



UNITED STATES DEPARTMENT *of* JUSTICE

Practical Approaches to Fee Determinations



Legislative history from 1986 shows
Congress did not intend for fees to be
barriers to access.



Agencies should act promptly and in a spirit of cooperation.

OIP has issued multiple guidance articles on the importance of good communication.

Good communication with requesters is key when approaching fee issues.



Three Categories of Requesters

- Commercial Use
- “Preferred Status”: Educational Institutions/Noncommercial Scientific Institutions/Representatives of the News Media (Institutions/Media)
- All others



Commercial-Use Requester

- A request made by, or on behalf of someone “who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester.
- Placement in this category is based on the *use* to which the requester will put the information and not their identity.



Commercial-Use Requester

Example

- A company seeks records to enhance prospect of the company securing a contract.
- When the requester is an attorney, look to the client's intended use of the documents.



Representative of the News Media

“[A]ny person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.



Representative of the News Media

“In this clause, the term ‘news’ means information that is about current events or that would be of current interest to the public.”



Representative of the News Media

A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity.



Representative of the News Media

Key Elements for Determination - Look at requester's **overall activities**.

1. Gathering information of potential interest to segment of the public.
2. Using editorial skills to turn raw material into distinct work.
3. Disseminating that work to an audience.



Representative of the News Media

As to *gathering information*, the D.C. Circuit has ruled this fee category is focused:

- “on the nature of the *requester*, not its request.”
- A case-by-case approach is not necessary.



Representative of the News Media

Example

- Newspaper reporter is a representative of the news media regardless of how much interest there is in the particular story for which they are requesting information.



Representative of the News Media

As to using *editorial skills to create a distinct work*, the D.C. Circuit has ruled that the requester need not gather information from multiple sources.

Requester can create “distinct work” based solely on FOIA-released documents.



Representative of the News Media

Example

- Substantive press release about documents or editorial comments can be “distinct work.”



Representative of the News Media

As to *distribution of the work*, posting on a website can qualify as distribution.

- Size of audience does not matter.
- Not necessary to have track record if there are firm plans.
- Fact-based determination based on past record, current operations, and future plans.



Representative of the News Media

Method of dissemination is not relevant as FOIA expressly provides that methods of news delivery may evolve over time.

Whether products are available by subscription or for purchase is not relevant.



Representative of the News Media

OMB Guidelines provide that a request from a representative of the news media that supports a news-dissemination function “shall not be considered to be a request that is for a commercial use.”



Two Other “Preferred” Fee Statuses

1. Noncommercial scientific institution:
Institution operated solely for the purpose of conducting scientific research not intended to promote any particular product or industry.
2. Educational institutions: Schools, including vocational schools, which operate a program of “scholarly research.”¹⁸



“Educational” Requesters

“[T]o qualify . . . [t]he requester – whether teacher or student – must seek the information in connection with his or her role at the educational institution.”

Sack v. DOD, No. 14-5039 (D.C. Cir. 2016)



“Educational” Requesters

- Not applicable when requester seeks information for personal or commercial use.
- Agency may seek some assurance that student is submitting the request to further coursework or other school-sponsored activities.



Determining Requester Categories

If an agency needs additional information to determine a requester's fee category it should seek additional information from the requester.



Three Types of Fees

➤ Search

➤ Review

➤ Duplication



Three Types of Fees

Search

All time spent searching for and retrieving records or information responsive to a request.



Three Types of Fees

Review

All that is necessary to review the material to determine if it can be released, and all that is necessary to prepare its release.



Three Types of Fees

Duplication

The per-page cost of the materials to be released to the requester.

Often, however, materials are released by email, negating the ability to charge conventional duplication costs.



Fee Assessment Considerations

Statutory Fee Restrictions

Except for Commercial Use requesters, agencies must provide the first 100 pages and the first two hours of search time without cost to the requester.



Who Pays What?

	<i>Search</i>	<i>Review</i>	<i>Duplication</i>
Commercial Use	✓	✓	✓
Institutions/Media			✓*
All Others	✓**		✓*

* First 100 pages of duplication free of charge per request.

** The first two hours of search free of charge per request.



Fee Assessment Considerations

Agency Threshold

Fees are not assessed when the total falls below an agency's cost to process a check.



Fee Assessment Considerations

Timing of Receipt of Fee Payment

After a requester has agreed to pay fees up to a certain amount, the agency can require payment once processing is complete. Upon receipt of payment, the processed records must be promptly transmitted to the requester.



Fee Assessment Considerations

Advance Payment

- Fee estimate exceeds \$250; or
- Requester has previously failed to timely pay a properly assessed fee.



Requester Notice of Fees

An agency should never begin to accrue fees greater than those that the requester has already paid, or agreed to pay.



Aggregation

If an agency reasonably believes that a requester is attempting to divide a request into a series of requests for the purpose of avoiding the assessment of fees, the agency may aggregate those requests and charge accordingly.



Agreement to Pay Fees

- Estimated fees should not be used to discourage requesters from exercising their access rights under the FOIA.
- Fee estimates should be explained and options offered.



Good Communication & Fee Matters

- The need to communicate concerning fees can arise in different ways.
- Some requesters may not even be aware that fees could apply to their requests.
- It is particularly important for agencies to have clear, helpful communication with requesters regarding fees.



Good Communication & Fee Matters

- Explanations ahead of time regarding the scope of a request and how records are organized and have to be searched can be very beneficial.
- Agencies should always strive to assist the requester in obtaining records at no cost or at the lowest possible cost.



Good Communication & Fee Matters

- Fee communications should reflect a “spirit of cooperation” and provide requesters with information on how they can best proceed.
- In communications, provide: a breakdown of fees; an explanation when fees might be higher than expected; opportunities to further discuss and collaborate.



Many requests do not require decision-making on fees.

- Statutory entitlements for free search time and duplication.
- Threshold dollar amount before fees can be charged.



Fee Waivers Under the FOIA

“Documents shall be furnished without any charge [or at a reduced rate] ... if disclosure of the information is in the public interest because *it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.*”



Preliminary Fee Waiver Questions

- Was a waiver of fees requested?
- Are there assessable fees?



Fee Waiver Considerations

- Can toll if you need more information.
- Case-by-case determination.
- Fee Waiver requests should be evaluated on the face of the request.



Fee Waiver Considerations

- Indigence is not a consideration.
- Standard of review and importance of the administrative record.



Applying the Fee Waiver Standard

“Disclosure of the requested information must: (1) shed light on ‘the operations or activities of the government’; (2) be ‘likely to contribute significantly to public understanding’ of those operations or activities; and (3) not be ‘primarily in the commercial interest of the requester.’”

Cause of Action v. FTC, 799 F.3d 1108 (D.C. Cir. 2015)



First Criteria for Fee Waivers

Disclosure of the requested information must shed light on 'the operations or activities of the government.'

Request concerns identifiable operations or activities of the government with a connection that is clear and not remote.



Second Criteria for Fee Waivers

Disclosure of the requested information must be 'likely to contribute significantly to public understanding' of the government operations or activities.

Two considerations: (1) the degree to which 'understanding' of government activities will be advanced by seeing the information, and (2) the extent of the 'public' that the information is likely to reach.



Second Criteria for Fee Waivers

Public Domain: The information requested must be a meaningful addition to the information already in the public domain. The fact that a document is technically public, however, does not necessarily mean that the criteria is not met.



Second Criteria for Fee Waivers

Dissemination: Will the requester disseminate the information to a reasonably broad audience of persons interested in the subject?

- Proof of the ability to disseminate to a broad cross-section of the public is not required.
- Requester also need not identify several methods of dissemination.



Second Criteria for Fee Waivers

- Considerations can include requester's expertise and the intention and ability to convey the information to the public.
- Representatives of the news media generally satisfy this criteria.
- Advocacy and non-profits can satisfy this criteria too if they plan to publish/distribute to further the public interest.



Third Criteria for Fee Waivers

Disclosure of the requested information must not be primarily in the commercial interest of the requester.

- A commercial interest is one that furthers a commercial, trade, or profit interest.



Third Criteria for Fee Waivers

- Requester ineligible for a fee waiver if he or she will benefit alone.
- But, it does not matter if the information will also benefit the requester as long as it will also likely contribute significantly to public understanding.



Third Criteria for Fee Waivers

- Agencies can presume that representatives of the news media satisfy this criteria.
- Data brokers or others who merely compile and market government information for direct economic return less likely to serve the public interest.



Limitations on Assessing Fees

The FOIA statute contains limitations on how and when agencies can charge certain fees.



Limitations on Assessing Fees

When an agency fails to comply with any time limit for responding to a request, there are limitations on its ability to assess certain fees unless one of three exceptions are met.



Exception to the Fee Limitation

“Exceptional circumstances”:

- If court determines that “exceptional circumstances exist,” the agency’s failure to comply with a time limit “shall be excused for the length of time provided by the court order.” (1)



Exception to the Fee Limitation

“Unusual Circumstances”:

- When “unusual circumstances” apply, and the agency has provided “timely written notice to the requester,” the delay is “excused for an additional 10 days.” (2)



Exception to the Fee Limitation

“If the agency fails to comply with the extended time limit,” it may not charge search fees (or for requesters with preferred fee status, may not charge duplication fees), unless the last exception is met.



Exception to the Fee Limitation

Agencies can still charge fees if:

- Timely written notice of unusual circumstances is provided to the requester;
- “more than 5,000 pages are necessary to respond to the request,” and
- The agency discussed with the requester via written mail, electronic mail, or telephone (or made not less than 3 good-faith attempts to do so) how the requester could effectively limit the scope of the request. (3)



Exception to the Fee Limitation

OIP has issued guidance to assist agencies in understanding these prohibitions on assessing certain fees and the exceptions to these limitations.

Guidance includes a decision tree to assist agencies in the analysis of determining whether exceptions apply when operating under “unusual circumstances.”



Exception to the Fee Limitation

Fee guidance from OIP is available at:

https://www.justice.gov/oip/oip-guidance/prohibition_on_assessing_certain_fees_when_foia_time_limits_not_met



FOIA Fees and Fee Waivers

Sources of Authority/Guidance

- FOIA Statute
- Case Law
- OMB Fee Guidelines
- Agency Regulations
- FOIA Regulations Guidance & Template
- DOJ Guide to the FOIA



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Questions?