Making the Most of the New Policy Guidance on FOIA Fee Waivers

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[¶7019] The waiver or reduction of fees charged by agencies for processing FOIA requests can be an essential element in people's ability to obtain information under the Act. Indeed, up-front fee payment requirements can effectively preclude use of the Act by many, and the specter of massive search fees (often with little to show in the way of documents found and released) may scare off potential FOIA requesters. Practices vary widely with respect to such components of an agency's fee schedule as hourly search and per-page copy fees, automatic fee waiver thresholds, costs for manual versus computer search, and the use of clerical and professional personnel to process a request. Each agency's regulations must be consulted to get an idea of what your FOIA request may cost.

Background. The FOIA limits the fees agencies may impose to "reasonable standard charges for document search and duplication," and such fees may provide for "recovery of only the direct costs of such search and duplication." The Act directs that documents "shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fees is in the public interest because furnishing the information can be considered as primarily benefiting the general public" 5 USC 552(a)(4)(A) (1976) [¶200,011]. These provisions were added to the Act in 1974 as a result of congressional findings that excessive fees and collection of the full cost of processing requests for records were discouraging use of the Act. The legislative history of the fee and waiver provisions indicates that fees shouldn't be used to prevent disclosure of information and that the public interest standard for fee waiver or reduction should be liberally construed. A policy statement issued by the Attorney General in 1981 concluded that agencies were failing to grant fee waivers in appropriate circumstances and mandated a generous fee waiver practice [¶300,793].

New Fee Waiver Policy. The Department of Justice recently issued new guidelines to agency heads on the administration of the fee waiver provisions of the Act [¶300,815] designed to replace the 1981 policy. The guidelines immediately generated controversy, with criticism levelled at an alleged antiwaiver bias in the thrust of the policy memorandum. Chairman Glenn English of the House Subcommittee on Government Information, Justice, and Agriculture, the FOIA oversight subcommittee in the House, responded to the policy guide with a letter to all agencies, reminding them of the Act's requirements and what he viewed as the congressional intent that the waiver provisions be liberally construed. Despite the controversy, and until and unless Congress amends the law,[1] it's essential that users of the Act understand the new guidelines and fashion their waiver requests accordingly.

[Footnote ¶7019] 1. Fees and fee waiver have been a prominent part of the proposals to overhaul the FOIA in the 97th and 98th Congress. S. 774, currently working its way through the Senate, expands the costs recoverable by agencies in processing FOIA requests by permitting recovery not only of search and duplication costs, but also for services involved in examining records for possible withholding or deletions. Waiver or reduction of search and duplication charges is provided for under the standard presently in the law. Other processing charges are to be waived if the agency determines the information isn't being requested for a commercial purpose and the request is being made by (1) an individual or educational or noncommercial scientific institution whose purpose is scholarly or scientific research; (2) a representative of the news media; or (3) a non-profit group that intends to make the information available to the general public. The proposal thus would increase the fees potentially recoverable but require waiver of the additional processing charges on the basis of the status and/or motivation of particular requesters. S. 774 was ordered favorably reported by the Senate Judiciary Committee on June 16, 1983.

The guidelines list five general factors agencies are to consider in determining whether a fee waiver is warranted because disclosure of the requested documents primarily benefits the general public. They are:

- Whether there is a genuine public interest in the subject matter of the documents. The "public" to be benefitted must be distinct from the requester alone. The policy memorandum also indicates that it is not in the public interest to grant a waiver solely on the basis of indigency of the requester.
- The value of the records to the public; whether the information contributes to public understanding of the subject.
- Whether the information is already in the public domain. Denial of a fee waiver is deemed appropriate, for instance, if the material is available in the agency's public reading room.
- Identity and qualifications of the requester; ability and intention to effectively convey information to the public. The guidelines instruct agencies that "requesters should specifically describe their qualifications, the nature of their research, and the purposes for which they intend to use the requested material."
- Personal interest of the requester; comparison of personal versus public interest. Commercial interests, first-party interest in one's own records, and the interests of parties seeking records for use in litigation were identified as the types of personal interests to be assessed.

Justice Department's policy differs little. The basic criteria outlined above differ little from those contained in the Attorney General's memorandum on the 1974 amendments to the Act and the 1981 superseded Carter administration guidelines. They also reflect considerations courts have deemed relevant to the fee waiver question. The memo as a whole, however, invites agencies to take a harder look at fee waiver requests, and its motivation is to reverse what was seen as too liberal a policy of granting fee waivers. OMB communications prior to issuance of the Department's memo anticipated a policy that strictly and narrowly interpreted the FOIA's fee waiver provisions. The resulting articulation of the policy seems to satisfy that hope.

Death of suggestions regarding implementation. One striking aspect of the memorandum is its lack of encouragement to agencies to grant waivers to qualified requesters. Prior guidance had urged agencies to be generous and suggested practices to facilitate qualification for waivers. Agencies were told to invite requesters to reformulate requests if difficulties arose in either complying with the request or determining its public interest component. Establishing an administrative appeal mechanism for fee decisions was also suggested. Partial waivers were encouraged if the agency found complete waiver wasn't warranted. The new policy statement contains none of these suggestions to agencies.[2]

Guidelines focus on unrepresentative cases and excerpts. The narrower focus of the guidelines is also reflected in the curious mix of cases cited. Nearly half the cases relied on by the Department involved requests by prisoners or ex-convicts for their own records. Such cases predominate in fee waiver case law. They usually provide little guidance to agencies, given the obvious absence of public interest in the records. If they were the only authority available, reliance on them would be understandable. The memorandum omits significant cases, however, and cites others for propositions not central to the holdings of the case. The inclusion of these partially and wholly omitted cases—while not casting doubt on the basic accuracy of the description of the elements to be generally considered in fee waiver cases—might have provided illustrations useful to agencies in making fee waiver decisions and to requesters or litigants in structuring their fee waiver requests.

[Footnote ¶7019 continued]

2. *FOIA Update*, a quarterly publication of the Justice Department's Office of Information and Privacy, reprinted the new fee waiver guidelines in its January 1983 issue [¶300,815]. An article accompanying the guidelines outlined other considerations for agencies, including the option of fee reduction if waiver isn't warranted and the propriety of providing for administrative appeal in fee waiver cases. The article concludes, that "an agency that applies the substantive criteria of the Department of Justice's fee waiver policy statement, together with the procedural guidance highlighted here, can be confident that its overall fee waiver policy is in conformity both with the statute and with sound administrative practice." 4 FOIA Update 4 (January 1983).

The memorandum ignores the holdings of two cases it cites for more general propositions. In Diamond v Federal Bureau of Investigation (SDNY 1982) 548 F Supp 1158 [3 GDS ¶83,017], the court held that "(i)nsofar as the agency's determination was based on the risk to the public fisc in waiving fees for prospective authors without a guarantee of future public benefit, it was based on a factor 'not controlling under the terms of the statute' and was, therefore, arbitrary and capricious." It noted that courts seem "most willing to overrule agency fee determinations in cases in which authors sought information to further their research into topics of historical interest." 548 F Supp at 1160 [3 GDS ¶83,017 at page 83,455].

Eudey v Central Intelligence Agency (DD.C. 1979) 478 F Supp 1175 [1 GDS ¶79,138] is similarly used. It is cited in the memorandum for the self-evident proposition that a fee waiver or reduction is appropriate under the statute only when the benefit to the general public is primary. However, the decision contains useful cautionary advice to agencies in the course of rejecting the agency decision not to waive fees:

> In the instant case, the Central Intelligence Agency's determination not to waive fees was based on its assessment that few documents will be released in response to Plaintiff's request. That determination was arbitrary and capricious because it was based on a factor that is not controlling under the terms of the statute. The statute does not permit a consideration of how many documents will ultimately be released. The Court notes, moreover, that a single document may, in the present context, substantially enrich the public domain. In addition, knowledge of the quantity of responsive documents in agency files alone, or of the absence of such documents, itself benefits the public by shedding light on the subject of Plaintiff's research. 478 F Supp at 1177.

➠**THE LESSON**➝ Don't let an agency get away with the argument that the quantity of data at stake is too limited. Both Diamond and Eudey contain relevant judicial discussions of what agencies can and cannot do in making fee waiver determinations. These aspects of the cases, however, weren't highlighted in the Department's memorandum. Other cases were ignored completely. For example, Allen v FBI (DD.C. 1982) 551 F Supp 694 [2 GDS ¶82,242] the court rejected the agency's denial of fee waiver to a researcher examining the work of the House Select Committee on Assassinations. It noted that while the agency recited seven factors relevant to the waiver determination (factors that are also recited in the policy guide), it didn't properly apply them to the requester's case. The court in Fitzgibbon v CIA (DD.C. 1976) No. 76-700, also held the requester entitled to a fee waiver, rejecting as irrelevant the fact that the agency perceived an obligation to the public to collect fees for processing FOIA requests. See also, Wooden v Office of Juvenile Justice Assistance (DD.C. 1981) 2 GDS ¶81,123.

The use of another case, Shaw v. CIA, (DD.C. 1982) 3 GDS ¶83,009, also reveals the narrower focus of the Department's guidelines. It is cited for the proposition that "No matter how interesting or vital the subject matter of a request, the public is benefited only if the information released meaningfully contributes to the public development or understanding of the subject." It is true that the court upheld the agency's denial of fee waiver and the case could be viewed as supportive of the general proposition articulated by the Department. However, the agency's denial was accompanied by what the court described as a "significant caveat", namely, that the agency would reconsider its decision if, on the basis of documents retrieved in response to the request, the agency concludes, "independently or with the assistance of the plaintiffs", that release of the documents would benefit the general public.

➠**CONSIDER GOING FOR HALF A PIE**➝ The agency in Shaw also set a ceiling on copying charges for each of the plaintiffs' requests. Fee reduction as an alternative to complete waiver and reconsideration of the waiver decision at later stages of

the administrative process are elements of the fee waiver decision that both agencies and requesters should be aware of. There is no discussion of them in the Department's memorandum and cases such as Shaw, which illustrate those options, are not highlighted. See also, Lybarger v Cardwell (CA-1 1978) 577 F2d 764 (fee reduced); Burris v CIA (MD Tenn. 1981) 524 F Supp 448 [2 GDS ¶82,027] (requester invited to restructure request).

The Guidelines aren't the last word. Despite the shortcomings of the policy guide, agencies will undoubtedly rely on it and requesters and litigants must be prepared to adapt to it. Agency fee waiver decisions are judicially reviewable. However, agency action will only be overturned if found to be arbitrary and capricious, a difficult standard for an unsuccessful requester to establish. As noted above, though, there have been judicial reversals of agency fee waiver denials. Those cases establish that courts will scrutinize agency decisions in appropriate cases. It is also possible that agency stinginess with fee waivers resulting from the new guidelines will prompt more litigation of this issue and development of a body of case law favorable to waiver requesters.

More Documentation Necessary. In light of the new guidelines, requesters may now have to supply more information to buttress their requests for waiver of fees. While identity and motivation of the requester are not usually relevant to entitlement to records under the Act, they may be crucial factors at the fee waiver stage of the case. That stage of the case should also commence at the time the request for documents is made. Agencies might not begin processing a request without assurance that fees will be paid. Down payments may also be demanded before document search begins. Thus, establishing qualifications for fee waiver or reduction is one of the first things a requester should do.

➠**KEY YOUR REQUESTS TO THE GUIDELINES' STANDARDS**➝ A fee waiver request should be keyed to the standards in the new guidelines. It can't be assumed that agencies will automatically infer entitlement to waiver from one's status or the nature of the documents requested. Journalists and members of public interest groups have already been asked to supply information substantiating the public interest in requested disclosures under the new guidelines.

If waiver of the entire cost of search and copying is denied, the requester should seek a reduction of fees or ask that the agency establish a ceiling for his particular request. Where the request is wide-ranging, requiring extensive search without assurance that significant records will be found, agencies can also be requested to reconsider initial waiver or reduction denials on the basis of the public interest in the documents ultimately retrieved and disclosed. Requesters have successfully pursued these routes in the past. See e.g., Shaw, Lybarger, supra.

➠**DON'T COUNT ON CONSISTENCY**➝ While one stated goal of the Justice Department's fee waiver guidelines is to produce consistency among agencies in the administration of the waiver provisions of the Act, agency practice is still likely to vary considerably. Fee waiver decisions are made on a case-by-case basis.

Look beyond the guidelines. The guidelines are not binding, in the sense that agencies are directed by law to adopt them, and some agencies may be more sympathetic to the guidance than others. The guidelines do correctly catalog considerations that are appropriate to the waiver decision. The change in policy is more one of tone and motivation rather than application of different legal standards. By looking behind some of the cases cited by the Department and supplementing the guidelines with the cases omitted and discussed above, agencies and requesters can gain a more complete picture of the "law" of fee waivers. While there is a feeling that it's a "whole new ballgame" with respect to fee waivers, the long-term impact of the guidelines is uncertain. Closer congressional scrutiny of the fee waiver practices of agencies, which has already begun, and the likely increase in litigation over the question may provide a counterpoise to the Department's restrictive policy guidance.

The views expressed are solely those of the author.

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