

## § 70.28–70.37 [Reserved]

**Subpart C—Costs for Production of Records****§ 70.38 Definitions.**

The following definitions apply to this subpart:

(a) *Request*, in this subpart, includes any request, as defined by § 70.2(f), as well as any appeal filed in accordance with § 70.22.

(b) *Direct costs* means those expenditures which a component actually incurs in searching for and duplicating (and in the case of commercial use requests, reviewing) records to respond to a FOIA request. Direct costs include, for example, the salary of the Federal employee performing work (the basic rate of pay for the Federal employee plus 16 percent of that rate to cover benefits) and the cost of operating duplication machinery. Not included in direct costs are overhead expenses such as costs of space, heating or lighting the facility in which the records are kept.

(c) *Reproduction* means the process of making a copy of a record necessary to respond to a request. Such copy can take the form of paper, microform, audio-visual materials or electronic records (e.g., magnetic tape or disk).

(d) *Search* means the process of looking for and retrieving records or information that is responsive to a FOIA request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. Disclosure officers will ensure that searches are done in the most efficient and least expensive manner reasonably possible. A search does not include the review of material, as defined in paragraph (e) of this section, which is performed to determine whether material is exempt from disclosure.

(e) *Review* means the process of examining records, including audio-visual, electronic mail, etc., located in response to a request to determine whether any portion of the located record is exempt from disclosure, and accordingly may be withheld. It also includes the act of preparing materials

for disclosure, i.e., doing all that is necessary to excise them and otherwise prepare them for release. Review time includes time spent contacting any submitter, and considering and responding to any objections to disclosure made by a submitter under § 70.26, but does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(f) *Commercial use request* means a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade or profit interests, which can include furthering those interests through litigation. Components will determine, whenever reasonably possible, the use to which a requester will put the requested records. When it appears that the requester will put the records to a commercial use, either because of the nature of the request itself or because a component has reasonable cause to doubt a requester's stated use, the component will provide the requester a reasonable opportunity to submit further clarification.

(g) *Educational institution* means an institution which:

(1) Is a preschool, public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, and

(2) Operates a program or programs of scholarly research. To qualify under this definition, the program of scholarly research in connection with which the information is sought must be carried out under the auspices of the academic institution itself as opposed to the individual scholarly pursuits of persons affiliated with an institution. For example, a request from a professor to assist him or her in writing of a book, independent of his or her institutional responsibilities, would not qualify under this definition, whereas a request predicated upon research funding granted to the institution would meet its requirements. A request from a student enrolled in an individual course of study at an educational institution would not qualify as a request from the institution.

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(h) *Non-commercial scientific institution* means an institution that is not operated on a commercial basis and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(i) *Representative of the news media* means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public.

(1) Factors indicating such representation status include press accreditation, guild membership, a history of continuing publication, business registration, and/or Federal Communication Commission licensing, among others.

(2) For purposes of this definition, news contemplates information that is about current events or that would be of current interest to the public.

(3) A freelance journalist will be treated as a representative of the news media if the person can demonstrate a solid basis for expecting publication of matters related to the requested information through a qualifying news media entity. A publication contract with a qualifying news media entity satisfies this requirement. An individual's past publication record with such organizations is also relevant in making this determination. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals including newsletters (but only in those instances where they can qualify as disseminators of news) who make their products available for purchase or subscription by the general public.

### § 70.39 Statutes specifically providing for setting of fees.

This subpart will not apply to fees charged under any statute, other than the FOIA, that specifically requires an agency to set and collect fees for particular types of records.

### § 70.40 Charges assessed for the production of records.

(a) *General*. There are three types of charges assessed in connection with the production of records in response to a request, charges for costs associated with:

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(1) Searching for or locating responsive records (search costs),

(2) Reproducing such records (reproduction costs), and

(3) Reviewing records to determine whether any materials are exempt (review costs).

(b)(1) There are four types of requesters:

(i) Commercial use requesters,

(ii) Educational and non-commercial scientific institutions,

(iii) Representatives of the news media, and

(iv) All other requesters.

(2) Depending upon the type of requester, as set forth in paragraph (b)(1) of this section, the charges outlined in paragraph (c) of this section may be assessed.

(c) *Types of charges that will be assessed for each type of request*. (1) *Commercial use request*. When a requester makes a commercial use request, search costs, reproduction costs and review costs will be assessed in their entirety.

(2) *Educational or non-commercial scientific institution request*. When an educational or non-commercial scientific institution makes a request, only reproduction costs will be assessed, excluding charges for the first 100 pages.

(3) *Request by representative of news media*. When a representative of the news media makes a request, only reproduction costs will be assessed, excluding charges for the first 100 pages.

(4) *All other requests*. Requesters making a request which does not fall within paragraphs (c)(1), (2), or (3) of this section will be charged search costs and reproduction costs, except that the first 100 pages of reproduction and the first two hours of search time will be furnished without charge. Where computer searches are involved, the monetary equivalent of two hours of search time by a professional employee will be deducted from the total cost of computer processing time.

(d) *Charges for each type of activity*. (1) *Search costs*. (i) When a search for records is performed by a clerical employee, a rate of \$5.00 per quarter hour will be applicable. When a search is performed by professional or supervisory personnel, a rate of \$10.00 per