



United States Department of Justice

Office of Information Policy

FOIA Fee Summit

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Sources of Fee and Fee Waiver Guidance

- OMB's Uniform Freedom of Information Act Fee Schedule and Guidelines (March 27, 1987)
- OMB has responsibility for government-wide fee guidance, and each federal agency promulgates its own fee regulations in accordance with those guidelines.
- Agency Regulations
- OIP Fee Waiver Guidance
- Department of Justice Guide to the Freedom of Information Act (2009 ed.)
- FOIA Counselor Hotline (202) 514-3642

OPEN Government Act of 2007 — Amended the FOIA to Impose Limitations on Assessing Fees When Response Times Not Met

FOIA now precludes agencies, with two notable exceptions, from charging search fees – or for certain requesters, duplication fees – if the agency does not meet the FOIA’s standard, twenty-day time limit

Specifically, the FOIA provides that “[a]n agency shall not assess search fees (or in the case of a requester described under clause (ii)(II) [i.e., a requester who qualifies as an educational or noncommercial scientific institution, or as a representative of the news media], duplication fees) . . . if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined [under the FOIA]) apply to the processing of the request.”

This provision imposes consequences on an agency that does not comply with the FOIA's time limits. In such cases, if the exceptions to the rule are not met, agencies cannot:

- charge requesters search fees, or
- for those requesters who are not charged search fees under the FOIA in any event, i.e., those requesters who qualify as an educational or noncommercial scientific institution, or as a representative of the new media, this provision directs that agencies cannot charge such requesters duplication fees.

Exceptions to the Rule Against Assessing Certain Fees

Notably, the FOIA has two exceptions to the rule against charging search (or, when applicable, duplication) fees when the time limits are not met.

If either “unusual” or “exceptional” circumstances apply to the processing of the request, the prohibition against charging certain fees does not apply.

Those two terms are already defined in the FOIA and those preexisting definitions apply.

“Unusual circumstances” occur in three situations:

- 1) When there is a need to search for and collect records from field offices, or other establishments;
- 2) When there is a need to search for, collect, and examine a voluminous amount of records; or
- 3) When there is a need for consultations with another agency or with more than two components within the same agency

In all these situations the exception to the rule against assessing search fees (or, if applicable, duplication fees) is met and the agency is not precluded from assessing such fees.

“Exceptional circumstances” are not affirmatively defined in the FOIA in the same way that “unusual circumstances” are, but the FOIA does provide that “exceptional circumstances” cannot include “a delay that results from a predictable agency workload of requests . . . unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.” 5 U.S.C. § 552(a)(6)(C).

Put another way, exceptional circumstances would occur if:

- the agency has a backlog of pending requests and
- is making reasonable progress in reducing that backlog.

In such situations, the exception to the rule against assessing search fees (or, if applicable, duplication fees) is met and the agency is not precluded from assessing such fees.

Thus, if the processing of a request involves:

- 1) Any of the circumstances that qualify as “unusual circumstances,” or
- 2) If the agency is facing circumstances that qualify as “exceptional” as detailed above

an exception to the rule against charging fees is met. The agency in those circumstances can assess fees as it normally would.

Applying the Rule Against Assessing Certain Fees

The FOIA precludes the charging of certain fees when the exceptions to the rule are not met.

So, for example, this provision will preclude the charging of certain fees when:

- requesters seek a small volume of records,
- where those records are readily located within the office that is processing the request, and
- where there is little or no need to consult with other entities.

For such requests, agencies should be able to comply with the FOIA's twenty-day time limit. If they do not, there is a direct consequence; the agency will not have the ability to assess search fees, (or if applicable, duplication fees) for such requests.

Question: What if the requester is a “commercial use” requester. Can “review” fees still be assessed even if no search fees can?

Answer: Yes. The limitation contained in Section 6(b) of the OPEN Government Act pertains to the charging of search fees. Commercial use requesters will still be subject to duplication and review fees.

Question: What if the requester is an “all other” requester. Can duplication fees still be assessed, even if no search fees can?

Answer: Yes. The limitation on charging fees for such requesters pertains to search fees. Duplication fees can still be assessed.

Three Types of Requesters

- **Commercial-Use Requesters**
Seek information that furthers commercial, trade, or profit interests.
- **“Favored” Requesters**
Educational institutions, non-commercial scientific institutions, and representatives of the news media.
- **All Other Requesters**
All requesters who are not classified by one of the two above categories.

Three Types of Fees

- **Search Fees**

All time spent searching for responsive material (including electronic searches); can be charged even if no records are located.

- **Review Fees**

All time spent reviewing the material to determine if it can be released, including the time necessary to prepare its release.

- **Duplication Fees**

The per-page cost of the material being released to the requester.

Who Pays What?

	<u>Search</u>	<u>Review</u>	<u>Dup.</u>
Commercial Use	Yes	Yes	Yes
“Favored”	No	No	Yes*
All Others	Yes**	No	Yes*

* “Favored” and All Others requesters receive the first 100 pages of duplication free of charge per component.

** All Others requesters receive the first two hours of search free of charge per component.

Determining a Fee Category

The requesters' appropriate fee category is based on their intent in seeking the information, not their identity.

Implications of this:

- No requester is always one fee category by default. Category is determined on a case-by-case basis. However, some requesters can generally be categorized.
- Necessary communication with the requester.
- Administrative record is vital, particularly when determining that a requester is in a category other than what he claims.

Representative of the News Media

The FOIA now defines the term “representative of the news media:”

“In this clause, the term ‘a representative of the news media’ means any 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. 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 (cont...)

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 (cont...)

Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ‘news’) who make their products available for purchase by or subscription by or free distribution to the general public.

Representative of the News Media (cont...)

These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities.

Representative of the News Media (cont...)

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, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.”

Representative of the News Media (cont...)

Determining Media Status:

Requesters seeking media status must be “organized and operated to publish or broadcast news.”

- The method of dissemination (i.e. blogs) is not a determining factor.
- Do they utilize their editorial skills to create new content based on the material they have gathered?
- Look to organizations’ mission statement. How do they describe themselves?

Representative of the News Media (cont...)

Plaintiffs found not to qualify for media status:

- Freelance journalist & publisher of a website

(Brown v. U.S. Patent & Trading Office, 445 F. Supp.2d 1347 (M.D. Fla. 2006) – no evidence of employment by news organization or evidence that he was “freelance” journalist as defined in agency’s regulations; no demonstration of firm intention of creating or publishing an original work).

- Accuracy in Media, Inc. & Author of single magazine or newspaper article

(Hall v. CIA, No. 04-0814, 2006 WL 197462 (D. D.C. Jan. 26, 2006) – as to corp., lack of evidence in the administrative record; as to individual, plaintiff’s endeavors — research contributions, email newsletters, and a single article — more akin to a those of a middleman or information vendor).

- Judicial Watch, Inc.

(Five district court opinions ruled that this organization did not qualify, as it was not organized to broadcast news, while one district court has found that it does qualify).

Representative of the News Media (cont...)

Plaintiffs found to qualify for media status:

- National Security Archive

(Nat'l Sec. Archive v. DOD, 880 F.2d 1381 (D.C. Cir. 1989) – plans to publish “document sets” that will index and cross-reference records in a particular subject area).

- ACLU of Washington

(ACLU of Wash. v. DOJ, 09-0642, 2011 WL 887731 (W.D. Wash. Mar. 10, 2011) – without discussion, cites ACLU of Washington’s website as evidence that it is a representative of the news media).

- Center for Public Integrity

(Ctr. For Public Integrity v. HHS, No. 06-1818, 2007 WL 2248071 (D.D.C. Aug. 3, 2007) – staff comprised of investigative journalists, demonstrated past journalistic record).

- Electronic Privacy Information Center

(Elec. Privacy Info. Ctr. v. DOD, 241 F.Supp.2d 5 (D.D.C. 2003) – publishes and prints book on a wide range of privacy issues, gleans information from a wide variety of sources, published a biweekly electronic newsletter distributed to 15,000 readers)

Representative of the News Media (cont...)

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.”

Example #1

Attorney requesting records on behalf of his client, a newspaper reporter. Request is seeking records concerning the reporter and has claimed “favored” status for fee purposes.

The existence of the attorney-client relationship, even if that relationship is commercial, does not make the request commercial. The fee category is determined by the client.

Example #2

Requester, an attorney representing a company, seeks records to enhance prospect of the company securing a contract.

Fee category is determined by looking at the client's intended use of the documents.

The client's intended use would constitute a "commercial use."

Fee Assessment Considerations

- Threshold

No fee may be charged if the government's cost of collecting and processing the fee is equal to, or will exceed the amount of the fee itself.

Every agency establishes in its regulations the threshold amount for charging a fee.

DOJ's new regulations will provide a threshold of \$25.00

Statutory Entitlements

Except for commercial-use requesters, agencies must provide the first one hundred pages of duplication for free and the first two hours of search for free.

Statutory Entitlements (cont...)

Note: These two provision work together. So, except for commercial-use requesters, agencies should not begin to assess fees until *after* they provide the free search time and free pages *and* determine whether the assessable fees that remain exceed the agency's threshold amount for charging fees. Only then would fees be assessed.

Advance Payment

If a fee estimate exceeds \$250 or if a requester has previously failed to timely pay a properly assessed fee, an agency can require advance payment of the fee before it proceeds.

Agreement to Pay Fees

If an estimated fee is less than \$250, an agency should get an agreement from the requester in writing to pay the estimated fees.

Note: Estimated fees should not be used to discourage requesters from exercising their access rights under the FOIA.

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.

Payment Before Delivery of Records

In cases where no advance payment was made and the requester agreed to pay fees up to a certain amount, upon completion of the processing of the records, but before their actual delivery of the records to the requester, the agency can require payment.

In other words, prior to mailing the processed records to the requester, the agency should provide the requester with the fee assessment and then upon receipt of the fee, promptly mail the processed records.

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.

Additional Fee Considerations

- Superseding fee statutes
- Charging interest on unpaid bills
- Contracting out services
- Other charges for “special” services done at the discretion of the agency

Litigation Considerations

- A requester's failure to comply with the FOIA's fee provisions, such as failing to pay an estimated fee, or failing to appeal an adverse fee determination, will generally constitute a failure to exhaust administrative remedies.
- A requester's obligation to pay fees does not cease after litigation has been initiated.

Depositing Fees

Absent statutory authority to the contrary, fees collected through the FOIA are deposited in the U.S. Treasury.

FOIA Costs v. Fees Collected

In FY2010, the government expended an estimated \$416 million on FOIA-related activities.

Approximately \$5 million was recouped through the collection of FOIA fees.

That is just over one percent of the costs expended.

Fee Waivers Under the FOIA

A. General & Procedural Considerations

1. Preliminary questions.

- a. Are there responsive records?
- b. Are there assessable fees?
- c. Has a fee waiver been requested?

Fee Waivers Under the FOIA

A. General & Procedural Considerations (cont . . .)

2. Timing issues. [See DOJ Guide at 137 & n. 179.]

- a. When should a fee waiver be evaluated?
 - Agreements to pay pending fee waiver determination (no waiver of appeal rights), or
 - At the outset
 - Exceptions

Fee Waivers Under the FOIA

A. General & Procedural Considerations (cont . . .)

b. How much time does agency have to evaluate a fee waiver request?

- Implied by the statute.
- Impact of the Oglesby case.

c. How should a belated fee waiver request be handled?

Fee Waivers Under the FOIA

A. *General and Procedural Considerations (cont . . .)*

3. Case-by-case determinations. [See DOJ Guide at 120 & n. 117.]
4. The burden-of-proof. [See DOJ Guide at 120 & n. 116; see also, e.g., 28 C.F.R. § 16.11(k).]
5. Insufficient information. [See DOJ Guide at 121-122 & nn. 122, 123, 124; see also OMB Fee Guidelines, 52 Fed. Reg. at 10,017-18, ¶ 6(g).]
6. Focus on the releasable records. [See DOJ Guide at 136-37.]

Fee Waivers Under the FOIA

A. *General and Procedural Considerations (cont . . .)*

7. The effect of indigence on entitlement to a waiver. [See **DOJ Guide at 128-29 & n.143.**]
8. Administrative record. [See **DOJ Guide at 139 & n.185, 186.**]
9. Appeal rights. [See **DOJ Guide at 138; see also, e.g., 28 C.F.R. §§ 16.6(c) & 16.9.**]
10. Standard of review and the scope of review. [See **5 U.S.C. § 552(a)(4)(A)(vii).**]

Fee Waivers Under the FOIA

B. The Statutory Standard

1. 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 [2] likely to contribute [4] significantly to [3] public understanding of the [1] operations or activities of the government and is [6] not primarily in the [5] commercial interest of the requester.

Fee Waivers Under the FOIA

C. *Applying The Standard.* [See FOIA Update, Vol . VIII, No. 1 at 3-10; see also, e.g., 28 C.F.R. § 16.11(k).]

1. Identification of the public interest.

a. Does the subject of the request concern the operations or activities of the government? [See DOJ Guide at 123-24.]

b. Is disclosure “likely to contribute” to an understanding of specific government operations? [See DOJ Guide at 124-26]

Fee Waivers Under the FOIA

C. Applying The Standard (cont . . .)

c. Will disclosure contribute to public understanding? [See DOJ Guide at 126-31.]

d. Will disclosure contribute significantly to public understanding? [See DOJ Guide at 131-32.]

Fee Waivers Under the FOIA

C. Applying The Standard (continued)

2. Measurement of the commercial interest.

a. Does the requester have a commercial interest, i.e., one that furthers the commercial, trade, or profit motive of the requester?

[See DOJ Guide at 133-34.]

b. If yes, which is greater, the identified public interest or the identified commercial interest? [See DOJ Guide at 134-135.]

Fee Waivers Under the FOIA

D. Sources of Authority/Guidance

1. 5 U.S.C. § 552(a)(4)(A).
2. Agency Regulations.
3. Case Law.
4. 1987 DOJ Fee Waiver Policy Guidance.
5. 1987 OMB Fee Schedule and Guidelines
6. DOJ Guide to the FOIA.