



OFFICE *of* GOVERNMENT INFORMATION SERVICES

May 18, 2016—Sent via email

██████████
████████████████████

Re: Case No.: 201600321
NG: HK: CM

NATIONAL
ARCHIVES
and RECORDS
ADMINISTRATION

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Dear ██████████:

This responds to your December 21, 2015 request for assistance from the Office of Government Information Services (OGIS), which we received via email. Your request for assistance pertains to your Freedom of Information Act (FOIA) request to the National Aeronautics and Space Administration (NASA) Goddard Space Flight Center (GSFC).

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.

After opening a case, OGIS gathers information from the requester and the agency to learn more about the nature of the dispute. This process helps us gather necessary background information, assess whether the issues are appropriate for mediation, and determine the willingness of the parties to engage in our services. As part of our information gathering, OGIS carefully reviewed your submission of information. We understand that you made a request for email records related to ██████████; in your request, you expressed your willingness to pay fees up to \$50.00. GSFC responded to you, informing you that for the purposes of this request you are considered a “commercial” requester. GSFC further informed you that the fees associated with this request will exceed your stated limit. You appealed that response, and NASA’s FOIA appeals unit affirmed the agency’s determination on your fee category. You dispute NASA’s response and request OGIS’s assistance with this matter.

In response to your submission, OGIS staff contacted NASA Attorney-Advisor ██████████ to discuss the agency’s decision on your appeal. ██████████ affirmed the agency’s decision that, for the purposes of this request, you are considered a “commercial” requester. 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.

All FOIA requests are considered under one of three requester categories, and there are different fee structures—and requirements—associated with each. In your appeal,



you explain that [REDACTED] is a non-profit group; for this reason, you assert that it is incorrect to consider your request commercial in nature. In explaining the agency's analysis of your request, [REDACTED] referred to the Office of Management and Budget (OMB) Fee Guidelines (available at https://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/foia_fee_schedule_1987.pdf). [REDACTED] explained that OMB interprets the FOIA statute that "commercial use request" is one that is made for a "use or purpose that furthers the commercial, trade, or profit interests" of the requestor or the person on whose behalf the request is made. According to [REDACTED], "commercial" and "profit" are called out separately, which may indicate that OMB doesn't necessarily see them as synonymous. This is consistent with the cases cited in NASA's appeal response that indicate that non-profit entities, including [REDACTED], can have commercial interests. *See, e.g., Consumers Checkbook v. HHS*, 502 F. Supp. 2d 79, 89 (D.D.C. 2007) (Although the context was fee waivers, the court noted that "[c]ommercial interests' include interests relating to business, trade, and profit. Not only profit-making corporations have commercial interests — so do nonprofit corporations, individuals, unions, and other associations.")

[REDACTED] further explained that in making the determination, an agency is instructed in the OMB Fee Guidelines to look to the requestor's stated use for the documents. While some requestors' proposed uses will be considered commercial because they will impact profit-making endeavors, the analysis is not solely based on that factor.

[REDACTED] described [REDACTED] business as advocacy and representation of [REDACTED]. In considering your appeal, NASA looked to see whether the proposed use of the information was essentially in furtherance of that business or whether it was for a purpose that arguably would have served a broader interest. According to [REDACTED], the facts did not support the latter conclusion. However, [REDACTED] explained that because [REDACTED] [REDACTED]—could have a commercial or non-commercial interest in any particular request, NASA makes a case-by-case determination based on the specific facts. [REDACTED] also explained that if NASA determines that [REDACTED] qualifies as a commercial use requestor in one instance, it does not preclude a contrary conclusion for later requests from the same entity that may serve a different non-commercial purpose. According to [REDACTED], NASA strives to be impartial and fair in its application of the FOIA process to all requestors and will make every effort to do so with regard to [REDACTED] in the future.

While I understand that this is not the outcome for which you hoped, I hope that this information about your request is useful to you. Thank you for contacting OGIS; we will now consider this matter closed.

Sincerely,

/s/

NIKKI GRAMIAN
Acting Director

cc: NASA FOIA

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.