



Billing Code 3110-01

OFFICE OF MANAGEMENT AND BUDGET

Final Revisions to Uniform Freedom of Information Act Fee Schedule and Guidelines

AGENCY: Office of Management and Budget.

ACTION: Notice of revised guidelines.

SUMMARY: The Office of Management and Budget (OMB) is finalizing revisions to sections of its Uniform Freedom of Information Act Fee Schedule and Guidelines (“Guidelines”) last published in 1987. This action is necessary to conform the Guidelines with statutory amendments to the Freedom of Information Act (FOIA) and to clarify the scope of the Guidelines. This action is intended to provide Federal agencies with guidance on the appropriate and uniform application of FOIA processing fees.

DATES: These revisions to the Guidelines are effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Jonathan Hill, Office of Information and Regulatory Affairs, OMB, at (202) 395-1658 or oira_pb_comments@omb.eop.gov.

SUPPLEMENTARY INFORMATION: The Freedom of Information Reform Act of 1986, Pub. L. 99-570 (1986), required OMB to promulgate a uniform schedule of fees and guidelines, pursuant to notice and public comment, for agencies to use when processing FOIA requests. 5 U.S.C. 552(a)(4)(A)(i). OMB issued the Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 FR 10012 (available at https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/foia_fee_schedule_1987.pdf) on March 27, 1987. In the ensuing years, the FOIA has been amended, notably by the OPEN Government Act of 2007, Pub. L. 110-175 (2007), and the FOIA Improvement

Act of 2016, Pub. L. 114-185 (2016). In response, OMB has undertaken to revise the Guidelines.

On May 4, 2020, OMB published a notice in the Federal Register, 85 FR 26499, seeking comments on four proposed substantive revisions. OMB also proposed to revise Section 4. *Inquiries*, to update contact information for questions about the Guidelines. OMB received comments directly and through Regulations.gov from 13 entities, including both individuals and organizations. OMB greatly appreciates the detailed comments it received, and believes the final guidance, as modified in response to those comments, has been significantly improved. A description of the relevant comments, and OMB's responses, follow.

(1) OMB proposes to revise Section 2. Scope to indicate that the Guidelines do not address the waiver or reduction of fees if disclosure is in the public interest.

Four commenters recommended that OMB address public interest fee waivers in the Guidelines. OMB finds that addressing fee waivers is beyond the allowable scope of this guidance. In relevant part, the FOIA requires OMB to promulgate guidelines “which shall provide for a uniform schedule of fees for all agencies.” 5 U.S.C. 552(a)(4)(A)(i). As OMB explained in the preamble to the first publication of the Guidelines, “OMB’s role is limited by the plain wording of the statute to developing guidelines and a fee schedule.” 52 FR 10016.

The application of the OMB fee schedule to related fee categories is distinct from a public interest fee waiver. A requester’s fee category concerns the services – search, duplication, and review – for which that requester may be assessed fees. *See* 5 U.S.C. 552(a)(4)(A)(ii). By contrast, a public interest fee waiver concerns whether the requester will ultimately be responsible for paying any such fees. *See* 5 U.S.C. 552(a)(4)(A)(iii). The comments on this proposal suggested that there is an inter-relationship between a requester’s fee category and whether they are eligible for a public interest fee waiver, and

as a result, the OMB Guidelines should also address public interest fee waivers. Whether or not the two issues involve a common element, for instance whether there is a commercial interest at stake, the fact remains that separate legal constructs have developed around each, and other, independent considerations are necessary to the analysis of each. To expound on distinct elements of the public interest fee waiver would exceed OMB's mandate, which is limited to fee categories.

At least one commenter suggested that it would cause confusion among requesters and agencies for the Guidelines to address fee categories but not public interest fee waivers. OMB disagrees. Whatever commonalities there may be, OMB intends these Guidelines only to advise agencies with respect to fee categories. The revision to Section 2 is carefully worded, with citation to the public interest fee waiver provision in the FOIA, to specifically exclude from the scope of the Guidelines "the waiver or reduction of fees if the disclosure of the information is in the public interest." No commenter offered a recommendation on a more effective way to achieve this limitation on the scope.

OMB emphasizes that, while the Guidelines do not address public interest fee waivers, it is not the case that agencies have no guidance on this topic. Just as OMB issued the original Guidelines in response to the Freedom of Information Reform Act, one commenter rightly pointed out that the Department of Justice (DOJ) issued its own New Fee Waiver Policy Guidance (Apr. 2, 1987) (<https://www.justice.gov/oip/blog/foia-update-new-fee-waiver-policy-guidance>). Furthermore, the DOJ Guide to the Freedom of Information Act (<https://www.justice.gov/oip/doj-guide-freedom-information-act-0>), updated in relevant part in September 2020, also provides a thorough survey and discussion of case law related to public interest fee waivers. Rather than causing confusion, OMB believes it is more effective and efficient for the Guidelines to explicitly and only address fee categories, and to continue the decades-long practice of deferring to other sources for guidance on public interest fee waivers.

(2) OMB proposes to remove Section 6j, which defines “representative of the news media,” given that this term is now defined in statute.

Six commenters submitted recommendations related to this proposal. Each commenter recommended that, instead of removing Section 6j, OMB revise it to explicitly reiterate the statutory definition of “a representative of the news media” and/or incorporate judicial interpretations of that definition. OMB points out that the Guidelines already incorporate the FOIA’s statutory definitions, and rejects these recommendations, except as discussed below.

As a general proposition, agencies are expected to stay abreast of relevant statutory and judicial developments related to their implementation of the FOIA. It is usually unnecessary to issue guidance that merely reiterates standards that are stated authoritatively elsewhere, and in the case of judicial developments, that are more susceptible to evolving factors.

This is especially true with respect to the statutory definition of “a representative of the news media.” Section 6a of the Guidelines states clearly that “[a]ll the terms defined in the Freedom of Information Act apply.” There should be no doubt that this provision applies to the term “a representative of the news media,” which is defined at 5 U.S.C. 552(a)(4)(A)(ii). One commenter suggested that reiterating the statutory definition in the Guidelines would avoid confusion, but did not elaborate. OMB fails to see what confusion would result from expressly incorporating all of the statutory definitions, rather than spelling them out in the guidance. Rather than causing confusion, OMB considers cross-referencing the statutory definition an effective way to avoid potential future confusion, if Congress amends the definition.

Similarly, OMB does not agree with all of the recommendations to incorporate judicial interpretations of the statutory definition into these Guidelines, but has made some modifications based on these comments. In the notice, OMB indicated that part of

the purpose of revising the Guidelines is “to provide clarity in light of evolving judicial interpretation,” and to “ensure they reflect... leading judicial decisions.” 85 FR 26500. This goal has its limits, however. Commenters urged the incorporation of a D.C. Circuit opinion that interpreted the statutory definition of “a representative of the news media.” *See Cause of Action v. FTC*, 799 F.3d 1108, 1125 (D.C. Cir. 2015). Insofar as the decision rejects the definition of “representative of the news media” in Section 6j as factually inconsistent with the current statutory definition, OMB agrees with the comments and has removed the inconsistent language from the Guidelines. Instead the Guidelines cross-reference the definition now provided in statute, to avoid any inconsistency.

However, OMB does not believe it is generally necessary to incorporate, proactively, judicially-developed analytical frameworks into the Guidelines, especially when no inconsistency is evident. In fact, there are practical and policy reasons why doing so is imprudent. Along these lines, OMB rejects other, specific recommendations made by commenters to incorporate other aspects of judicial holdings in the Guidelines.

First, there are hundreds of FOIA cases decided each year.¹ It would not be efficient to try to update the Guidelines to account for the decisions in these cases. While OMB recognizes that not every holding would require updates to the Guidelines, there would be diminishing returns in trying to parse out which ones rise to that level and retrospectively evaluating which ones last the test of time. To borrow an economic term, there would be an opportunity cost that would serve neither agencies nor the public, if agencies were to wait for OMB to update the Guidelines before applying otherwise applicable case law.

¹ One commenter drew OMB’s attention to the FOIA Project, which claims that its website “includes detailed information on every case that challenges government withholding [under the FOIA] in federal court.” *See* www.foiaproject.org/about (last visited Dec. 10, 2020). While OMB has not verified this number, the FOIA Project reports that in fiscal year 2020, 844 FOIA cases were filed. *See* www.foiaproject.org (last visited Dec. 10, 2020).

Relatedly, it is not OMB's role to serve as legal counsel to agencies. Every agency has attorneys, and the Office of Information Policy (OIP) at the Department of Justice exists, in part, to "provide[] legal counsel and training to agency personnel," with respect to complying with the FOIA. *See* www.justice.gov/oip/about-office (last visited Dec. 10, 2020). In fact, DOJ's Guide to the Freedom of Information Act, discussed above, is a "comprehensive legal treatise on the FOIA" that "contains a detailed analysis of the key judicial opinions issued on the FOIA," including those related to fees and fee waivers. *See* <https://www.justice.gov/oip/doj-guide-freedom-information-act-0> (last visited Dec. 10, 2020). OMB considers that agencies' primary source of advice concerning the application of judicial decisions should be the attorneys who represent them.

One commenter opined that some elements of Section 6j continue to warrant inclusion in the Guidelines, such as the definition of "news." As the commenter recognizes, however, the definition of "news" in the statute, 5 U.S.C. 552(a)(4)(A)(ii), is unchanged from the definition in Section 6j. Moreover, OMB fails to perceive any significant substantive differences – and the commenter failed to identify any – between the rest of the text in Section 6j and in the statute. Insofar as any difference exists, OMB considers that Congress had the language in the Guidelines at its disposal when it amended the FOIA, and chose to diverge. In that case, OMB defers to the language in the statute as the best indicator of Congress's will. Just as discussed above, OMB considers it unnecessary to restate the language in the statute.

Several commenters recommended that OMB include in the Guidelines examples of types of entities that would be considered representatives of the news media. OMB declines. Congress has provided the framework agencies should use to determine when a requester qualifies as a representative of the news media, and the courts have interpreted, and continue to interpret, that framework. To the extent such authorities leave no doubt whether a type of entity qualifies as a representative of the news media, OMB will let

those authorities speak for themselves. To the extent there is a doubt, as discussed above, OMB defers to agency counsel to advise on the proper application of the law under specific circumstances. Furthermore, OMB considers that including a list of examples, even with a disclaimer that it is non-exclusive, runs the risk of being interpreted as exclusive. Failure to include a type of requester in this list – especially in light of the rapid evolution of the state of technology and information dissemination – could lead to the conclusion that such a requester is not a representative of the news media. This outcome would not serve agencies nor the public.

One commenter recommended that OMB define representative of the news media because the Guidelines define other fee categories. The difference is that the FOIA does not define those other categories in the way that it defines “a representative of the news media.” As discussed, OMB does not consider it necessary to repeat the law.

Furthermore, as discussed above, the definition in the statute generally covers the same subject matter as exists in Section 6j. Therefore, removing the section and cross-referencing the statute does not result in the loss of detail.

OMB received comments of a technical nature on two issues. One commenter pointed out that the preamble of the notice seeking comments misidentified the section that OMB proposed to remove as Section 6f, instead of Section 6j. This comment is correct; however, no further revision to the Guidelines is necessary. OMB correctly identified Section 6j later in the notice, and there was no evident confusion about OMB’s intent.

Existing-Section 6j is clearly the provision that defines “representative of the news media,” and despite the earlier typographical error, commenters discerned OMB’s intent and provided recommendations in response. OMB affirms that its actions with respect to this proposal relate to Section 6j, not Section 6f.

Two comments pointed out that OMB failed to address a cross-reference to Section 6j appearing in Section 8c. OMB responds by revising Section 8c to bring it into

conformity with its decision to remove Section 6j. Section 8c will refer to the statutory definition, rather than the definition in Section 6j.

(3) OMB proposes to revise Section 8b. Educational and Non-commercial Scientific Institution Requesters to clarify that both teachers and students may be eligible for inclusion in this fee category.

OMB received recommendations from three commenters with respect to this proposal. Two commenters recommended that Section 8b be further revised to clarify that it applies not only to teachers and students but to other staff of educational institutions, such as librarians. OMB accepts this recommendation and revises the relevant language in Section 8b to include “faculty, staff, or students.” While the comments focused on staff of educational institutions, OMB considers that the inclusion of “staff” also appropriately accounts for requests made in connection with a non-commercial scientific institution. So long as staff of an educational or non-commercial scientific institution can demonstrate that their request is being made in connection with their role at the institution, OMB considers them to be appropriately within the scope of this fee category. One commenter suggested that it would be necessary to amend Section 6h to conform to the new language in Section 8b, to ensure consistency. OMB perceives no inconsistency, and therefore rejects this recommendation. The commenter drew an analogy to the relationship between Section 6j and Section 8c, discussed above. Section 6j and Section 8c both address requesters. Conversely, Section 6h (and Section 6i) defines a type of institution, while Section 8b addresses requesters associated with those institutions. The FOIA requires agencies to determine the nature of the institution as a distinct entity, which is why OMB provides a separate definition in Section 6. OMB does not consider clarifying who may be considered a requester, in Section 8b, to have a necessary impact on the definition of the institution, in Section 6h or Section 6i.

(4) OMB proposes to add a subsection to Section 9. Administrative Actions to Improve Assessment and Collection of Fees to indicate that agencies may not charge certain fees when they fail to comply with the FOIA's time limits, except under certain circumstances provided in the statute.

OMB received recommendations related to this proposal from three commenters.

Two commenters recommended that OMB provide additional guidance on the application of the referenced provision concerning an agency's failure to comply with the FOIA's time limits, 5 U.S.C. 552(a)(4)(A)(viii). OMB did not accept these recommendations.

This is a complex statutory provision better addressed through legal analysis and individualized counsel, rather than OMB policy. Furthermore, insofar as the provision relies on terms defined in the statute, OMB defers to the statutory language and judicial interpretation, just as discussed above. OMB points out that the Department of Justice has issued guidance on this provision, including a "Decision Tree for Assessing Fees." See Dep't of Justice, OIP Guidance: Prohibition on Assessing Certain Fees When the FOIA's Time Limits Are Not Met (Oct. 19, 2016), https://www.justice.gov/oip/oip-guidance/prohibition_on_assessing_certain_fees_when_foia_time_limits_not_met (last visited Dec. 10, 2020).

One requester recommended that all charges and fees be waived for United States citizens when the government fails to comply with requests in a timely manner. This comment appears to OMB to be insufficiently supported by statutory authority, and therefore it is rejected.

In addition to the four topics discussed above, OMB received a number of comments on topics that were clearly out of scope of the proposal and therefore will not be addressed here.

As discussed in the notice seeking comment, OMB revises Section 4. *Inquiries* to update contact information for questions about the Guidelines.

For the reasons discussed in the Preamble, and under the authority of 5 U.S.C. 552(a)(4)(A)(i) and 44 U.S.C. chapter 35, OMB amends the Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 FR 10012, by removing Section 6j, adding Section 9f, and revising Sections 2, 4, 8b, and 8c to read as follows:

UNIFORM FREEDOM OF INFORMATION ACT FEE SCHEDULE AND GUIDELINES

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2. *Scope*— * * * This Fee Schedule and Guidelines, including Sections 6 and 8, does not address the waiver or reduction of fees if the disclosure of the information is in the public interest, as provided in 5 U.S.C. 552(a)(4)(A)(iii).

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4. *Inquiries*—Inquiries should be directed to the Office of Information and Regulatory Affairs, Office of Management and Budget, at oir_a_pb_comments@omb.eop.gov.

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8. *Fees to be Charged—Categories of Requesters.* * * *

b. Educational and Non-commercial Scientific Institution Requesters— * * * To be eligible for inclusion in this category, requesters – whether faculty, staff, or students – must show that the request is being made in connection with their role at the institution, and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research. * * *

c. Requesters who are Representatives of the News Media— * * * To be eligible for inclusion in this category, a requester must meet the criteria established by the FOIA. *See* 5 U.S.C. 552(a)(4)(A)(ii). * * *

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9. *Administrative Actions to Improve Assessment and Collection of Fees*— * * *

f. Failure to Comply with Time Limits—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).

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