Fees and Fee Waivers
General Information
Sources of Guidance

➢ Office of Management and Budget
Contact: (202) 395-6466

➢ Office of Information Policy
Department of Justice
Contact: FOIA Hotline (202) 514-3642
General Information
Sources of Guidance

- OMB’s Uniform Freedom of Information Act Fee Schedule and Guidelines (March 27, 1987)
- Agency Regulations
- Department of Justice Guide to the Freedom of Information Act (2009 ed.)
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.
Three Categories of Requesters

Commercial-Use

Information that furthers commercial, trade, or profit interests.
Three Categories of Requesters

“Favored”

- Educational institutions
- Non-commercial scientific institutions
- Representatives of the news media
Three Categories of Requesters

All Other

All requesters who are not Commercial Use or “Favored”
### Who Pays What?

<table>
<thead>
<tr>
<th>Category</th>
<th>Search</th>
<th>Review</th>
<th>Dup.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commercial Use</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>“Favored”</td>
<td>No</td>
<td>No</td>
<td>Yes*</td>
</tr>
<tr>
<td>All Others</td>
<td>Yes**</td>
<td>No</td>
<td>Yes*</td>
</tr>
</tbody>
</table>

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

** All Others requesters receive the first two hours of search free of charge per request.
Agreement to pay fees up to $25 unless fee waiver sought.
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.
Fee Assessment Considerations

Limits on Charging Search Fees

- Agencies are prohibited from charging certain fees if they do not meet the response time.

- The FOIA prohibits agencies from assessing search fees (or duplication fees if requester is an educational or non-commercial, scientific institution, or representative of the news media) if the agency fails to meet the 20-day response time limit, unless unusual or exceptional circumstances apply to the processing of the request.
**Fee Assessment Considerations**

**Limits on Charging Search Fees**

*Exceptions to the Rule*

- If either “unusual” or “exceptional” circumstances apply to the processing of the request, the exceptions to the rule apply and agencies can assess fees as they have normally done.

- The pre-existing definitions of “unusual” and “exceptional” circumstances apply to this search fee rule.
Fee Assessment Considerations

Limits on Charging Search Fees

Exceptions to the Rule

“Unusual Circumstances” exist in three situations:

• When there is a need to search for and collect records from separate offices;

• When there is a need to search for, collect, and examine a voluminous amount of records; or

• When there is a need for consultations with another agency or among two or more components within the same agency.
“Exceptional Circumstances”:

• The FOIA states that exceptional circumstances cannot include a “delay that results from a predictable workload of requests . . . unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.”

• In other words, exceptional circumstances exist if the agency has a backlog of pending requests and is making reasonable progress in reducing that backlog.
Fee Assessment Considerations

Agency Threshold

No charge when total fees are below the agency’s cost to process the check.
Fee Assessment Considerations

Aggregation

When component reasonably believes a requester is attempting to divide a request to avoid fees.
**Fee Assessment Considerations**

**Prepayment**

In cases where requester agreed to pay fees up to a certain amount, the agency can require payment upon completion of the processing but before actual delivery of the records to the requester.
Fee Assessment Considerations

Advance Payment

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

Interest on Unpaid Bills
Fee Assessment Consideration

Other charges for “special” services done at the discretion of the agency
Fee Waivers
General & Procedural Considerations

**Preliminary Questions**

- Responsive records?
- Assessable fees?
- Fee waiver requested?
Fee Waivers
General & Procedural Considerations

- Timing for making determination
- Case by Case determination
- Importance of Administrative Record
Fee Waivers
General & Procedural Considerations

➢ Tolling for insufficient information
➢ Releasable information
➢ Indigence
Fee Waivers
General & Procedural Considerations

- Appeal Rights
- Burden of Proof
- Standard of Review
Fee Waivers – The Standard

Documents shall be furnished without any charge or at 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.
**Fee Waivers – The Standard**

➢ "Public Interest” Requirement

• Factors 1–4

➢ Measurement of the Commercial Interest:

• Factors 5 & 6
Fee Waivers

The Public Interest Requirement

➢ Factor 1:

• Does the subject matter of the request concern the operations or activities of the federal government?
Fee Waivers

The Public Interest Requirement

Factor 2:

• Are the records likely to contribute to the understanding of the subject of the request?
Fee Waivers

The Public Interest Requirement

➢ Factor 3:

• Will the records contribute to public understanding?
Fee Waivers

The Public Interest Requirement

➢ Factor 4:

• Will the contribution to public understanding be significant?
Fee Waivers

Measurement of Commercial Interest

Factor 5:

• Does the requester have a commercial interest in the records, i.e., one that furthers its profit, trade, or business motive?
Fee Waivers

Measurement of Commercial Interest

➤ Factor 6:

• Which is greater, the identified public interest or the identified commercial interest? (balancing test)