



NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
Freedom of Information Act (FOIA) Advisory Committee
Recommendation Memorandum

MEMORANDUM FOR:

FROM:

SUBJECT: FOIA Fees

DATE:

1. **PURPOSE:** The FOIA Fees Subcommittee was established by the FOIA Federal Advisory Committee to conduct research to determine if current guidance on FOIA fees is still relevant and representative of the President's policy that a "presumption of disclosure should be applied to all decisions involving the FOIA."¹

2. **BACKGROUND:** (Factors bearing on the problem)

a. The FOIA (5 U.S.C. §552) establishes the basic statutory requirements for agency assessing of fees when processing FOIA requests. The fee provisions of this statute were amended with the OPEN Government Act of 2007. Furthermore, Freedom of Information Reform Act of 1986 (Pub. L. 99-570), requires the Office of Management and Budget (OMB) to promulgate guidelines containing a uniform schedule of FOIA fees applicable to all agencies that are subject to the FOIA. OMB published these guidelines on April 27, 1987. Finally, significant case law exists that has a direct bearing on agencies making fee-related determinations.

b. The subcommittee was formed by the FOIA Federal Advisory Committee because a significant number of its members believe FOIA fees to be a major source of contention between FOIA requesters and agencies. Many, both inside and outside the government, hold the view that fee determinations such as fee waivers and fee categories are so subjective that there appears to be very little consistency in agency fee determinations. Additionally, this subjectivity adds to the time it takes agencies to process FOIA requests.

c. The subcommittee conducted a poll of 407 government FOIA professionals, asking ten questions concerning agency application of the statutory and OMB FOIA fee guidelines. An analysis of the responses is attached, and it concludes that, in "general, it appears that most employees surveyed think that the current fee structure is unfair and time consuming, and prefer a flat fee structure graduated based on volume of the request and category of the requester."

¹ Memorandum for the Heads of Executive Departments, "Freedom of Information Act", January 21, 2009.

Given this, and the strong belief that FOIA fee guidelines as currently written contribute to an overall confusion and animosity between FOIA professionals and FOIA requesters, the full FOIA Advisory Committee is considering the following three options for future action.

3. DISCUSSION: (Possible solutions and/or major factors or contentious points)

a. Option 1: That the Archivist ask OMB to revise its 1987 guidance. Because much of the confusion surrounding fee issues are a result of the dynamic changes in the public's ability to disseminate information, OMB should revise its guidance in light of these changes. The pros of this option would include updated guidance that would incorporate Congressional intent, case law, and advances in technology that would eliminate some of the subjectivity that agencies must exercise to make fee issue determinations. Additionally, the subcommittee believes that a revision would be beneficial in ameliorating this problem. The cons could be that the public dissemination environment is so dynamic that further OMB guidance may be more confusing than helpful.

b. Option 2: That the Archivist make a legislative proposal to Congress to amend the fee provisions of the FOIA by revising the various fee standards, thereby enabling agencies standardize fee determinations. This would be in accordance with the statutory requirement of the Office of Government Services to "recommend policy changes to Congress and the President to improve the administration of [the FOIA] (5 U.S.C. §552(h)(2)(C)." The cons include the time it would take to get a legislative proposal through OMB and through Congress and its low likelihood of success.

c. Option 3: Keep the status quo and not make any changes to the fee provisions. The committee sees no pros to this option, and the cons including continuing a practice that is not productive.

5. RECOMMENDATION: That the Archivist adopt Option 1 and send a memorandum to the Director, OMB, asking OMB to revise its Guidelines for FOIA Fees, 1987.