



AMERICAN BATTLE MONUMENTS COMMISSION

36 CFR Part 404

RIN 3263-AA01

ABMC FOIA Regulation

AGENCY: American Battle Monuments Commission.

ACTION: Final rule.

SUMMARY: This final rule amends the American Battle Monuments Commission's (ABMC) regulations under the Freedom of Information Act (FOIA). The procedures and guidelines have been revised for compliance with FOIA to incorporate changes required by the FOIA Improvement Act of 2016 and applicable Department of Justice Office of Information Policy guidance.

DATES: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Edwin L. Fountain, General Counsel, American Battle Monuments Commission, 2300 Clarendon Boulevard, Suite 500, Arlington VA 22201, fontaine@abmc.gov, 703-696-6907.

SUPPLEMENTARY INFORMATION: The authority for this rulemaking is Section 3 of the FOIA Improvement Act of 2016, Pub. L. 114-185, 5 U.S.C. 552 note, which requires agencies to issue regulations on procedures for the disclosure of records under FOIA in accordance with that Act. On February 18, 2020 (85 FR 8783), the American Battle Monuments Commission published a notice of proposed rulemaking (NPRM) to update and revise ABMC's procedures and guidelines for compliance with FOIA. The Agency invited comments through March 19, 2020. Interested persons were afforded the opportunity to participate in the rulemaking process through submission of written comments to the proposed rule during the open comment period. No comments were received by the Agency.

Changes Proposed By ABMC in this Rulemaking

This action updates and revises ABMC's procedures and guidelines for compliance with FOIA. The revisions to the rule:

- Update the description of and contact information for ABMC and the ABMC FOIA Office.

- Require ABMC to make available for public inspection in an electronic format records that have been requested three or more times.
- Set forth verification of identity requirements for requesters making a request for records about himself or another individual.
- Outline procedures for consultation, referral, and coordination with other agencies when appropriate.
- Update procedures and time periods for appeals of denials of requests.
- Notify requesters of their right to seek dispute resolution services from the Office of Government Information Services.

REGULATORY PROCEDURES

Executive Order 12866, Regulatory Planning and Review, and Executive Order 13563, Improving Regulation and Regulatory Review

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule benefits the public and the United States Government by providing clear procedures for members of the public, contractors, and employees to follow with regard to the ABMC privacy program. This rule is not a significant regulatory action under EO 12866.

Executive Order 13771, Reducing Regulations and Controlling Regulatory Costs

This rule is not expected to be subject to the requirements of EO 13771 (82 FR 9339, February 3, 2017) because this rule is not significant under EO 12866.

Unfunded Mandates Reform Act

This rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments.

Public Law 96-354, Regulatory Flexibility Act

The ABMC certifies this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. Ch. 6) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require ABMC to prepare a regulatory flexibility analysis.

Executive Order 13132, Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications. This rule will not have a substantial effect on the States; the relationship between the National Government and the States; or the distribution of power and responsibilities among the various levels of Government.

Public Law 96-511, Paperwork Reduction Act

It has been determined that this rule does not impose reporting or record keeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Dated: April 23, 2020.

Robert J. Dalessandro,
Deputy Secretary, ABMC.

List of Subjects in 36 CFR Part 404

Freedom of information.

For the reasons stated in the preamble, ABMC revises 36 CFR part 404 to read as follows:

Title 36: Parks, Forests, and Public Property

PART 404—PROCEDURES AND GUIDELINES FOR COMPLIANCE WITH THE FREEDOM OF INFORMATION ACT

Sec.

- 404.1 General.
- 404.2 Authority and functions.
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- 404.10 Waiver or reduction of charges.

AUTHORITY: Pub. L. 114-185, 130 Stat. 538 (5 U.S.C. 552 note).

§404.1 General.

The information in this part is furnished for the guidance of the public and in compliance with the requirements of the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended. Nothing in this part shall be construed to entitle any person to any service or to the disclosure of any record to which such person is not entitled under the FOIA. The rules in this part should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget (“OMB Guidelines”).

§404.2 Authority and functions.

The general functions of the American Battle Monuments Commission (ABMC or Commission), as provided by statute, 36 U.S.C. 2101 *et seq.*, are to build and maintain suitable memorials commemorating the service of American Armed Forces and to maintain permanent American military cemeteries in foreign countries.

§404.3 Organization.

(a) *Personnel.* (1) The Commission is composed of not more than 11 members appointed by the President.

(2) The day to day operation of the Commission is under the direction of a Secretary appointed by the President.

(3) Principal officials subordinate to the Secretary include the Deputy Secretary, Chief Operating Officer, Chief of Staff, Executive Officer, Chief Financial Officer, Chief of Human Resources and Administration, Chief Information Officer, Director of Cemetery Operations, Executive Engineer, General Counsel, and Public Affairs Officer.

(4) The Commission also creates temporary offices when tasked with major additional responsibilities not of a permanent nature.

(b) *Locations.* (1) The principal office of the American Battle Monuments Commission is located at 2300 Clarendon Boulevard, Suite 500, Arlington, VA 22201, (703) 696-6900.

(2) The American Battle Monuments Commission maintains an overseas field office in Paris, France, and cemetery offices at 25 locations in Belgium, France, Italy, Luxembourg, Mexico, the Netherlands, Panama, the Philippines, Tunisia, and the United Kingdom.

§404.4 Access to information.

(a) *Contact information.* (1) Individuals wishing to file a request under the Freedom of Information Act (FOIA) should address their request in writing to the FOIA Office, American Battle Monuments Commission, 2300 Clarendon Boulevard, Suite 500, Arlington, VA 22201, or to FOIA@abmc.gov, or via <https://www.foia.gov>.

(2) The American Battle Monuments Commission makes available information pertaining to Commission matters within the scope of 5 U.S.C. 552(a)(2), including records that have been requested three or more times, by publishing them electronically at the ABMC home page at <https://www.abmc.gov/foia>. Additional information may be found on the National FOIA Portal at <https://www.foia.gov>. Note: The ABMC.gov site provides all of the information the Commission has

regarding burials at its cemeteries. ABMC does not have service records, casualty lists, or information on burials within the United States.

(b) *Requests.* (1) Requesters must provide contact information, such as their phone number, email address, and/or mailing address, to assist ABMC in communicating with them and providing released records.

(2)(i) Requests for records must reasonably describe the records sought. Requesters must describe the records sought in sufficient detail to enable agency personnel to locate them with a reasonable amount of effort. To the extent possible, requesters should include specific information that may help ABMC identify the requested records, such as the date, title or name, author, recipient, subject matter, case number, file designation, or reference number. Before submitting their requests, requesters may contact the ABMC FOIA Assistant or FOIA Public Liaison to discuss the records they seek and to receive assistance in describing the records.

(ii) If a request does not reasonably describe the records sought, response to the request may be delayed. If, after receiving a request, ABMC determines that the request does not reasonably describe the records sought, ABMC must inform the requester what additional information is needed or why the request is otherwise insufficient. Requesters who are attempting to reformulate or modify such a request may discuss their request with the FOIA Assistant or FOIA Public Liaison.

(3) Requests may specify the preferred form or format (including electronic formats) for the records sought. ABMC will accommodate the request if the record is readily reproducible in that form or format.

(c) *Responses to requests.* (1) The ABMC FOIA Office is responsible for responding to FOIA requests. Upon receipt of any perfected request for records, the FOIA Office will determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) of the date the request is received in the FOIA Office whether it is appropriate to grant the request and will immediately provide written notification to the person making the request.

(2) ABMC responds to requests in the order of receipt, using multitrack processing. Tracks include simple, and complex, based on whether unusual circumstances apply (see paragraph (d) of this section), the volume of potential records, the need for consultation or referral, and the amount of work or time needed to process the request.

(3) ABMC will acknowledge requests with a tracking number, summary of the request, estimated completion dates, track information, the opportunity to narrow or modify the scope, and contact information for the FOIA Public Liaison.

(4) In determining which records are responsive to a request, ABMC ordinarily will include only records in its possession as of the date that it begins its search. If any other date is used, ABMC must inform the requester of that date.

(d) *Extending time limits.* If the ABMC FOIA Office determines that unusual circumstances apply to the processing of a request, and provides timely written notice to the requester, ABMC may extend the time limits prescribed in paragraphs (c) and (h) of this section for not more than 10 days (excepting Saturdays, Sundays, or legal public holidays). Where unusual circumstances merit an extension of more than 10 working days, ABMC will provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request.

(1) As used in this paragraph (d), but only to the extent reasonably necessary to the proper processing of the particular request, the term *unusual circumstances* means:

(i) The need to search for and collect the requested records from establishments that are separated from the office processing the request;

(ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(ii) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency which have a substantial subject matter interest therein.

(2) Extensions will be by written notice to the persons making the request. The notice of extension will set forth the reasons for the extension and the date the determination is expected, and will notify the requester of the right to seek assistance from ABMC's FOIA Public Liaison to resolve any disputes between the requester and ABMC, or to seek dispute resolution services from the Office of Government Information Services.

(3) Before issuing a written notice extending time limits, the agency shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an

opportunity to arrange with the agency an alternative time frame for processing the request or a modified request.

(4) When ABMC reasonably believes that a requester, or a group of requestors acting in concert, has submitted requests that constitute a single request, involving clearly related matters, ABMC may aggregate those requests for purposes of this paragraph (d). One element to be considered in determining whether a belief would be reasonable is the time period over which the requests have occurred.

(5) If ABMC fails to comply with the extended time limit, it may not charge search fees (or for requesters with preferred fee status, may not charge duplication fees), except if unusual circumstances apply and more than 5000 pages are necessary to respond to the request, ABMC may charge search fees (or, for requesters in preferred fee status, may charge duplication fees) if timely written notice has been made to the requester and ABMC has discussed with the requester (or made not less than 3 good-faith attempts to do so) how the requester could effectively limit the scope of the request.

(6) If a court determines that exceptional circumstances exist, ABMC's failure to comply with a time limit shall be excused for the length of time provided by the court order. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist.

(e) *Consultation, referral, and classified information.* When reviewing records located in response to a request, ABMC will determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA. As to any such record, the ABMC must proceed in one of the following ways:

(1) *Consultation.* When ABMC records contain within them information of interest to another agency, ABMC should typically consult with that other agency prior to making a release determination.

(2) *Referral.* When an ABMC record originated with a different agency or contains significant information that originated with a different agency, or when ABMC believes that a different agency is best able to determine whether to disclose a record, ABMC typically should refer the responsibility for responding to the request regarding that record to that agency. When ABMC refers any part of the responsibility for responding to a request to another agency, it must document and maintain a copy of the

record, and notify the requester of the referral, informing the requester of the name of the agency and FOIA contact information.

(3) *Classified information.* On receipt of any request involving classified information, ABMC must determine whether the information is currently and properly classified in accordance with applicable classification rules. ABMC must refer the responsibility for responding to the request regarding that information to the agency that classified the information, or that should consider the information for classification.

(f) *Expedited processing.* (1) Requests and appeals will be taken out of order and given expedited treatment whenever it is determined that they involve:

(i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, beyond the public's right to know about Government activity generally, if made by a person primarily engaged in disseminating information;

(iii) The loss of substantial due process rights; or

(iv) A matter of widespread and exceptional media interest in which there exist possible questions about the Government's integrity which affect public confidence.

(2) A request for expedited processing may be made at the time of the initial request for records or at any later time. A request must include a statement, certified to be true and correct to the best of that person's knowledge and belief, explaining in detail the basis for requesting expedited processing.

(3) Within 10 days of receipt of a request for expedited processing, ABMC will decide whether to grant it and will notify the requester of the decision. If a request for expedited treatment is granted, the request will be given priority and will be processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision will be acted on expeditiously.

(g) *Grants and denials of requests.* (1) Once ABMC determines it will grant a request in full or in part, it shall notify the requester in writing. ABMC must also inform the requester of any fees charged under § 404.10 and must disclose the requested records to the requester promptly upon payment of any

applicable fees. ABMC must inform the requester of the availability of its FOIA Public Liaison to offer assistance.

(2) ABMC may provide interim releases for voluminous requests.

(3) If ABMC determines that a full disclosure of a requested record is not possible, it will consider whether partial disclosure of information is possible. Records disclosed in part will be marked clearly to show the amount of information deleted and the exemption under which the deletion was made, unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted will also be indicated on the record, if technically feasible.

(4) If the request is denied, in part or in full, the written notification to the requester shall include the reasons for the denial and the estimated volume withheld (unless indicated via markings, or if providing such an estimate would harm an interest protected by an exemption). The notification must inform the requester of:

(i) The requester's right to seek assistance from ABMC's FOIA Public Liaison;

(ii) The requester's right to lodge an appeal with ABMC within 90 days after the date of the denial;

and

(iii) The requester's right to seek dispute resolution services from the Office of Government Information Services (OGIS).

(h) *Appeals*. Appeals shall be set forth in writing within 90 days of receipt of a denial and addressed to the FOIA Office at the address specified in paragraph (a) of this section. The appeal should clearly identify the agency determination that is being appealed and the assigned request number. To facilitate handling, the requester should mark both the appeal letter and envelope, or subject line of the electronic transmission, "Freedom of Information Act Appeal." The appeal shall include a statement explaining the basis for the appeal. Appeals will be adjudicated by the ABMC Secretary, or his designee, and the adjudication will be set forth in writing within 20 days of receipt of the appeal in the ABMC FOIA Office (excepting Saturdays, Sundays, and legal public holidays). If, on appeal, the denial is upheld in whole or in part, the written determination will also contain a notification of the provisions for judicial review and contact information for OGIS dispute resolution services. An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation.

§404.5 Inspection and copying.

When a request for information has been approved pursuant to §404.4, the person making the request may make an appointment to inspect or copy the materials requested during regular business hours by writing or telephoning the FOIA Officer at the address or telephone number listed in §404.4(b). Such materials may be copied and reasonable facilities will be made available for that purpose. Copies of individual pages of such materials will be made available at the price per page specified in §404.7(d); however, the right is reserved to limit to a reasonable quantity the copies of such materials which may be made available in this manner when copies also are offered for sale by the Superintendent of Documents.

§404.6 Definitions.

For the purpose of this part:

(a) All the terms defined in the Freedom of Information Act apply.

(b) The term *direct costs* means those expenditures that ABMC actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

(c) The term *search* means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. ABMC employees should ensure that searching for material is done in the most efficient and least expensive manner so as to minimize costs for both the agency and the requester. For example, employees should not engage in line-by-line search when merely duplicating an entire document would prove the less expensive and quicker method of complying with a request. Search should be distinguished, moreover, from review of material in order to determine whether the material is exempt from disclosure (see paragraph (f) of this section).

(d) The term *duplication* means the making of a copy of a document, or of the information contained in it, necessary to respond to a FOIA request. Such copies can take the form of paper, microform, audio-visual materials, or electronic records (e.g., magnetic tape or disk), among others. The requester's specified preference of form or format of disclosure will be honored if the record is readily reproducible in that format.

(e) The term *review* refers to the process of examining documents located in response to a request to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, e.g., doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(f) The term *commercial use request* refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, ABMC must determine the use to which a requester will put the documents requested. Moreover, where an ABMC employee has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, the employee should seek additional clarification before assigning the request to a specific category.

(g) The term *educational institution* refers to a school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with his or her role at the educational institution. Agencies may seek verification from the requester that the request is in furtherance of scholarly research and agencies will advise requesters of their placement in this category.

(h) The term *non-commercial scientific institution* refers to an institution that is not operated on a commercial basis (as that term is referenced in paragraph (g) of this section), and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.

(i) The term *representative of the news media* refers to 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 an audience. 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 that broadcast news to the public at large, and publishers of periodicals that disseminate “news” and make their products available through a variety of means to the general public, including news organizations that disseminate solely on the Internet. “Freelance” journalists who demonstrate a solid basis for expecting publication through a news media entity will be considered as a representative of the news media. A publishing contract would provide the clearest evidence that publication is expected; however, agencies can also consider a requester’s past publication record in making this determination. Agencies will advise requesters of their placement in this category. A request for records supporting the news-dissemination function of the requester will not be considered to be for a commercial use.

§404.7 Fees to be charged—general.

ABMC shall charge fees that recoup the full allowable direct costs it incurs. ABMC will collect all applicable fees before sending copies of records to the requester. Moreover, it shall use the most efficient and least costly methods to comply with requests for documents made under the FOIA. ABMC may recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records.

(a) *Manual searches for records.* ABMC will charge at the salary rate(s) (*i.e.*, basic pay plus 16 percent) of the employee(s) making the search.

(b) *Computer searches for records.* ABMC will charge at the salary rate(s) (*i.e.*, basic pay plus 16 percent) of the employee(s) making the search. Before assessing fees associated with creating a new computer program, ABMC will ensure that requester is first notified and agrees to pay such fees, pursuant to paragraph (g)(3) of this section.

(c) *Review of records.* Only requesters who are seeking documents for commercial use may be charged for time spent reviewing records to determine whether they are exempt from mandatory disclosure. Charges may be assessed only for the initial review; *i.e.*, the review undertaken the first time ABMC analyzes the applicability of a specific exemption to a particular record or portion of a record. Records or portions of records withheld in full under an exemption that is subsequently determined not to

apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review is assessable.

(d) *Duplication of records.* Records will be duplicated at a rate of \$.10 per page. For copies prepared by computer, such as tapes or printouts, ABMC shall charge the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction or duplication, ABMC will charge the actual direct costs of producing the document(s). If ABMC estimates that duplication charges are likely to exceed \$25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with agency personnel with the object of reformulating the request to meet his or her needs at a lower cost.

(e) *Other charges.* (1) When it elects to charge them, ABMC will recover the full costs of providing services such as certifying that records are true copies or sending records by special methods such as express mail.

(2) For requests that require the retrieval of records stored by an agency at a Federal records center operated by the National Archives and Records Administration (NARA), ABMC will charge additional costs in accordance with the Transactional Billing Rate Schedule established by NARA.

(f) *Payment of fees.* Remittances shall be in the form either of a personal check or bank draft drawn on a bank in the United States, or a postal money order. Remittances shall be made payable to the order of the Treasury of the United States and mailed to the FOIA Officer, American Battle Monuments Commission, 2300 Clarendon Blvd., Suite 500, Arlington, VA 22201. A receipt for fees paid will be given upon request.

(g) *Restrictions on assessing fees.* With the exception of requesters seeking documents for a commercial use, ABMC will provide the first 100 pages of duplication and the first 2 hours of search time without charge. Moreover, ABMC will not charge fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself.

(1) The elements to be considered in determining the cost of collecting a fee are the administrative costs of receiving and recording a requester's remittance, and processing the fee for deposit in the Treasury Department's special account.

(2) For purposes of the restrictions on assessment of fees in this paragraph (g), the word *pages* refers to paper copies of 8½ × 11 or 11 × 14. Thus, requesters are not entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or 100 pages of computer printout, does meet the terms of the restriction.

(3) Similarly, the term *search time* in this paragraph (g) has as its basis, manual search. To apply this term to searches made by computer, ABMC will determine the hourly cost of operating the central processing unit and the operator's hourly salary plus 16 percent. When the cost of search equals the equivalent dollar amount of two hours of the salary of the person performing the search, *i.e.*, the operator, ABMC will begin assessing charges.

§404.8 Fees to be charged—categories of requesters.

For purposes of assessing fees, the FOIA establishes four categories of requesters: commercial use requesters, educational and non-commercial scientific institution requesters; news media requesters, and all other requesters.

(a) *Commercial use requesters.* When ABMC receives a request for documents for commercial use, it will assess charges that recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial use requesters are not entitled to 2 hours of free search time nor 100 free pages of reproduction of documents.

(b) *Educational and noncommercial scientific institution requesters.* Requesters in this category who meet the criteria in §404.6(g) or (h) are entitled to two free hours of search time and the first 100 pages of duplication without charge. To be eligible for inclusion in this category, a requester must show that the request is authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research.

(c) *Requesters who are representatives of the news media.* Requesters in this category who meet the criteria in §404.6(i) are entitled to two free hours of search time and the first 100 pages of duplication without charge. To be eligible for inclusion in this category, a requester must show that the records are

not sought for a commercial use, but are sought in furtherance of the news dissemination function of the requester.

(d) *All other requesters.* ABMC shall charge requesters who do not fit into any of the categories in paragraphs (a) through (c) of this section fees that recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first 2 hours of search time shall be furnished without charge.

§404.9 Miscellaneous fee provisions.

(a) *Charging interest—notice and rate.* ABMC may begin assessing interest charges on an unpaid bill starting on the 31st day following the day on which the billing was sent. The fact that the fee has been received by ABMC within the 30-day grace period, even if not processed, will suffice to stay the accrual of interest. Interest will be at the rate prescribed in 31 U.S.C. 3717 and will accrue from the date of the billing.

(b) *Charges for unsuccessful search.* ABMC may assess charges for time spent searching, even if it fails to locate the records or if records located are determined to be exempt from disclosure. If ABMC estimates that search charges are likely to exceed \$25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his or her willingness to pay fees as high as those anticipated. Such a notice shall offer the requester the opportunity to confer with agency personnel with the object of reformulating the request to meet his or her needs at a lower cost.

(c) *Aggregating requests.* A requester may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When ABMC reasonably believes that a requester, or a group of requestors acting in concert, has submitted requests that constitute a single request, involving clearly related matters, ABMC may aggregate those requests and charge accordingly. One element to be considered in determining whether a belief would be reasonable is the time period over which the requests have occurred.

(d) *Advance payments.* ABMC may not require a requester to make an advance payment, *i.e.*, payment before work is commenced or continued on a request, unless:

(1) ABMC estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250. Then, ABMC will notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment; or

(2) A requester has previously failed to pay a fee charged in a timely fashion (*i.e.*, within 30 days of the date of the billing). Then, ABMC may require the requester to pay the full amount owed plus any applicable interest as provided in paragraph (a) of this section or demonstrate that he or she has, in fact, paid the fee, and to make an advance payment of the full amount of the estimated fee before the agency begins to process a new request or a pending request from that requester.

(3) When ABMC acts under paragraph (d)(1) or (2) of this section, the administrative time limits prescribed in the FOIA, 5 U.S.C. 552(a)(6) (*i.e.*, 20 working days from receipt of initial requests and 20 working days from receipt of appeals from initial denial, plus permissible extensions of these time limits), will begin only after ABMC has received fee payments described in paragraphs (d)(1) and (2) of this section.

(e) *Effect of the Debt Collection Act.* ABMC will comply with provisions of the Debt Collection Act of 1982 (Pub. L. 97-365), including disclosure to consumer reporting agencies and use of collection agencies, where appropriate, to encourage repayment.

(f) *Tolling.* If the requester has indicated a willingness to pay some designated amount of fees, but the ABMC estimates that the total fee will exceed that amount, ABMC will toll the processing of the request when it notifies the requester of the estimated fees in excess of the amount the requester has indicated a willingness to pay. The agency will inquire whether the requester wishes to revise the amount of fees the requester is willing to pay or modify the request. Once the requester responds, the time to respond will resume from where it was at the date of the notification.

(g) *Reducing costs.* At any time a request may contact the ABMC FOIA Public Liaison or other FOIA professional to assist in reformulating a request to meet the requester's needs at a lower cost.

§404.10 Waiver or reduction of charges.

Requesters may seek a waiver of fees by submitting a written application demonstrating how 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 is not primarily in the commercial interest of the requester.

(a) ABMC will waive its fees in whole or in part when it determines, based on all available information, that the following factors are satisfied:

(1) Disclosure of the requested information will shed light on identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(2) The disclosure will contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. ABMC will consider the requester's expertise in the subject area as well as the requester's ability and intention to effectively convey information to the public. ABMC will presume that a representative of the news media satisfies this consideration.

(3) The disclosure is not primarily in the commercial interest of the requester. Requesters will be given an opportunity to provide explanatory information regarding this consideration. ABMC ordinarily will presume that when a news media requester has satisfied factors in paragraphs (a)(1) and (2) of this section, the request is not primarily in the commercial interest of the requester.

(b) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver must be granted for those records.

(c) Requests for a waiver or reduction of fees should be made when the request is first submitted to the agency and should address the criteria referenced in paragraph (a) of this section. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester must pay any costs incurred up to the date the fee waiver request was received.

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