

MEMORANDUM

Date: October 23, 2014

To: Ginger McCall, Marc Rotenberg

From: [REDACTED], [REDACTED]

RE: DC Circuit Case Law on Educational Institutions

I. Introduction

The classification of an organization as an educational institution is significant under the FOIA because

[f]ees shall be limited to reasonable 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; or a representative of the news media. 5 U.S.C. § 552(a)(4)(A)(ii)(II) (emphasis added).

Despite its importance to a requester, “educational...institution” is not further defined in the statute, but through both case law and regulations, its definition has come to refer only to schools. Further, persons making requests may be covered by educational institution status when acting on the behalf of one. This has, like the understanding of educational institution generally, been narrowly construed to only include those requesting to serve a research goal of the institution.

Because “there is a dearth of authority” regarding what constitutes an educational institution for purposes of FOIA fee provisions, what follows is a mix of both Circuit and District decisions. Sack v. United States, 6 F. Supp. 3d 78, 92 (D.D.C. 2013). This will provide a functional, representative framework to assist in determining ‘educational institution’ status.

II. Analysis

What constitutes an (A) educational institution has been constructed narrowly to include only schools, consistent with the Office of Management and Budget (OMB) definition

promulgated pursuant to the Freedom of Information Reform Act of 1986. However, (B) an individual qualifies as a representative of such an educational institution for the purposes of fee status is if that person is acting on behalf of the institution, with respect its scholarly research goals. Despite the importance of a determination either in the affirmative or negative, (C) if an agency grants favorable fee status the relevant organization is not entitled to a determination regarding its status as an educational institution.

A. Educational Institutions are schools.

Regulations and case law have cabined the meaning of “educational institution” to include schools only. This is consistent with (1) OMB’s promulgated, government-wide guidelines for the assessment of fees and with the (2) D.C. Circuit case law that draws on other interpretive techniques.

1. According to OMB’s guidelines, educational institutions are schools.

Pursuant to its statutory mandate under the FOIA, the OMB promulgated a definition for determining fee status, which was to be used as the basis for new agency regulations. 5 U.S.C. § 552(a)(4)(A)(i). That definition is:

Educational institution means a preschool, a public or private elementary or secondary school, an institution of graduate or undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

2. D.C. Circuit case law holds that educational institutions are just schools.

In National Sec. Archive v. U.S. Dept. of Defense, 880 F.2d 1381, 1383 (D.C. Cir. 1989), the court held that only a school qualifies as an educational institution, thereby excluding the plaintiff, a non-profit private research institution and library that makes its holdings available for public use. However, in so holding, the court did not rely upon the OMB’s guideline regulations mandated by the FOIA, but rather plain meaning and logical statutory interpretation

The plaintiff argued that “educational institution” should not be read as a single idiomatic term, but rather as a noun and an adjective, and that the court should make its determination based on whether it served an educational purpose. Id. The defendants, the DoD, demanded a narrow reading of FOIA consistent with the OMB guidelines.

The court found in favor of the DoD interpretation, and took a narrower reading that conforms to the plain or common meaning of “educational institution” as only describing schools. Id. at 1385. It also reasoned that the term “educational institution” was meant to be read narrowly, because when Congress has meant for a statute broadly to cover organizations that provide services that can be characterized as “educational,” it has used different language to reflect that intention Id. at 1384 (citing 15 U.S.C. § 77c(a)(4) (exempting from registration requirements of Securities Act of 1933 “[a]ny security issued by a person organized and operated exclusively for ... educational ... purposes ...”) as an example).

However, even though the definition of educational institution was narrowly drawn in this case, “member of the news media” was deemed to accommodate the requester, because the organization procured the documents to be included in “an encyclopedic work that it will then offer to the public” consistent with Senator Leahy’s comment that ‘representative of the news media’ must be “broadly interpreted” in order to give FOIA its intended effect. Id. at 1387 (citing 132 Cong.Rec. S14298 (daily ed. Sept. 30, 1986)). Therefore, institutions one is more likely to consider “educational” that are nonetheless precluded from that designation by its narrow interpretation, may yet find shelter as representatives of the news media.

B. An individual is an educational institution when acting on its behalf.

In Sack v. U.S. Dept. of Defense, the court held that the “educational institutions category extends to representatives acting on behalf of the institution, as long as the request

serves a scholarly research goal of the institution.” 6 F.Supp. 3d 78, 93 (D.D.C. 2013) (citing OMB Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10,012, 10,014 (Mar. 27, 1987)). It went on to use an example present in the OMB’s guideline regulations, to further explain the significance:

[A] request from a professor of geology at a State university for records relating to soil erosion, written on letterhead of the Department of Geology, could be presumed to be from an educational institution. A request from the same person for drug information from the Food and Drug Administration in furtherance of a murder mystery he is writing would not be presumed to be an institutional request, regardless of whether it was written on institutional stationary.

Id. Thus, determining whether a requester classifies as an educational institution depends in part on the purpose of the request. If the request serves a scholarly research goal of the institution and is consistent with the scholarly research of the requesting faculty member or researcher, the individual could qualify under the educational institution definition. If the request, like in the example cited, serves an individual goal unrelated to scholarly research, the individual cannot benefit from status as an educational institution.

Students may be covered by this test, but not if the request were used for completion of a course of instruction, as that would be in pursuit of an individual research. Id. at 93. Students have the burden of proving that their request is for the purposes of an institutional research goal, and not an individual one. Conclusory assertions by a student that a request is covered by the “educational institution” category are inadequate, as are such statements by faculty on University letterhead. Rather, there must be specific assertions that the request will be used to support a research project being carried out by a faculty member or any department of the relevant educational institution, in order for status to be conferred. Id.

C. If a requester receives fee waiver, it is not entitled to a determination as to whether it is an educational institution.

When an organization is granted a fee waiver, the question of its status as an educational institution is moot because such a determination is only significant with regard to assessment of fees, and is not an independent entitlement. Long v. U.S. Dept. of Justice, 450 F.Supp. 2d 42, 84-85 (D.D.C. Sept. 8 2006); Long v. Bureau of Alcohol, Tobacco and Firearms, 964 F.Supp. 494, 497 (D.D.C. May 21, 1997). There is, therefore, an agency incentive to grant fee waiver without making a determination as to status as “educational institution” on requests that are deemed less important. In so doing, the agency retains the ability to later deny fee waiver on requests to which it is reluctant to respond. This stymies efforts to not only procure desired records in the case of contentious requests, but interferes with the ability to develop informed strategies so as to best tailor requests.

III. Conclusion

The educational institution status is thus narrow with regard to what qualifies, what constitutes working “on behalf of” such an institution, and even when a requester is entitled to such a determination.