



OFFICE of GOVERNMENT INFORMATION SERVICES

May 18, 2015 — Sent via email

[REDACTED]

Re: Case No. 201500514
NG: CM: CL

Dear [REDACTED]:

This responds to your March 13, 2015 request for assistance from the Office of Government Information Services (OGIS), which we received via email. You requested assistance with Freedom of Information Act (FOIA) requests filed by the [REDACTED] on behalf of the [REDACTED].

As you are aware, Congress created OGIS to complement existing 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.

We carefully reviewed your submission of information, and we understand that [REDACTED] filed two requests with the Department of Veterans Affairs (VA). The VA responded to these requests, Nos. [REDACTED] and [REDACTED], with correspondence informing you that for the purpose of fees, the VA considered [REDACTED] to be a “commercial requester.” [REDACTED] appealed the VA’s determination, maintaining that [REDACTED] belongs in the “any” or “all other” requester category; however, the VA formally affirmed [REDACTED]’s commercial requester status for the purpose of these requests. You dispute this response.

To learn more about the Department’s response to your request and appeal, we contacted VA Staff Attorney Julio W. Valdivieso. Mr. Valdivieso affirmed that the VA’s action on your 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. We are glad to provide you with more information on FOIA fees and the agency’s response to your request.

The FOIA allows agencies to charge fees in connection with the processing of FOIA requests. Though every agency has its own FOIA regulations related to fees, there is a uniform fee schedule and guidelines published by the Office of Management and Budget (OMB) that applies to all agencies. The guidelines are available online at https://www.whitehouse.gov/sites/default/files/omb/inforeg/foia_fee_schedule_1987.pdf. The VA’s FOIA regulations are available online at <http://www.oprm.va.gov/docs/foia/FOIA-Reg-Fed-Reg-8-19-2011.pdf>. 38 CFR § 1.561 of the VA’s FOIA regulations addresses FOIA fees and fee-related definitions.

When an agency receives a FOIA request, a FOIA professional must determine into which of three requester categories a requester fits. Mr. Valdivieso noted that the VA determines

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fee requester category on a case by case basis. Agencies may base their requester category assessments in part on the identity of the requester and the type of organization or institution the requester represents or how the requester will use the information. Fees for each requester category are assessed differently.

The first requester category is commercial-use requesters, which is defined as those who are making a request for records that further their own commercial, trade, or profit interests, or that of someone on whose behalf they are making requests. As the OMB guidelines note, inclusion in this category is determined not by the identity of the requester, but how the requester will use the information he or she seeks. The OMB guidelines further state that because use is the determining criterion, it is possible for a commercial enterprise to make a request that is not for commercial use and for a non-profit organization to make a request that is for a commercial use. Commercial requesters are charged all three types of fees--search, review, and duplication fees--associated with processing a FOIA request.

The second requester category consists of educational institutions, noncommercial scientific institutions, and representatives of the news media. These requesters seek records for a noncommercial use. You may consult the VA's FOIA regulations or OMB Guidelines for a definition of each distinct subcategory of requester. Requesters in this category are not charged for search or review time, but they must pay for duplication after the first 100 pages, which are provided free of charge.

The third broad category of requesters -- all others -- includes anyone who does not fit into the first two categories. Requesters in this category pay for search time after the first two hours and duplication after the first 100 pages. Requesters within this category are not charged for review time.

As a best practice, OGIS recommends that FOIA requesters specify the requester category in which they believe they should be placed and provide any information that an agency's FOIA regulations require to support the desired requester category. In your case, VA considered the information [REDACTED] presented in its requests and appeal, but ultimately determined that for the purposes of [REDACTED]'s requests, [REDACTED] is most appropriately placed in the commercial use category.

In your correspondence to OGIS, you express concern about VA reviewing [REDACTED]'s website as part of its fee category analysis. It has been OGIS's observation that agencies will use whatever information is available to them when making fee category determinations, including websites, previous publications, et cetera.

We hope you find this information useful. At this time, OGIS can offer you no further assistance. Thank you for bringing this matter to OGIS. We will close your case.

Sincerely,

Nikki Gramian, Acting Director
Office of Government Information Services

cc: Julio W. Valdivieso, Staff Attorney, Department of Veterans Affairs via email