April 11, 2016

White House Office of Management and Budget
Re: Proposed federal source code policy (https://sourcecode.cio.gov/)

The Electronic Frontier Foundation applauds the White House Office of Management and Budget for introducing a much-needed policy for publishing source code created by or for government agencies. We hope that the policy will promote transparency and lead to important opportunities for reuse and customization of government-created software. The policy can achieve these goals by requiring government agencies to share source code, encouraging agencies to use and contribute to existing free and open source software projects, and by sharing government code created by third parties under free and open source software licenses or dedicating it to the public domain.

We have a few suggestions for how the OMB could adjust the policy to best meet its goal of improved access to government software.

Public domain status of government-created code

As the notice points out, software created by government employees is considered a government work and therefore is not subject to copyright protection in the United States.

We recommend that the OMB affirm its intention for government-employee-created-code to be accessed and used globally—preferably by expressly dedicating it the global public domain or, alternatively, by sharing it internationally under a permissive free software license. By asserting the global public domain status of the code covered under the policy, the OMB can ensure that doubts over copyright do not become a barrier for the researchers, developers, and free and open source software communities that might use government-created code.

Along with a large coalition of users' rights organizations, the EFF has endorsed a set of best practices for affirming the public domain status of government-created data, available at https://theunitedstates.io/licensing/.

As a general rule, the same practices should be applied to government-created software.

Grants and Cooperative Agreements

We strongly recommend that the OMB also apply a policy favoring reuse to software produced under federal grants and cooperative agreements.

We've applauded and encouraged the U.S. government's trend toward requiring that publicly funded works be shared freely. The White House's 2013 memo on access to federally funded research was an important landmark. Ultimately, access to grant-funded research and access to grant-funded software complement and strengthen each other.

Some proposed agency-specific open access mandates have not addressed source code at all, or addressed it poorly. A strong mandate that grant-funded code be publicly shared as free and open source software would assure that the public can use covered software regardless of what government agency the grant originates from.

Open-by-Default Preferable to 20% Rule

We echo the broad consensus of fellow commenters who prefer an "open-by-default" approach for government code created by third parties to the 20% guideline proposed in the notice. The 20% rule would limit Project Open Source's utility as a source for federal government code.

We recommend that the policy address exceptions for third-party code the same way it currently addresses exceptions for government-employee-created code, via a list of specific scenarios in which it's appropriate to apply for an exception.

Narrower List of Applicable Exceptions

The "applicable exceptions" list in Section 6 is too broad and could be used to obscure the CIO's reasons for granting an exception. Specifically, we suggest omitting the word "confidentiality" and removing the last item on the list: "The CIO believes it is in the national interest to exempt publicly releasing the work." Either of those items, if used as a reason to grant an exception, would offer no information about the actual reason for the exception.

We're glad to see that the OMB expects exceptions to be rare. A way to ensure that they stay rare is to define them specifically enough that agencies must provide concrete and particular reasons in support of any exception.

Once again, we applaud the Office of Management and Budget for its commitment to making federal government software more freely and openly available. We are eager to see this policy implemented and to provide future support and guidance.

Electronic Frontier Foundation