United States Government Accountability Office

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Report to the Ranking Minority Member, Committee on the Judiciary, U.S. Senate

May 2005

INFORMATION MANAGEMENT

Freedom of Information Act Fee and Fee Waiver Processing at the Department of Energy

GAO-05-405

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GAO Accountability · Integrity · Reliability

Highlights

Highlights of GAO-05-405, a report to the Ranking Minority Member, Committee on the Judiciary, U.S. Senate

Why GAO Did This Study

The Freedom of Information Act (FOIA) gives the public the right to access information about the federal government. In addressing requests for information, agencies have the authority to assess fees for certain categories of requesters to cover the costs of locating and copying records, as well as discretion to waive fees if specific criteria are met. GAO was asked to determine, for fiscal year 2004, the volume and nature of FOIA request processing at the Department of Energy (DOE), to what extent DOE followed the act and related Office of Management and Budget and Department of Justice guidance in processing cases that involve fees, and to what extent DOE communicated its fee-related decisions to requesters.

What GAO Recommends

To improve FOIA requesters' understanding of agency fee decisions, GAO recommends that Justice revise its FOIA guidelines to require that requesters be explicitly informed of all fee-related determinations associated with their requests.

In commenting on a draft of this report, DOE clarified its process at one field office and stated that it is implementing the GAO recommendation. Justice stated that the recommendation was addressed to the wrong agency; however, GAO believes Justice is the proper addressee because it provides guidance and support to federal agencies on FOIA issues.

www.gao.gov/cgi-bin/getrpt?GAO-05-405.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Linda Koontz at (202) 512-6240 or koontzl@gao.gov.

What GAO Found

In fiscal year 2004, DOE received 2,289 new FOIA cases, of which 31 percent (705 of 2,289) were received by the department's headquarters in Washington, D.C., and DOE sites at Albuquerque, New Mexico, and Richland, Washington—the sites selected for our review. Generally, very few of the requests at these sites involved assessments of fees or requests for waivers of possible fees. DOE's process includes several phases ranging from initial processing and acknowledgement to preparing and releasing records to requesters. The table shows the disposition of FOIA requests for fiscal year 2004 at these three DOE sites.

DOE generally followed FOIA and related guidance when determining fee categories for requesters, fee waivers, and actual fees to be charged. All three sites we reviewed always made explicit determinations about requesters' fee categories in accordance with guidance. DOE also generally adhered to guidance in determining fee waivers by seeking information addressing the prescribed criteria for making fee waiver determinations. In assessing actual fees to be charged, FOIA offices at all three sites charged fees in accordance with guidance.

DOE's FOIA offices often did not communicate the specifics of their fee-related decisions to FOIA requesters. For example, while DOE headquarters often informed requesters of determinations about their fee category, the Richland and Albuquerque offices rarely did. In addition, the three sites rarely informed requesters of the outcome of fee waiver determinations. Further, when fees were not charged, requesters were rarely informed of the reason. Current FOIA guidelines do not require agencies to inform requesters of fee-related decisions. However, without being informed of fee-related determinations, requesters could misunderstand agency fee determinations and have false expectations for the handling of future FOIA requests.

Fee Disposition of Requests Reviewed

Request description	Number of requests charged a fee	Number of requests not charged a fee	Total
Fee waiver not requested	33	501	**534**
Fee waiver requested	2	169	**171**
Fee waiver granted	0	38	**38**
Fee waiver denied	0	8	**8**
No record of an explicit fee waiver determination[a]	2	123	**125**

Source: GAO.

[a]These case files do not contain documentation showing that an explicit fee waiver determination was made. According to DOE officials, in most cases this is because they believed, based on their knowledge and experience, that the costs incurred would be below DOE's $15 threshold for charging fees and that there was no need to make a fee waiver determination.

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Abbreviations

DOE	Department of Energy
FOIA	Freedom of Information Act
OMB	Office of Management and Budget

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United States Government Accountability Office
Washington, D.C. 20548

May 27, 2005

The Honorable Patrick J. Leahy
Minority Democratic Member
Committee on the Judiciary
United States Senate

Dear Senator Leahy:

The Freedom of Information Act (FOIA) provides the public with a legal right to access government information about the operations and decisions of the federal government. Specific requests by the public for information through FOIA have led to the disclosure of waste, fraud, abuse, and wrongdoing in the government. The act authorizes agencies to recoup certain direct costs associated with processing requests, which may include search, duplication, or review, depending on the requester's fee category. It defines three categories for requesters: (1) commercial; (2) educational, noncommercial scientific institutions, and representatives of the news media; or (3) other. Agencies also have discretion to reduce or waive fees under various circumstances.

This report responds to your request that we conduct a detailed review of FOIA request processing at one agency, the Department of Energy (DOE). Specifically, as agreed with your office, our objectives were to determine for fiscal year 2004

- the volume and nature of FOIA request processing at DOE,
- the extent to which DOE's process for handling fee assessments and waivers was consistent with FOIA and related guidance, and
- the extent to which DOE communicated its fee-related decisions to requesters.

To address these objectives, we analyzed FOIA case files from three DOE locations, reviewed FOIA and related guidance, and interviewed officials from each location. The three DOE locations we assessed were responsible for about 77 percent of the fee waiver cases in fiscal year 2004 and 35 percent of the cases in which fees were charged. Further details on our scope and methodology are provided in appendix I. Our work was conducted from June 2004 through March 2005, in accordance with

generally accepted government auditing standards, at Washington, D.C.; Albuquerque, New Mexico; and Richland, Washington.

Results in Brief

In fiscal year 2004, DOE reported receiving 2289 new FOIA cases and closing 2440. Of all new cases received, headquarters, Albuquerque, and Richland received 31 percent (705 of 2289). In approximately 5 percent (35 of 705) of these cases, requesters were charged a fee; most (30 of 35) of these cases involved commercial requesters. In total, the three sites charged about $4,700 in fees; DOE Headquarters charged requesters about $2,200, Albuquerque charged about $1,300, and Richland charged about $1,200. Further, of the 705 cases, 24 percent (171 of 705) involved requesters formally asking for a fee waiver, and only two of these requesters were actually assessed fees.

At the three locations, DOE generally followed FOIA and related guidance when assessing fees and determining fee waivers. When DOE determined a requester's fee category, all three locations always made explicit fee category determinations. DOE also generally adhered to guidance when making fee waiver determinations. Officials at all three locations indicated that if they believed, based on their knowledge and experience, that the charge for the request was going to be below a predetermined threshold specified in guidance, they would not go through the process of making a formal fee waiver determination. Lastly, in assessing actual fees to be charged, FOIA offices at all three sites charged fees in accordance with guidance.

The three DOE locations often did not communicate the specifics of their fee-related decisions to requesters. For example, while DOE Headquarters often informed requesters of determinations about their fee category, the sites at Richland and Albuquerque rarely did. In addition, the three sites rarely informed requesters of the outcome of fee waiver determinations. When fees were not charged, requesters were rarely informed of the reason. However, without understanding what determinations have actually been made, requesters could develop false expectations about how future requests will be handled. Of the 17 FOIA requesters we interviewed, more than half (11) believed they had received fee waivers from DOE, when in fact no such waivers had been granted. Without clearer communication of fee-related determinations, requesters are likely to not fully understand agency fee determinations, which could lead to dissatisfaction with the FOIA process in general.

To improve requesters' understanding of agency fee-related determinations, we are recommending that the Attorney General direct the co-directors of the Department of Justice's Office of Information and Privacy to revise its guidelines to include a requirement that requesters be explicitly informed of all fee-related determinations associated with their requests.

We provided a draft of this report to DOE and Justice for their review and comment. Copies of DOE's and Justice's comments are included in appendixes II and III, respectively. DOE reported that it had already taken steps to implement our recommendation, although the department noted that it was not required to provide requesters with fee-related notifications when potential fees would be below the minimum amount for charging. Justice stated that our recommendation was addressed to the wrong agency, because it did not fall within the jurisdictional purview of the department and therefore Justice cannot properly implement the recommendation. However, we disagree. Justice is the lead agency for providing guidance and support to federal agencies on FOIA issues. To confirm that we had appropriately addressed our recommendation to Justice rather than the Office of Management and Budget (OMB)—which is required to issue a uniform schedule of fees for all agencies—we contacted the Deputy Administrator, Office of Information and Regulatory Affairs, OMB, who agreed that the recommendation should be addressed to Justice.

Background

FOIA established a legal right of access to government records and information, on the basis of the principles of openness and accountability in government. Before the act, an individual seeking access to federal records had faced the burden of establishing a right to examine them. FOIA also established a "right to know" standard for access, instead of a "need to know," and shifted the burden of proof from the individual to the government agency seeking to deny access. FOIA was originally enacted in 1966 and has been amended several times, most recently in 2002.

Citizens are requesting an ever-increasing amount of information from the federal government, as reflected in a steadily increasing number of FOIA requests. In fiscal year 2003, over 3 million requests were received by federal agencies, an increase of 36 percent over the previous year. Further, the number of requests closed was also more than 3 million, an increase of 34 percent compared with the previous year. The number of requests closed is, in part, an indicator of the responsiveness of agencies in

providing the public with requested information and shows that agencies are taking steps to respond to the increasing FOIA workload.

FOIA provides the public with access to government information either through "affirmative agency disclosure"—publishing information in the *Federal Register* or making it available in reading rooms—or in response to public requests for disclosure. Public requests for disclosure of records are the best known type of FOIA disclosure. Any member of the public may request access to information held by federal agencies, without showing a need or reason for seeking the information. Agencies may deny access to material (e.g., by withholding records or redacting information) only if it falls within any of nine statutory categories of exemptions. There are also FOIA exclusions for specific, sensitive records held by law enforcement agencies. In addition, agencies have a statutory requirement to meet certain time frames for determining whether to comply with requests, making determinations with respect to appeals of adverse determinations, and determining whether to provide expedited processing of requests. Requesters are entitled to know the reasons for denials, to appeal denials, and to challenge them in court. Under the act, agencies are required to submit annual reports on their FOIA activities to the Attorney General.

Roles of Justice and OMB in FOIA Implementation

The Department of Justice oversees agencies' compliance with FOIA and is the primary source of policy guidance for agencies. Justice's specific requirements under the act are to

- make agencies' annual FOIA reports available through a single electronic access point and notify Congress as to their availability;
- in consultation with OMB, develop guidelines for the required agency reports, so that all reports use common terminology and follow a similar format; and
- submit an annual report on FOIA statistics and the efforts undertaken by Justice to encourage agency compliance.

In addition, FOIA requires OMB to issue guidelines to "provide for a uniform schedule of fees for all agencies."[1] Agencies are required to conform to the OMB fee guidelines. Further, in 1987, the Department of Justice issued guidelines on waiving fees when FOIA requests are determined to be in the public interest. Under the guidelines, requests for waivers or reduction of fees are considered on a case-by-case basis, taking into account both the public interest and the requester's commercial interests.

FOIA Processing at DOE

Some FOIA requests are relatively simple to process, such as requests for specific pieces of information that the requester sends directly to the appropriate office. Other requests require more extensive processing, depending on the complexity of the request, the volume of information involved, the need for the agency FOIA office to work with offices that have relevant subject-matter expertise to find and obtain information, the need for a FOIA officer to review and redact information in the responsive material, the need to communicate with the requester about the scope of the request, and the need to communicate with the requester about the fees that will be charged for fulfilling the request (or whether fees will be waived). FOIA processing, especially review of classified, sensitive, or privacy-related material, can be labor-intensive.

DOE's process typically begins when the agency's headquarters FOIA office receives a written request (fax, letter, e-mail, or electronic form on DOE's Web site).[2] From that point, the request goes through several phases, which include

- initial processing,
- acknowledgment of the request,
- fee determination and identification of office with relevant subject matter expertise,

[1]This provision was added by the Freedom of Information Reform Act of 1986 (Pub. L. 99-570). See OMB, *Uniform Freedom of Information Act Fee Schedule and Guidelines*, 52 FR 10011 (Mar. 27, 1987), effective April 27, 1987.

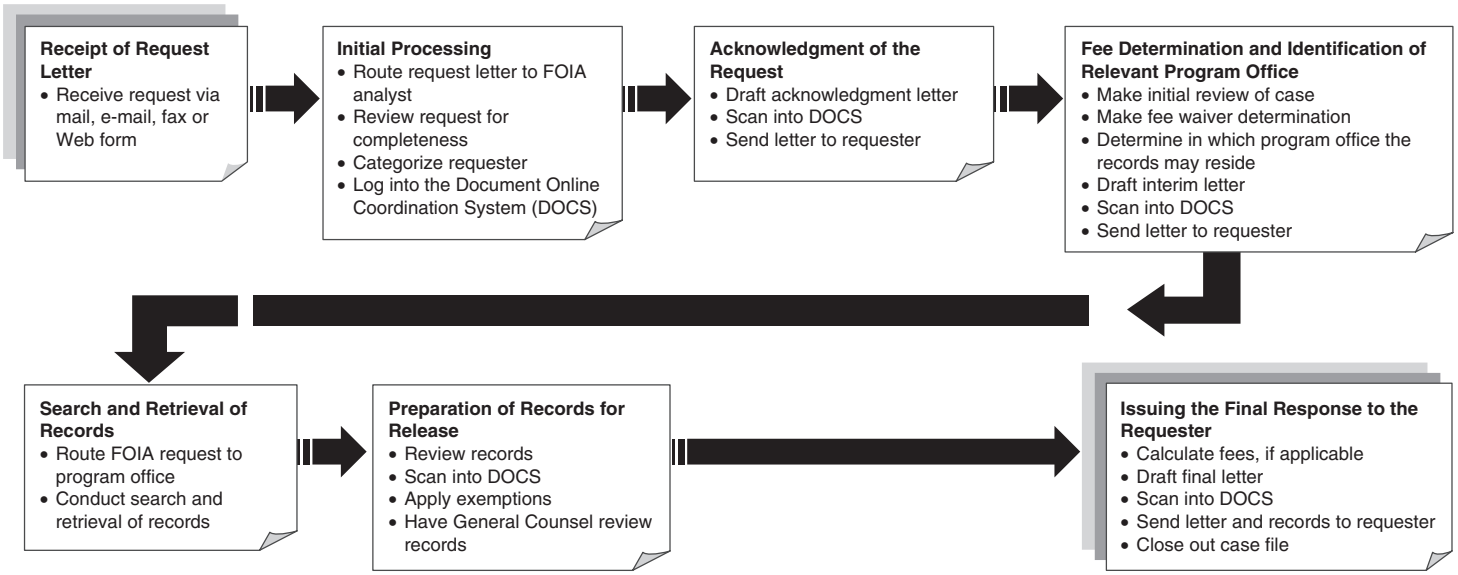
[2]Field offices receive and process requests independently of headquarters but use similar processes.

- search and retrieval of records,
- preparation of records for release, and
- issuing of the final response to the requester.

Initial processing is focused on ensuring that the request is a proper FOIA request and that all relevant information has been obtained from the requester.[3] From here, an acknowledgment letter informs the requester that the department received the request and also provides the requester with a tracking number. FOIA officials then review the case to determine which office may have responsive records and make an initial determination about fees and, if a fee waiver has been requested, whether it is to be granted. After the appropriate office has located responsive records, a determination is made about what, if any, information is exempt from public release and should be redacted from records planned to be released, which would result in a "partial grant" of requested information. Finally, the agency assembles the responsive records to be released and provides them to the requester. Figure 1 depicts the FOIA process at DOE Headquarters.

[3]Among other things, a FOIA requester is required to provide an assurance to pay any applicable fees, and if DOE cannot obtain such an assurance—either in the original request or through follow-up—its practice is not to process the request.

Figure 1: DOE Headquarters FOIA Process



Source: GAO analysis of DOE Headquarters process.

Note: DOCS (Document Online Coordination System) is DOE's electronic document management system.

From the receipt of the request until a final decision is made about the release or withholding of documents, DOE has a number of opportunities to communicate with requesters. As recorded in DOE's FOIA case files, the types of communications included

- acknowledgment letters, which informed requesters that DOE received the request;
- interim letters, which provided requesters with additional information pertaining to their request and may have requested additional information to clarify the request;
- final letters, which provided requesters with the final outcome of their request;
- oral communications, which were made typically via telephone and provided clarification and additional information about how the request was being handled; and

- e-mail messages, which also provided clarification and additional information about DOE's handling of the request.

Aside from very minor variations, the FOIA process at the Albuquerque and Richland field offices is essentially the same. The FOIA offices at each site receive requests centrally and assign them to appropriate offices with subject-matter expertise for action.

Fee Structure and Fee Waivers

Agency determinations about fees and fee waivers are complex decisions that include determining (1) the requester's fee category, (2) whether a fee waiver is to be granted, and (3) the actual fees to be charged. FOIA stipulates three types of fee categories for requesters: (1) commercial; (2) educational, noncommercial scientific institution, and representative of the news media; and (3) other. Further, fees can be charged for three types of FOIA-related activities—search, duplication, and review—depending on the requester's fee category. In addition, in certain situations fees may not be charged to a requester, as, for example, when a fee waiver is granted or when the applicable fees are below a certain threshold.

Commercial users can be charged for the broadest range of FOIA-related activities, including document search, review, and duplication. Commercial use is defined in the OMB fee schedule guidelines as "a use or purpose that furthers the commercial, trade or profit interests of the requester or the person on whose behalf the request is being made." The second category exempts search and review fees for documents sought for noncommercial use by educational or noncommercial scientific institutions, and for representatives of the news media. The third category of fees, which applies to all requesters who do not fall within either of the other two categories, allows for "reasonable" charges for document search and duplication. Table 1 shows the FOIA-related activities for which agencies can charge by fee category, as stipulated in the act.

Table 1: FOIA Charges by Category

	Activities for which agencies can charge		
Category of requester	**Search**	**Review**	**Duplication**
Category 1: Commercial requester	Yes	Yes	Yes
Category 2: Educational, noncommercial scientific institutions, and representatives of the news media	No	No	Yes (100 pages free)
Category 3: Other	Yes (2 hours free)	No	Yes (100 pages free)

Source: GAO analysis of 5 U.S.C. § 552 (a)(4)(A)(iv).

Although the act generally requires that requesters pay fees for their requests to be processed, in certain circumstances, fees are not to be charged. For example, as stipulated in the act, fees may not be charged when the government's cost of collecting and processing the fee is likely to equal or exceed the amount of the fee itself.

Further, under certain circumstances, the act requires an agency to furnish documents without charge, or at reduced charges. This is commonly referred to as the FOIA fee waiver. An agency must provide a fee waiver if two conditions are met:

- disclosure of the requested 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

- disclosure of the information is not primarily in the commercial interest of the requester.

Under the act and guidance, when these requirements are both satisfied, based upon information supplied by a requester or otherwise made known to the agency, the fee waiver or reduction is to be granted by the FOIA officer. Where one or both of these requirements is not satisfied, a fee waiver is not warranted. As these criteria suggest, fee waivers are to be granted on a case-by-case basis. Individuals who receive fee waivers in some cases may not necessarily receive them in other cases.

DOE's FOIA Requests in Fiscal Year 2004

In fiscal year 2004, DOE reported receiving 2,289 new FOIA cases and closing 2,440.[4] In 76 percent (1848 of 2440) of the closed cases, DOE provided some or all requested records to the requesters. Of all new cases received across the department, headquarters, Albuquerque, and Richland—the sites selected for our review—received 31 percent (705 of 2,289). Specifically, headquarters received 431 cases, Albuquerque received 152 cases, and Richland received 122 cases.

In approximately 5 percent (35 of 705) of the cases at these three sites, requesters were charged a fee; 86 percent (30 of 35) of these cases involved commercial requesters. In total, the three sites charged about $4,700 in fees. DOE Headquarters charged requesters about $2,200; Albuquerque charged about $1,300; and Richland charged about $1,200. Further, of the 705 cases, 24 percent (171 of 705) involved requesters formally asking for a fee waiver, and only two of these requesters were actually assessed fees (see table 2).

Table 2: Fee Disposition of Requests Reviewed

Request description	Number of requests charged a fee	Number of requests not charged a fee	Total
Fee waiver not requested	33	501	**534**
Fee waiver requested	2	169	**171**
Fee waiver granted	0	38	**38**
Fee waiver denied	0	8	**8**
No record of an explicit fee waiver determination [a]	2	123	**125**

Source: GAO.

[a]These case files do not contain documentation showing that an explicit fee waiver determination was made. According to DOE officials, in most cases this is because they believed, based on their knowledge and experience, that the costs incurred would be below DOE's $15 threshold for charging fees and that there was no need to make a fee waiver determination.

[4]The number of requests closed is larger than that received because DOE resolved cases that had remained open from previous years.

DOE Generally Adhered to FOIA Guidance

Based on an analysis of 170 cases,[5] DOE at these three locations generally followed FOIA and related guidance in its processes for making each of three major decisions related to fees and fee waivers: (1) determining the requester's fee category, (2) determining if a fee waiver is to be granted, and (3) assessing actual fees, if any, to be charged.

FOIA and related guidance issued by OMB and Justice give FOIA officers detailed directions about how to handle fees and fee waivers. First, FOIA officers need to determine a requester's fee category in order to know what types of activities the requester can be charged for. The three types of fee categories for requesters are (1) commercial; (2) educational, noncommercial scientific institution, and representative of the news media; and (3) other. Then, if a requester is eligible to be charged fees, a determination must be made if any of those fees can be waived. Assuming a requester has asked for a fee waiver, FOIA personnel must evaluate information provided by the requesters, addressing six criteria[6] outlined in the Justice guidance in order to make a fee waiver determination. Finally, assuming fees have not been waived, FOIA personnel must assess the actual fees to be charged. According to guidance, no fee is to be charged if the requester has received a fee waiver or if the amount to be charged is under a predetermined threshold. Otherwise, FOIA personnel are to determine the amount of time spent on search, review, and duplication, and, based on a requester's fee category, charge the appropriate fees.

Determining a requester's fee category is the simplest of the three decisions in terms of the information needed to make a decision, and it typically takes little time. Officials at all three sites we reviewed always (170 of 170 cases) made explicit fee category determinations. Headquarters officials

[5]Of the 705 cases received by the three DOE locations in fiscal year 2004, we selected a review group totaling 170 cases that included all completed cases in which fees were charged (34 cases), all completed cases in which fee waivers were requested (95 cases), and a randomly selected group of nonfee and non-fee-waiver related cases (43 cases). Note that for two of the cases in which fees were charged, fee waivers were also requested. For a complete description of the selection process for our review group, see appendix I.

[6]The six criteria are that (1) the subject matter of the request must concern identifiable "operations or activities of the government"; (2) the releasable portions of the requested information must be meaningfully informative in relation to the subject matter of the request; (3) the disclosure must contribute to the public at large as opposed to a narrow audience; (4) the disclosure must contribute "significantly" to public understanding of government operations and activities; (5) the public interest must outweigh any commercial interest; and (6) the requester's primary interest is not commercial.

stated that if a requester did not provide enough information to make a fee category determination, FOIA personnel would often attempt to locate additional information, for example through the Web, in order to make an expeditious category determination.

DOE also generally adhered to FOIA guidance in determining if a fee waiver was to be granted by seeking information to address all relevant fee waiver criteria. Often, if requesters did not sufficiently address all the fee-waiver criteria in their initial requests, officials sought additional information from the requesters. DOE also generally adhered to FOIA guidance by asking requesters to address all relevant fee waiver criteria. For example, headquarters requested additional information to address fee waiver criteria in 21 cases wherein sufficient information was not included with the original request. Officials at all three sites indicated that if they believed, based on their knowledge and experience, that the charge for the request was going to be below the threshold, they would not go through the process of making an explicit fee waiver determination.

In assessing actual fees to be charged, if any, FOIA offices at all three sites we reviewed charged fees in accordance with guidance. The three locations charged fees in 34 completed cases.[7] For example, requesters were appropriately charged for search, review, or duplication based on their FOIA category.[8] In addition, all three locations uniformly complied with the regulation of granting 2 hours of free search time and 100 pages of free duplication to requesters in certain categories. Table 3 lists the 34 completed cases in which fees were charged, by location and category.

[7]One of the 35 fee charged cases shown in table 2 had not been fully processed at the time of our review.

[8]One deviation was that Richland's policy of charging 10 cents per page for duplication was not consistent with DOE's guidance, which stipulates a duplication charge of 5 cents per page.

Table 3: Cases in Which Fees Were Charged

Category	Headquarters	Albuquerque	Richland	Total
Commercial	14	11	4	**29**
Educational, scientific, and news media	1	0	0	1
Other	0	4	0	**4**
Total	**15**	**15**	**4**	**34**

Source: GAO.

In many cases in which fees were not charged to requesters, we could not determine if DOE made its decision correctly, because the necessary information to determine fees—an accounting of search time and cost, review time and cost, and the number of pages duplicated—was not routinely recorded. Of the cases we reviewed that did not charge a fee (136 of 170), about 61 percent (83 of 136) did not include records of all of the necessary information. Officials at each of the sites stated that—as was the case with many fee waiver determinations—they often did not record such information when they believed, based on their knowledge and experience, that the costs incurred would be below DOE's $15 threshold for charging fees.

DOE Did Not Always Inform Requesters About Fee and Fee-Waiver Decisions

DOE's three FOIA offices did not always communicate all the specifics of their fee-related decisions to requesters. Requesters were sometimes informed of one or more of the three major fee-related decisions, especially fee category decisions. However, they were rarely given a full explanation of all relevant decisions. Because of the complexity of the decision-making process for fees and fee waivers, providing a full explanation of what decisions have been reached is important. Without a clear understanding of DOE's fee-related determinations, requesters could have false expectations about how their future requests are to be handled.

Current FOIA processing guidelines do not require agencies to explicitly inform requesters of fee-related decisions. However, informing requesters about fee and fee-waiver decisions is important because it can provide an explanation to the requester about the specific and possibly unique circumstances of a particular fee determination. For example, although an agency may determine that a requester is not eligible for a fee waiver, based on the information provided, it may not actually charge any fee for the request because the charges would be below the minimum threshold. If the

requester was not informed of this, he or she could mistakenly believe that a waiver had indeed been granted and might expect that a similar waiver would be granted for future FOIA requests. While not specifically referring to fee determinations, Justice has cited the importance of communications as an element of customer service.

The three DOE sites did not always communicate fee category decisions to requesters. Of the three locations, headquarters was most likely to inform requesters of their fee category. Richland and Albuquerque rarely communicated fee category determinations to requesters. Table 4 enumerates how often requesters were informed of fee category determinations for the cases we reviewed.

Table 4: Communication of Fee Category Determinations to Requesters

Description	Headquarters	Albuquerque	Richland	Total
Fee category communicated	57	11	5	**73**
Fee category not communicated	22	31	44	**97**
Total	**79**	**42**	**49**	**170**

Source: GAO.

The three sites also rarely informed requesters of the outcome of fee waiver determinations. Specifically, requesters were not informed of fee waiver determinations in 87 percent of the completed fee waiver cases that we reviewed (83 of 95). Whenever DOE's case files show that an explicit determination was made denying a fee waiver, the requester was informed of this decision. This occurred seven times in fiscal year 2004. However, fee waiver determinations were not always recorded in the case files. DOE officials indicated that if they believed fees would be below the threshold, based on their knowledge and experience, they would not address a fee waiver request explicitly, and, accordingly, requesters would not be informed of any fee waiver decision. Further, in 22 cases at headquarters, requesters were notified that a fee waiver determination would not be addressed until they provided additional information addressing the fee waiver criteria that DOE is required to use in reaching its fee waiver determinations. However, the records in these cases do not indicate whether additional information was obtained, nor do they reflect a final determination of fee waiver status. Table 5 shows communication of completed fee waiver case determinations by location.

Table 5: Communication of Fee Waiver Determinations to Requesters

Description	Headquarters	Albuquerque	Richland	Total
Communicated granting of fee waiver	3	2	0	**5**
Communicated denial of fee waiver	1	0	6	**7** [a]
Did not communicate fee waiver determination	45	14	24	**83**
Additional support had been requested to address decision criteria	22	0	0	
Total	**49**	**16**	**30**	**95**

Source: GAO.

[a]In addition to these seven cases, Headquarters, at the time of our review, had one open case where a fee waiver had been denied.

Although the DOE offices informed requesters when fees were assessed and actually charged, they did not always explicitly inform requesters of decisions not to charge fees, even when fees might have been applicable. In half of the cases we reviewed in which fees were not charged (68 of 136), requesters were not informed about the decision not to charge a fee. Without being informed about this decision, a requester could mistakenly believe that fees were not applicable and develop a false expectation that fees also would not be applicable for future requests. Table 6 below shows the disposition of cases by location in which a fee was not charged.

Table 6: Communication of Fee Decision When Fees Were Not Charged

Description	Headquarters	Albuquerque	Richland	Total
Fee decision communicated	32	24	12	**68**
Fee decision not communicated	32	3	33	**68**

Source: GAO.

Further, in most (24 of 35) cases where fees were charged, requesters were not informed of the complete details of the fees to be charged. In assessing fees, FOIA personnel are to determine the amount of time spent on search, review, and duplication, and, based on a requester's fee category, charge the appropriate fees. If requesters do not receive detailed information about these determinations, including an accounting of what activities they

were not charged for, they may not be able to understand how fees had been assessed. Although Albuquerque consistently informed requesters about the complete details of assessed fees, headquarters and Richland rarely did.

Without a clear understanding of what determinations DOE has made, requesters could develop false expectations on how future requests would be handled. For example, 11 of 17 requesters we interviewed who had requested a fee waiver believed they had received a fee waiver from DOE, yet in actuality none of them had. Without clearer communication of fee-related determinations, requesters are likely to not fully understand agency fee determinations, which could lead to dissatisfaction with the response to future FOIA requests.

Conclusions

DOE reported closing 2,440 FOIA requests in fiscal year 2004 and provided some or all of the requested records in 76 percent of the cases. Requesters were charged fees in about 5 percent of cases. Further, in most cases, DOE followed FOIA and related guidance in each of the three major decisions related to fees and fee waivers that arise for any given request. However, DOE did not always communicate these decisions to requesters.

Current FOIA processing guidance issued by Justice does not require agencies to explicitly inform requesters of any fee-related decisions. However, doing so would be beneficial. If requesters do not understand what determinations have actually been made, they could develop false expectations for the handling of future FOIA requests.

Recommendation for Executive Action

To improve FOIA requesters' understanding of agency fee-related determinations, we recommend that the Attorney General direct the co-directors of the Department of Justice's Office of Information and Privacy to revise FOIA guidance to include a requirement that agencies explicitly inform requesters of all fee-related determinations associated with their requests, including a notification that fees were not assessed, if applicable.

Agency Comments and Our Evaluation

We received written comments on a draft of this report from the DOE's Director, Office of Management, Budget, and Evaluation/Chief Financial Officer, and the Co-Directors, Office of Information and Privacy, of the

Department of Justice, which are reproduced in appendixes II and III, respectively.

DOE provided its comments in three parts. First, DOE reported that it had already taken steps to implement our recommendation, although the department noted that it was not required to provide requesters with notifications about fee-waiver determinations when potential fees would be below the minimum amount for charging. Second, the department noted that its past procedures did not call for notifying requesters about fee determinations when processing fees were below the minimum threshold. Finally, the department disagreed with our characterization of fee waiver determinations at the Richland field office, stating that Richland does not have a practice of automatically granting fee waivers to public interest groups and news media. We have accordingly revised the final report to clarify our characterization of Richland's fee-waiver practices.

Justice stated that our recommendation was addressed to the wrong agency, because it did not fall within the jurisdictional purview of the department and therefore Justice cannot properly implement the recommendation. However, we disagree. Justice is the lead agency for providing guidance and support to federal agencies on FOIA issues and has statutory responsibility for encouraging agency compliance with the act.[9] Justice has several vehicles for providing such guidance, including the periodically updated Freedom of Information Act Guide and Privacy Act Overview, as well as training materials and other online updates such as the department's "FOIA Post." To confirm that we had appropriately addressed our recommendation to Justice rather than OMB—which is required to issue a uniform schedule of fees for all agencies—we contacted the Deputy Administrator, Office of Information and Regulatory Affairs, OMB, who agreed that the recommendation should be addressed to Justice.

As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time, we will send copies of this report to the Attorney General; the Secretary of Energy; and the heads of other interested congressional committees. Copies will be made available to

[9]5 U.S.C. § 552 (e)(5).

others on request. In addition, this report will be available at no charge on our Web site at www.gao.gov.

If you have any questions concerning this report, please call me at (202) 512-6240 or send e-mail to koontzl@gao.gov. Key contacts and major contributors to this report are Barbara Collier, John de Ferrari, Wilfred Holloway, Stephanie Lee, David Plocher, and Elizabeth Zhao.

Sincerely yours,

Linda D. Koontz
Director, Information Management Issues

Objectives, Scope, and Methodology

Our objectives were to determine, for fiscal year 2004, (1) the volume and nature of Freedom of Information Act (FOIA) request processing at the Department of Energy (DOE), (2) the extent to which the department's process for handling fee assessments and waivers is consistent with FOIA and related guidance, and (3) the extent to which DOE has clearly communicated its fee-related decisions to requesters.

To determine the volume and nature of FOIA request processing at DOE, we reviewed documentation indicating the volume of requests received by the department, and we analyzed in detail the nature of DOE Headquarters' FOIA process. We assessed the reliability of the DOE Headquarters' process by reviewing existing information about the FOIA process and interviewing agency officials knowledgeable about the process. We determined that the data were sufficiently reliable for the purposes of this report.

To determine the extent to which DOE's process for handling fee assessments and waivers was consistent with guidance, we analyzed the requirements in FOIA, the Department of Justice guidance, and OMB guidance, and we compared these requirements to those contained in DOE's regulations. We then analyzed information gathered from selected FOIA case files to determine if DOE was complying with regulations at selected locations.

We also used data from the selected case files to determine the extent to which the department clearly communicated its fee-related decisions to requesters. The case files from DOE contained several types of communications between DOE and requesters. These communications allowed us to assess how and when DOE communicated fee-related decisions to requesters.

To select the case files for our analysis, we began by identifying the number of fee waiver cases at each of DOE's field locations. We then chose field locations that processed the majority of fee waiver cases in fiscal year 2004. We determined that DOE Headquarters and the department's sites at Albuquerque, New Mexico, and Richland, Washington, processed about 77 percent of DOE's fee waiver cases in fiscal year 2004 and 35 percent of the cases in which fees were charged. These three locations received a total of 705 new FOIA requests in fiscal year 2004. From these 705 cases, we selected (1) all cases in which fees were charged, (2) all cases in which fee waivers were requested, and (3) a random sample of 43 cases not involving a fee being charged or a fee waiver being requested. This process produced

a group of 253 cases. The remaining 452 of the original 705 cases were not reviewed.

After making an initial assessment of these 253 cases, we excluded several types of requests from our analysis, including requests that were open, cancelled, referred to another agency, or not proper FOIA requests:

- An open request is one that has not yet been completed.
- A cancelled request occurs when the requester decides that he or she no longer wants to receive the information requested.
- A request referred to another agency is one that cannot be completed at the original location to which it was sent, and therefore needs to be sent to another location either within DOE or another agency.
- A request is determined not to be a proper FOIA request when any one of the following conditions is met: (1) the documents requested are not reasonably described, (2) the request does not contain a statement regarding fee agreement or request for a fee waiver, (3) the request asks a question rather than requesting documents, and (4) the documents requested do not exist—that is, they would need to be created, or the date of the request letter is earlier than the date of required publication of the agency document.

Table 7 shows the numbers of cases that we excluded for any of these four reasons. In one of the open cases DOE did charge a fee.

Table 7: Number of Requests Excluded by Location

Description of request	Headquarters	Albuquerque	Richland	Total
Open	30	12	1	**43**
Cancelled	1	2	3	**6**
Referred to another agency	28	3	1	**32**
Not a proper FOIA request	1	0	1	**2**
Total	**60**	**17**	**6**	**83**

Source: GAO.

After excluding these 83 cases, 170 cases remained, which formed the review group we used in our analysis. Table 8 below shows the number, description, and location of the cases in our final review group.

Table 8: Number of Cases Analyzed

Description of case	Headquarters	Albuquerque	Richland	Total
Cases in which fees were charged and no fee waiver was requested	15	13	4	**32**
Cases in which fees were charged and fee waiver was requested	0	2	0	**2**
Cases in which no fee was charged and fee waiver was requested	49	14	30	**93**
Cases in which no fee was charged and no fee waiver was requested	15	13	15	**43**
Totals	**79**	**42**	**49**	**170**

Source: GAO.

In addition to the case file analysis, we surveyed requesters about their interaction with DOE and the processing of their FOIA request. Of the 170 cases we analyzed, we identified 86 distinct requesters who were charged a fee or requested a fee waiver. The DOE case files contained contact information for 61 of the 86 requesters. We surveyed each of these 61 requesters and obtained 20 responses. For 17 of these responses the requester asked for a fee waiver, and for the remaining 3 responses the requester had been charged a fee.

Our work was performed from June 2004 through March 2005, in accordance with generally accepted government auditing standards, at Washington, D.C.; Albuquerque, New Mexico; and Richland, Washington.

Comments from the Department of Energy

Department of Energy
Washington, DC 20585

April 28, 2005

Ms. Linda D. Koontz
Director, Information Management Issues
Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Ms. Koontz:

The Department of Energy (DOE) has reviewed the draft Government Accountability Office (GAO) report entitled *Information Management – Freedom of Information Act Fee and Fee Waiver Processing at the Department of Energy* and has several comments.

First, the draft report states that the three audited DOE sites (Headquarters, Alburquerque, and Richland) rarely informed requesters of the outcome of fee waiver determinations. In most of these cases, DOE had determined that the fees incurred to process the requests were less than the minimum amount at which fees are assessed by the Department under its Freedom of Information Act (FOIA) implementing regulation. As such, a fee waiver determination was not required, and we determined that it was not necessary to inform the requester.

Nonetheless, all three sites have modified their procedures and are now informing requesters that a fee waiver determination is not required, even when fees to process the request are less than the minimum amount assessed by the Department. Although not required to provide such a statement to a requester, the DOE sites recognize that such specificity might help a requester understand the FOIA process better.

Second, DOE does not agree with the statement that the DOE sites did not provide requesters the reasons for a determination when fees were not charged because the Department of Justice guidance does not require it. As stated above, the Department's past procedures did not require informing the requestor when processing fees were below the minimum threshold.

Finally, the draft report represents that officials at the Richland Operations Office "automatically granted fee waivers to news media and public interest groups without having them address all of the fee waiver criteria." This statement is incorrect. Richland does not have a policy or practice to grant fee waivers without having the requester address the fee waiver criteria.

Richland does have a particular public interest requester that makes frequent requests to that office. The requester always provides information to address all of the fee waiver criteria, but officials at Richland do not always evaluate the submissions for four of the criteria because the officials have sufficient knowledge about the group's operations and activities to be able to make a fee waiver determination. The other two criteria are always evaluated by Richland for each request and the requester may be asked to provide additional information before a fee waiver determination is made.

Richland received only one request for a fee waiver determination during the audit period from a news media group. A fee waiver determination was not necessary in that case, because it was determined that the fees incurred to process the request were less than the minimum amount at which fees are assessed by the Department.

Thank you for the opportunity to review the draft report. If you have any questions, please contact Mr. Abel Lopez, Director, FOIA and Privacy Act Group, at (202) 586-5955.

Sincerely,

James T. Campbell

Susan J. Grant
Director, Office of Management, Budget
and Evaluation/Chief Financial Officer

Comments from the Department of Justice

U.S. Department of Justice

Office of Information and Privacy

Telephone: (202) 514-3642

Washington, D.C. 20530

May 12, 2005

Ms. Linda D. Koontz
Director, Information Management Issues
United States Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Ms. Koontz:

This letter responds to your staff's notification to us, on April 25, 2005, that the Government Accountability Office intends to go forward with issuance of its recently prepared draft report pertaining to fee matters under the Freedom of Information Act, and that the Department of Justice will be the recipient of the recommendation made in that report.

As we pointed out to your staff during a recent meeting, we are gravely concerned that this report's central recommendation is addressed to the wrong federal agency. Such a recommendation, if it is to be made, does not fall within the jurisdictional purview of the Department of Justice. Therefore, the Department of Justice cannot properly implement this recommendation.

As in the past, please do not hesitate to call upon us, and the Department of Justice in general, regarding any matter on which we can provide meaningful assistance at any time. The Department requests that this letter be published in the final report.

Sincerely,

Richard L. Huff
Co-Director

Daniel J. Metcalfe
Co-Director

Related GAO Products

Information Management: Update on Freedom of Information Act Implementation Status. GAO-04-257. Washington, D.C.: February 18, 2004.

Freedom of Information Act: Agency Views on Changes Resulting from New Administration Policy. GAO-03-981. Washington, D.C.: September 3, 2003.

Information Management: Update on Implementation of the 1996 Electronic Freedom of Information Act Amendments. GAO-02-493. Washington, D.C.: August 30, 2002.

Information Management: Progress in Implementing the 1996 Electronic Freedom of Information Act Amendments. GAO-01-378. Washington, D.C.: March 16, 2001.

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