

§ 1171.11 Fees.

(a) *In general.* The NEH will assess fees for processing FOIA requests in accordance with this section and with the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget at 52 FR 10012 (Mar. 27, 1987). In order to resolve any fee issues that arise under this section, the NEH may contact a requester for additional information. The NEH ordinarily will collect all applicable fees before sending copies of records to a requester. Requesters must pay fees by check or money order made payable to the Treasury of the United States.

(b) *Definitions.* For purposes of this section:

(1) *Commercial use request* means a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interest, which can include furthering those interests through litigation. When it appears that the requester will put the records to a commercial use, either because of the nature of the request itself or because the NEH has reasonable cause to doubt a requester's stated use, the NEH will provide the requester a reasonable opportunity to submit further clarification.

(2) *Direct costs* means those expenses that an agency actually incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records 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 cost of operating duplication machinery. Not included in direct costs are overhead expenses such as the costs of space and heating or lighting of the facility in which the records are kept.

(3) *Duplication* means the making of a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, microform, audiovisual materials, or electronic records among others.

(4) *Educational institution* means any school that operates a program of scholarly research. A requester in this category must show that the request is authorized by and made under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought to further scholarly research.

(5) *Noncommercial scientific institution* means an institution that is not operated on a "commercial" basis, as defined in paragraph (b)(1) above, 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. A requester in this category must show that the request is authorized by and made under the auspices of a qualifying institution and that the records are not sought for a commercial use or to promote any particular product or industry, but are sought to further scientific research.

(6) *Representative of the news media* means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. 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 if such entities qualify as disseminators of “news”) who make their products available for purchase or by subscription or by free distribution to the general public. The NEH will regard “freelance” journalists as working for a news-media organization if they demonstrate a solid basis for expecting publication through that organization. A publication contract would provide the clearest evidence, but the NEH will also consider a requester's past publication record in making this determination.

(7) *Review* means the process of examining a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. Review includes processing any record for disclosure, such as doing all that is necessary to redact it and prepare it for disclosure. It also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter under § 1171.9, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions. Review costs are recoverable even if the NEH ultimately does not disclose a record.

(8) *Search* means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and the reasonable efforts expended to locate and retrieve information from electronic records. The NEH will ensure that searches are done in the most efficient and least expensive manner reasonably possible.

(c) *Fee schedule*. In responding to FOIA requests, the NEH will charge the following fees for requests, subject to paragraphs (d), (e), and (f) of this section:

(1) *Search*. (i) The NEH will charge \$4.00 for each quarter hour spent by clerical personnel in searching for and retrieving a requested record. When clerical personnel cannot perform the search and retrieval (e.g. identification of records within scope of request requires professional personnel), the NEH will charge \$7.00 for each quarter hour of search time spent by professional personnel. Where the time of managerial personnel is required, the fee will be \$10.00 for each quarter hour of time spent by those personnel. The NEH may charge for time spent searching even if it does not locate any responsive records or if it determines that the records are entirely exempt from disclosure.

(ii) For computer searches of records, the NEH will charge the actual direct cost of conducting the search.

(2) *Duplication*. The fee for a photocopy of a record on one-side of an 8 1/2 × 11 inch sheet of paper is ten cents per page. For copies of records produced on tapes, disks, or other electronic media, the NEH will charge the direct costs of producing the copy, including operator time. For other forms of duplication, the NEH will charge the direct costs of that duplication. The NEH will honor a requester's preference for receiving a record in a particular form or format where it is readily reproducible by the NEH in the form or format requested.

(3) *Review*. The NEH will charge review fees to requesters who make a commercial use request. Review fees will be charged only for the initial record review (i.e., the review the NEH conducted

to determine whether an exemption applies to a particular record or record portion at the initial request stage). No charge will be made for review at the administrative appeal stage for exemptions applied at the initial review stage. However, if the NEH re-reviews the records for the applicability of other exemptions that it did not previously consider, then the costs for the subsequent review are assessable. Review fees will be charged at the same rates as those charged for a search under paragraph (c)(1)(i). The NEH may charge for review even if it ultimately decides not to disclose a record.

(d) *Limitations on charging requesters.* (1) Except for requesters seeking records for commercial use, the NEH will provide without charge:

(i) The first 100 pages of duplication (or the cost equivalent); and

(ii) The first two hours of search (or the cost equivalent).

(2) When, after first deducting the 100 pages (or its cost equivalent) and the first two hours of search, the total fee is \$25.00 or less for any request, the NEH will not charge a fee.

(3) If NEH fails to comply with the FOIA's time limits in which to respond to a request, it may not charge search fees, or, in the instances of requests from requesters described in paragraphs (b)(4) through (6) of this section, may not charge duplication fees, except as described in paragraphs (d)(3)(i) through (iii) of this section.

(i) If NEH has determined that unusual circumstances, as defined by the FOIA, apply and NEH has provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit shall be excused for an additional ten (10) working days.

(ii) If NEH has determined that unusual circumstances, as defined by the FOIA, apply and more than 5,000 pages are necessary to respond to the request, NEH may charge search fees, or, in the case of requesters described in paragraphs (b)(4) through (6) of this section, may charge duplication fees, provided NEH provided timely written notice of unusual circumstances to the requester in accordance with the FOIA and NEH discussed with the requester via written mail, email, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii).

(iii) If a court has determined that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(e) *Categories of requesters.* There are four categories of FOIA requesters: commercial use requesters; educational and non-commercial scientific institutions; representatives of the news media; and all other requesters. The NEH will assess fees for these categories of requesters as follows:

(1) *Commercial use requesters.* The NEH will charge the full direct costs for searching for, reviewing, and duplicating requested records.

(2) *Educational and non-commercial scientific institution requesters.* The NEH will charge for duplication only, excluding costs for the first 100 pages.

(3) *News media requesters.* The NEH will charge for duplication only, excluding costs for the first 100 pages.

(4) *All other requesters.* The NEH will charge requesters who do not fit into any of the categories above the full reasonable direct cost of searching for and reproducing records, excluding costs for the first 100 pages and the first two hours of search time.

(f) *Requirements for fee waivers or reduction of fees.* (1) The NEH will furnish responsive records without charge or at a reduced charge if it determines, based on all available information, that the requester has demonstrated that:

(i) Disclosure of the requested 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

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

(2) To determine whether the first fee requirement is met, the NEH will consider the following factors:

(i) The subject of the requested records must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote or attenuated.

(ii) The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be “likely to contribute” to an increased public understanding of those operations or activities. Disclosure of information already in the public domain, in either duplicative or substantially identical form, is unlikely to contribute to such understanding where nothing new would be added to the public’s understanding.

(iii) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester’s expertise in the subject area as well as his or her ability and intention to effectively convey information to the public will be considered. It will ordinarily be presumed that a representative of the news media satisfies this consideration.

(iv) The public’s understanding of the subject in question must be enhanced by the disclosure to a significant extent. The NEH will make no value judgments about whether the information at issue is “important” enough to be made public.

(3) To determine whether the second fee waiver requirement is met, the NEH will consider the following factors:

(i) The NEH will identify any commercial interest of the requester, as defined in paragraph (b)(1) of this section, that would be furthered by the requested disclosure. Requesters will be given an opportunity to provide explanatory information regarding this consideration.

(ii) A fee waiver or reduction is justified where the public interest is greater than any identified commercial interest in disclosure.

(4) Where only some of the requested records satisfy the requirements for a fee waiver, a waiver will be granted for those records.

(5) Requesters should make fee waiver or reduction requests when they first submit a FOIA request to the NEH. Fee waiver or reduction requests should address the factors listed in paragraphs (f)(2) and (3) of this section. Fee waiver or reduction requests may be submitted at a later time so long as the underlying record request is pending or on administrative appeal.

(g) *Notice of anticipated fees in excess of \$25.00.* (1) When the NEH determines or estimates that the fees to be charged under this section will exceed \$25.00, it will notify the requester of the actual or estimated fees, unless the requester has indicated a willingness to pay fees as high as those anticipated. If the NEH can only readily estimate a portion of the fees, it will advise the requester that the estimated fee may be only a portion of the total fee.

(2) The notice will offer the requester an opportunity to confer with NEH personnel in order to reformulate the request to meet the requester's needs at a lower cost and inform the requester of paragraph (d)(1) of this section, if applicable. A commitment by the requester to pay the anticipated fee must be in writing and must be received by the NEH within thirty (30) calendar days from the date of notification of the fee estimate. Until the requester agrees to pay the anticipated fee, the NEH will not consider the request as received by the agency and no further work will be done on the request. If a requester fails to respond within this timeframe, the NEH will administratively close the request.

(h) *Charges for other services.* When the NEH chooses, in its sole discretion, to provide a requested special service (e.g. certifying that records are true copies or sending them by other than ordinary mail), it will charge the direct costs of providing the service to the requester.

(i) *Charging interest.* The NEH may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. The NEH will assess interest charges at the rate provided in 31 U.S.C. 3717 and such charges will accrue from the billing date until the NEH receives payment from the requester. The NEH will follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97-365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(j) *Advance payment.* (1) For requests other than those described in paragraphs (j)(2) and (3) of this section, the NEH will not require the requester to make an advance payment before it commences or continues work on a request. Payment owed for work already completed (i.e., payment before copies are sent to a requester) is not an advance payment.

(2) When the NEH determines or estimates that a total fee to be charged under this section will be more than \$250.00, it may require the requester to make an advance payment of an amount up to the amount of the entire anticipated fee before beginning to process the request, except where it

receives a satisfactory assurance of full payment from a requester that has a history of prompt payment.

(3) When a requester has previously failed to pay a properly charged fee to the NEH within thirty (30) days of the billing date, the NEH may require the requester to pay the full amount due, plus any applicable interest, and to make an advance payment of the full amount of any anticipated fee, before the NEH begins to process a new request or continues to process a pending request from that requester.

(4) When there is an advance payment request, the NEH will not consider the request as received by the agency and no further work will be done on the request until the required payment is received. If the requester fails to respond within thirty (30) calendar days after the date of the advance payment request, the NEH will administratively close the request.

(k) *Aggregating requests.* When the NEH reasonably believes that a requester or a group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees, the NEH may aggregate those requests and charge accordingly. The NEH may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. For requests separated by a longer period, the NEH will aggregate them only when there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. The NEH will not aggregate multiple requests involving unrelated matters.

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