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**Sent:** Friday, August 28, 2015 1:35 PM  
**To:** Hogan, James P CIV OSD ODCMO (US)  
**Subject:** Fees  
**Attachments:** CoA v. FTC.pdf

All DoD FOIA Officers and Attorneys,

Please see the attached opinion from the U.S. Court of Appeals for DC. It concerns FOIA fee status and fee waivers. At this time, I am waiting to see if DOJ is going to send out any supplemental guidance. Meanwhile, please take this opinion into consideration when you are making fee determinations.

Speaking of fees, I would like to remind you of my stance, "Don't make fees an issue when fees aren't an issue!!" What does that mean? It means that if you receive a FOIA request and can tell, up front, that you are not going charge the requester for any fees, then don't address the requesters fee status, fee waiver, or lack of willingness to pay fees.

For example, you receive a FOIA request from CBS News. Now, you know that a representative of the news media gets all search and review free, and only has to pay for document reproduction, after the first 100 pages. Given that many of you (it should be all) of you provide the requesters with electronic copies of documents, in this case there will be no fees. So, if CBS News asks for a fee waiver, don't address it. At all. When you are done processing, just say "There are no assessable fees in this instance." No need to mention a fee waiver or not.

Example 2. You get a request from a public interest group that may or may not be a representative of the news media. Let's call them the Society of Concerned Unemployed Left-Handed Socialists (SCULS). SCULS demands new media fee status, and a waiver of all fees (regardless of what category they are in). You determine that the search time for the SCULS request is 2 hours or less, and you provide the information electronically. Additionally, you are not really sure whether they qualify a representative of the news media or other requester. In this case, I recommend that instead of going through all the work of conducting research, etc., in trying to determine the fee status and writing the letter you should, again, just ignore the fee issue and tell them, at the end "There are no assessable fees in this instance." Additionally, I recommend this approach even if the search is greater than 2 hours - why make fees an issue for a few bucks? Of course, you should use discretion in this area as the potential search gets larger.

Example 3. You get a FOIA request from an "other" requester who doesn't agree to pay fees. Again, if there will be no or minimal assessable fees, then don't make fees an issue.

One last thing on fees - please see our December 3, 2008, memo concerning the OPEN Government Act of 2007, available at <http://open.defense.gov/Portals/23/Documents/OpenGovtPolMemo2007.pdf>. I call your attention to paragraph 4.c. of the attachment, which details the limitations on assessing fees when you cannot make a determination within the statutory time limit. Please ensure you are complying with this guidance.

Bottom line - some components are automatically adjudicating fee issues (i.e. denying representative of the news media status and fee waivers) right up front without even determining what the fees are. If there will be fees, this is a good practice. However, if fees won't be an issue, such a practice only causes animosity between requesters and FOIA officers. I recommend, instead, that FOIA officers get into the habit of picking up the phone and call requesters. If the request is large and burdensome, let them know that their request is worded in such a way that it will take a long time to process. Work with them on reworking the request to get them what they want quicker, if possible.

Hopefully this helps.

Jim Hogan