

MEMORANDUM

To: SB 324 Work Group (2024)

From: Ramin Seddiq

Re: Proposed VFOIA Fee Structure and Provisions From Other Jurisdictions Related to FOIA Fees

Date: July 29, 2024

PROPOSED VFOIA FEE STRUCTURE

I. When records are requested for commercial (for-profit) use:

a.) Fee charged for search time: Free for the first one (1) hour (applicable only to the first two VFOIA requests made to a public body by the requester in a calendar year). Thereafter, the lesser of the hourly rate of pay of the lowest-paid individual capable of fulfilling the request or \$40 per hour.

b.) Fee charged for review time: Free for the first one (1) hour (applicable only to the first two VFOIA requests made to a public body by the requester in a calendar year). Thereafter, the lesser of the hourly rate of pay of the lowest-paid individual capable of fulfilling the request or \$40 per hour.

c.) Duplication charges: Actual, reasonable charges as per the public body's published fee/cost schedule.

II. When the records are requested for educational/scholarly purposes or by a noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media:

a.) Fee charged for search time: Free for the first three (3) hours (applicable only to the first two VFOIA requests made to a public body by the requester in a calendar year). Thereafter, the lesser of the hourly rate of pay of the lowest-paid individual capable of fulfilling the request or \$40 per hour.

b.) Fee charged for review time: No charge.

c.) Duplication charges: No charge for the first one hundred (100) pages per request. After the first 100 pages: Actual, reasonable charges as per the public body's published fee/cost schedule.

III. When the records are requested by any other requesters (including members of the general public):

a.) Fee charged for search time: Free for the first two (2) hours (applicable only to the first two VFOIA requests made to a public body by the requester in a calendar year). Thereafter, the lesser of the hourly rate of pay of the lowest-paid individual capable of fulfilling the request or \$40 per hour.

b.) Fee charged for review time: No charge.

c.) Duplication charges: No charge for the first one hundred (100) pages per request. After the first 100 pages: Actual, reasonable charges as per the public body's published fee/cost schedule.

IV. Addition of the following to VFOIA:

Records shall be furnished without any charge or at a charge reduced below the fees established by the public body 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. Any of the three categories of requesters [noted above] may seek this fee waiver.

PROVISIONS FROM OTHER JURISDICTIONS RELATED TO FOIA FEES

The Freedom of Information Act, 5 U.S.C. § 552

(a)(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(a)(4)(A)(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

....

(a)(4)(A)(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) 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.

Code of the District of Columbia § 2-532. Right of access to public records; allowable costs; time limits.

(b) A public body may establish and collect fees not to exceed the actual cost of searching for, reviewing, redacting, and making copies of records. Documents may be furnished without charge or at a reduced charge where a public body determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(b-1) Any fee schedules adopted by the Mayor, an agency or a public body shall provide that:

(1) Fees shall be limited to reasonable standard charges for document search, duplication, and review when records are requested for commercial use;

(2) Fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or non-commercial scientific institution for scholarly or scientific research, or a representative of the news media;

(3) For any request for records not described in paragraphs (1) or (2) of this subsection, fees shall be limited to reasonable standard charges for document search and duplication; and

(4) Only the direct costs of search, duplication, or review may be recovered.

(b-2) Review costs shall include only the direct costs incurred during the initial examination of a document to determine whether the documents must be disclosed or withheld in part as exempt under this section. Review costs may not include costs incurred to determine issues of law or policy related to the request.

(b-3) No agency or public body may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency or public body has determined that the fee will exceed \$250.

Maryland Public Information Act
MD. General Provisions Code § 4-206 (2023)

4-206(c) The official custodian may not charge a fee for the first 2 hours that are needed to search for a public record and prepare it for inspection.

4-206(e) The official custodian may waive a fee under this section if:

(1) the applicant asks for a waiver; and

(2)

(i) the applicant is indigent and files an affidavit of indigency; or

(ii) after consideration of the ability of the applicant to pay the fee and other relevant factors, the official custodian determines that the waiver would be in the public interest.

California Public Records Act

The California Supreme Court in *National Lawyers Guild v. City of Hayward* (S252445) held that public agencies cannot recover redaction and compilation costs incurred in response to a California

Public Records Act request. The court stated: “As a general rule, a person who requests a copy of a government record under the act must pay only the costs of duplicating the record, and not other ancillary costs, such as the costs of redacting material that is statutorily exempt from public disclosure.”

The Supreme Court acknowledged the California Public Records Act allows public agencies to recover the costs associated with producing copies of electronic records, “including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record” (California Government Code § 6253.9, subd. (b)) when “[t]he request would require data compilation, extraction, or programming to produce the record.” (California Government Code § 6253.9(b)(2)). However, the court stated: “We conclude the term “data extraction” does not cover the process of redacting exempt material from otherwise disclosable electronic records.”

Sample Federal Agency Fee Structure

Title 16 —Commercial Practices
 Chapter I —Federal Trade Commission
 Subchapter A —Organization, Procedures and Rules of Practice
 Part 4 —Miscellaneous Rules
 Section 4.8 —Costs for obtaining Commission records.
 Authority: 15 U.S.C. 46.

Requester categories	Fee charged for all search time	Fee charged for all review time	Duplication charges
Commercial	Fee	Fee	Fee charged for all duplication.
Educational, Non-commercial Scientific Institution, or News Media	No charge	No charge	No charge for first 100 pages.
All other requesters (including members of the general public)	Fee after two hours	No charge	No charge for first 100 pages.