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## Freedom of Information Act Fees for Government Information

The Freedom of Information Act (FOIA) establishes a presumption that information in the possession of executive branch agencies and departments of the U.S. federal government is accessible to the public. Under FOIA, the burden of proof to access government information shifted from a requester’s “need to know” to a “right to know” doctrine, where the federal government has to show a need to keep the information secret (H.Rept. 109-226). However, federal agencies may recoup the costs of providing information to the public by assessing FOIA fees (hereinafter, fees).

This piece discusses what fees are used for, how fees are assessed, fee waivers, and payment of fees.

### What Are the Fees Used for?

Created by the White House Office of Management and Budget (OMB) pursuant to FOIA, the Uniform Freedom of Information Act Fee Schedule and Guidelines provides information on the use and assessment of fees. Fees assessed for the duplication and receipt of government information reimburse the responding agency for costs incurred in providing these services. Direct costs related to providing these services include:

- The salary cost of the employee searching for relevant materials;
- The searching costs of locating the material (for example, costs for staff time or computer search time);
- The reproduction of the information on a reasonably usable media; and
- The review of information to determine whether it is exempt from mandatory disclosure.

Direct costs do not include overhead expenses of the agency for storing and maintaining the records.

### How Are the Fees Assessed?

Fees for government information are assessed on two criteria: first, the type of requester asking for the information; and second, the type of information being sought. An information request fee is determined first by the requester category, and then by selecting the particular fees for the types of information sought.

### Fees by Category of Requester

OMB provides information on the four categories of FOIA requesters. The category in which a requester is placed determines the requester’s fee responsibility.

The four categories of requesters are:

1. *Commercial Use Requesters*—where a request is made for information to further the commercial, trade or profit interests of the requester or person on whose behalf the request is made;
2. *Educational Institutions and Non-Commercial Scientific Institution Requesters*—where a request is made on behalf of an institution for the purposes of scholarly or scientific research not intended to promote any particular product or industry;
3. *Requesters Who Are Representatives of the News Media*—where a request is received from any person actively gathering information about current events or information that would be of current public interest and has a reasonable expectation of being published; and
4. *All Other Requesters*.

Requesters who are members of the general public (who do not typically meet the (1) commercial use, (2) educational and scientific institution, or (3) news media requester definitions) are furnished the first 100 pages of reproduction of the information and the first two hours of search time without charge. Commercial use requesters are charged for the full direct costs, including reproduction costs, while educational and non-commercial scientific institution requesters are only charged for reproduction costs over 100 pages.

### Uniform Freedom of Information Act Fee Schedule and Guidelines

52 *Federal Register* 10019, March 27, 1987

- **Commercial Use Requesters:** Charged for the full direct costs and reproduction costs;
- **Educational Institutions, Non-commercial Scientific Institutions, and News Media Requesters:** Charged for only reproduction costs in excess of the first 100 pages;
- **All Other Requesters:** Charged for the direct costs excluding review of information; *first 100 pages and 2 hours of search time are free of charge.*

### Selected Fees by Type of Information

Common types of information that fall under this category include information on an individual, information in the pursuit of government benefits, and information on an individual’s military service.

**Information on an Individual.** The Privacy Act of 1974 governs the disclosure of information on an individual, and only pertains to U.S. citizens and permanent residents. The

act allows individuals to request an agency perform a search for information in a system of records based on identifiers such as their name or Social Security Number. Generally, unless a request meets an exemption under 5 U.S.C. §552a(b), information may not be disclosed without the individual's consent. An agency may only assess fees for reproduction of such information. (5 U.S.C. §552a(f)(5)).

**Military Records Fees.** Military records fees depend on where the information is currently located, be it at the Department of Defense (DOD), or the National Archives and Records Administration (NARA). For more information on the transfer of records, see CRS In Focus IF11119, *Federal Records: Types and Treatments*, by Meghan M. Stuessy. Records of an individual who separated from the military less than 62 years ago are under the purview of DOD, while those exceeding 62 years are managed by NARA. The U.S. Code (10 U.S.C. §§1041-1042) prohibits DOD fees for providing certificates of service or discharge under certain conditions. NARA assesses reproduction fees as it would for any other types of archival records under 44 U.S.C. §2116 and 44 U.S.C. §2307.

**Information for Pursuit of Government Benefits.** In cases where NARA receives an agency's records for archiving, NARA guidance allows for the free furnishing of one copy of the required document free of charge (36 C.F.R. §1258.12). This provision does not automatically apply to other agencies, though similar provisions may exist.

### Fee Waivers and Reductions

FOIA provides for a waiver or reduction of fees for information "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" (5 U.S.C. §552(a)(4)(A)(iii)).

The Department of Justice (DOJ) released policy guidance for implementing this provision of FOIA (Department of Justice Guide to the Freedom of Information Act: Fees and Fee Waivers, 2014). To qualify for a fee waiver, a request must (1) be in the public interest, and (2) not be primarily in the commercial interest of the requester.

In determining whether a request is in the public interest, DOJ applies several factors, such as whether the request discusses and contributes to an understanding of identifiable government activities, and whether the request would provide meaningfully informative material not already in the public domain. In determining whether a request is not primarily in the requester's commercial interest, the value of the information to the public must outweigh possible commercial interests.

### Waiver Appeals Processes

FOIA does not provide for a waiver appeals process in statute; however, many agencies have processes either through agency regulation or practice. Information on fee waiver requests may be found in an agency's annual FOIA

report, where an agency must report the number of fee waiver requests that were granted and denied.

Further, DOJ guidance notes, "FOIA contains no provision for reimbursement of fees if the requester is dissatisfied with the agency's response."

### Updated Guidelines for Media Requester Waivers

In 2007, Congress clarified the definition of requesters who are representatives of the news media through P.L. 110-175. Prior to the enactment of the 2007 law, DOJ noted that the categorization of representatives of the news media was the subject of a number of court FOIA opinions, often deciding that plaintiffs were not news media requesters. Congress clarified and expanded the definition to include freelance journalists and new forms of news delivery through the Internet.

The incentive for being classified as a news media requester means that the requester may only be billed for the reproduction of information in excess of the first 100 pages. A narrow definition of a news media requester may mean requesters could be assessed higher fees for information they intend to disseminate in the public interest.

Accompanying the 2007 legislation, H.Rept. 110-45 explained that the modifications were to clarify that "agencies may not deny fee waivers for legitimate journalists solely on the basis of an absence of institutional associations of the requester" and that instead "agencies must consider the prior publication history" and "stated intent to distribute information to a reasonably broad audience" when determining the requester's eligibility. Furthermore, the statutory definition at 5 U.S.C. §552(a)(4)(A)(ii) notes a requester may be considered a freelance journalist "whether or not the journalist is actually employed by the [news] entity."

### Payment of Fees

In the event the responding agency anticipates the fees for furnishing the information to be more than \$25, the agency will notify the requester in advance before proceeding with the request. At that time, the requester has the opportunity to accept the outlines of the search, or to work with the agency to narrow the scope of the request and thus reduce costs. Under statute (5 U.S.C. §552(4)(v)), agencies are not allowed to require pre-payment of the fees unless the fees will exceed \$250, or if the requester has previously failed to pay a fee in a timely fashion.

### Limitation on Agency Collection of Fees

OMB's Uniform Freedom of Information Act Fee Schedule and Guidelines further limits an agency's collection of fees from any type of requester if the cost of collecting the fee would be equal or greater than the fee itself. In assessing whether the cost of collection would exceed the fee, agencies are to consider the agency's administrative costs in receiving and recording receipt of the fee, and the cost for processing the fee for deposit in the Treasury Department.

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