

The National Security Archive

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Fourth National Action Plan for Open Government

Recommendation to update outdated Office of Management and Budget Freedom of Information Act Fee Guidance

The National Security Archive recommends that the United States Government's 2017 Open Government Partnership National Action Plan include a commitment to follow the unanimous recommendation made by the 2015 federal Freedom of Information Act Advisory Committee to revise the Office of Management and Budget's out-dated and confusing FOIA fee guidance as it drafts its 2017 Open Government Partnership National Action Plan.

In April 2016 the FOIA Advisory Committee, composed of government and nongovernment FOIA experts, voted unanimously to recommend that to improve and clarify confusing FOIA fee rules and regulations, the Office of Management and Budget should update its 1987 fee guidance. The Committee recommended that the updated guidance should improve the FOIA process by:

- Specifying the differences between fee waivers and requester fee category status by creating unambiguous and uniform guidelines to explain which criteria must be met for each fee category. These specifications should embrace members of the media who publish primarily through electronic means.
- Providing guidance on what constitutes a "representative of the news media," taking into account the changes in journalism over the last thirty years. These guidelines should also clarify that fee categories are determined by the identity of the requester, and not the nature of the request. This would better enable agencies to make accurate fee category determinations.
- Clarifying when fees can be charged, including 5 U.S.C. § 552 4(A) (viii), which specifies that certain fees cannot be charged when the agency fails to comply with any time limit. The changes should also include clarification about which fees can be charged if "unusual or exceptional circumstances" prevent the twenty working-day time limit from being met.
- Giving guidance on fees associated with reproduction costs, including the costs of providing electronic copies, and of transferring documents from classified to unclassified systems for the purpose of electronic release.
- Clarifying that agencies may use discretion (rather than a formal fee waiver) to decide not to charge fees when the interests of the United States Government would be served.

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- Recognizing that FOIA fees cover only a small percentage of FOIA costs, and that these fees are paid to the General Fund of the Treasury rather than to each agency's FOIA office. The current OMB guidelines are missing a key word in Section 8, which makes it impossible to know the quantity of FOIA costs the government intends to recoup.

These changes would reduce the current ambiguity surrounding the antiquated 1987 fee guidance. The revisions are necessary to account for technological changes over the last thirty years, as well as to explain and correct vague aspects of the OMB's fee structure. In making these changes, both agencies and requesters will benefit from increased clarity and more relevant contemporary practices regarding FOIA fees.

Unfortunately, the Office of Management and Budget has taken no visible action to implement this recommendation and FOIA fees remain a contentious and confusing issue. The National Security Archive recommends that the Fourth US Governments National Action Plan include a pledge to conduct this much needed update of FOIA fee guidance.