

May 13, 2020

Mr. Jonathan Hill
Office of Information and Regulatory Affairs
Office of Management and Budget

RE: Revisions to Uniform Freedom of Information Act Fee Schedule and Guidelines

The National Security Archive applauds the Office of Management and Budget for finally, belatedly, and decades-late, deciding to revise sections of its Freedom of Information Act Fee Guidelines, which date from 1987. Those guidelines were inadequate and contradictory to begin with, and gave rise to multiple episodes of wasteful litigation – wasting both the government’s resources and those of the FOIA requesters who were forced to challenge requester fee category denials – because OMB had irresponsibly cherry-picked from the Congressional legislative history around the 1986 FOIA amendments to construe the most restrictive interpretations possible, rather than produce guidance that fit the intent of the FOIA.

The Archive notes, for the record, that history has repeated itself. OMB undertakes this revision not voluntarily, but only in response to the lawsuit by the group Cause of Action under the Administrative Procedures Act, after OMB had denied the petition for rule making that Cause of Action filed in 2016. The necessity of litigation to compel long overdue action is a sad commentary on the efficiency and competence of the OMB.

The Archive has a special interest in the Fee Guidelines, since the Archive was perhaps the first to challenge their inadequacies in court, with lawsuits against multiple agencies’ denials of preferential requester fee categories including the Department of Justice and most notably, the Department of Defense, in 1987, 1988, and 1989. OMB had particularly erred in its exclusion of non-traditional publishers like the Archive from the category of “representative of the news media,” and the D.C. Circuit ultimately had to compel the Defense Department to grant “news media” status to the Archive, in the landmark case *National Security Archive v. Department of Defense*, 880 F.2d 1381 (D.C. Cir. 1989). When the Supreme Court denied the government’s petition for certiorari, media across the country headlined the case as a victory for the public.

Did OMB even notice? Apparently not. OMB did not even amend its outdated guidance when Congress put the D.C. Circuit’s language into the FOIA statute in the 2007 Amendments. The 1989 decision, and the statutory revision of 2007, should have ensured preferential treatment and waiver of FOIA fees for freelance journalists, bloggers, digital publishers, and compilers of released documents. Instead, OMB retained its old and outdated language, and together with the Office of Information Policy at the Justice Department, deserve opprobrium for the repeated instances of unnecessary litigation that FOIA requesters have been compelled to undertake from 1989 to the present over requester fee categories.

The Archive strongly recommends that OMB include the D.C. Circuit's language on "news media" in the revised Fee Guidelines. Specifically, any requester who is engaged in "gather[ing] information of potential interest to a segment of the public, us[ing] its editorial skills to turn the raw materials into a distinct work, and distribut[ing] the work to an audience" deserves to be included in the "news media" fee category.

The D.C. Circuit was not completely correct, however. In that same 1989 ruling, the D.C. Circuit denied the Archive's request to be recognized as an educational institution (the Archive's digital collection recently won Choice Magazine's "Outstanding Academic Title" award for 2018; the annual award goes to publications deemed especially worthy of attention from academic librarians seeking to build research collections). The ruling held "that, to the extent that DoD's regulations provide that only schools are eligible for that status, those regulations mirror congressional intent."

The court got this part wrong. The Freedom of Information Reform Act of 1986 - championed by Senator Patrick Leahy among others – intended for organizations like the Archive that both have the designated 501(c)3 status and that publish documents used for research at top-tier universities across the United States, to qualify as educational institutions for the purpose of assessing FOIA fees.

The way OMB crafted its Fee Guidelines in 1987, however, limited this fee category only to degree-granting institutions. This hampered Congress' intent and left out deserving scholarly organizations, think tanks, high schools, and other educational institutions. **OMB should use this current opportunity to explicitly cover those institutions left out of the 1987 guidance.**

OMB should also use this opportunity to address what the Archive calls "fee bullying" – attempts by agencies to intimidate requesters into unduly narrowing or dropping their FOIA requests by threatening to charge exorbitant FOIA fees – sums that are rarely, or ever, being appropriately calculated. This practice wastes the time and good will of requesters and agencies alike – despite the FOIA Improvement Act of 2016 prohibiting agencies charging most fees when they miss their statutorily-mandated response times.

Some recent egregious examples of fee bullying include:

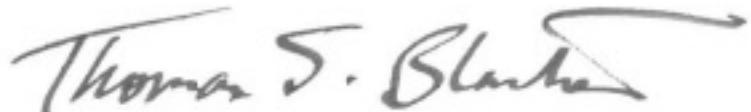
- In 2019, the Army tried to charge \$300,000 in FOIA fees to release the results of water tests performed at military installations for a dangerous contaminant that is linked to cancers and other illnesses. The Army stopped its fee bullying in this instance only after Sen. Leahy publicly excoriated the department, calling the decision to charge for the records absurd and the fee "offensive."
- In 2018, a federal judge ruled against the Commerce Department and in favor of reporter David Yanofsky; the judge found no legal basis for Commerce's attempt to charge nearly \$174K for access to government immigration data and ordered the agency to re-evaluate the fees; Yanofsky said after the ruling that the fees now "will likely cost me less than \$30—possibly even nothing at all."

- In 2015 the DEA told a FOIA requester it would cost \$1.46 million to search, review, process, and print documents about the DEA's role in the search and capture of the Mexican Cartel boss Joaquin Guzman, more commonly known as "El Chapo."

As the FOIA Federal Advisory Committee noted in its April 19, 2016 recommendations to the Archivist of the United States, FOIA fees total less than one percent of reported agency FOIA costs. What's more, these fees are not recouped by the agency FOIA offices that charges them – they are collected by the Treasury Department's General Fund. More explicit fee guidelines incorporating the above recommendations would be a more effective cost saving measure than engaging in spurious fee bullying to intimidate requesters into dropping their requests.

Thank you for your consideration of these comments.

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