



United States Department of the Interior

OFFICE OF THE SOLICITOR

Washington, D.C. 20240

May 18, 2015

IN REPLY REFER TO:
Appeal No. 2015-100

Charles A. George
George Law Firm LLC
Maritime Law Group
P.O. Box 354
Mount Pleasant, SC 29465

Dear Mr. George:

This responds to the April 16, 2015, Freedom of Information Act (“FOIA”) appeal (“appeal”) that you filed with the Department of the Interior (“Department”) on behalf of John Amrhein, which the Department received on April 20, 2015, (the date the Department received all of the documents that you are required to submit in order to file an appeal).¹ The Department assigned the appeal as **Appeal Number 2015-100** and it concerns your February 2, 2015, FOIA request to the Fish and Wildlife Service (“FWS”) that sought, among other things not relevant to the appeal, records “related to Mr. Timothy Binzen and the *La Galga* shipwreck and/or his archaeological investigations on Assateague Island from January 1, 2010 to January 9, 2015.” In response to the FOIA request, the FWS released some documents and invoked a FOIA exemption as a basis to withhold two records.

You filed the appeal because, given Mr. Binzen’s involvement in and work on certain matters, you find it “odd” that additional responsive documents beyond what the FWS already released to you do not exist and were not provided. You also challenge the FWS’s assessment of \$402.55 in fees for the processing of the FOIA request, asserting that the FWS cannot charge any fees because it responded to the request outside of the time limit set in the FOIA.

With regard to the first issue in the appeal that challenges whether additional responsive documents exist that the FWS did not release to you, the Department concludes that the FWS conducted an adequate search of its files and it provided you with the disclosable portions² of all of the documents that are responsive to your FOIA request that it located. Therefore, this aspect of the appeal is **DENIED**. The rationale for this determination follows.

The FOIA requires an agency to disclose, upon request by any person, non-exempt documents that are in its possession and control and are retrievable by a reasonable search of its files.³ To decide appeals such as yours that challenge whether additional responsive documents beyond what a bureau has

¹ The Department’s FOIA regulations state that “Appeals arriving or delivered after 5 p.m. Eastern Time, Monday through Friday, will be deemed received on the next workday.” 43 C.F.R. § 2.58(e). Mr. Amrhein’s e-mail message transmitting the missing page from the FOIA request that the Department needed before it could accept this matter for processing as an appeal arrived in the FOIA Appeals Office’s e-mail on Friday, April 17, 2015, at 5:23 PM. Thus, the Department deems the appeal as received on the next workday, Monday, April 20, 2015.

² As previously noted, the FWS invoked an exemption as a basis to withhold two records.

³ See 5 U.S.C. § 552(a)(3).

already released exist, the Department looks at whether the bureau conducted a reasonable search of its files in an effort to locate the materials. A reasonable search is one that is “reasonably calculated to uncover the sought materials.”⁴ Where a bureau has conducted a reasonable search of its files to locate the requested documents, the Department will deem its search as adequate. The fact that a requester believes that the subject of the requested records should generate more documents than what a bureau disclosed or addressed does not mean that the search was not adequate.⁵ The bureau simply cannot produce documents that it does not have or cannot locate through a reasonable search.

In this case, the FWS conducted manual and electronic searches of the files (including e-mail) in its office that are most likely to contain the requested documents using key words that were likely to retrieve any responsive documents that might exist. The FWS released to you all of the non-exempt responsive documents that it uncovered through its search. However, its extensive search efforts did not produce any additional responsive documents to disclose. Since the FWS has met its obligations under the FOIA to conduct a search that was reasonably calculated to uncover all relevant documents, the Department concludes that the FWS’s search was adequate.

If you are dissatisfied with the Department’s determination that the FWS conducted an adequate search of its files, you have a right to seek judicial review of this decision under 5 U.S.C. § 552(a)(4)(B).

As to the second issue that you raise in the appeal regarding the FWS’s assessment of processing fees against you, your argument on this issue is mostly correct. Please note that the FOIA requires an agency to “determine within 20 [work]days...after the receipt of [a FOIA] request whether [it will] comply with such request” and to immediately notify the requester of its determination and the reasons for its decision.⁶ When an agency does not comply with the 20 workday time limit or a properly extended time limit that it established, the statute prohibits it from assessing “search fees”⁷ (not any fees, as you indicate in the appeal) “if no unusual or exceptional circumstances...apply to the processing of the request.”⁸ Though, an agency may still assess duplication fees against a requester.⁹

⁴ See *Judicial Watch, Inc. v. United States DOE*, 310 F. Supp. 2d 271, 296 (D.D.C. 2004) (quoting *Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)).

⁵ See *Jennings v. DOJ*, 230 F. App’x 1, 1 (D.C. Cir. 2007) (finding that “the adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search”); *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1247-48 (11th Cir. 2008); *Radcliffe v. IRS*, No. 081513, 2009 WL 1459449, at *1-2 (2d Cir. May 27, 2009).

⁶ See 5 U.S.C. § 552(a)(6)(A)(i).

⁷ An agency cannot assess search fees against “commercial use” and “other” requesters if it fails to comply with the prescribed time limit. Since “educational or noncommercial scientific institution” requesters and “representatives of the news media” are assessed only duplication fees, the FOIA precludes an agency from assessing such fees against these requesters if it fails to comply with the time limits. See also 5 U.S.C. § 552(a)(4)(A)(ii)(I)-(III) (discussing the various fee categories and the types of fees that can be assessed against each).

⁸ 5 U.S.C. § 552(a)(4)(A)(viii). See also 5 U.S.C. § 552(a)(6)(B)(i)-(ii) (setting forth the procedures an agency must follow to extend the 20 workday time limit); 5 U.S.C. § 552(a)(4)(B)(iii)(I)-(III) (explaining what constitutes “unusual circumstances”); 5 U.S.C. § 552(a)(4)(C)(ii) (defining “exceptional circumstances”).

⁹ Please also be aware that the provision in the Department’s FOIA regulations (“regulations”) to which you cite regarding the time limit that a bureau must adhere to in deciding whether to grant a fee waiver (43 C.F.R. §

Having noted that, the decision returns to the fees that the FWS assessed against you. The FWS classified you as an “other” requester for the purpose of assessing fees.¹⁰ “Other” requesters are assessed fees for document search and duplication only. Additionally, “other” requesters are entitled to two hours of search time and 100 pages of duplication without charge.¹¹ However, “other” requesters, such as you, are not assessed fees for “review” time,¹² which is a fee that is reserved exclusively for assessment against “commercial use” requesters.¹³

The Bill for Collection that the FWS sent to you states that it assessed 10 hours of “Search and Review Time” by a GS-11 employee, three hours of “Search Time” by a GS-13 employee, and that it copied 137 pages of responsive documents at \$0.15 per page. In calculating the total amount due of \$402.55, the FWS advised you that it took into account your entitlement as an “other” requester to two hours of search time and 100 pages of duplication without charge.¹⁴

With regard to the review time that the FWS assessed against you, since the FWS classified you as an “other” requester for the purpose of assessing fees, it should not have assessed any “review” time. As to the search fees, the FWS advised the Department that it will not assess search fees against you for the processing of your FOIA request. Finally, for the duplication fee, the FWS cannot collect that fee from you either. After subtracting your entitlement to 100 pages of duplication without charge, the duplication fee totals \$5.55. The Department’s FOIA regulations state that a bureau will not charge a requester if the fee for processing his request is less than \$50.00.¹⁵

Because the FWS will not assess search fees against you, cannot assess any review time, or collect a duplication fee, there are no collectible fees associated with the processing of the February 2, 2015, FOIA request. Therefore, the aspect of the appeal that challenges the FWS’s assessment of processing fees is **GRANTED**. **By copy of this letter, the FWS is directed to:**

- **Cancel the Bill for Collection and refund any monies that the Appellant may have paid towards the processing of the February 2, 2015, FOIA request.**
- **Complete the cancellation of the bill within 10 workdays of the date of this decision.**

The FWS will correspond directly with you to confirm that it has cancelled the Bill for Collection, with a copy of its letter to this Office.

2.19) appears in a version of the regulations that is no longer in effect. The Department published its current FOIA regulations in the Federal Register on January 30, 2013. *See* 77 *Fed. Reg.* 76,902.

¹⁰ *See* 5 U.S.C. § 552(a)(4)(A)(ii)(III).

¹¹ *See* 5 U.S.C. § 552(a)(4)(A)(iv)(II); 43 C.F.R. § 2.39(a).

¹² *See* 43 C.F.R. § 2.70 (defining “Review” as “the examination of a record located in response to a request to determine whether any portion of it is exempt from disclosure.”).

¹³ *See* 5 U.S.C. § 552(a)(4)(A)(ii)(I).

¹⁴ The Department’s calculation of the fees that the FWS assessed against you shows that it actually deducted four hours of search time from the Bill for Collection instead of two (two hours for each search group).

¹⁵ 43 C.F.R. § 2.49(a)(1).

This completes the Department's response to your appeal. If you have any questions regarding this matter, please call the FOIA Appeals Office at (202) 208-5339.

Sincerely,



Darrell R. Strayhorn
FOIA Appeals Officer
Department of the Interior

cc: Melissa Allen, FOIA Officer, FWS (**FOR ACTION**)
Dean Rhine, Assistant Refuge Supervisor, FWS-R5
Cindy Cafaro, Department FOIA Officer