

## FOIA FEES SUBCOMMITTEE STATUS

JANUARY 27, 2015

- Meeting was held on December 3, 2014, from 1:30 PM to 3:00 PM, at the offices of EPIC in Washington, DC.
- Members in attendance were co-chairs Jim Hogan and Ginger McCall, Anne Weismann, Karen Finnegan, and Dave Bahr (the last two by telephone). Christa Lemelin, the Designated Federal Officer (DFO), also attended.
- Summaries of the fee provisions concerning the access laws of Australia, the United Kingdom, Canada, Mexico, and New Zealand were presented. A table of the summaries follows.

Country	Fees Charged?	Fee Waiver?	Comments
Australia	Yes	Yes – financial hardship and public interest	Fee waivers are optional and at agency discretion. Charges are for search, decision making (review), photocopy, supervised inspection, transcript, and delivery. First 5 hours of decision making are free for all. Requesters may ask for review of charges by internal agency review or Information Commissioner.
UK	Yes	No	Search, retrieval, and extraction time are chargeable. Some authorities (agencies) charge for redaction. Authorities do not have to comply with a request if the cost of complying would exceed the appropriate limit (£600.00 for the Ministry of Defence).
Canada	Yes	No— regulations offer a chance to review the requested material in person to limit copying costs	Flat fee of \$5 charged for all requests, which entitles a requester to 5 hours of search and preparation. Additional charges may be related to search, preparation, computer processing, photocopy (and other related costs as identified in the Access to Information Regulations).
Mexico	Yes	No	Costs of duplication and sending the information are chargeable.
New Zealand	Yes	No	Fees for the supply of official information shall be reasonable and regard may be had to the cost of labor and materials involved. Any costs incurred pursuant to a request to make the information available urgently may be charged.

- Discussion focused on the perceived advantages and disadvantages of each country’s fee structure, recognizing that governmental structure and types of records of these countries could be vastly different than ours.
- Attendees also reviewed current U.S. standards for favored requester categories, including caselaw defining news media requesters, educational requesters, and non-commercial scientific institutions. Attendees agreed that these categories are often ill-defined and confusing for both agency and requester.
- The meeting continued with speculative discussion on the consequences of eliminating FOIA fees (except for commercial requesters). The primary advantage of this is the reduction of time that agencies spend on fee issues (adjudicating fee category and fee waiver requests). There was general agreement that this is a good consequence since it would allow agencies to focus their resources on the processing of FOIA requests. However, there was much discussion on the potential of risk of FOIA requesters flooding agencies with FOIA requests since they would no longer have to pay processing fees. Some speculated that this could increase agency FOIA backlogs and response times.
- It was noted that there is a history of a small number of requesters flooding agencies with requests, and that given this history the elimination fees would only make it worse. Other nations label this type of requesters as “vexatious”; however, for our discussion as it relates to the US FOIA we will use the term “extreme”. Currently, agencies do not have a tool in their toolkit to deal with extreme requesters.
- Several nations have within their access laws sections dealing with “vexatious” requesters. Specifically, Australia, the UK, and New Zealand all approach this issue, though all do it differently. A summary of the approaches follows.
  - The term “vexatious” is defined in a variety of ways.
  - Vexatious requests (or requesters) do not have to be honored.
  - Australia allows for the Information Commissioner to declare a requester to be vexatious.
  - The UK allows for the public authority or Information Commissioner to declare that a request is vexatious.
  - New Zealand allows for the refusal of a request if it is frivolous or vexatious.
- Extensive discussion ensued as to the applicability, or even the necessity, of a similar provision in the US. Some of the related concerns are
  - The likelihood or unlikelihood of an increase in extreme (a preferred term) requests should FOIA fees be eliminated.
  - The potential of “mischief” by agencies in labeling requests or requesters as extreme.
  - The difficulty of objectively defining an extreme request or requester.
  - The potentiality of foreclosing access rights to the public because of a “few bad apples.”

- It seems advantageous to have an independent authority make the “extreme” determination, and not an agency. However, this process could add significant time in making the determination.
- Other potential ideas for fees improvements were discussed, including
  - Creating a single, low uniform fee to be paid by all requesters – which would make requesting more affordable, eliminate the time spent by FOIA officers on resolving fee category issues, and potentially discourage extreme requesters;
  - Creating a scheme that would be, by default, free of fees unless the number of documents implicated by a request passes a fixed threshold – i.e. 10,000 pages. This would eliminate agency time spent assessing and collecting fees, eliminate economic barriers for most requesters, and help to discourage overbroad, burdensome requests.
- Attendees debated the merits of each of these claims, but ultimately decided that the discussion was lacking necessary information about the actual burden created by extreme requesters, existing agency mechanisms for dealing with broad or frequent requests, and actual amount of agency time spent assessing/collecting fees. To that end, a survey of FOIA officers was proposed.
- Attendees agreed that questions could center around two general areas. The first area would concern fees and a determination of how extensive they are an issue, if at all, and the second would explore large, burdensome requests.
- The next meeting will again be in February, 2015.