



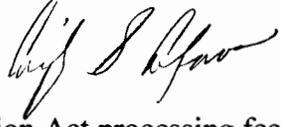
United States Department of the Interior

OFFICE OF THE SECRETARY

WASHINGTON, D.C. 20240

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To: Bureau and Office FOIA Officers
Designated FOIA Attorneys

From: Cindy Cafaro, FOIA Officer, Department of the Interior 

Subject: The impact of missed deadlines on Freedom of Information Act processing fees

I. Introduction

Delayed responses to Freedom of Information Act (“FOIA”) requests and/or FOIA appeals can prevent the Department from charging certain processing fees to FOIA requesters. This guidance memorandum discusses scope and fee issues related to delayed responses in the context of a case that recently explored this principle: *Bensman v. National Park Service* (“*Bensman*”).¹ It includes sample language for FOIA Officers to use in similar factual situations to help avoid the potentially costly mistake of missing FOIA deadlines.

II. Background

Nearly five years ago, Congress amended the FOIA through the OPEN Government Act of 2007 (the “2007 Amendments”).² The 2007 Amendments mandate that “[a]n agency shall not assess search fees (or in the case of a [representative of the news media or certain educational or noncommercial scientific institutions], duplication fees) . . . if the agency fails to comply with *any* time limit” of the FOIA, unless “unusual or exceptional circumstances” apply to the processing of the request.³ The 2007 Amendments also specify that the time to respond to a FOIA request “shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency.”⁴

The 2007 Amendments identify two circumstances where the basic time limit allowed for responding to a FOIA request can be tolled (i.e., temporarily suspended) by an agency. The first circumstance is when the agency “is awaiting such information that it has reasonably requested from the requester”⁵ (for example, to clarify issues regarding the scope of the FOIA request). This circumstance may occur only once per FOIA request; the 2007 Amendments mandate that an agency may only toll the basic time limit for the time it takes the requester to respond to a

¹ 806 F. Supp. 2d 31 (D. D.C. 2011).

² 121 Stat. 2524.

³ 5 U.S.C. § 552(a)(4)(A)(viii) (emphasis added). The basic time limit for responding to FOIA requests and FOIA appeals is twenty work days. See 5 U.S.C. § 552(a)(6)(A). This time limit can be extended under certain limited circumstances. See *id.* at § 552(a)(6)(A) to (B).

⁴ *Id.* at § 552(a)(6)(A)(ii).

⁵ *Id.* at § 552(a)(6)(A)(ii)(I).

single reasonable request for clarifying information.⁶ The second circumstance is when it is “necessary to clarify with the requester issues regarding fee assessment.”⁷ This circumstance can occur more than once in the course of responding to a FOIA request; the 2007 Amendments allow an agency to toll the basic time limit repeatedly under this circumstance. For example, if it becomes clear that the processing fees for the request will exceed the processing fees the requester has already agreed to pay in earlier clarifying communications, the agency can toll the clock again until the new fee issue has been clarified.⁸ But, under either of the two circumstances, “*the agency’s receipt of the requester’s response to the agency’s request for information or clarification ends the tolling period.*”⁹ The agency’s response on whether we will grant or deny the request, or any portion of the request, must be sent before the expiration of the statutory time period.

III. The *Bensman* Case

In 2009, Jim Bensman requested data and a waiver of processing fees from the National Park Service (“NPS”).¹⁰ Within the basic FOIA time limit for response, NPS notified Mr. Bensman he had not provided “sufficient justification to qualify for a fee waiver,” asked him for additional information, and suggested how he could provide sufficient justification. Mr. Bensman responded by briefly expanding on his earlier justification.

A month later, NPS notified Mr. Bensman that his request for a fee waiver was still under consideration and that he had the right to appeal due to NPS’s delayed response. Mr. Bensman did appeal, asserting among other things that NPS was now required to release the data to him at no cost, regardless of the merits of his fee waiver justification, because NPS had not reached a determination on his FOIA request within 20 work days.

Seven months later, NPS reached its decision on Mr. Bensman’s fee waiver request, denying it as insufficient.¹¹ On the same day, the Department denied Mr. Bensman’s FOIA appeal. Mr. Bensman appealed again, asserting that the FOIA now prohibited NPS from charging him fees for two reasons: NPS’s failure to comply with response deadlines and the Department’s failure to rule on his first appeal within the statutory time limit. The Department denied Mr. Bensman’s second appeal and he filed suit. The Department defended by arguing that Mr. Bensman had never “perfected” his request (because he did not resolve all of the issues regarding fees) and therefore the statutory response time limit to respond to his request never began to run.

IV. The *Bensman* Court’s Analysis

⁶ *Id.* Agencies should therefore be certain to ask all of their informational questions at once. If additional non-fee related questions come up later, the clock will continue to run while the agency goes back to the requester for additional information.

⁷ *Id.* at § 552(a)(6)(A)(ii)(II).

⁸ The Department’s current FOIA regulations complicate the Department’s ability to toll the response period to clarify fee issues somewhat, as discussed in the “*Bensman’s* Ramifications” section below.

⁹ *Id.* (emphasis added).

¹⁰ *Id.* at § 552(a)(4)(A)(iii).

¹¹ The Department’s current regulations specify that fee waiver decisions must be made within the statutory time limit. 43 C.F.R. § 2.19(a) (“The bureau may, at its discretion, communicate with [the requester] to request additional information if necessary. However the bureau must make a determination on the fee waiver request within the statutory time limit, even if the agency has not received such additional information.”).

The *Bensman* Court found that the Department’s regulations and interpretive guidance (specifically the FOIA Handbook) were “internally inconsistent.”¹² For example, the Court found that “[s]ome provisions [of the Department’s current FOIA regulations] imply . . . no time limit to resolve fee issues, but require their full resolution before the 20-working-day time limit begins to run against a bureau processing a FOIA request; other provisions, conversely, require bureaus to make determinations on fee-waiver requests within the statutory time period.”¹³ In contrast, the Court found the language of the FOIA statute and the 2007 Amendments to be “unambiguous.”¹⁴ The court therefore held that the Department’s assertion that there was no time limit to resolve fee issues “must yield to the unequivocal expression of Congress’s intent.”¹⁵ According to the Court, once Bensman had responded to NPS’s request for clarification, the tolling period ended. The decision to comply with his FOIA request was not made within the statutory time limits, so certain fees could not be assessed against him.

V. *Bensman*’s Ramifications

The provisions of the Department’s current FOIA regulations that are inconsistent with the requirements of the 2007 Amendments are void.¹⁶ Under the 2007 Amendments and the surviving portions of the Department’s current regulations, response periods can be tolled only once for clarifying issues unrelated to fees, repeatedly when it is necessary to clarify issues regarding fee assessment, and not at all to clarify issues involving fee waivers. In any case, the response period resumes as soon a requester’s response has arrived—even if it is an inadequate response—and the agency must advise the requester whether it will comply with the request before the time limit for response expires. If issues need clarification and are related to fees, but not a fee waiver, the statutory tolling period resumes after a response is received from the requester, but the agency may re-toll the request as necessary (within the statutory time limits) to continue to further clarify the issues related to fees. Until the regulations are amended, however, if the issues that need clarification are related to a fee waiver, the agency must respond within the statutory time limits,¹⁷ without tolling the request even once.¹⁸ But once the regulations are amended, if the issues that need clarification are related to a fee waiver, the agency will be

¹² The Departmental Manual Chapter the FOIA Handbook is attached to, 383 DM 15, was last updated in 1991. The FOIA Handbook was last updated in 2004, and is inconsistent with 383 DM 15. The FOIA regulations were last edited (in part) in 2009, and they are inconsistent with 383 DM 15, the FOIA Handbook, and the 2007 Amendments. After the pending new FOIA regulations are in place, we will turn to the 383 DM 15 and the Handbook to ensure that they are also consistent and up-to-date.

¹³ 806 F. Supp. 2d at 39. The Court further noted that, because of these inconsistencies: “even if DOI’s guidelines and regulations were not at odds with the 2007 Amendments, the Court would have difficulty determining which to follow and which to ignore.” *Id.* at 40.

¹⁴ *Id.* at 42.

¹⁵ *Id.*

¹⁶ See *id.* at 40 (“Where [the Department] relies on a ‘perfecting’ rationale or a tolling theory that is contrary to the [2007] Amendments, it cannot prevail.”). These voided provisions include portions of 43 C.F.R. § 2.8(a)(2), (a)(3), (b)(2), (b)(3); § 2.12(b); and § 2.18(d).

¹⁷ See 43 C.F.R. § 2.19(a).

¹⁸ This is true because the Department can impose a higher standard upon itself than the one that Congress has imposed by statute. (It cannot, however, impose a lesser standard upon itself than the one that Congress has imposed by statute.)

permitted to toll and re-toll the statutory time limits as necessary to clarify fee issues.¹⁹ Standard language for FOIA Officers to use in this situation, and other situations involving clarification and tolling, is set forth below.

VI. *Post-Bensman* Standard Language

If a requester provides an insufficient response to a request for clarification, the FOIA Officer should issue a response letter (often a denial or partial denial letter) within the statutory time limit for response. A denial letter should include the following standard language, as appropriate, and be sent within the time frames discussed in the “*Bensman*’s Ramifications” section above. Of course, a denial letter must be consistent with the requirements of the Department’s regulations and include the other standard language for FOIA responses, such as appeal rights.

A. Scope of a request is not clear or is too broad

“We cannot comply with your request because you did not reasonably describe the records sought in sufficient detail to enable an employee who is familiar with the subject to locate the records with a reasonable amount of effort. [Explain in detail why the scope is still not clear or is too broad.] Therefore, your request is denied. You may resubmit your FOIA request with the additional information noted in this letter that we need in order to reasonably determine the documents you are seeking.”

B. Fee issues are not yet resolved

1. *No written assurance or fee waiver request*

“We cannot comply with your request because you did not submit information that would resolve all issues regarding fees, as required by the FOIA and the Department’s FOIA regulations. Therefore, your request is denied. In order to resolve all issues regarding fees, you must submit either your written assurance that you will pay all of the processing fees (or fees up to a certain amount) or provide adequate justification to support your entitlement to a fee waiver in accordance with the criteria set forth in [currently Appendix D, cite to the appropriate section of the Department’s FOIA regulations once the new regulations are final]. The burden is on you to justify your entitlement to a fee waiver and you must address all of the criteria set forth in [currently Appendix D, cite to the appropriate section of the Department’s FOIA regulations once the new regulations are final] to assist you in doing so. If you request a fee waiver, as an option, at the same time you may state your willingness to pay the processing fees (or fees up to a certain amount) regardless of whether a fee waiver is granted. This will permit us to begin processing your request for records at the same time that we are considering the fee waiver request. You may resubmit your FOIA request with sufficient information that would resolve all issues regarding fees and we will process your request accordingly.”

2. *Written assurance to pay fees is inadequate*

¹⁹ Of course, if the requester fails to respond to a clarification request, the FOIA Officer should close the FOIA request, as anticipated under the current and upcoming revised regulations. See, e.g., 43 C.F.R. § 2.8 and § 2.18.

“We cannot fully comply with your request because you did not submit information that would resolve all issues regarding fees, as required by the FOIA and the Department’s FOIA regulations. Therefore, your request is partially denied. In order to resolve all issues regarding fees, you must submit either your written assurance that you will pay all of the processing fees (or fees up to a certain amount) or provide adequate justification to support your entitlement to a fee waiver in accordance with the criteria set forth in [currently Appendix D, cite to the appropriate section of the Department’s FOIA regulations once the new regulations are final]. The burden is on you to justify your entitlement to a fee waiver and you must address all of the criteria set forth in [currently Appendix D, cite to the appropriate section of the Department’s FOIA regulations once the new regulations are final] to assist you in doing so. If you request a fee waiver, as an option, at the same time you may state your willingness to pay the processing fees (or fees up to a certain amount) regardless of whether a fee waiver is granted. This will permit us to resume processing your request for records at the same time that we are considering the fee waiver request. You may resubmit your FOIA request with sufficient information that would resolve all issues regarding fees and we will process the remainder of your request accordingly.”

3. *Fee waiver justification is inadequate*

“In order to resolve all issues regarding fees, the Department’s FOIA regulations require a FOIA requester to either provide adequate justification to support his or her entitlement to a fee waiver or state that he or she willing to pay all fees associated with processing the request or is willing to pay up to a specified amount. In the case of your FOIA request, you did not provide adequate justification to support your entitlement to a fee waiver because [insert detailed explanation of why the fee waiver does not meet the fee waiver criteria]. You also did not provide your written assurance that you would pay the fees associated with processing your FOIA request if your fee waiver request was denied. Because of this, your request is denied. You may resubmit your FOIA request with sufficient information that would resolve all issues regarding fees and we will process your request accordingly.”

VII. Conclusion

The *Bensman* case made it clear that the Department’s FOIA regulations, Handbook, and Departmental Manual chapter must be updated and we are currently working to do so. In the meantime, regardless of what the Department’s current regulations and internal guidance say on the point, waiting for a FOIA request to be “perfected” before a decision is made is not legally supportable.

Failing to meet FOIA’s requirements can be very costly,²⁰ so it is important to make prompt responses to FOIA matters a high priority. Please distribute this memorandum to the employees in your bureau who have FOIA responsibilities as soon as possible, so they are aware of these

²⁰ For example, after his successful litigation, Mr. Bensman asked for \$49,000 in attorneys fees and settled for \$40,000. The total cost of processing Mr. Bensman’s request had originally been estimated by NPS to be under \$1,400. To make matters worse, fees in FOIA cases may no longer be paid by the United States Treasury’s Claims and Judgment Fund. Instead, they must be paid from the agency’s annual appropriations. See 121 Stat. 2525.

requirements. If you have any questions, please contact me at 202-208-5342 or at cindy_cafaro@ios.doi.gov.

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor
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