

OMB Circular A-110, Proposed Revision



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON D.C. 20503

OFFICE OF MANAGEMENT AND BUDGET

OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations."

AGENCY: Office of Management and Budget, Executive Office of the President

ACTION: Proposed Revision

SUMMARY: This notice offers interested parties an opportunity to comment on a proposed revision to OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations." Public Law 105-277 directs OMB to amend Section __.36 of OMB Circular A-110 to require Federal awarding agencies "to ensure that all data produced under an award will be made available to the public through the procedures established under the Freedom of Information Act" (FOIA). The Act further states that "if the agency obtaining the data does so solely" in response to a FOIA request, the agency "may authorize a reasonable user fee equaling the incremental cost of obtaining the data." Pursuant to the direction of P.L. 105-277, OMB is proposing to revise Circular A-110 as shown below.

DATES: Comments must be received by April 5, 1999.

ADDRESSES: Comments on this proposed revision should be addressed to: F. James Charney, Policy Analyst, Office of Management and Budget, Room 6025, New Executive Office Building, Washington, DC 20503. If possible, please include a word processing version of comments on a computer disk. Comments may also be submitted via E-mail to: fcharney@omb.eop.gov. Please include the full body of E-mail comments in the text of the message and not as an attachment. Please include the name, title, organization, postal address, and E-mail address in the text of the message. The full text of Circular A-110 may be obtained by calling the Office of Administration, Publications Office at (202) 395-7332 or by accessing OMB's home page (/OMB).

FOR FURTHER INFORMATION CONTACT: F. James Charney, Policy Analyst, Office of Management and Budget, at (202) 395-3993.

SUPPLEMENTARY INFORMATION: Public Law 105-277 includes a provision that directs OMB to amend Section __.36 of OMB Circular A-110 "to require Federal awarding agencies to ensure that all data produced under an award will be made available to the public through the procedures established under the Freedom of Information Act." P.L. 105-277 further provides that "if the agency obtaining the data does so solely at the request of a private party, the agency may authorize a reasonable user fee equaling the incremental cost of obtaining the data." According to congressional floor statements made in support of the provision, its aim is to "provide the public with access to federally funded research data" that is "used by the Federal Government in developing policy and rules." 144 Cong. Rec. S12134 (October 9, 1998) (Statement of Sen. Lott); see *id.* (Statement of Sen. Shelby) (the provision "represents a first step in ensuring that the public has access to all studies used by the Federal Government to develop Federal policy").

In describing the foregoing provisions of P.L. 105-277, congressional proponents stated that it requires OMB "to amend OMB Circular A-110 to require Federal awarding agencies to ensure that all research results, including underlying research data, funded by the Federal Government are made available to the public through the procedures established under the Freedom of Information Act." *Id.* (Statement of Sen. Lott). The proponents also stated that "the amended Circular shall apply to all Federally funded research, regardless of the level of funding or whether the award recipient is also using non-Federal funds." *Id.* (Statement of Sen. Campbell). They also explained that "[t]he Conferees recognize that this language covers research data not currently covered by the Freedom of Information Act. The provision applies to all Federally funded research data regardless of whether the awarding agency has the data at the time the request is made" under the FOIA. *Id.* Under the Supreme Court's decision in *Forsham v. Harris*, 445 U.S. 169, 179-80 (1980), data that is in the files of a recipient of a Federal award, but not in the files of a Federal agency, would not otherwise be available under FOIA.

The proposed revision to Section __.36 of Circular A-110 implements the requirements of P.L. 105-277 by providing that, after publication of research findings used by the Federal government in developing policy or rules, the research results and underlying data would be available to the public in accordance with the FOIA. Pursuant to the direction of P.L. 105-277, the proposed revision requires Federal awarding agencies, in response to a FOIA request, to obtain the requested data from the recipient of the Federal award. Since the agency must take steps to obtain the data, the agency is afforded a reasonable time to do so. Once the agency has obtained the data, the agency will then process the FOIA request in accordance with the standard procedural and substantive rules that govern FOIA requests. These standard FOIA rules include the statutory concept of what constitutes a "record" and the statutory "exemptions" (found in 5 U.S.C. 552(b)) from the FOIA's requirement to disclose records. Accordingly, after obtaining and reviewing the requested data, the agency will have to determine whether any of the FOIA exemptions, which permit an agency to withhold requested records, would apply to some or all of the data. For example, FOIA Exemption 6, 5 U.S.C. 552(b)(6), exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly

unwarranted invasion of personal privacy". If the Federal awarding agency obtained the data solely in response to a FOIA request, the agency may charge the requester a reasonable fee equaling the full incremental cost of obtaining the data. This fee should reflect costs incurred by the agency, the recipient, and applicable subrecipients. This fee is in addition to any fees the agency may assess under the FOIA (5 U.S.C. 552(a)(4)(A)).

OMB recognizes that this proposed revision required by P.L. 105-277 raises a number of important issues. Accordingly, OMB encourages interested parties to provide comment at this time so that any concerns may be addressed in OMB's development of the final revision to the Circular, to be published after the close of the comment period.

In conclusion, pursuant to the direction contained in P.L. 105-277 OMB is proposing to revise Circular A-110 as shown below.

-
- Issued in Washington, D.C., January 26, 1999.

/s/

Norwood J. Jackson

Acting Controller

Pursuant to the direction of P.L. 105-277, OMB hereby proposes to amend Section _____.36(c) of OMB Circular A-110 to read as follows:

(c) The Federal Government has the right to (1) obtain, reproduce, publish or otherwise use the data first produced under an award, and (2) authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes. In addition, in response to a Freedom of Information Act (FOIA) request for data relating to published research findings produced under an award that were used by the Federal Government in developing policy or rules, the Federal awarding agency shall, within a reasonable time, obtain the requested data so that they can be made available to the public through the procedures established under the FOIA. If the Federal awarding agency obtains the data solely in response to a FOIA request, the agency may charge the requester a reasonable fee equaling the full incremental cost of obtaining the data. This fee should reflect costs incurred by the agency, the recipient, and applicable subrecipients. This fee is in addition to any fees the agency may assess under the FOIA (5 U.S.C. 552(a)(4)(A)).