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Office of Management and Budget
725 17th Street, N.W.
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June 3, 2020

[via regulations.gov](https://www.regulations.gov)

Re: Proposed Revisions to the Office of Management and Budget's Uniform Freedom of Information Act Fee Schedule and Guidelines, Docket No. OMB-2020-0004/ID OMB-2020-0004-0001

To Whom It May Concern:

The Reporters Committee for Freedom of the Press (the “Reporters Committee” or “RCFP”), and the 17 news media organizations identified below (collectively, the “News Media Coalition”) respectfully submit these comments regarding the proposed revisions to the Uniform Freedom of Information Act Fee Schedule and Guidelines (“Guidelines”) of the Office of Management and Budget (“OMB”) implementing the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA” or the “Act”), which were published on May 4, 2020, 85 Fed. Reg. 26499 (May 4, 2020) (hereinafter, the “Proposed Rule”).

As set forth herein, the News Media Coalition writes with respect to two aspects of the Proposed Rule: (1) the elimination of a definition of “representative of the news media,”¹ and (2) the addition of a statement that the Guidelines do not address the reduction or waiver of fees under FOIA. The News Media Coalition urges that OMB’s Guidelines, instead, be updated with the current statutory definition of representative of the news media and codify its interpretation by the U.S. Court of Appeals for the District of Columbia Circuit in *Cause of Action v. Federal Trade Commission*, 799 F.3d 1108 (D.C. Cir. 2015). In addition, because the current Guidelines do address FOIA’s fee waiver provision, the Proposed Rule should not include language to the contrary.

I. The Proposed Rule should include the statutory definition of representative of the news media and its interpretation by the D.C. Circuit.

Congress codified the definition of “representative of the news media” in 2007, *see* 5 U.S.C. 552(a)(4)(A)(ii). OMB should include the current statutory definition in the Guidelines for clarity and to ensure consistency in the implementation of FOIA across the federal government. Every other

¹ The Proposed Rule erroneously refers to this provision of the OMB Guidelines as “Section 6f”; it is set forth in Section 6j. *See* 52 Fed. Reg. 10018.

category of requester is currently defined in the Guidelines, and agencies that are required to follow OMB's Guidelines should be given updated direction as to who qualifies for each category. Moreover, Section 8c of the current Guidelines—which concerns fees chargeable to representatives of the news media—cross-references the current definition in Section 6j, *see* 52 Fed. Reg. 10019, but the Proposed Rule does not make any modifications to Section 8c. Accordingly, the News Media Coalition recommends that OMB replace the current definition in Section 6f of the Guidelines with the statutory definition set forth at 5 U.S.C. 552(a)(4)(A)(ii).

In addition, as the Proposed Rule also correctly notes, the “judicial interpretation of [FOIA] has and continues to evolve.” 85 Fed. Reg. 26500. That is especially true with respect to the judicial interpretation of “representative of the news media” which has evolved in recent years. Most notably, in its unanimous decision in *Cause of Action v. Federal Trade Commission*, 799 F.3d 1108 (D.C. Cir. 2015), the D.C. Circuit interpreted the statutory definition of representative of the news media set forth at 5 U.S.C. 552(a)(4)(A)(ii). Just as the Proposed Rule updates the definition of “educational and non-commercial scientific institution” requesters to take account of the D.C. Circuit’s interpretation of that category of requester, *compare* Proposed Rule with *Sack v. U.S. Dep’t of Def.*, 823 F.3d 687 (D.C. Cir. 2016), so too should it codify the D.C. Circuit’s interpretation of “representative of the news media.” The D.C. Circuit’s interpretation of this definition is especially important given that a significant majority of FOIA cases are heard in the “universal venue” of the U.S. District Court for the District of Columbia. *See* Michael Hasan, *Geographic Distribution of FOIA Cases*, The FOIA Project (last updated May 27, 2020), <http://foiaproject.org/foia-map/> (depicting the geographic distribution of FOIA lawsuits across the country from October 1, 1992 through May 27, 2020).

Cause of Action distilled the statutory definition of “representative of the news media” into five elements; to qualify, the requester “must: (1) gather information of potential interest (2) to a segment of the public; (3) use its editorial skills to turn the raw materials into a distinct work; and (4) distribute that work (5) to an audience.” 799 F.3d 1108 at 1120. Crucially, the court noted that these criteria must be evaluated with respect to the *requester*, not an individual FOIA request or the nature of the records requested. In other words, if a requester “satisfies the five criteria as a general matter, it does not matter whether any of the individual FOIA requests does so.” *Id.* For example, a reporter for a newspaper “is a representative of the news media regardless of how much interest there is in the story for which he or she is requesting information.” 799 F.3d. at 1121. Accordingly, once an individual or entity has established itself as a representative of the news media, it should always be accorded such status if it is submitting a request in that capacity.

With respect to the individual elements of the definition, the D.C. Circuit explained that as both technology and society’s means of seeking information evolve, there are numerous ways requesters can use their editorial skills to turn raw materials into a distinct work and distribute that work to an audience. In evaluating the third element, for example, the court noted that a “distinct work” could not only take the traditional form of a newspaper article, but also could be a “substantive press release or editorial comment.” *Id.* at 1122. Such a “distinct work” can be based on government records alone; there is no

requirement that a representative of the news media requester gather information “from a range of sources” or a “wide variety of sources.” *Id.*

With regard to the fourth and fifth elements—distributing a distinct work to an audience—the D.C. Circuit held that “posting content to a public website can qualify as a means of distributing” the information. *Id.* at 1123. And, while “an audience” must be more than a single person, there is no minimum requirement beyond that. *Id.* at 1124. Indeed, a requester need not even have a track record of distributing work to an audience in order to qualify as a representative of the news media; “firm plans” for future distribution can suffice. *Id.* Agencies should thus evaluate the requester’s “past record, current operations, and future plans” to determine if they meet the statutory standard. *Id.* In such an evaluation, an “entity with an extensive record will ordinarily qualify with only a thin recital of its plans (or perhaps none at all). Conversely, an entity with little or no historical record of distributing its work . . . may make up for that absence by concretely setting out its plans to do so.” *Id.*

The News Media Coalition recommends that this interpretation of representative of the news media be included alongside the statutory definition in the revised Guidelines. OMB should also instruct agencies to review *Cause of Action* in evaluating whether to categorize a requester as a representative of the news media.

II. OMB should not state that the Guidelines do not address FOIA’s fee waiver provision.

The Proposed Rule would add language to the Guidelines stating that the Guidelines “do not address the waiver or reduction of fees if disclosure is in the public interest[.]” 85 Fed. Reg. 26500. However, the current Guidelines correctly instruct agencies that with respect to a request from a representative of the news media, “a request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use.” 52 Fed. Reg. 100019. That instruction—which remains unchanged by the Proposed Rule—is important for journalists and news organizations who seek a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). To satisfy that provision, the requester must show that disclosure of the sought-after information is “not primarily in the commercial interest of the requester.” *Id.* When representatives of the news media seek records under FOIA they do so for the benefit of the public, not to serve a commercial interest, even if they happen to be a “for-profit enterprise[.]” *Nat’l Sec. Archive v. U.S. Dep’t of Def.*, 880 F.2d 1381, 1388 (D.C. Cir. 1989).

Because it is incorrect to state that the Guidelines “do not address the waiver or reduction of fees if disclosure is in the public interest,” including such a statement in the Guidelines could create confusion among agencies. Accordingly, the News Media Coalition urges that this element of the Proposed Rule not be included in the revised Guidelines.

Sincerely,

The Reporters Committee for Freedom of the Press
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Atlantic Media, Inc.
BuzzFeed
The Center for Investigative Reporting (d/b/a Reveal)
The E.W. Scripps Company
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