subject to the FOIA "is currently relying" on outdated or superseded portions of the OMB Guidelines, App. at 000007; (2) that "every agency subject to the FOIA" is already responsible for maintaining its own implementing regulations, which renders updated government-wide guidance "redundant," App. at 000008; and (3) that any effort to update the OMB Guidelines would be "an unreasonable and substantial use of . . . limited resources" because courts continue to "interpret[] the FOIA statute." App. at 000008. On each count, Defendant's purported basis for denying CoA Institute's petition is factually infirm and undermined by the administrative record and existing law or regulation.

A. Agencies continue to rely on the OMB Guidelines.

In its petition, CoA Institute explained that "agencies continue to rely upon" the OMB guidelines "for policy making," including the design and implementation of FOIA regulations. App. at 000003; *see* App. at 000004 (discussing how the "organized and operated" standard still appears in regulations of "eleven cabinet-level agencies and numerous other important agencies"). Rather than provide a detailed and reasoned response, Defendant countered only that it was "not aware of any agency that is currently relying" on its fee guidance and that it believed "the majority of agencies" had updated (or were updating) their regulations in accordance with the FOIA Improvement Act of 2016. App. at 000007–08. In Defendant's view, an "update" of the OMB Guidelines would be "redundant," if not useless. It claimed that "it is not evident that revising OMB's Fee Guidance would alleviate or prevent any of the alleged substantial harms that [CoA Institute] alludes to in its letter." App. at 000008.

But a few "conclusory sentences . . . are insufficient to assure" this Court that Defendant's "refusal to act was the product of reasoned decision making." *Am. Horse Prot. Ass'n, Inc.*, 812

F.2d at 6. Indeed, there are at least three deficiencies with Defendant's position. Those deficiencies suggest that Defendant made little effort to examine CoA Institute's arguments or the scope of the problem at hand. Agencies continue to rely on the OMB Guidelines, and that reliance detrimentally impacts requesters. Defendant's failure to offer any detailed justification for its denial "runs counter to the evidence" that CoA Institute and others have placed before the agency. *Heckler*, 653 F. Supp. at 1240.

First, the FOIA Improvement Act of 2016's mandate that agencies update their FOIA regulations was explicitly limited to changes introduced *with that legislation*. *See* § 3(a), 130 Stat. at 544. The requirement did not extend to changes made by earlier amendments or to judicial developments in the law. Agencies that refused to eliminate references to the "organized and operated" standard during notice-and-comment rulemaking to implement the FOIA Improvement Act of 2016, for example, bear this out. *See, e.g.*, Rules Regarding Availability of Information, 82 Fed. Reg. 49,286, 49,287 n.3 (Oct. 25, 2017) (to be codified at 40 C.F.R. pt. 770) ("While the [Federal Reserve System] intends to make more extensive amendments to its FOIA Rule [such as updating the definition of a "representative of the news media"] . . . [this rulemaking] only addresses the matters required by the Improvement Act[.]"); *see also* Revisions to the Freedom of Information Act Regulation, 82 Fed. Reg. 29,711, 29,711 (June 30, 2017) (to be codified at 12 C.F.R. pt. 792) (National Credit Union Administration deferring elimination of the "organized and operated" standard to a "technical amendment rule").[6]

[6] Some agencies expanded the scope of their rulemakings to include revisions necessary to update the OPEN Government Act of 2007, which was already a decade old. Defendant is one example. *See* 84 Fed. Reg. at 22,947. But other agencies engaged in direct final or technical rulemakings, and many of these agencies bypassed revisions required by earlier amendments. *See* Compl. ¶¶ 52–53.

Second, Defendant's conclusory response suggests it has an uninformed "understanding" of the number of agencies with regulations that conflict with the actual text of the FOIA. It is unclear whether Defendant took a "hard look" at the scope of the problem raised in CoA Institute's petition and it likely was not diligent in examining the current regulatory landscape. *See State Farm*, 463 U.S. at 43; *WWHT, Inc.*, 656 F.2d at 817. For example, although CoA Institute mentioned eleven cabinet-level agencies that had retained the "organized and operated" standard, and cited several other prominent agencies, App. at 000007, a cursory examination of the *Code of Federal Regulations* reveals that at least forty-four agencies retain Defendant's outdated definition of a "representative of the news media." Compl. ⁋ 44 (collecting citations).[7]

Third, and relatedly, it is reasonable to presume that agencies follow their regulations. Defendant suggests that "it is not evident that revising OMB's Fee Guidance would alleviate or prevent any of the alleged substantial harms" detailed in CoA Institute's petition. App. at 0000008. But the "absence of evidence is not evidence of absence." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 254 (D.C. Cir. 2013). It is equally possible—and as discussed in the next section, demonstrated in several instances—that continued reference to the OMB Guidelines is intentional, if misguided, and leads to legally incorrect outcomes. At the least, continued reference to the OMB Guidelines contributes to "confusion" among "government FOIA professionals" about proper application of the law, thereby heightening "animosity" between agencies and the requester community. App. at 000023; *cf.* 84 Fed. Reg. at 22,950 (Defendant acknowledging that "continued textual deviations from the statutory definition [of a "representative of the news media" in its FOIA regulations] may add confusion and uncertainty

[7] And this does not include agencies that refer directly to the OMB Guidelines in their FOIA regulations instead of regulatory definitions or agencies without formal regulations that use the OMB Guidelines. *See* Compl. ⁋⁋ 49–50.

for requesters."). Defendant appears to have ignored the seriousness of the problem at hand, which it could alleviate with the rulemaking requested by CoA Institute.

B. Agency FOIA regulations describe the OMB Guidelines as authoritative, as do model regulations maintained by the Department of Justice.

Among the agencies that have failed to eliminate references the OMB Guidelines, or which have maintained various aspects of Defendant's fee guidance, there is a smaller subset that has positively argued that the OMB Guidelines are binding. One example is the Department of State ("State"). As CoA Institute explained in its petition, State rejected a proposal offered during notice-and-comment rulemaking to address the so-called "middleman standard," *see* Compl. ¶ 55 n.4, which is occasionally applied in fee-category adjudications. CoA Institute sought to align State's rule more closely with the FOIA and controlling caselaw. *See* App. at 000005; *see generally* Compl. ¶¶ 54–55. When State rejected the proposal, it argued that OMB retained "policymaking responsibility for issuing fee guidance." Public Access to Information, 81 Fed. Reg. 19,863, 19,863 (Apr. 6, 2016) (to be codified at 22 C.F.R. pt. 171). State also explained that it would "defer to OMB with regard to [CoA Institute's] suggestion." *Id.* In other words, State openly recognized that Defendant has the final say over fee-related issues and stated its intention to follow the OMB Guidelines even when that guidance conflicts with the statute.

More recently, the General Services Administration ("GSA") finalized an update to its FOIA regulations. One commenter—CoA Institute[8]—proposed eliminating any reference to the OMB Guidelines as "an authority for interpreting the FOIA and GSA's implementation regulations, because the OMB Guidelines are now outdated." Public Availability of Agency Records and Informational Materials, 85 Fed. Reg. 5,137, 5,137 (Jan. 29, 2020) (to be codified at

[8] *See generally CoA Institute Calls on General Services Administration to Revise Proposed FOIA Regulations*, Cause of Action Inst., https://coainst.org/2lHPNwJ (last visited Jan. 31, 2020)

41 C.F.R. pt. 105-60). GSA categorically rejected that proposal, citing the FOIA Reform Act of 1986 and the agency's obligation to follow the OMB Guidelines as authoritative:

> Per the [FOIA] Reform Act of 1986 (Pub. L. 99-570), all federal agencies subject to the FOIA are required to promulgate regulations implementing the FOIA's amended fee and fee waiver provisions reflecting the OMB Guidelines. To date, there has not been a statutory amendment to the [FOIA] Reform Act of 1986 . . . nor any case precedent which has eliminated GSA's requirement to promulgate regulations implementing the FOIA's amended fee and fee waiver provisions reflecting the OMB Guidelines. GSA will continue to implement the OMB Guidelines accordingly.

Id. at 5,137.

The Institute for Museum and Library Services ("IMLS") forcefully voiced the same position. *See* Compl. ¶ 57. After CoA Institute suggested during rulemaking that IMLS remove references to the OMB Guidelines from its FOIA regulations—if only to avoid confusing agency staff responsible for adjudicating requests—the agency adamantly refused, arguing that Defendant's fee guidance remained in force, despite conflicts with the FOIA: "[R]eference[s] to the OMB Guidelines are general references to the overall guidelines; and *such guidelines remain in force, continuing to generally apply to agency FOIA regulations*." Freedom of Information Act Regulations and Additional Incidental Technical Amendments to Other IMLS Regulations, 84 Fed. Reg. 22,943, 22,943 (May 21, 2019) (to be codified at 2 C.F.R. pt. 3187; 45 C.F.T. pts. 1181–82, 84) (emphasis added).

IMLS also defended its continued reliance on the OMB Guidelines because they were in OIP's model FOIA regulations, as well as the FOIA rules implemented by other agencies. It argued that "references [to the OMB Guidelines] . . . are consistent with . . . [OIP's] Template for Agency FOIA Regulations and consistent with the language used by many other government agencies, including the [DOJ], which provides interagency leadership on FOIA matters." *Id.* OIP's template rule—which was published at least a year before the denial of CoA Institute's

petition—repeatedly refers to the OMB Guidelines and emphasizes that agency regulations "must comply" with them. *See* Compl. ¶ 60 (citing Office of Info. Policy, Dep't of Justice, Template for Agency FOIA Regulations).

Defendant ignored all this regulatory backdrop and did not address the portions of it that were in CoA Institute's petition or the administrative record. Defendant thus failed to provide a reasoned explanation for its denial. *Level the Playing Field*, 232 F. Supp. 3d at 147.

C. It is unreasonable for Defendant to refuse to update its fee guidelines on the basis that Congress continues to amend the FOIA and courts continue to interpret it.

Finally, Defendant refuses to grant CoA Institute's petition for rulemaking because "it would be impractical . . . for OMB to attempt to repeatedly update its Fee Guidance to reflect the voluminous and ever-growing case law interpreting the FOIA statute." App. at 000008. But CoA Institute never asked Defendant to "repeatedly update" its guidance—only that Defendant update it for the first time after more than thirty years. More importantly, the ongoing evolution of the FOIA statute and FOIA caselaw cannot excuse an agency from trying to keep its implementing regulations or guidance up-to-date, especially when that guidance contains standards that apply across the government.

Congress requires that every agency's FOIA regulations "conform" to the OMB Guidelines. 5 U.S.C. § 552(a)(4)(A)(i). The guidelines therefore must accurately reflect fee-related statutory provisions and their authoritative interpretation. *See id*. § 552(a)(4)(A)(ii). Courts have roundly rejected Defendant's "wait-and-see" approach, which effectively amounts to regulatory neglect, in the face of clear statutory mandates. *See, e.g.*, *Fox Television Stations, Inc. v. Fed. Commc'ns Comm'n*, 280 F.3d 1027, 1042 (D.C. Cir. 2002). There is no evidence that Congress intended to allow Defendant to adopt an "incremental" or "cautionary" approach to its fee guidelines; Defendant itself recognized as much when it promulgated those guidelines over

thirty years ago. Defendant admitted that it "intends to follow agencies' implementation of the schedule and guidelines closely and *will issue clarifications when needed*." App. at 000052 (emphasis added). Defendant's apparent recognition of its ongoing obligation to update the guidelines in the face of legal developments and agency-specific implementation complements the principle that an agency should modify its rules whenever underlying "factual premises" have "radically changed." *Am. Horse Prot. Ass'n, Inc.*, 812 F.2d at 5. Changes in the statutory text that a rule implements or interprets, or the elimination by Congress of ambiguities that such a rule seeks to resolve, are prime examples of the sort of changed "premises" that oblige an agency to begin a new rulemaking.

Relatedly, Defendant's denial is arbitrary and capricious because Defendant failed to address "an important aspect of the problem," namely, the failure to update the OMB Guidelines in the wake of *legislative*—rather than judicial[9]—developments. *State Farm*, 463 U.S. at 43. These legislative developments include at least three amendments to the FOIA, which incorporated changes affecting fee administration.[10] CoA Institute raised this consideration, *see* App. at 000001–02 (discussing OPEN Government Act's introduction of a statutory definition of "representative of the news media"), but Defendant's denial letter did not address it.

Defendant's refusal to start a rulemaking sadly perpetuates an unnecessary tension between the OMB Guidelines—which Defendant admits are outdated—and the law as it stands. Defendant's glib retort is that requesters ought to bear the burden of that disconnect. It asserts that

[9] Defendant's argument that caselaw developments cannot ever require it to update the OMB Guidelines is a slap in the face of the judiciary. Agencies are bound by court decisions and, when appellate courts issue authoritative decisions that meaningfully impact the interpretation of the FOIA's fee provisions or their administration, those decisions must not be ignored. Defendant would seem to tolerate individual agencies relying on the outdated OMB Guidelines, even when such reliance could produce a legally incorrect outcome that violates binding precedent.

[10] *See* FOIA Improvement Act of 2016, 130 Stat. at 538, *et seq.*; OPEN Government Act of 2007, 121 Stat. at 2524, *et seq.*; Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996).

"nothing prevents requesters from citing relevant case law when submitting FOIA requests to agencies." App. at 000008. But Defendant's position cuts against the recognized rule that, under the FOIA, agencies—and not requesters—bear the burden of sustaining their actions. *See* 5 U.S.C. § 552(a)(4)(B). Considering the difficulties that many requesters face when challenging agency determinations or mustering adequate resources to seek judicial review, they cannot also be expected to routinely hold agencies to task for relying on outdated guidance. *See Cause of Action*, 799 F.3d at 1108 (requester securing 2015 D.C. Circuit opinion overturning an improper 2011 agency determination that relied on the OMB Guideline's outdated "organized and operated" standard). And although an agency need not engage in *continuous* rulemaking to ensure compliance with the FOIA and relevant, controlling caselaw, it is eminently reasonable to expect agencies to update regulations in the wake of a statutory amendment, and certainly at least once every thirty years. Here, the reasonable alternative is to hold Defendant to its stated commitment to update its fee guidelines whenever the need for "clarifications" arises. *See* App. at 000052.

III. THE COURT SHOULD ORDER DEFENDANT TO INITIATE A RULEMAKING TO UPDATE THE OMB GUIDELINES.

When an agency's denial of a petition is set aside as arbitrary and capricious, a court typically remands the matter for reconsideration. "This remedy is particularly appropriate when the agency has failed to provide an adequate explanation of its denial." *Am. Horse Protection Ass'n, Inc.*, 812 F.2d at 7. But "abnormal circumstances" may justify an order that the agency initiate the requested rulemaking without the opportunity for reconsideration. *Geller*, 610 F.2d at 979. Such circumstances exist when evidence suggests "plain errors of law," or "blind[ness] to the source of [an agency's] delegated power" or "the nature of [its] mandate from Congress." *Am. Horse Prot. Ass'n, Inc.*, 812 F.2d at 5, 7. Those "abnormal circumstances" obtain in this case.

Defendant has failed to engage in reasoned decision-making and did not adequately explain its denial of CoA Institute's petition. Yet remand for reconsideration of the petition would be futile because it "would serve no purpose" given the undisputed fact that the OMB Guidelines are inconsistent with the FOIA. *Heckler*, 653 F. Supp. at 1241. Defendant concedes that its guidance is outdated; it even revised its own regulations to avoid the "confusion and uncertainty" on fee issues that arise from uncritical application of the OMB Guidelines. 84 Fed. Reg. at 22,950.

More importantly, repeated amendments to the FOIA have "removed the sole basis for the [original] regulations at issue." *Gutierrez*, 532 F.3d at 921. Any ambiguity in the FOIA that the OMB Guidelines sought to clarify has been eliminated by Congress, and Defendant's guidance does not expound upon other statutory provisions that have been introduced in recent years. *See supra* at pp. 7–10. Defendant has not only "refused to . . . show that [the OMB Guidelines have] a [continuing] basis in law," it *cannot* provide such a basis because the FOIA has fundamentally changed over the past three decades. *See Nat'l Customs Brokers*, 883 F.3d at 97 (addressing "fundamental change[s] in the factual premises previously considered by the agency"); *see also Am. Horse Prot. Ass'n, Inc.*, 812 F.2d at 5.

In sum, there is no adequate legal justification for the denial of CoA Institute's petition. Whatever discretion Defendant may enjoy in shaping the content of the OMB Guidelines—and even then Defendant is bound by the FOIA's fee provisions, 5 U.S.C. § 552(a)(4)(A)(i) —it cannot divest itself of responsibility for ensuring that the OMB Guidelines remain in force consistent with the FOIA as presently worded and understood. *Cf. Farmers All. for Improved Regulation v. Madigan*, No. 89-0959, 1991 WL 178117, at *8 n. 8 (D.D.C. Aug. 30, 1991). The denial of CoA Institute's petition is a plain error of law that can only be cured by the requested rulemaking.

Defendant also appears to be either willfully ignorant or, at best, myopic as to the nature of its obligations under the FOIA to maintain government-wide fee guidelines. As detailed above, Congress requires that agency FOIA regulations "conform" to the OMB Guidelines. 5 U.S.C. § 552(a)(4)(A)(i). Those guidelines must accurately reflect fee-related statutory provisions and their authoritative interpretation. *See id*. § 552(a)(4)(A)(ii). That is, just as all FOIA regulations must conform to the OMB Guidelines, the OMB guidelines themselves must conform to the FOIA. In this sense, Congress has "expressed intent" that can only be met with the rulemaking sought by CoA Institute. *Envtl. Def. Fund, Inc. v. Dep't of Health, Educ. & Welfare*, 428 F.2d 1083, 1092 (D.C. Cir. 1970) (ordering agency to begin rulemaking in line with statutory obligation). Defendant appeared to acknowledge this obligation over thirty years ago when it admitted that it would "follow agencies' implementation of the [OMG Guidelines] and . . . issue clarifications when needed." App. at 000052. This Court must now hold Defendant to that obligation.

Continued reliance upon Defendant's outdated fee guidance aggravates a government-wide problem that can only be alleviated with the requested rulemaking. Three decades of Defendant's regulatory neglect is enough. *Cf. Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 633 (D.C. Cir. 1987), *vacated as moot*, 817 F.2d 890 (D.C. Cir. 1987) (ordering agency to promulgate rule after fourteen years of delay). The Court should order Defendant to begin a rulemaking to update the OMB Guidelines.

CONCLUSION

For all these reasons, the Court should set aside Defendant's denial of CoA Institute's petition for rulemaking. That denial is arbitrary and capricious. Defendant has failed to prove its reasoned decision-making. It has refused to take seriously the issues raised by CoA Institute and others, including the FOIA Advisory Committee and the Archivist. And it has ignored abundant evidence that agencies continue to rely on the OMB Guidelines as authoritative, even though they

have not been updated in over thirty years. Even Defendant admits that its guidance conflicts with the law and causes confusion. The Court should therefore order Defendant to start the rulemaking requested by CoA Institute within sixty days.

Dated: January 31, 2020

Respectfully submitted,

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