

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
THE ARCHDIOCESE OF NEW YORK)	FOIA Control Nos. 2009-096 through 131
)	
On Request for Inspection of Records)	

MEMORANDUM OPINION AND ORDER

Adopted: August 2, 2010

Released: August 4, 2010

By the Commission:

I. INTRODUCTION

1. By this memorandum opinion and order, we deny an application for review by the Archdiocese of New York on behalf of itself and 36 private schools affiliated with the Archdiocese (collectively “the Archdiocese”).¹ The Archdiocese seeks review of a decision of the Wireline Competition Bureau (“WCB”) that denied the claim of the Archdiocese for reduced processing fees for the above-captioned Freedom of Information Act (“FOIA”) requests and which aggregated the requests for purposes of computing the fees.²

II. BACKGROUND

2. The Archdiocese submitted the above-captioned FOIA requests seeking records regarding Notices of Commitment Adjustment (COMAD) Letters sent by the Universal Service Administrative Company (USAC) to reassess the Archdiocese schools’ eligibility for funding under the Commission’s E-rate program.³ For the purpose of computing FOIA processing fees, the requesters sought classification as “educational institutions,” which would reduce the fees

¹ See Letter from Cynthia B. Schultz to Mr. Matthew Berry, Esq., [former] General Counsel (Feb. 13, 2009) (AFR).

² See Letter from Kirk S. Burgee, Chief of Staff to Cynthia B. Schultz, Esq. (January 14, 2009) (Decision).

³ See 36 Letters from Cynthia B. Schultz to Managing Director (Nov. 26, 2008) (Requests). Eighteen of the requests were received on December 1, 2009 and 18 on December 2. Under the E-Rate program, a component of the universal service support mechanism, eligible schools, libraries, and consortia may apply for discounts on telecommunications services, Internet access, and internal connections. See, e.g., *Academy of Careers and Technologies San Antonio, TX*, 21 FCC Rcd 5348, 5348-49 ¶ 2 (2006). The E-Rate Program is administered for the Commission by the Schools and Libraries Division (SLD) of USAC, a private, not-for-profit organization. See, e.g., *United Talmudical Academy, Brooklyn, New York*, 15 FCC Rcd 423, 424-25 ¶ 4 (2000). See also <http://www.usac.org/fund-administration> (information concerning USAC).

applicable to the Archdiocese to the cost of reproduction beyond the first 100 pages.⁴ The Commission's FOIA rules define an educational institution as "a preschool, a public or private elementary school or secondary school, an institution of graduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research."⁵ WCB held that the Archdiocese did not qualify for the designation "educational institution," although the Archdiocese schools comprise private elementary and secondary schools, because no showing was made that the Archdiocese schools conduct programs of scholarly research. WCB found that:

The Office of Management and Budget FOIA Fee Guidelines indicate that, although the definition includes elementary and secondary schools, "[a]s a practical matter, it is unlikely that a preschool or elementary or secondary school would be able to qualify for treatment as an 'educational' institution, since few preschools, for example, could be said to conduct programs of scholarly research."

We are unable to find that the requesting schools should be classified as "educational institutions," as defined by section 0.466(a)(5) of the Commission's rules.[Footnote omitted.] No showing has been made here that the Archdiocese schools conduct programs of scholarly research, nor has the Archdiocese asserted that they do. Moreover, the OMB Fee Guidelines observe that "[A]gencies should be sure that it is apparent from the nature of the request that it serves a scholarly research goal of the institution . . ."[Footnote omitted] The requests here appear to relate to the schools' internal operations and not to scholarly research goals. Accordingly, we find that the schools should be classified as "All Other" requesters under section 0.470(a)(3) of the Commission's rules.[Footnote omitted]⁶

As an "all other" requester, the Archdiocese would be responsible for search fees beyond the first two hours and reproduction costs for over 100 pages.⁷

⁴ See 5 U.S.C. § 552(a)(4)(A)(ii)(II); 47 C.F.R. § 0.470(a)(2).

The statute provides: "fees shall be limited to standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research. . . ."

The rule provides: The Commission shall provide documents to requesters in [the categories of educational and non-commercial scientific institutions] for the cost of reproduction only . . . excluding reproduction costs for the first 100 pages."

⁵ See 47 C.F.R. § 0.466(a)(5). The section provides: "The term educational institution refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education and an institution of vocational education, which operates a program or programs of scholarly research."

⁶ See Decision at 1-2, citing *Uniform Freedom of Information Act Fee Schedule and Guidelines*, 52 Fed. Reg. 10012, 10014 (Mar. 27, 1987) (OMB Fee Guidelines).

⁷ See *id.*

3. WCB also found that the above-captioned requests should be aggregated for the purposes of computing fees.⁸ WCB found that all of the requests were filed the same day, and each of the requests seeks the same information for one of 36 schools. It noted that three business days before the above-referenced requests were filed, the Archdiocese itself filed a consolidated request for information concerning the same schools. Thus, WCB found that the Archdiocese would not be able to claim two free search hours and 100 free pages for each request, but instead would be entitled to only two free search hours and 100 free pages in total.⁹ WCB estimated that the Archdiocese would be liable for search costs of approximately \$39,000.¹⁰

III. APPLICATION FOR REVIEW

4. In its AFR, the Archdiocese contends that it is entitled to classification as an “educational institution under 47 C.F.R. § 0.466(a)(5) and accordingly to a reduction of fees under 47 C.F.R. § 0.470(a)(2). The Archdiocese contends that WCB misconstrued the definition of “educational institution” in section 0.466. The Archdiocese first asserts that the reference to “program of scholarly research” in the definition does not imply that the FOIA request itself must serve the institution’s scholarly research goals.¹¹ In this regard, the Archdiocese argues that WCB had no basis to find that the Archdiocese’s FOIA request concerned its internal operations, and not scholarly purposes, because WCB did not inquire of the Archdiocese what it would use the information for.¹² The Archdiocese further asserts, based on the “plain meaning” of the definition, that the reference to programs of scholarly research applies only to institutions of professional education and vocational education and not to primary and secondary schools.¹³ The Archdiocese enumerates several respects in which its students and other personnel engage in scholarly research. For example, the Archdiocese states that “students at all grade levels must engage in scholarly research and prepare research reports in science, social studies and other areas; organize facts, and include a thesis, support and conclusion.” The Archdiocese asserts that its interpretation of the definition is reasonable, that there is no legislative history to the contrary, and that the OMB Guidelines relied on by WCB are not entitled to deference.¹⁴

5. The Archdiocese next asserts that failure to grant it educational institution status denies it due process. The Archdiocese characterizes itself as an “interested and aggrieved” party with respect to USAC’s COMAD Letters.¹⁵ It complains that it cannot be expected to afford

⁸ See Decision at 2.

⁹ The Archdiocese does not appeal WCB’s decision to aggregate its FOIA requests.

¹⁰ See Decision at 2.

¹¹ See AFR at 3-4.

¹² See *id.* at 4.

¹³ See *id.*

¹⁴ See *id.* at 5-6.

¹⁵ See *id.* at 6.

upwards of \$37,000 in fees¹⁶ and that, without the requested information, it cannot prepare an appeal¹⁷ of the COMAD Letters to USAC or the FCC.¹⁸

6. Further, the Archdiocese asserts that denying it the status of an “educational institution” contravenes the President’s memorandum calling for openness in administering the FOIA.¹⁹ According to the Archdiocese, charging the Archdiocese a fee that it cannot afford is inconsistent with the President’s objective of providing broad disclosure in response to FOIA requests.²⁰

7. Finally, the Archdiocese argues that no fee can be charged because WCB’s response was untimely, and under the current FOIA statute, as amended by the Open Government Act, no fee can be charged for processing a FOIA request where the agency’s response is untimely.²¹

IV. DISCUSSION

A. Interpretation of “Educational Institution” Definition

8. We find that WCB correctly determined the fee applicable to the Archdiocese’s FOIA request. First, the Archdiocese’s assertion that the FOIA request does not itself have to be in furtherance of the educational institution’s program of scholarly research in order for the request to qualify for a fee reduction is directly contradicted by OMB’s interpretation of the FOIA.²² The Guidelines provide: “Agencies should ensure that it is apparent from the nature of the request that it serves a scholarly research goal of the institution”²³ In reaching this reading of “educational institution” under the FOIA, OMB stated “these terms must be applied in

¹⁶ WCB estimated that the fees for processing the requests without aggregating them would be \$37,000 and that with aggregation the fee would be approximately \$39,000. *See* Decision at 2. Thus, the Archdiocese appears to be indicating that it could not afford even the lower fee that would apply if the requests were not aggregated.

¹⁷ USAC indicates that the Archdiocese has filed appeals for each of its schools and that, with the following exceptions these appeals remain pending before USAC. No longer pending are appeals associated with two of the FOIA requests, which USAC granted. Moreover, USAC denied appeals associated with three of the FOIA requests, and the Archdiocese has sought review of these appeals by the Commission. .

¹⁸ *See* AFR. at 6-7. The Archdiocese also claims that a search fee of \$39,000 “is incomprehensible” and “excessive.” *See id.* at 7. The Archdiocese also objects that WCB has not provided” any index” regarding the basis of the estimated fee. *See id.* We believe that what the Archdiocese means by “index” is a detailed justification for the estimated fee, such as we provide in paragraph 13 of this Order.

¹⁹ *See* Memorandum for the Heads of Executive Departments and Agencies, Freedom of Information Act (Jan. 31, 2009) (Presidential Memo), 74 Fed. Reg. 4683 (Jan. 21, 2009), *available online at* http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/.

²⁰ *See* Decision at 7.

²¹ *See id.* at 8. *See also* 5 U.S.C. § 552(a)(4)(A)(viii).

²² We discuss the interpretive authority of the OMB Guidelines at paragraph 11, *infra*.

²³ *See* OMB Guidelines, 52 Fed Reg. at 10014.

conjunction with the FOIA's scholarly research requirement."²⁴ Accordingly, the OMB Guidelines note that "As a practical matter, it is unlikely that a preschool or elementary or secondary school would be able to qualify for treatment as an 'educational' institution since few preschools, for example, could be said to conduct programs of scholarly research."²⁵

9. Second, we reject the Archdiocese's assertion that there is no basis for WCB's finding that the Archdiocese's FOIA requests "appear to relate to the schools' internal operations and not to scholarly research goals."²⁶ As WCB recognized, the OMB Guidelines provide that agencies "should be sure that it is apparent *from the nature of the request* that it serves a scholarly research goal of the institution."²⁷ Here, no such purpose was apparent and indeed the FOIA request on its face dealt with COMAD letters sent by USAC to the schools. In any case, the Archdiocese's argument is effectively mooted by the AFR. The Archdiocese's AFR itself indicates that the Archdiocese is "an interested and aggrieved party" seeking information in support of its appeal of USAC's decision to reduce the E-Rate funding of the Archdiocese's technology services.²⁸ Such funding can fairly be said to concern the Archdiocese's "internal operations," not any scholarly research goals.

10. Third, the Archdiocese's contention that various student activities qualify as scholarly research is also inconsistent with the OMB Guidelines. The OMB Guidelines state: "A student who makes a request in furtherance of the completion of a course of instruction is carrying out an individual [as opposed to institutional] research goal and the request would not qualify" as scholarly research.²⁹

11. Further, contrary to the Archdiocese's contention, it is reasonable for the Commission to look to the OMB Guidelines when interpreting the FOIA and the Commission's implementing rules. The FOIA itself directs that agency fee schedules "shall conform to the guidelines which shall be promulgated . . . by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies."³⁰ The Commission noted this requirement when it adopted the Commission fee rules, specifically

²⁴ See *id.*

²⁵ See *id.*

²⁶ See Decision at 2.

²⁷ See OMB Guidelines, 52 Fed. Reg. at 10014 (emphasis added).

²⁸ See AFR at 6-7.

²⁹ See OMB Guidelines, 52 Fed. Reg. at 10014. This approach is consistent with the definition of "scholarly" commonly used, for example, by universities, *i.e.*, original research or experimentation conducted by an expert in the field. See, e.g., Illinois Institute of Technology, Paul V. Galvin Library, *Finding Scholarly Articles*, available online at <http://library.iit.edu/guides/FindingScholarlyArticles.pdf> (Illinois Institute of Technology guidance to students on what a "scholarly" article is). Thus, even if one were to agree with the Archdiocese that the Commission's rules cannot look to the OMB Guidelines in interpreting the FOIA, as is plainly required by the statute and the rules (see notes 4 and 5), the Archdiocese has failed to show that the institutions in question conduct scholarly research.

³⁰ See 5 U.S.C. § 552(a)(4)(A)(i).

stating that “the definitions . . . were taken verbatim from the OMB Guidelines . . .”³¹ The courts have also relied on the OMB Guidelines to construe the FOIA.³² Further, the Presidential Memo relied on by the Archdiocese in another context expressly directs OMB to update its guidelines, thus acknowledging their importance.³³ We therefore conclude that WCB reasonably relied on the OMB Guidelines in determining that the Archdiocese was not entitled to be classified as an educational institution and was instead properly classified as an “all other” requester. In any event, we believe that our rules can be read as consistent with the OMB Guidelines, which as noted above, are intended to reflect the OMB Guidelines.

B. Due Process

12. The Archdiocese’s concerns about due process can properly be considered in the proceeding on the appeals of the COMAD letters and are irrelevant to the merits of the FOIA fee issues before us. In particular, the Archdiocese’s alleged status as an “interested and aggrieved party”³⁴ has no bearing on the merits of its FOIA request. The Supreme Court has held that in general “the identity of the requesting party has no bearing on the merits of his or her FOIA request. . . . Congress ‘clearly intended’ the FOIA ‘to give any member of the public as much right to disclosure as one with a special interest [in a particular document].”³⁵ Thus, the Archdiocese’s entitlement to receive documents pursuant to its FOIA request, much less its entitlement to receive them at reduced cost, is not affected by the Archdiocese’s claimed need to use the documents to support an appeal. A Commission decision relied on by the Archdiocese³⁶ does not hold to the contrary. There, the Commission remanded a funding decision to USAC because “without specific information to determine the basis for the denial, applicants cannot provide comprehensive responses to USAC’s arguments.”³⁷ This case did not involve a FOIA request and provides no guidance in how a FOIA request should be evaluated, but rather suggests that the proceeding involving the funding decision is the more appropriate context in which to raise arguments about access to agency materials.³⁸

³¹ See *The Freedom of Information Reform Act of 1986; Fee Schedule and Administrative Procedures*, 3 FCC Rcd 5107, 5107 ¶¶ 2, 7 (1988).

³² See, e.g., *Environmental Protection Information Center v. U.S. Forest Service*, 432 F.3d 945, 948 (9th Cir. 2005).

³³ See Presidential Memo, 74 Fed. Reg. at 4683.

³⁴ See AFR at 6.

³⁵ See *U.S. Dep’t of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 771 (1989).

³⁶ *Request for Review of the Decision of the Universal Service Administrator by Academy of Careers and Technologies, San Antonio, TX*, 21 FCC Rcd 5348, 5350-51 ¶ 6 (2006).

³⁷ See *id.*

³⁸ As an additional matter, the Archdiocese states that “FOIA, which is a governed by the Administrative Procedure Act, does not appear to encompass USAC, which is a private corporation.” See AFR at 6 n.17. Whether or not USAC is subject to the FOIA is beside the point because under established policy, FOIA requests seeking USAC records are directed to the Commission, where WCB is deemed the custodian of the records. See *Inter-Tel Technologies, Inc.*, 19 FCC Rcd 5204, 5204 n.3 (2004). See also <http://www.usac.org/privacy.aspx>. To the extent the Archdiocese is challenging USAC’s authority to (continued. . .)

13. As a related matter, we address the Archdiocese's claim that the \$39,000 estimated fee is excessive and unsupported.³⁹ Because the records requested are in the physical possession of USAC, USAC personnel will conduct any search, and WCB relied on USAC's estimate of how much a search would cost. WCB's Decision indicates that the computation of estimated search costs was based on a rate of approximately \$30 an hour.⁴⁰ Thus, the \$39,000 search fee represents approximately 1300 hours for 36 FOIA requests, or approximately 36 hours per request. Each of the Archdiocese's 36 requests seeks four categories of records:

1. Any documents that support USAC's findings either from the school or the service provider that the school did not prepare or file its FCC Form 470.
2. Any records reflecting that [a particular school's service provider] was engaged in the preparation and submission of [a particular school's] FCC Form 470.
3. Any records reflecting that [a particular school] surrendered control of the competitive bidding process to the service provider who participated in the competitive bidding process as a bidder.
4. All service certifications and invoices for [a Funding Request Number(s) (FRN) related to a particular funding year].⁴¹

This corresponds to a search of approximately nine hours per category per request. USAC supports this estimate⁴² on the basis of the estimated volume of documents involved and the time it will take to find what may be responsive documents, pull the documents and then determine if the documents are in fact responsive. More specifically, USAC explains that the relevant records are stored in databases maintained by a contractor. Because of the structure of the databases, separate searches are required using different identifiers and different file types. Moreover, once documents are retrieved from the databases, they must be reviewed manually to ascertain their relevance and to discard duplicates. USAC further explains that the requesters seek information related to almost 100 FRNs. These FRNs are associated with 36 schools and three service providers. To ensure that USAC finds "any records" and "any documents" (as described in page 2 of the FOIA requests) related to USAC's findings to adjust commitments to these schools, USAC indicates that it must search several different databases and several different file types per FRN, school and service provider. USAC estimates that over 2,000 documents would be involved. The requesters also seek information on invoices and service certifications, which are maintained in a different database. Because of the method by which invoices are submitted and filed, USAC states that it has to look at each invoice to determine if an associated service certification was submitted, in this case over 200 documents. According to USAC, taking into account all of these permutations of searches, results in an estimate of \$39,000. USAC understands that this estimate

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administer the Commission's Universal Service Fund programs, the Archdiocese is raising an issue beyond the scope of this appeal of WCB's ruling on the Archdiocese's FOIA request.

³⁹ See note 18, *supra*.

⁴⁰ See Decision at 2 (estimating that the two free search hours due to the requestor categorization as an "all other" requester would reduce costs by approximately \$60).

⁴¹ See Requests, note 3, *supra*.

⁴² USAC conveyed these views to Commission staff.

appears high, but stands behind it. We understand the Archdiocese's concern that the estimated fee seems high. However, in light of the detail with which USAC has justified its figures, we credit USAC's estimate.⁴³ Of course to the extent that the actual costs involved in processing the FOIA turned out to be lower than the estimate, the Archdiocese would be billed the lower amount.

C. Presidential Memo

14. The Presidential Memo⁴⁴ provides no basis to modify WCB's fee decision. Although the FOIA Executive Order declares that agencies should adopt "a presumption in favor of disclosure," it does not address or modify the procedural requirements of the FOIA, including the imposition of fees. Thus, the Presidential Memo does not warrant departing from the statute, our rules, and the OMB Guidelines.

D. Timeliness

15. Under section 552(a)(4)(A)(viii) of the FOIA,⁴⁵ which was added to the FOIA by the Open Government Act of 2007,⁴⁶ an agency may not assess certain fees when its response to a FOIA request is not made by the statutory deadline. The Archdiocese's FOIA requests were received on December 1 and 2, 2008.⁴⁷ Accordingly, the Archdiocese claims that a response was due on December 31, 2008.⁴⁸ Whether or not a response was due on December 31, the statutory provision does not apply to the Archdiocese's FOIA requests. Under the Open Government Act, the provision did not become effective until December 31, 2008 and does not apply to FOIA requests submitted before that date.⁴⁹ Thus, it does not apply to the Archdiocese's FOIAs, which

⁴³ The staff informs us that the magnitude of the fees could be substantially reduced, without depriving the Archdiocese of critical documents, if the Archdiocese were willing to narrow the scope of its request. The staff further indicates, however, that the Archdiocese declined to pursue this course.

⁴⁴ See Presidential Memo, 74 Fed. Reg. at 4683. See also Memorandum for Heads of Executive Departments and Agencies, The Freedom of Information Act (FOIA) (Attorney General March 19, 2009), available online at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf> (establishing presumption of openness without creating any right or benefit).

⁴⁵ See 5 U.S.C. § 552(a)(4)(A)(viii). The Archdiocese also refers to 47 C.F.R. § 0.470(a)(3)(B), which was adopted to implement the statutory provision. See *Amendment of Part 0 of the Commission's Rules Regarding Public Information, the Inspection of Records, and Implementing the Freedom of Information Act*, FCC 08-282 (Dec. 31, 2008) at ¶ 25. That amendment did not, however, become effective until 30 days after publication in the Federal Register. See *id.* at ¶ 29. Publication had not occurred at the time the Archdiocese filed its AFR.

⁴⁶ See Pub. L. No. 110-175 (Dec. 31, 2007).

⁴⁷ See note 3, *supra*.

⁴⁸ See AFR at 8 and n.22. The response was in fact due 20 business days after receipt of the FOIA requests. 5 U.S.C. § 552(a)(6)(A)(i); 47 C.F.R. § 0.460(g)(1) (specifying time limits). For the requests received December 1, 2009, the due date was December 30, and for those received December 2, the due date was December 31.

⁴⁹ See Open Government Act, § 6(b)(2).

were submitted on December 1 and 2, 2008. In any event, WCB's response, although not made by the original due date was timely. WCB extended the due date by 10 working days, until January 14 and 15, 2009.⁵⁰ WCB's response was timely made by the extended deadline.

V. ORDERING CLAUSE

16. ACCORDINGLY, IT IS ORDERED that the Application for Review filed by the Archdiocese of New York on behalf of itself and 36 private schools affiliated with the Archdiocese IS DENIED. The Archdiocese may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).

17. By the Commission, Chairman Genachowski and Commissioners Copps, McDowell, Clyburn, and Baker.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁵⁰ See Letter from Kirk Burgee, Chief of Staff to Mrs. Cynthia Schultz (Dec. 30, 2008). Such extensions are authorized by the FOIA. See 5 U.S.C. § 552(a)(6)(B)(i).