



OFFICE of GOVERNMENT INFORMATION SERVICES

October 19, 2012—sent via e-mail

Ms. Amie Stepanovich
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Re: OGIS Case No. 201200602
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Dear Ms. Stepanovich:

This responds to your June 1, 2012 request for assistance, which the Office of Government Information Services (OGIS) received on June 7, 2012. Your request pertains to Freedom of Information Act (FOIA) fee and fee waiver policies and practices of the Department of Homeland Security (DHS) and various DHS components, including Customs and Border Protection (CBP) and the Transportation Security Administration (TSA).

Specifically, in a July 12, 2012 phone call between you, Ginger P. McCall, Director of the Open Government Project at the Electronic Privacy Information Center (EPIC), and OGIS Facilitator Kirsten Mitchell, you asked for assistance regarding the following DHS FOIA fee practices:

- Neither granting nor denying fee waiver requests and mooted any appeals on the matter because the fee waiver requests have neither been granted nor denied;
- In cases in which non-commercial requesters do not agree to pay fees, not telling the requesters that non-commercial requesters are entitled to two free hours of search time and 100 free pages of duplication; and
- Not providing requesters with a breakdown of fees for search, review and duplication in fee estimates.

We carefully reviewed the correspondence you submitted and discussed the practices with James Holzer, DHS's Director of Disclosure and FOIA Operations. We learned that DHS is changing its policies with regard to all three practices.

Regarding the granting of fee waiver requests, DHS had a policy of neither granting nor denying such requests until FOIA professionals reviewed responsive records to determine whether the fee waiver request met the six analytical factors required under Department of Justice (DOJ) guidelines for a fee waiver. We learned from Mr. Holzer that earlier this year, Immigration and Customs Enforcement (ICE), a DHS component, consulted with DOJ's Office of Information Policy (OIP), about how best to handle fee waivers.



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Under a new department-wide policy that went into effect on October 1, 2012, DHS now conditionally grants fee waiver requests if the subject of the request appears likely to produce documents that meet the six analytical factors that agencies must consider “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” See, 5 U.S.C. § 552(a)(4)(A)(iii).

After a conditional grant of a fee waiver and careful review of responsive documents, the agency either grants the fee waiver or denies it and explains to the requester why the waiver is denied. This process is designed to be sequential, but can be iterative as the agency and the requester share information and the process progresses. Under a conditional fee waiver grant, a requester cannot appeal because the decision is not final.

With regard to non-commercial requesters and fees, as you know, such requesters are statutorily entitled to two free hours of search time and 100 free pages of duplication regardless of whether they commit to paying fees and regardless of whether the remainder of any responsive records is processed. See 5 U.S.C. § 552(a)(4)(A)(iv)(II). DHS, which previously did not tell non-commercial requesters who chose not to pay fees that they are entitled to two free hours of search time and 100 free pages of duplication, will now inform such requesters of this statutory right.

Regarding fee estimates, DHS and its components will begin providing requesters with a breakdown of fees for search, review and duplication, an OGIS Best Practice. Previously, DHS provided fee totals that had not been itemized.

Mr. Holzer informed OGIS that all three changes are in the process of being implemented department-wide and it may take a while to get the policies in place throughout all of DHS’s 16 components.

Mr. Holzer also informed us that he and his colleagues are interested in discussing these recent changes to DHS’s fee policies and procedures with you and your EPIC colleagues; OGIS would be pleased to facilitate such a discussion. If you are interested, please contact OGIS Facilitator Kirsten Mitchell at 202-741-5775 or kirsten.mitchell@nara.gov.

I hope you find this information useful. Your case with OGIS is now closed, though we will be pleased to continue our involvement by facilitating a conversation between DHS and EPIC.

Sincerely,



Miriam Nisbet, Director
Office of Government Information Services

cc: Jonathan Cantor, Acting Chief FOIA Officer, Department of Homeland Security
James Holzer, Director of Disclosure and FOIA Operations, Department of Homeland Security
Rep. Darrell Issa, Chairman, House Committee on Oversight and Government Reform
Rep. Elijah Cummings, Ranking Member, House Committee on Oversight and Government Reform

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.