



**Legal Opinion L-2004-08**  
**April 15, 2004**

U.S. Railroad Retirement Board Phone: (312) 751-7139  
844 North Rush Street TTY: (312) 751-4701  
Chicago Illinois, 60611-2092 Web: <http://www.rrb.gov>

**TO** : Ronald Russo  
Director of Policy and Systems  
Office of Programs

**FROM** : Steven A. Bartholow  
General Counsel

**SUBJECT** : Fees for search, transcription and copying of compensation records in litigation

This is in reply to your request for guidance regarding charging the fees which the agency may assess for costs incurred in the search, and production copying of documents. Additional conversations with your staff and the Privacy Act Officer of the Board, and the background material they have furnished indicate your request specifically concerns the agency's authority to collect fees for the search and production of copies and transcriptions of microfilm records of an employee's service and compensation as reported by a railroad employer, when requested by either counsel for the subject employee, or by counsel for the opposing side, for use as evidence in litigation to which the railroad employee is a party. In both instances, the requesting party has furnished written authorization by the employee for disclosure.

Disclosure of information concerning individuals which is in the agency's possession is governed by several statutes. It is most appropriate to begin with provisions in the benefit statutes which establish the Railroad Retirement Board, and which the Board administers. Section 12(d) of the Railroad Unemployment Insurance Act as amended, which is incorporated into the Railroad Retirement Act by section 7(b)(3) of that Act, provides, in pertinent part, as follows:

Information obtained by the Board in connection with the administration of this Act shall not be revealed or open to inspection nor be published in any manner revealing an employee's identity: Provided, however, that \* \* \* (ii) the Board may disclose such information in cases in which the Board finds that such disclosure is clearly in furtherance of the interest of the employee or his estate; (iii) any claimant of benefits under this Act shall, upon his request, be supplied with information from the Board's records pertaining to his claim and (iv) the Board shall disclose to any base-year employer of a claimant for benefits any information, including information as to the claimant's identity, that is necessary or appropriate to notify such employer of the claim for benefits or to full and fair participation by such employer in an appeal, hearing or other proceeding relative to the claim pursuant to \* \* \* this Act. \* \* \*

Section 12(n) of the RUIA, also incorporated by section 7(b)(3) of the RRA, and regulations of the Board, together allow disclosure of medical records to only the subject individual. See 20 CFR 200.5(e). Subject to these limitations, section 12(d) of the RUIA provides that, "the Board may furnish such information to any person or organization upon payment by such person or organization to the Board of the cost incurred by the Board by reason thereof \* \* \*."

As a Federal agency, information in the Board's possession is also subject to the Privacy Act (5 U.S.C. § 552a) and the Freedom of Information Act (5 U.S.C. §552). The Privacy Act generally prohibits disclosure of information concerning individuals to third parties, while the Freedom of Information Act (FOIA) generally requires disclosure of any documents or information. Both Acts specify exceptions which allow disclosure in the case of the Privacy Act, or prohibit disclosure in the case of the FOIA. In particular, the Privacy Act generally requires agencies to furnish individuals documents concerning themselves (5 U.S.C. § 552a(d)), while the FOIA allows agencies to withhold from third party requesters information which would invade an individual's privacy (5 U.S.C. § 552(b)(6)).



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Both the Privacy Act and the FOIA also specify conditions under which agencies may charge fees in connection with production of information. The FOIA, as amended by the Freedom of Information Reform Act of 1986 (Public Law 99-570, 100 Stat. 3207-48), provides that "each agency shall promulgate regulations \* \* \* specifying the schedule of fees applicable to the processing of requests under this section \* \* \* ." See 5 U.S.C. § 552(a)(4)(A)(i). Agencies are required to differentiate in these regulations between fees charged for information requested "for commercial use"; "for scholarly or scientific research" or by "a representative of the news media"; and for all others. Id. at 552(a)(4)(A)(ii).

Section 552(a)(4)(A)(i) also requires the Director of the Office of Management and Budget (OMB) to issue guidelines for all agencies. The Director of OMB issued final guidelines for agencies on March 27, 1987 (Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10012). In that document, the Director noted with respect to fees assessed for requests for commercial uses that:

\* \* \* Congress intended to distinguish between requesters whose use of the information was for a use that furthered their business interests, as opposed to a use that in some way benefited the public. The [FOIA Reform Act] amendment shifts some of the burden for paying for the FOIA to the former group and lessens it for the latter.

As opposed to the other fee categories created by the amendment, inclusion in this one is determined not by the identity of the requester, but the use to which he or she will put the information obtained. \* \* \*. 59 Fed. Reg. at 10013.<sup>1</sup>

The FOIA Reform Act also added clause 552(a)(4)(A)(vi), which provides regarding the calculation of fees assessed for search, review and reproduction that, "Nothing in this subparagraph shall supercede fees chargeable under a statute specifically providing for the level of fees for particular types of records." In Board Order 96-112, issued May 15, 1996, the members of the Board adopted an amendment to section 200.4(g)(2)(v) which altered the fees assessed for requests not classified as commercial, news media or scholarly research, or from a subject individual pursuant to the Privacy Act. In the analysis portion of that document as adopted by the Board and published at 61 Fed. Reg. 25390 (May 21, 1996), the Board relied upon its authority to set fees under 12(d) as a statute providing fees for particular records under 552(a)(4)(vi). I also note that the Director of OMB explicitly declined to issue a government-wide fee schedule because each agency must set fees based upon that agency's costs. Uniform Freedom of Information Act Fee Schedule and Guidelines, supra, at 10015. In view of the Board's determination of its fee authority in Board Order 96-112 and the general directions given Federal agencies by the Director of OMB, it is my opinion, therefore that the agency has authority to determine the fees to be assessed for search, transcription and copying of compensation records for use in litigation, if the costs upon which the calculation of such fees is based are reasonable.

Finally,<sup>2</sup> as mentioned above the Board must under the Privacy Act provide information from its records to individuals who are the subject of that information. Section 552a(f)(5) of the Privacy Act allows agencies to promulgate rules which "establish fees to be charged, if any, to any individual for making copies of his

<sup>1</sup> Case law suggests that an inquiry like those which prompted your request for this memorandum, i.e., by attorneys or their agents for information to be used as evidence in a private lawsuit for damages, would be considered to be a commercial use. See, Rozet v. Department of Housing and Urban Development, 59 F. Supp. 2d 55 (D.D.C., 1999).

<sup>2</sup> In addition to information collected directly by the Board, the agency receives earnings information from the Social Security Administration which is subject to restrictions on disclosure imposed on taxpayer return information imposed by section 6103 of the Internal Revenue Code (26 U.S.C. § 6103). The Code allows disclosure of return information to the taxpayer or to any third party designated by the taxpayer (26 U.S.C. §6103(c)). The Code also allows that "A reasonable fee may be prescribed for furnishing such return information." 26 U.S.C. § 6103(p)(2)(B). Restrictions on and fees assessed for furnishing tax return information are beyond the scope of this memorandum.



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record, excluding the cost of any search for and review of the record.” In accord with section 552a(f)(5), the Board has issued section 200.4(g)(iv), which states that the Board will furnish the subject individual copies of documents in the Board’s records at the cost of reproduction. The basis for or amount of fees assessed in responding to Privacy Act requests therefore cannot be altered without amendment of this regulation. Any proposals to change the basis for assessment of fees under the Privacy Act should consider the lack of any provision in the Privacy Act for document fees under other laws parallel to section 552(a)(4)(vi) of the FOIA, and the civil penalties imposed upon agencies which fail to comply with the Act in such a way as to cause an adverse impact on the individual. See 5 U.S.C. § 552a(g)(1).