

[Document ID OMB-2020-0004-0001]

June 3, 2020

Paul J. Ray, Administrator
c/o Jonathan Hill
Office of Information and Regulatory Affairs
Office of Management and Budget
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*Submitted Via Federal eRulemaking Portal at
www.regulations.gov*



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**RE: ACLU Response to OMB's "Request for Comments
on Revisions to Uniform Freedom of Information Act Fee
Schedule and Guidelines," FR Doc. 2020-09432.**

Dear Administrator Ray:

For a century, the American Civil Liberties Union (ACLU) has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee to all people in this country. Given our interest in strengthening and improving the Freedom of Information Act (FOIA)¹ as part of this effort, we submit the following comments in response to proposed changes² to the Office of Management and Budget's (OMB) Uniform Freedom of Information Act Fee Schedule and Guidelines³ ("Fee Guidelines").

Introduction

Updates to the current Fee Guidelines are necessary and long overdue. Issued by OMB in 1987 pursuant to the Freedom of Information Reform Act of 1986,⁴ the Fee Guidelines are applied by federal agencies promulgating their own FOIA fee regulations.⁵ This guidance has never been revised during the three decades since its issuance, despite subsequent court rulings, statutory amendments to FOIA,⁶ and technological and societal changes that render key parts outdated, confusing, or faulty. While we welcome OMB's efforts to finally promulgate new guidance, its proposed revisions fall short of meaningfully bringing the Fee Guidelines in line with modern FOIA law and

practice. We urge OMB to reconsider this inadequate approach and instead take full advantage of the opportunity to make FOIA live up to its promise to open government to the public.

Public Interest Fee Waiver

OMB proposes⁷ to change the Fee Guidelines to explicitly state that they do not address the FOIA statute's public interest fee waiver provision, which requires fees to be waived or reduced if disclosure of the information sought is "likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."⁸

Although OMB's current proposal does not explain its reasoning, analysis accompanying the original Fee Guidelines state that OMB considers "developing a schedule providing for the charging of fees" and "issuing guidance on when fees should be reduced or waived" to be "separate issues" and that OMB's role is limited to only the former. However, the FOIA statute does not prohibit OMB from exercising its financial management and information policy responsibilities to provide useful instruction to agencies on the waiver or reduction of FOIA fees,⁹ beyond promulgating guidelines that agencies must follow in producing their own fee schedule.¹⁰ Addressing one but not the other will needlessly create confusion for both FOIA practitioners and the agencies that process their requests because any waiver or reduction of FOIA fees and the FOIA fee schedule must be considered in relation to each other.

As such, rather than declining to address the public interest fee waiver provision, OMB should embrace the topic and begin with a clarification to all applicable federal agencies that fee waiver applications should be "liberally construed" in favor

¹ 5 U.S.C. § 552.

² 85 Fed. Reg. 26499, May 4, 2020.

³ 52 Fed. Reg. 10012, Mar. 27, 1987.

⁴ Pub. L. No. 99-570.

⁵ 5 U.S.C. § 552(a)(4)(A)(i).

⁶ See, e.g., Electronic Freedom of Information Act Amendments of 1996, Pub. L. 104-231; OPEN Government Act of 2007, Pub. L. No. 110-175; and FOIA Improvement Act of 2016, Pub. L. No. 114-185.

⁷ OMB Proposed Revisions, 85 Fed. Reg. at 26500.

⁸ 5 U.S.C. § 552(a)(4)(A)(iii). The D.C. Circuit has elaborated on this provision, stating that in order to qualify for the public interest fee waiver, disclosure of the "requested information must: (1) shed light on 'the operations or activities of the government'; (2) be 'likely to contribute significantly to public understanding' of those operations or activities; and (3) not be 'primarily in the commercial interest of the requester.'" *Cause of Action v. FTC*, 799 F.3d 1108, 1115 (D.C. Cir. 2015).

⁹ It should be noted that FOIA fees "are to be deposited in the general revenues of the United States rather than individual agency accounts," per OMB's original Fee Guidelines.

¹⁰ 5 U.S.C. § 552(a)(4)(A)(i).

of finding that the requester qualifies. Such instruction would bring the Fee Guidelines in conformity with congressional intent and modern judicial interpretation. As multiple courts have affirmed, Congress amended FOIA to ensure that it "be liberally construed in favor of waivers for noncommercial requesters."¹¹

OMB should also clarify aspects of the public interest fee waiver standard where agencies exercise discretion to determine whether the requester qualifies, or aspects for which there is uncertainty or confusion about agency implementation. For example, agencies determine whether requested information is already in the "public domain" when deciding whether disclosure would "contribute significantly to public understanding of the operations or activities of the government."¹² In those situations, OMB should require agencies to treat requested records as *not* being in the public domain if the information is merely available through an in-person visit to an agency's FOIA reading room¹³ or if the records have merely been released to other requesters.¹⁴ Also, federal court records in an executive branch agency's possession should not be presumed to be readily available to the public due to the mere existence of the Public Access to Court Electronic Records (PACER) system, given that PACER users are charged a financial cost when the total quarterly bill exceeds a modest threshold.¹⁵

Additionally, OMB should clarify that entities that routinely disseminate information obtained through FOIA to the public—including and not limited to freelance journalists, bloggers, digital publishers, and nonprofit organizations—presumptively fulfill the public interest fee waiver standard's first statutory criterion. As the Department of Justice's (DOJ) Office of Information Policy (OIP) explains in its own FOIA guidance,¹⁶ "representatives of the news media" should be presumed to readily satisfy that aspect—a definition term that is overdue for a separate update in OMB's Fee Guidelines. To minimize confusion and to help ensure consistent and fair application across the federal government, OMB's own guidance should expressly state this presumption and explain how the updated

¹¹ See, e.g., *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003); *Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987). Both decisions refer to 132 Cong.Rec. S14298 (Sept. 30, 1986) (Sen. Leahy).

¹² 5 U.S.C. § 552(a)(4)(A)(iii).

¹³ *Friends of the Coast Fork v. Dep't of the Interior*, 110 F.3d 53, 55 (9th Cir. 1997) (finding that the requested documents' availability in a public reading room alone does not justify denial of a fee waiver).

¹⁴ *Carney v. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994) (finding that the mere fact records were released to others does not mean the same information is readily available to the public).

¹⁵ As the PACER website explains at <https://www.pacer.gov/> (last accessed June 1, 2020), access to case information costs \$0.10 per page and the cost of accessing a single document is capped at \$3.00; by Judicial Conference policy, fees are waived when usage is \$30 or less for the calendar quarter.

¹⁶ U.S. Dep't. of Justice, FOIA Update: New Fee Waiver Policy Guidance, Jan. 1, 1987, available at <https://www.justice.gov/oip/blog/foia-update-new-fee-waiver-policy-guidance>.

definition of "representative of the news media" interacts with the public interest fee waiver standard.

Definition Of "Representative of the News Media"

Under the FOIA statute, requesters in the "representative of the news media" user category are entitled to be charged only for the cost of reproducing the information, so long as the records are not sought for commercial use.¹⁷ In the original Fee Guidelines, OMB limited this news-media requester status to "any person actively gathering news for an entity organized and operated to publish or broadcast news to the public."¹⁸ OMB now proposes¹⁹ to exclude any definition of "representative of the news media" from the Fee Guidelines, reasoning that the term has a new statutory definition under the OPEN Government Act of 2007.²⁰ Specifically, this legislation defined a "representative of the news media" as "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."²¹ In legislating so, Congress adopted language from an influential ruling by the District of Columbia Circuit in 1989.²²

We applaud OMB's intent to finally update this portion of the Fee Guidelines in light of the superseding statutory change. However, instead of completely omitting any definition of "representative of the news media" from the new Fee Guidelines, OMB should expressly provide the statutory definition to ensure government-wide compliance and consistency. History has shown that the existence of the statutory definition is no assurance that agencies will use it. Indeed, in one prominent incident after the enactment of the 2007 amendments, the Federal Trade Commission (FTC) improperly relied on OMB's outdated "organized and operated" definition to deny news media requester status to a nonprofit organization, which filed a lawsuit that the FTC ultimately lost.²³

In providing further explanation, it is vital for OMB to account for the significant changes that the news media sector and journalism profession have undergone over the past 33 years, particularly in information technology and news distribution. In particular, OMB should ensure that the new Fee Guidelines implement the "representative of the news media" category to include the requester types that have been affirmed by the courts as qualifying as such, as well as those on the rise when Congress in 2007 explicitly enshrined into the FOIA statute the provision that

¹⁷ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

¹⁸ OMB Fee Guidelines, 52 Fed. Reg. at 10018.

¹⁹ OMB Proposed Revisions, 85 Fed. Reg. at 26500.

²⁰ Pub. L. No. 110-175, 121 Stat. 2524 § 3 (codified at 5 U.S.C. § 552(a)(4)(A)(ii)).

²¹ *Id.*

²² *Nat'l Security Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

²³ *Cause of Action v. Fed. Trade Comm'n*, 799 F.3d 1108 (D.C. Cir. 2015).

"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."²⁴

Specific requester types that should be considered part of the "representative of news media" favored fee group include (and are not limited to) citizen journalists, bloggers who publish primarily or exclusively through electronic means, digital publishers, entities new to journalism or news distribution, and nonprofit organizations that disseminate information to the public, including items created based only on the information obtained through FOIA.²⁵ To avoid confusion, improper agency denials, and inconsistent implementation, OMB should also clarify that fee categories are determined by the nature or identity of the requester, not the particular request, as the FOIA Advisory Committee recommended in 2016.²⁶

Educational Or Noncommercial Scientific Institutions Fee Category

Under the FOIA statute, requesters in the category of an "educational or noncommercial scientific institution, whose purpose is scholarly or scientific research" may be charged only for the cost of reproducing the records sought for the requester, provided that the information requested is for noncommercial use.²⁷ In the original Fee Guidelines, OMB defined "educational institution" as "refer[ring] to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education,

²⁴ 5 U.S.C. § 552(a)(4)(A)(ii).

²⁵ For supportive case law, see, e.g., *Lieberman v. U.S. Dep't of Transp.*, 227 F. Supp. 3d 1, 11-12 (D.D.C. 2016) (concluding that online blogger of for-profit entity qualified as representative of news media); *Serv. Women's Action Network v. U.S. Dep't of Defense*, 888 F. Supp. 2d 282 (D. Conn. 2012) (finding that nonprofit organizations, including ACLU, are representatives of news media because they "have submitted an extensive list of past publications and adequately allege that they intend to publish" on topic of requested records); *Elec. Privacy Info. Ctr. v. U.S. Dep't of Defense*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books is a "representative of the news media"); *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding Judicial Watch, self-described as a "public interest law firm," to be a news media requester); *Hosp. & Physician Publ'g*, 1999 WL 33582100, at *3 (finding that plaintiff qualified for news media status even though it had not gathered news in past, nor did so at time of litigation, because it had stated plans to "begin gathering news for dissemination . . . to news media via free news releases"); and *Nat'l Sec. Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, "devises indices and finding aids," and "distributes the resulting work to the public" is a "representative of the news media" for FOIA purposes).

²⁶ Freedom of Information Act Advisory Committee, Final Report and Recommendations (Apr. 19, 2016), available at <https://www.archives.gov/files/ogis/assets/final-recommendation-to-archivist-fees.pdf>.

²⁷ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

which operates a program or programs of scholarly research."²⁸ OMB now proposes to revise the Fee Guidelines to expressly state that teachers and students may be eligible for inclusion in this fee category.²⁹

We welcome the modest clarification to the Fee Guidelines to ensure that individual educators and students qualify for this favored fee category. Although the original guidance gives an example of a professor who "could be presumed to be from an educational institution," the only student example listed addresses an *ineligible* request.³⁰ That student example further notes that a student "who makes a request in furtherance of the completion of a course of instruction is carrying out an individual research goal and the request would not qualify."³¹ However, the D.C. Circuit reached a different conclusion in 2016, finding that "[s]tudents who make FOIA requests to further their coursework or other school-sponsored activities are eligible for reduced fees under FOIA because students, like teachers, are part of an educational institution."³² Expressly clarifying that students and teachers qualify for "educational institution" status for FOIA purposes, as OMB proposes, would thus conform the Fee Guidelines to leading case law and leave no doubt about these individual requesters' eligibility.

We are concerned that OMB proposes to do nothing more with respect to this fee category beyond the clarification regarding teacher or student requesters. OMB should instead expressly clarify that requesters are eligible for educational or noncommercial scientific institution status if they are a nonprofit organization, non-commercial archive, think tank, library, research center, or another organization that publishes documents used for scholarly or scientific research by academic or degree-granting institutions. The professional staff of such entities should be included as well, not just the "teachers" and faculty members, given the congressional intent that the D.C. Circuit has also affirmed.³³ Otherwise, by taking a cramped view of what entities should be covered by this fee category, OMB will retain a significant flaw in the original guidance while undermining FOIA's goal to make government information broadly accessible.

As to the basis for the original decision, nothing in the FOIA statute requires OMB to rely on any particular definition of "educational institution." Nonetheless, OMB

²⁸ OMB Fee Guidelines, 52 Fed. Reg. at 10018.

²⁹ OMB Proposed Revisions, 85 Fed. Reg. at 26500.

³⁰ OMB Fee Guidelines, 52 Fed. Reg. at 10014.

³¹ *Id.*

³² *Sack v. Dep't of Defense*, 823 F.3d 687, 692 (D.C. Cir. 2016) (noting that like teachers, students conduct research, "gather primary documents, write papers, publish, and contribute to the development and dissemination of knowledge within the school and to the outside world . . . in order to further their coursework or other school-sponsored activities").

³³ *Id.* at 691 (quoting Sen. Leahy's remarks during legislative debate that FOIA "request made by a professor or other member of the professional staff of an educational or noncommercial scientific institution should be presumed to have been made by the institution").

stated in the original Fee Guidelines that it adhered to a statutory definition used by the Department of Education, codified at 20 U.S.C. 1681(c) as part of Title IX of the Education Amendments of 1972.³⁴ OMB did not, however, explain why this specific Title IX definition used for anti-discrimination purposes was best suited for the Freedom of Information Act and government transparency purposes then, nor does OMB provide a rationale today. OMB should not repeat this flawed approach used in the 1987 guidance for the updated 2020 version. It should instead develop its own definition that would meaningfully capture the full range of requester types reasonably be described as educational and advancing a scholarly purpose.

Restrictions On Fees Charged

The OPEN Government Act of 2007 restricted agencies' ability to collect certain FOIA fees if they fail to respond to a FOIA request within the statute's mandatory deadlines and no exceptions apply.³⁵ The FOIA Improvement Act of 2016 further restricted agencies from charging certain fees when they fail to meet FOIA's response time frames, narrowing the exceptions and requiring agencies to take specific steps to invoke them.³⁶ Thus under current FOIA law, agencies in violation of FOIA's response deadlines cannot charge search fees to requesters in the "all other"³⁷ or "commercial use"³⁸ categories and cannot charge fees for duplicating records for requesters in the favored fee categories (i.e., "representative of the news media" and "educational or noncommercial scientific institution" requesters), unless one of three exceptions is met.

OMB now proposes to add a new subsection to the Fee Guidelines that expressly provides this statutory rule.³⁹ We support this update to match the Fee Guidelines to the FOIA statute in effect today. Explicitly stating the statutory rule in OMB's government-wide guidance will help ensure consistent and fair application across agencies.

However, we strongly encourage OMB to go beyond this minimum update to address the intertwined issue of attempts by agencies to cite exorbitant FOIA fees that dissuade people from filing records requests, including dilatory agencies in

³⁴ OMB Fee Guidelines, 52 Fed. Reg. at 10014.

³⁵ Pub. L. No. 110-175, 121 Stat. 2524.

³⁶ Pub. L. No. 114-185, 130 Stat. 538.

³⁷ 5 U.S.C. § 552(a)(4)(A)(ii)(III).

³⁸ 5 U.S.C. § 552(a)(4)(A)(ii)(I).

³⁹ OMB Proposed Revisions, 85 Fed. Reg. at 26500. Specifically, the proposal would add this statement: "An agency may not charge search fees (or in the case of educational or non-commercial scientific institution requesters, or representatives of the news media, duplication fees) if it has failed to comply with any time limit under 5 U.S.C. 552(a)(6), except as provided in 5 U.S.C. 552(a)(4)(A)(viii)."

violation of the statutory fee restrictions.⁴⁰ Other related aspects of FOIA fees administration deserve an update in the Fee Guidelines as well. For instance, major technological advances since 1987, such as the widespread adoption of email as well as portable flash drives, CDs, and DVDs, warrant detailed advice and instructions from OMB to agencies on the fees associated with modern reproduction costs, i.e., the cost of creating a copy of the requested records to send to the requester. As another example, OMB should take this opportunity to clarify the costs that may be charged for reproducing documents for the requester when they are transferred from classified to unclassified systems so that the documents may be released electronically.⁴¹

In formulating these and other improvements, we urge OMB to seek further input and collaboration from other stakeholders, including the FOIA Advisory Committee, the Office of Government Information Services within the National Archives and Records Administration, and DOJ's Office of Information Policy. Looking beyond the next set of revisions, OMB should also renew its commitment to regularly updating the Fee Guidelines—an obligation it acknowledged in finalizing the original version in 1987.⁴²

Thank you for the opportunity to share our views and for your consideration of our comments on OMB's proposed Revisions to the Uniform Freedom of Information Act Fee Schedule and Guidelines. If you have any questions, please contact Kate Oh at koh@aclu.org or (202) 715-0816.

Sincerely,



Ronald Newman
National Political Director



Kate Oh
Policy Counsel

⁴⁰ For a discussion, see, e.g., Nate Jones, Unnecessary Freedom of Information Act Fees, Unredacted (Mar. 18, 2015), available at <https://unredacted.com/2015/03/18/unnecessary-freedom-of-information-act-fees/>.

⁴¹ Freedom of Information Act Advisory Committee, Final Report and Recommendations (Apr. 19, 2016), available at <https://www.archives.gov/files/ogis/assets/final-recommendation-to-archivist-fees.pdf>.

⁴² OMB Fee Guidelines, 52 Fed. Reg. at 10012 ("OMB intends to follow agencies' implementation of the schedule and guidelines closely and will issue clarifications when needed").