



## OFFICE *of* GOVERNMENT INFORMATION SERVICES

February 27, 2015 — Sent via email

Mr. Michael Morisy  
Michael@morisy.com

Re: Case No.: 201400116  
NG: CM

NATIONAL  
ARCHIVES  
*and* RECORDS  
ADMINISTRATION

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Dear Mr. Morisy:

This responds to your November 12, 2013 request for assistance from the Office of Government Information Services (OGIS), which we received via email.

Congress created OGIS to complement existing Freedom of Information Act (FOIA) practice and procedure; we strive to work in conjunction with the existing request and appeal process. The goal is for OGIS to allow, whenever practical, the requester to exhaust his or her remedies within the agency, including the appeal process. OGIS has no investigatory or enforcement power, nor can we compel an agency to release documents. OGIS serves as the Federal FOIA Ombudsman and our jurisdiction is limited to assisting with the FOIA process.

You asked OGIS to examine the treatment of requests submitted to the Department of Homeland Security (DHS) through the MuckRock website. In particular, you and your colleagues dispute DHS's assigning the commercial use fee category to a number of requests submitted through the MuckRock site.

In working your case, OGIS staff participated in a number of conversations with representatives of MuckRock and with Senior Director of DHS FOIA Operations James Holzer. These discussions clarified MuckRock's position and that of DHS regarding how the agency approaches requests submitted through MuckRock.

We appreciate the time that you and your colleagues took to explain your position and the function of MuckRock's FOIA submission tool. You explained your position that the agency appears to be making fee determinations based on how a request is submitted (via MuckRock) rather than how the underlying requester plans to use those records. You asked that we discuss your concerns with DHS and learn more about the agency's position on requests submitted through MuckRock.

As a result of our discussions, Mr. Holzer re-analyzed MuckRock's current website and DHS's FOIA regulations (6 C.F.R. § 5.11). After conducting this review, Mr. Holzer confirmed that the agency is firm in its position that its treatment of requests submitted through MuckRock is correct.

Mr. Holzer explained that DHS FOIA staff makes fee determinations based on the guidance found in DHS's FOIA regulations. He shared with OGIS his observation that the requests submitted through MuckRock tend to provide too little information to enable DHS FOIA staff to make a fee category determination; absent this information,

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DHS FOIA must evaluate and consider the scope and purpose of the MuckRock website to determine the proper fee category.

I note that MuckRock's submission tool provides standard language requesting a fee waiver. Fee waivers are different from fee categories and demand a much higher threshold for consideration than a fee category. According to the Department of Justice's guidance on fee waivers, the standard for fee waivers is that disclosure of the information (1) is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and (2) is not primarily in the commercial interest of the requester. Further, the guidance states that six analytical factors must be considered in applying the statutory fee waiver standard. MuckRock requesters who wish to pursue a fee waiver should supply the agency with information to show how a request meets each of these analytical factors:

- the requested records must concern identifiable "operations or activities of the government;"
- the disclosable portions of the requested records must be meaningfully informative, i.e. not routine administrative information;
- the disclosure must contribute to the public understanding not the requester's individual understanding;
- the disclosure must contribute "significantly" to public understanding of government operations or activities;
- the request must not further the commercial interests of the requester (FOIA requests under the auspices of newsgathering are generally not considered to be furthering the commercial interest of a requester); and
- the public interest in the disclosure is greater than the requester's commercial interest.

Considering DHS's position on this matter and the analysis that DHS performs on incoming requests, MuckRock may find it useful to explain the difference between fee waivers and fee categories to its users, and to provide requesters with a tool to review the requirements for requesting a specific fee category outlined in agency FOIA regulations. OGIS encourages all requesters to direct agencies to place them in a specific fee category (and to provide information to illustrate that assertion) as part of their initial FOIA requests.

In cases such as this where an agency is firm in its position, there is little for OGIS to do beyond providing more information about the agency's actions. I hope that this information about the agency's position and analysis is useful to you. Thank you for contacting OGIS; we will now consider this matter closed.

Sincerely,



Nikki Gramian, Acting Director  
Office of Government Information Services (OGIS)

cc: James Holzer, DHS

We appreciate your feedback. Please visit <https://www.surveymonkey.com/s/OGIS> to take a brief anonymous survey on the service you received from OGIS.