

with the assistance of their legal advisor, witnesses should prepare a draft declaration to be included with the litigation report.

(vii) The following is some general guidance on the content of a declaration in FOIA litigation. Identify the declarant and describe his or her qualifications and responsibilities as they relate to the FOIA; provide a statement indicating that the declarant is familiar with the specific request and the general subject matter of the records; include a statement of the searcher's understanding of the exact nature of the request, including any modification (narrowing or expanding the search based on communications with the requester); generally, the factual portion of the declaration should be organized as a chronological statement beginning with receipt of the request; provide a specific description of the system of records searched; and provide a description of procedures used to search for the requested records, (manual search of records, computer database search, etc.). This portion of the declaration is especially important when no records are found. The declaration must reflect an adequate and reasonable search for records in locations where responsive records are likely to be found.

(5) *Special guidance for initial denial authorities.* If any information was withheld, the IDA or person with specific knowledge of the withholding must provide a specific statement of any Exemptions to the FOIA, which were applied to the records.

(i) *Withheld records.* For withheld records, describe in reasonably specific detail all records or parts of records withheld. If the number of records is extensive, use an index of the records and consider numbering the documents to facilitate reference. It is also permissible (and frequently helpful) to include redacted portions of records withheld as attachments or exhibits to the declarations.

(ii) *Exemptions.* Include in the declaration a specific statement demonstrating that all the elements of each FOIA exemption are met.

(iii) *Segregation.* The FOIA requires that all information not subject to an exemption to the FOIA, which can be

reasonably segregated from exempt information, must be released to FOIA requesters. In any instance where an entire document is withheld, the individual authorizing the withholding must specifically address that segregation and release of non-exempt material was not possible without rendering the record essentially meaningless. If applicable, this issue must be specifically addressed in the declaration.

(iv) *Sound Legal Basis.* Army policy promotes careful consideration of FOIA requests and discretionary decisions to disclose information protected under the FOIA. Discretionary disclosures should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information. The decision to withhold records, in whole or in part, otherwise exempt from disclosure under the FOIA must exhibit a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.

### Subpart F—Fee Schedule

#### §518.19 General provisions.

(a) *Authorities.* The FOIA, as amended; the Paperwork Reduction Act (44 U.S.C. 35), as amended; the PA of 1974, as amended; the Budget and Accounting Act of 1921 and the Budget and Accounting Procedures Act, as amended (see 31 U.S.C.); and 10 U.S.C. 2328).

(b) *Application.* The fees described in this Subpart apply to FOIA requests, and conform to the Office of Management and Budget Uniform Freedom of Information Act Fee Schedule and Guidelines. They reflect direct costs for search, review (in the case of commercial requesters), and duplication of documents, collection of which is permitted by the FOIA. They are neither intended to imply that fees must be charged in connection with providing information to the public in the routine course of business, nor are they meant as a substitute for any other schedule of fees, such as DoD 7000.14-R, which does not supersede the collection of fees under the FOIA. Nothing in this subpart shall supersede fees chargeable under a statute specifically providing

for setting the level of fees for particular types of records. A "statute specifically providing for setting the level of fees for particular types of records" (5 U.S.C. 552 FOIA, (a)(4)(A)(vi)) means any statute that enables a Government Agency such as the GPO or the NTIS, to set and collect fees. Components should ensure that when documents that would be responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs such as GPO or NTIS, they inform requesters of the steps necessary to obtain records from those sources.

(1) The term "direct costs" means those expenditures an Activity actually makes in searching for, reviewing (in the case of commercial requesters), and duplicating documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits), and the costs of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space, heating or lighting the facility in which the records are stored.

(2) The term "search" includes all time spent looking, both manually and electronically, for material that is responsive to a request. Search also includes a page-by-page or line-by-line identification (if necessary) of material in the record to determine if it, or portions thereof are responsive to the request. Activities should ensure that searches are done in the most efficient and least expensive manner so as to minimize costs for both the Activity and the requester. For example, Activities should not engage in line-by-line searches, when duplicating an entire document known to contain responsive information, would prove to be the less expensive and quicker method of complying with the request. Time spent reviewing documents in order to determine whether to apply one or more of the statutory exemptions is not search time, but review time.

(3) The term "duplication" refers to the process of making a copy of a document in response to a FOIA request. Such copies can take the form of paper

copy, microfiche, audiovisual, or machine-readable documentation (e.g., magnetic tape or disc), among others. Every effort will be made to ensure that the copy provided is in a form that is reasonably useable, the requester shall be notified that the copy provided is the best available and that the Activity's master copy shall be made available for review upon appointment. For duplication of computer-stored records, the actual cost, including the operator's time, shall be charged. In practice, if an Activity estimates that assessable duplication charges are likely to exceed \$25.00, it shall notify the requester of the estimate, unless the requester has indicated in advance his or her willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with Activity personnel with the object of reformulating the request to meet his or her needs at a lower cost.

(4) The term "review" refers to the process of examining documents located in response to a FOIA request to determine whether one or more of the statutory exemptions permit withholding. It also includes processing the documents for disclosure, such as excising them for release. Review does not include the time spent resolving general legal or policy issues regarding the application of exemptions. It should be noted that charges for commercial requesters may be assessed only for the initial review. Activities may not charge for reviews required at the administrative appeal level of an exemption already applied. However, records or portions of records withheld in full under an exemption, which is subsequently determined not to apply, may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review would be properly assessable.

(c) *Fee restrictions.* No fees may be charged by any Army Activity if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee. With the exception of requesters seeking documents for a commercial use, Activities shall provide the first two hours of search time, and the first one hundred

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pages of duplication without charge. For example, for a request (other than one from a commercial requester) that involved two hours and fifteen minutes of search time, and resulted in one hundred and twenty-five pages of documents, an Activity would determine the cost of only ten minutes of search time, and only five pages of reproduction. If this processing cost was equal to, or less than the cost to the Activity for billing the requester and processing the fee collected, no charges would result.

(1) Requesters receiving the first two hours of search and the first one hundred pages of duplication without charge are entitled to such only once per request. Consequently, if an Activity, after completing its portion of a request, finds it necessary to refer the request to a subordinate office, another Army Activity or DoD Component, or another Federal Agency for action their portion of the request, the referring Activity shall inform the recipient of the referral of the expended amount of search time and duplication cost to date.

(2) The elements to be considered in determining the "cost of collecting a fee" are the administrative costs to the Activity of receiving and recording a remittance, and processing the fee for deposit in the Department of Treasury's special account. The cost to the Department of Treasury to handle such remittance is negligible and shall not be considered in the Activity's determinations.

(3) For the purposes of these restrictions, the word "pages" refers to paper copies of a standard size, which will normally be "8½ × 11" or "11 × 14". Thus, requesters would not be entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or 100 pages of computer printout, however, might meet the terms of the restriction.

(4) In the case of computer searches, the first two free hours will be determined against the salary scale of the individual operating the computer for the purposes of the search. As an example, when the direct costs of the computer central processing unit, input-output devices, and memory capacity equal \$40.00 (two hours of equivalent

search at the clerical level), amounts of computer costs in excess of that amount are chargeable as computer search time. In the event the direct operating cost of the hardware configuration cannot be determined, computer search shall be based on the salary scale of the operator executing the computer search.

(d) *Fee waivers.* Documents shall be furnished without charge, or at a charge reduced below fees assessed to the categories of requesters when the Activity determines that waiver or reduction of the fees is in the public interest because furnishing the information is likely to contribute significantly to public understanding of the operations or activities of DA and is not primarily in the commercial interest of the requester.

(1) When assessable costs for a FOIA request total \$15.00 or less, fees shall be waived automatically for all requesters, regardless of category.

(2) Decisions to waive or reduce fees that exceed the automatic waiver threshold shall be made on a case-by-case basis. 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."

(i) Activities should analyze whether the subject matter of the request involves issues that will significantly contribute to the public understanding of the operations or activities of DA or DoD. Requests for records in the possession of the Army or DoD, which were originated by non-government organizations and are sought for their intrinsic content, rather than informative value, will likely not contribute to public understanding of the operations or activities of either DA or DoD. An example of such records might be press clippings, magazine articles, or records forwarding a particular opinion or concern from a member of the public regarding an Army or DoD activity. Similarly, disclosures of records of considerable age may or may not bear directly on the current activities of either DA or DoD; however, the age of a particular record shall not be the sole criteria for denying relative

significance under this factor. It is possible to envisage an informative issue concerning the current activities of DA or DoD, based upon historical documentation. Requests of this nature must be closely reviewed consistent with the requester's stated purpose for desiring the records and the potential for public understanding of the operations and activities of DA or DoD.

(ii) The informative value of the information to be disclosed requires a close analysis of the substantive contents of a record, or portion of the record, to determine whether disclosure is meaningful, and shall inform the public on the operations or activities of DA or DoD. While the subject of a request may contain information that concerns operations or activities of DA or DoD, it may not always hold great potential for contributing to a meaningful understanding of these operations or activities. An example of such would be a previously released record that has been heavily redacted, the balance of which may contain only random words, fragmented sentences, or paragraph headings. A determination as to whether a record in this situation will contribute to the public understanding of the operations or activities of DA or DoD must be approached with caution, and carefully weighed against the arguments offered by the requester. Another example is information already known to be in the public domain. Disclosure of duplicative, or nearly identical information already existing in the public domain may add no meaningful new information concerning the operations and activities of DA or DoD.

(iii) The contribution to an understanding of the subject by the general public is likely to result from disclosure that will inform, or have the potential to inform the public, rather than simply the individual requester or small segment of interested persons. The identity of the requester is essential in this situation in order to determine whether such requester has the capability and intention to disseminate the information to the public. Mere assertions of plans to author a book, researching a particular subject, doing doctoral dissertation work, or indigence are insufficient without dem-

onstrating the capacity to further disclose the information in a manner that will be informative to the general public. Requesters should be asked to describe their qualifications, the nature of their research, the purpose of the requested information, and their intended means of dissemination to the public.

(iv) Activities must differentiate the relative significance or impact of the disclosure against the current level of public knowledge, or understanding, which exists before the disclosure. In other words, will disclosure on a current subject of wide public interest be unique in contributing previously unknown facts, thereby enhancing public knowledge, or will it basically duplicate what is already known by the general public? A decision regarding significance requires objective judgment, rather than subjective determination, and must be applied carefully to determine whether disclosure will likely lead to a significant public understanding of the issue. Activities shall not make value judgments as to whether the information is important enough to be made public.

(3) Disclosure of the information "is not primarily in the commercial interest of the requester."

(i) If the request is determined to be of a commercial interest, Activities should address the magnitude of that interest to determine if the requester's commercial interest is primary, as opposed to any secondary personal or non-commercial interest. In addition to profit-making organizations, individual persons or other organizations may have a commercial interest in obtaining certain records. Where it is difficult to determine whether the requester is of a commercial nature, Activities may draw inference from the requester's identity and circumstances of the request. Activities are reminded that in order to apply the commercial standards of the FOIA, the requester's commercial benefit must clearly override any personal or non-profit interest.

(ii) Once a requester's commercial interest has been determined, Activities should then determine if the disclosure would be primarily in that interest. This requires a balancing test between

the commercial interest of the request against any public benefit to be derived as a result of that disclosure. Where the public interest is served above and beyond that of the requester's commercial interest, a waiver or reduction of fees would be appropriate. Conversely, even if a significant public interest exists, and the relative commercial interest of the requester is determined to be greater than the public interest, then a waiver or reduction of fees would be inappropriate. As examples, news media organizations have a commercial interest as business organizations; however, their inherent role of disseminating news to the general public can ordinarily be presumed to be of a primary interest. Therefore, any commercial interest becomes secondary to the primary interest in serving the public. Similarly, scholars writing books or engaged in other forms of academic research, may recognize a commercial benefit, either directly, or indirectly (through the institution they represent); however, normally such pursuits are primarily undertaken for educational purposes, and the application of a fee charge would be inappropriate. Conversely, data brokers or others who merely compile government information for marketing can normally be presumed to have an interest primarily of a commercial nature.

(4) Activities are reminded that the factors and examples used in this section are not all inclusive. Each fee decision must be considered on a case-by-case basis and upon the merits of the information provided in each request. When the element of doubt as to whether to charge or waive the fee cannot be clearly resolved, Activities should rule in favor of the requester.

(5) In addition, the following additional circumstances describe situations where waiver or reduction of fees are most likely to be warranted:

(i) A record is voluntarily created to prevent an otherwise burdensome effort to provide voluminous amounts of available records, including additional information not requested; or

(ii) A previous denial of records is reversed in total, or in part, and the assessable costs are not substantial (e.g., \$15.00—\$30.00).

(e) *Fee assessment.* Fees may not be used to discourage requesters, and to this end, FOIA fees are limited to standard charges for direct document search, review (in the case of commercial requesters) and duplication.

(1) In order to be as responsive as possible to FOIA requests while minimizing unwarranted costs to the taxpayer, Activities shall adhere to the following procedures:

(i) Each request must be analyzed to determine the category of the requester. If the Activity determination regarding the category of the requester is different than that claimed by the requester, the Activity should notify the requester to provide additional justification to warrant the category claimed, and that a search for responsive records will not be initiated until agreement has been attained relative to the category of the requester. Absent further category justification from the requester, and within a reasonable period of time (*i.e.*, 30 calendar days), the Activity shall render a final category determination, and notify the requester of such determination, to include normal administrative appeal rights of the determination. The requester should be advised that, notwithstanding any appeal, a search for responsive records will not be initiated until the requester indicates a willingness to pay assessable costs appropriate for the category determined by the Activity;

(ii) Requesters should submit a fee declaration appropriate for the below categories. Commercial requesters should indicate a willingness to pay all search, review and duplication costs. Educational or Noncommercial Scientific Institution or News Media requesters should indicate a willingness to pay duplication charges, if applicable, in excess of 100 pages if more than 100 pages of records are desired. All other requesters should indicate a willingness to pay assessable search and duplication costs;

(iii) Activities must be prepared to provide an estimate of assessable fees if desired by the requester. While it is recognized that search situations will vary among Activities, and that an estimate is often difficult to obtain prior

to an actual search, requesters who desire estimates are entitled to such before committing to a willingness to pay. Should Activities' actual costs exceed the amount of the estimate or the amount agreed to by the requester, the amount in excess of the estimate or the requester's agreed amount shall not be charged without the requester's agreement;

(iv) No Army Activity may require advance payment of any fee; *i.e.*, payment before work is commenced or continued on a request, unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.00. As used in this sense, a timely fashion is 30 calendar days from the date of billing (the fees have been assessed in writing) by the Activity;

(v) Where an Activity estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250.00, the Activity shall notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payments, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment;

(vi) Where a requester has previously failed to pay a fee charged in a timely fashion (*i.e.*, within 30 calendar days from the date of the billing), the Activity may require the requester to pay the full amount owed, plus any applicable interest, or demonstrate that he or she has paid the fee, and to make an advance payment of the full amount of the estimated fee before the Activity begins to process a new or pending request from the requester. Interest will be at the rate prescribed in 31 U.S.C. 3717, and confirmed with respective Finance and Accounting Offices;

(vii) After all work is completed on a request, and the documents are ready for release, Activities may request payment before forwarding the documents, particularly for those requesters who have no payment history, or for those requesters who have failed previously to pay a fee in a timely fashion (*i.e.*, within 30 calendar days from the date of the billing);

(viii) The administrative time limits of the FOIA will begin only after the Activity has received a willingness to pay fees and satisfaction as to category determination, or fee payments (if appropriate); and

(ix) Activities may charge for time spent searching for records, even if that search fails to locate records responsive to the request. Activities may also charge search and review (in the case of commercial requesters) time if records located are determined to be exempt from disclosure. In practice, if the Activity estimates that search charges are likely to exceed \$25.00, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his or her willingness to pay fees as high as those anticipated. Such a notice shall offer the requester the opportunity to confer with Activity personnel with the object of reformulating the request to meet his or her needs at a lower cost.

(2) *Commercial requesters.* Fees shall be limited to reasonable standard charges for document search, review and duplication when records are requested for commercial use. Requesters must reasonably describe the records sought.

(i) The term "commercial use" request refers to a request from, or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interest of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, Activities must determine the use to which a requester will put the documents requested. Moreover, where an Activity has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, Activities should seek additional clarification before assigning the request to a specific category.

(ii) When Activities receive a request for documents for commercial use, they should assess charges, which recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial requesters (unlike other requesters) are not entitled to two hours of free search

time, nor 100 free pages of reproduction of documents. Moreover, commercial requesters are not normally entitled to a waiver or reduction of fees based upon an assertion that disclosure would be in the public interest. However, because use is the exclusive determining criteria, it is possible to envision a commercial enterprise making a request that is not for commercial use. It is also possible that a non-profit organization could make a request that is for commercial use. Such situations must be addressed on a case-by-case basis.

(3) *Educational institution requesters.* Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by an educational institution whose purpose is scholarly research. Requesters must reasonably describe the records sought. The term “educational institution” refers to a preschool, a public or private elementary or secondary school, an institution of graduate high education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research. Fees shall be waived or reduced in the public interest if the criteria above have been met.

(4) *Non-commercial scientific institution requesters.* Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by a non-commercial scientific institution whose purpose is scientific research. Requesters must reasonably describe the records sought. The term “non-commercial scientific institution” refers to an institution that is not operated on a “commercial” basis and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(5) Activities shall provide documents to requesters for the cost of duplication alone, excluding charges for the first 100 pages. To be eligible for inclusion in these categories, requesters must show that the request is being

made under the auspices of a qualifying institution and that the records are not sought for commercial use, but in furtherance of scholarly (from an educational institution) or scientific (from a non-commercial scientific institution) research.

(6) *Representatives of the news media.* Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by a representative of the news media. Requesters must reasonably describe the records sought.

(i) The term “representative of the news media” refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term “news” means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances when they can qualify as disseminators of “news”) who make their products available for purchase or subscription by the general public. These examples are not meant to be all-inclusive. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of “freelance” journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but Activities may also look to the past publication record of a requester in making this determination.

(ii) To be eligible for inclusion in this category, a requester must meet the criteria in paragraph (e) (6) (i) of this section, and his or her request must not be made for commercial use. A request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use. For example, a document request by a newspaper

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for records relating to the investigation of a defendant in a current criminal trial of public interest could be presumed to be a request from an entity eligible for inclusion in this category, and entitled to records at the cost of reproduction alone (excluding charges for the first 100 pages).

(iii) "Representative of the news media" does not include private libraries, private repositories of Government records, information vendors, data brokers or similar marketers of information whether to industries and businesses, or other entities.

(7) *All other requesters.* Activities shall charge requesters who do not fit into any of the categories, fees which recover the full direct cost of searching for and duplicating records, except that the first two hours of search time and the first 100 pages of duplication shall be furnished without charge. Requesters must reasonably describe the records sought. Requests from subjects about themselves will continue to be treated under the fee provisions of the Privacy Act of 1974, which permit fees only for duplication. Activities are reminded that this category of requester may also be eligible for a waiver or reduction of fees if disclosure of the information is in the public interest as defined in paragraph (6) (ii) in this section.

(f) *Aggregating requests.* Except for requests that are for a commercial use, an Activity may not charge for the first two hours of search time or for the first 100 pages of reproduction. However, a requester may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When an Activity reasonably believes that a requester or, on rare occasions, a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of avoiding the assessment of fees, the agency may aggregate any such requests and charge accordingly. One element to be considered in determining whether a belief would be reasonable is the time period in which the requests have occurred. For example, it would be reasonable to presume that multiple requests of this type made within a 30-day period had

been made to avoid fees. For requests made over a longer period, however, such a presumption becomes harder to sustain and Activities should have a solid basis for determining that aggregation is warranted in such cases. Activities are cautioned that before aggregating requests from more than one requester, they must have a concrete basis on which to conclude that the requesters are acting in concert and are acting specifically to avoid payment of fees. In no case may Activities aggregate multiple requests on unrelated subjects from one requester.

(g) *Debt Collection Act of 1982 (Pub. L. 97-365).* The Debt Collection Act provides for a minimum annual rate of interest to be charged on overdue debts owed the Federal Government. Activities may levy this interest penalty for any fees that remain outstanding 30 calendar days from the date of billing (the first demand notice) to the requester of the amount owed. The interest rate shall be as prescribed in 31 U.S.C. 3717. Activities should verify the current interest rate with respective Finance and Accounting Offices. After one demand letter has been sent, and 30 calendar days have lapsed with no payment, Activities may submit the debt to respective Finance and Accounting Offices for collection pursuant to the Debt Collection Act.

(h) *Computation of fees.* The fee schedule shall be used to compute the search, review (in the case of commercial requesters) and duplication costs associated with processing a given FOIA request. Costs shall be computed on time actually spent. Neither time-based nor dollar-based minimum charges for search, review and duplication are authorized. The appropriate fee category of the requester shall be applied before computing fees. DD Form 2086 (Record of Freedom of Information (FOI) Processing Cost) will be used to annotate fees for processing FOIA information.

(i) *Refunds.* In the event that an Activity discovers that it has overcharged a requester or a requester has overpaid, the Activity shall promptly refund the charge to the requester by reimbursement methods that are agreeable to the requester and the Activity.