

# OIP GUIDANCE: New Limitations on Assessing Fees

Section 6 of the OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, imposes several new requirements on agencies that impact the time limits for complying with FOIA requests and impose consequences on agencies when those time limits are not met. This section will take effect on December 31, 2008, and will apply to FOIA requests "filed on or after that effective date." § 6(b)(2). Accordingly, beginning with requests received on December 31, 2008, agency FOIA offices will: 1) be required to forward any misdirected FOIA requests received by them to the proper FOIA office within the agency, within ten working days; 2) be limited in the number of times they can "toll" the twenty-working day response period; and 3) be precluded from assessing search (or if applicable, duplication) fees if they are unable to comply with the FOIA's response times, unless the exceptions to this limitation are met.

OIP is providing guidance on each of these three provisions in separate FOIA Post articles. This article addresses the third requirement of Section 6 which precludes agencies from assessing certain fees if the FOIA's time limits are not met.

## *Limits on Charging Fees When FOIA Response Times Not Met*

In general the FOIA provides that agencies have twenty working days to respond to a request. One of the major changes made to the FOIA by the OPEN Government Act is the provision in Section 6(b) that, with two notable exceptions, precludes an agency from charging search fees, or, if applicable, duplication fees to a FOIA requester if the agency does not meet the FOIA's twenty-day time limit. Specifically, Section 6(b) amends 5 U.S.C. § 552(a)(4)(A), the provision in the FOIA addressing fees, and provides that "[a]n agency shall not assess search fees (or in the case of a requester described under clause (ii)(II) [i.e., a requester who qualifies as an educational or noncommercial scientific institution, or as a representative of the news media], duplication fees) . . . if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined [under the FOIA]) apply to the processing of the request." § 6(b)(1)(A).

This provision imposes consequences on an agency that does not comply with the FOIA's time limits. In such cases, if the exceptions to the rule are not met, agencies cannot charge requesters search fees. For those requesters who are not charged search fees under the FOIA in any event, i.e., those requesters who qualify as an educational or noncommercial scientific institution, or as a representative of the news media, this provision directs that agencies cannot charge such requesters duplication fees if the agency fails to meet the FOIA's time limits and the exceptions to the rule are not met.

## *Exceptions to the Rule Against Assessing Certain Fees*

Notably, Section 6(b) provides two exceptions to the new rule. If either "unusual" or "exceptional" circumstances apply to the processing of the request, the prohibition against charging certain fees does not apply. Those two terms are already defined in the FOIA and those preexisting definitions apply to the new statutory provision.

"Unusual circumstances" occur in three situations: 1) when there is a need to search for and collect records from field offices, or other establishments; 2) when there is a need to search for, collect, and examine a voluminous amount of records; or 3) when there is a need for

consultations with another agency or with more than two components within the same agency. In all these situations the exception to the rule against assessing search fees or, if applicable, duplication fees, is met and the agency is not precluded from assessing such fees.

"Exceptional circumstances" are not affirmatively defined in the FOIA in the same way that "unusual circumstances" are, but the FOIA does provide that "exceptional circumstances" cannot include "a delay that results from a predictable agency workload of requests . . . unless the agency demonstrates reasonable progress in reducing its backlog of pending requests." 5 U.S.C. § 552(a)(6)(C). Put another way, exceptional circumstances would occur if the agency has a backlog of pending requests and is making reasonable progress in reducing that backlog. In such situations, the exception to the rule against assessing search fees, or, if applicable, duplication fees, is met and the agency is not precluded from assessing such fees.

Thus, under Section 6(b) if the processing of a request involves any of the circumstances that qualify as "unusual circumstances," or if the agency is facing circumstances that qualify as "exceptional" as detailed above, an exception to the rule against charging fees is met. The agency in those circumstances can assess fees as it normally would.

### *Applying the New Rule Against Assessing Certain Fees*

Section 6(b) will preclude the charging of certain fees when the exceptions to the rule are not met. So, for example, this provision will preclude the charging of certain fees when requesters seek a small volume of records, where those records are readily located within the office that is processing the request, and where there is little or no need to consult with other entities. For such requests, agencies should be able to comply with the FOIA's twenty-day time limit. If they do not, the new provision in Section 6(b) will impose a direct consequence; the agency will not have the ability to assess search, or if applicable, duplication fees, for such requests.

Question: What if the requester is a "commercial use" requester. Can "review" fees still be assessed even if no search fees can?

Answer: Yes. The limitation contained in Section 6(b) of the OPEN Government Act pertains to the charging of search fees. Commercial use requesters will still be subject to duplication and review fees.

Question: What if the requester is an "all other" requester. Can duplication fees still be assessed, even if no search fees can?

Answer: Yes. The limitation on charging fees for such requesters pertains to search fees. Duplication fees can still be assessed.

### *Role of FOIA Public Liaison*

The second provision in Section 6(b) of the OPEN Government Act amends 5 U.S.C. § 552(a)(6)(B)(ii), which requires agencies to notify requesters when unusual circumstances exist and to provide the requester with the option of modifying the scope of the request or arranging an alternative time period for processing it. The following new provision was added to that subsection by the OPEN Government Act: "To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency." § 6(b)(1)(B).

This provision incorporates into the FOIA statute an aspect of Executive Order No. 13,392 by codifying the role of the FOIA Public Liaison. This provision gives requesters a point of contact within the agency who is specifically designated to work with the requester in resolving disputes regarding the time required to process a request. The goal of this provision is to improve communication between the requester and the agency, which will benefit both parties

For example, by better understanding the work that would be involved in searching numerous field installations, the requester might choose to modify his request to eliminate certain of those offices. Similarly, a requester, when advised of the volume of material that is potentially responsive to his request, might agree to prioritize the records he is seeking or agree to an alternative time period for processing. Moreover, after discussions with a requester an agency may be better able to identify the particular records being sought and may be able to better target its search efforts. Having a designated point of contact in each agency who is charged with the responsibility of assisting in the resolution of disputes has the potential to greatly facilitate the FOIA process overall.

### *Conclusion*

Starting with requests received on December 31, 2008, Section 6(b) of the OPEN Government Act will preclude agencies from assessing certain fees if they fail to respond to a request within the FOIA's time limits, unless the exceptions to the rule are met. This section also codifies the critical role of FOIA Public Liaisons, who can work with requesters to resolve disputes and facilitate the processing of their requests.

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(Highlights, footnotes and minor edits may have been added, but only to add clarification)