



FEDERAL TRADE COMMISSION

16 CFR Part 4

Freedom of Information Act; Miscellaneous Rules

AGENCY: Federal Trade Commission (FTC).

ACTION: Proposed rule.

SUMMARY: The Federal Trade Commission proposes to implement provisions of the FOIA Improvement Act of 2016 by amending the regulation governing fees the agency may assess to offset the cost of disseminating information and records to the public. The FTC also proposes other clarifying changes and updates to the fee regulation.

DATES: Comments must be submitted on or before [insert date that is **thirty (30) days from date of publication in the FEDERAL REGISTER**].

ADDRESSES: Interested parties may file written comments electronically or in paper form by following the instructions in the Request for Comment part of the SUPPLEMENTARY INFORMATION section below. Write “Fee Schedule Rulemaking, 16 CFR 4.8, Project No. 122102” on your comment, and file your comment online at <https://ftcpublishcommentworks.com/ftc/feeschedule>, by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex T), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street, SW, 5th Floor, Suite 5610

(Annex T), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: G. Richard Gold, Attorney, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580, (202) 326-3355.

SUPPLEMENTARY INFORMATION: On June 30, 2016, President Obama signed into law the FOIA Improvement Act of 2016 (the “2016 FOIA Amendments”), Public Law No. 114-185, amending the Freedom of Information Act (FOIA), 5 U.S.C. 552. The new law addresses a range of procedural issues and places additional limitations on assessing search fees (or, for requesters with preferred fee status, duplication fees) if an agency’s response time to a requester is delayed. The new law also requires the head of each agency to review and update their agency’s regulations as necessary within 180 days of enactment.

The Commission proposes to change its fee schedule to implement the 2016 FOIA Amendments as appropriate. The Commission also proposes other fee-related changes that will serve to provide additional notice to the public or update the Commission’s fee schedule. The additional guidance will be available at the FOIA page on the FTC website, <https://www.ftc.gov/about-ftc/foia>.

As required by the FOIA, the Commission seeks public comment on the proposed revisions to its fee regulations set forth in this document. *See* 5 U.S.C. 552(a)(4)(A)(i). In a separate document published in today’s FEDERAL REGISTER, the Commission has published final regulations making other related administrative rule changes that incorporate the 2016 FOIA Amendments which do not require public

comment.

Proposed Changes to Fee Regulation

In Rule 4.8(b)(2)(iii), the Commission proposes to clarify that, for any given FOIA request, a requester qualifies as a representative of the news media only if it does not intend to make commercial use of the material it seeks. The proposed language more closely comports with the FOIA by clarifying that an entity will not qualify for the fee category status afforded to a representative of the news media where it makes the request in a corporate, rather than journalistic, capacity. *See* 5 U.S.C. 552(a)(4)(A)(ii)(II) (fee reduction applies only if “records are not sought for commercial use”). However, the proposed clarification also makes clear that, in the context of a news media request, “commercial use” does not include a request for records supporting the requester’s underlying news dissemination function.

Rule 4.8(b)(6) contains the Commission’s uniform schedule of fees that applies to records held by all constituent units of the Commission and to all requests made for materials on the public record and those made under the FOIA and the Privacy Act of 1974, 5 U.S.C. 552a. In Rule 4.8(b)(6)(i), the Commission proposes to eliminate a duplicative and outdated line item charge found under *Electronic Services* that is already covered under the *Duplication* category. Specifically, *Electronic Services: Preparing electronic records and media* is already covered and subsumed under *Duplication: Other reproduction (e.g., computer disk or printout, microfilm, microfiche, or microform)*. We are also clarifying that the existing line item for *Duplication: Other reproduction* covers operator time for conversions from one electronic format to a different electronic format

as requested by the FOIA requester.

Rule 4.8(b)(7) contains the Commission’s provisions relating to limitations on FOIA fees if an agency’s response time to a requester is delayed (*e.g.*, untimely responses). The 2016 FOIA Amendments mandated additional limitations on assessing search fees (or, for requesters with preferred fee status, duplication fees) for delayed responses. The Commission proposes modifying Rule 4.8(b)(7) to closely track the revised FOIA statutory language as appropriate.

In Rule 4.8(e)(2)(i)(C), the Commission proposes to add language that tracks the FOIA statutory standards for public interest fee waivers. 5 U.S.C. 552(a)(4)(iii). Specifically, the Commission proposes to replace “the understanding of the public at large” with “public understanding.”

In Rule 4.8(i), the Commission proposes to add an additional option for FOIA requesters to pay electronically through the Department of Treasury’s pay.gov website. Requesters would still have the option of paying through check or money order to the Treasury of the United States.

Request for Comments

You can file a comment online or on paper. For the Commission to consider your comment, it must be received on or before **[insert date that is thirty (30) days after publication of this document in the FEDERAL REGISTER]**. Write “FOIA Fee Rulemaking, 16 CFR 4.8, Project No. P122102” on your comment. Your comment – including your name and your state – will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Website, at

<https://www.ftc.gov/policy/public-comments>. As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Website.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any "[t]rade secret or any commercial or financial information which is . . . privileged or confidential," as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f). *See also* FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you must follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).¹ Your comment will be kept confidential only if the FTC General Counsel grants your request in accordance with the

¹ In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* 16 CFR 4.9(c).

law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at <https://ftcpublic.commentworks.com/ftc/feeschedule>, by following the instructions on the web-based form. If this Notice appears at <http://www.regulations.gov>, you also may file a comment through that website.

If you file your comment on paper, write “FOIA Fee Rulemaking, 16 CFR 4.8, Project No. P122102” on your comment, and on the envelope, and mail it to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex T), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street, SW, 5th Floor, Suite 5610 (Annex T), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Website at <https://www.ftc.gov> to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before **[insert date that is thirty (30) days following publication of this document in the FEDERAL REGISTER]**. For

information on the Commission’s privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

The Commission believes that the proposed Rule amendments do not require an initial regulatory analysis under the Regulatory Flexibility Act because the amendments will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 605(b). Most requests for access to FTC records are filed by individuals, who are not “small entities” within the meaning of that Act, 5 U.S.C. 601(6), and, in any event, the economic impact of the rule changes on all requesters is expected to be minimal, if any. Likewise, the proposed amendments do not contain information collection requirements within the meaning of the Paperwork Reduction Act, 44 U.S.C. 3501-520. The Commission nonetheless solicits comments on any economic and regulatory impact of the proposed rule; paperwork requirements, if any, that commenters believe the amendments impose upon private persons; and possible regulatory alternatives to reduce the amendments’ economic impact, if any, while fully implementing the statutory mandate. The Commission will consider any such comments before promulgating the amendments in final form.

List of Subjects in 16 CFR part 4

Administrative practice and procedure, Freedom of Information Act.

For the reasons set forth in the preamble, the Federal Trade Commission proposes to amend Title 16, Chapter I, Subchapter A, Part 4 of the Code of Federal Regulations as follows:

PART 4—MISCELLANEOUS RULES

1. The authority citation for part 4 continues to read as follows:

Authority: 15 U.S.C. 46.

2. Amend §4.8 by revising paragraphs (b)(2)(iii), (b)(6)(i), (b)(7), (e)(2)(i)(C) and (i) to read as follows:

§4.8. Costs for obtaining Commission records.

* * * * *

(b) * * *

(2) * * *

(iii) *A representative of the news media* is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to the public. The term “news” means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances where they can qualify as disseminators of news) who make their products available for purchase by or subscription by the general public or free distribution to the general public. These examples are not intended to be all-inclusive. As traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would provide a

solid basis for such an expectation, but the past publication record of a requester may also be considered in making such a determination. To qualify for news media status, a request must not be for a nonjournalistic commercial use. A request for records supporting the news dissemination function of the requester is not considered a commercial use.

* * * * *

(6)(i) *Schedule of direct costs.* The following uniform schedule of fees applies to records held by all constituent units of the Commission:

Duplication:	
Paper to paper copy (up to 8.5" x 14")	\$0.14 per page
Converting paper into electronic format (scanning)	Quarter hour rate of operator (Clerical, Other Professional, Attorney/Economist)
Other reproduction (e.g., converting from one electronic format to computer disk or printout, microfilm, microfiche, or microform)	Actual direct cost, including operator time
Electronic Services:	
Compact disc (CD)	\$3.00 per disc
DVD	\$3.00 per disc
Videotape cassette	\$2.00 per cassette
Microfilm Services:	
Conversion of existing fiche/film to paper	\$0.14 per page
Other Fees:	

Certification	\$25.00 each
Express Mail	U.S. Postal Service Market Rates
Records maintained at Iron Mountain or Washington National Records Center facilities (records retrieval, refiling, et cetera)	Contract Rates
Other Services as they arise	Market Rates

* * * * *

(7) *Untimely responses.* (i) Except as provided in paragraphs (b)(7)(ii)-(iv) of this section, search fees for responding to a Freedom of Information Act request will not be assessed for responses that fail to comply with the time limits, as provided at 5 U.S.C.

552(a)(4)(A)(viii), §4.11(a)(1)(ii) and §4.11(a)(3)(ii), if there are no unusual or exceptional circumstances, as those terms are defined by 5 U.S.C. 552(a)(6) and §4.11(a)(1)(ii). Except as provided in paragraphs (b)(7)(ii)-(iv) of this section, duplication fees will not be assessed for an untimely response, where there are no unusual or exceptional circumstances, made to a requester qualifying for one of the fee categories set forth in §4.8(b)(2).

(ii) If the Commission has determined that unusual circumstances apply and has provided a timely written notice to the requester in accordance with 5 U.S.C. 552(a)(6)(B), the delay in a response is excused for an additional 10 days. If the Commission fails to comply with the extended time limit, it will not charge search fees (or, for a requester qualifying for one of the fee categories set forth in §4.8(b)(2), will not charge duplication fees).

(iii) If the Commission has determined that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, the agency may charge search fees (or, for requesters qualifying for one of the fee categories set forth in §4.8(b)(2), may charge duplication fees) if timely written notice has been provided to the requester and the agency has discussed with the requester via written mail, electronic mail, or telephone (or made not less than 3 good-faith attempts to do so) how the requester could effectively limit the scope of the request.

(iv) If a court determines that exceptional circumstances exist, the Commission's failure to comply with a time limit shall be excused for the length of time provided by the court order.

* * * * *

(e) Public interest fee waivers

(2) * * *

(i) * * *

(C) The understanding to which disclosure is likely to contribute is public understanding,

as opposed to the understanding of the individual requester or a narrow segment of

interested persons (e.g., by providing specific information about the requester's expertise

in the subject area of the request and about the ability and intention to disseminate the

information to the public); and

* * * * *

(i) *Means of payment.* Payment shall be made either electronically through the Department of Treasury's pay.gov website or by check or money order payable to the Treasury of the United States.

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By direction of the Commission.

Donald S. Clark,
Secretary.

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