



UNITED STATES DEPARTMENT *of* JUSTICE

# Fees and Fee Waivers



## General Information Sources of Guidance

- Office of Management and Budget  
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- 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.

**6 C.F.R. 5.11(c)(1)**



## *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.

**6 C.F.R. 5.11(c)(3)**



## *Three Types of Fees*

### *Duplication*

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

**6 C.F.R. 5.11(c)(2)**



## *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
- Degree of integration





## *Three Categories of Requesters*

### *All Other*

All requesters who are not Commercial Use or “Favored”



## *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 request.

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



## *Fee Assessment Considerations*

Agreement to pay fees up to \$25  
unless fee waiver sought.

**6 C.F.R. 5.5(c)**



# *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.

**5 U.S.C. 552(a)(4)(A)(iv)(II); 6 C.F.R. 5.11(d)(3)**



## *Fee Assessment Considerations*

### *Agency Threshold*

No charge when total fees are below the agency's cost to process the check.

**6 C.F.R. 5.11(d)(4)**



# *Fee Assessment Considerations*

## *Aggregation*

When component reasonably believes a requester is attempting to divide a request to avoid fees.

**6 C.F.R. 5.11(h)**



## *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

6 C.F.R. 5.11(i)





## *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 [2] likely to contribute [4] significantly to [3] public understanding of the [1] operations or activities of the government and is not [6] primarily in the [5] 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)