



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

August 28, 2018

COMSECY-18-0020

MEMORANDUM TO: Chairman Svinicki
Commissioner Baran
Commissioner Burns
Commissioner Caputo
Commissioner Wright

PLEASE RESPOND BY:
September 13, 2018

FROM: Margaret M. Doane *Jamil H. Jaman FOR*
Executive Director for Operations

SUBJECT: BIENNIAL REVIEW OF FREEDOM OF INFORMATION ACT FEES

The purpose of this paper is to request Commission approval of the U.S. Nuclear Regulatory Commission (NRC) staff's recommendation to conduct a rulemaking, as a direct final rule, to update the fees charged by the NRC for search and review of agency records in response to Freedom of Information Act (FOIA) requests. The FOIA requires that agencies issue regulations to specify fees to recover reasonable direct costs of providing these services. This amendment is prompted by a recent review of fees performed by the Office of the Chief Financial Officer (OCFO) and ensures the NRC continues to recover the costs of FOIA search and review.

Although the staff does not believe this rulemaking presents any issue of policy for the Commission, as discussed below, the contents of this rule are not explicitly mandated by statute. Therefore, consistent with recent Commission direction in SRM-COMSECY-17-0002, "Rulemakings Mandated by Statute or Implementing U.S. Government Policy on Export Licensing Controls," to submit "a short paper seeking Commission approval to proceed with a rulemaking on matters involving the exercise of minor levels of discretion"—this paper complies with that direction.

The FOIA authorizes agencies to issue regulations specifying a schedule of fees for the processing of requests, which may be charged depending on the purpose for which the records are sought and the class of requestor; the Act also states that such fees shall recover the direct

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costs of search, duplication, and review.¹ The NRC's implementing FOIA regulations are found in Part 9, "Public Records," of Title 10 of the *Code of Federal Regulations* (10 CFR). Specifically, fees for search and review of agency records are codified at 10 CFR 9.37.²

The FOIA also specifies that agency fee regulations "shall conform" to guidelines published by the Office of Management and Budget (OMB), which provide for a uniform schedule of fees for all agencies.³ OMB issued these guidelines in 1987, stating that agencies "should charge fees that recoup the full allowable direct costs they incur . . . us[ing] the most efficient and least costly methods" to do so.⁴ With respect to charges for search and review of records, the OMB Guidelines state that agencies "may" establish reasonable, average rates for the range of grades of reviewers used when a homogenous or single class of reviewers is typically used for those tasks (plus 16 percent for fringe benefits).⁵ This is the method that the NRC has used for FOIA search and review fees since it first established fees in 1987 following the issuance of the OMB Guidelines.⁶ Specifically, the NRC charges separate hourly rates for search and review performed by clerical staff; professional/managerial staff; and senior executive or Commissioner. The NRC has not updated these hourly rates since 2010.⁷

OCFO recently determined, as part of its biennial review of fees pursuant to the Chief Financial Officers Act of 1990,⁸ that search and review fees must be increased to ensure the NRC recovers the costs associated with those activities. In conducting the current biennial review, the Office of the Chief Information Officer (OCIO) FOIA team consulted with the Office of the Chief Human Capital Officer to determine the current average grade of NRC employees in each of the three fee levels for search and review time. There is a difference between the published pay levels and the current actual average pay levels of the staff. Thus, the staff plans, via rulemaking, to update the amount for clerical search and review codified in 10 CFR 9.37(a) from GG-7/step 6 to GG-9/step 7, and the amount for professional/managerial search and review from GG-13/step 6 to GG-14/step 7.

Although the NRC is required by the FOIA and OMB Guidelines to recover the direct costs of its search and review, the NRC staff believes this is not a statutorily-required rulemaking where there is "no discretion as to the content of the rule."⁹ The FOIA and the OMB Guidelines provide options on how fees could be recovered. Specifically, the OMB Guidelines state that agencies "may" establish homogenous classes, which the NRC has chosen to do since 1987, or to charge the salary rate of the actual employee who performed the search or review task.¹⁰ Indeed, in response to public comments in the 1987 final rule that first established the NRC FOIA fees, the Commission considered and rejected the option to charge the salary rate of the actual employee who performed the review.

¹ 5 U.S.C. § 552(a)(4)(A)(i), (iv).

² Duplication fees are codified at 10 CFR 9.35. The NRC staff is not proposing to increase duplication fees in this rulemaking.

³ 5 U.S.C. § 552(a)(4)(A)(i).

⁴ *The Freedom of Information Reform Act of 1986; Uniform Freedom of Information Act Fee Schedule and Guidelines*; (52 FR 10012, 10018; March 27, 1987) (OMB Guidelines).

⁵ *Id.*

⁶ *Revision of Freedom of Information Act Regulations; Conforming Amendments*, (52 FR 49350; December 31, 1987).

⁷ *Public Records*, (75 FR 41368; July 16, 2010).

⁸ 31 U.S.C. § 902(a)(8).

⁹ SRM-COMSECY-17-0002, "Rulemakings Mandated by Statute or Implementing U.S. Government Policy on Export Licensing Controls" (February 28, 2017), (ADAMS Accession No. ML17059D045).

¹⁰ OMB Guidelines at 10018.

The NRC staff recommends maintaining the status quo for the method the NRC has chosen to recover FOIA search and review fees (i.e., average hourly rates of three classes of employee), updating only the amounts of those rates to reflect current costs as calculated by OCIO. Given the limited nature of this proposal, the NRC staff has not to date performed any extensive assessment of alternative options for FOIA fee recovery, though the staff believes that there are several straightforward benefits to the NRC's chosen method as compared to charging the actual salary rate of employees. Charging average salary rates that are codified in NRC regulations promotes certainty for FOIA requesters, who will know at that time they are submitting their request precisely what rates the NRC will charge. It also promotes fairness, in that requesters will not be charged different fees for substantially the same level of work depending on the grade and step of the actual employee tasked with search and review. Codifying average rates into NRC regulations also promotes efficiency for NRC staff tasked with processing FOIA requests, who otherwise would have to inquire about individual NRC employees' grades and steps when preparing fee estimates for FOIA requesters or calculating actual fees accrued. Although the use of an average salary rate, by definition, means that some requesters will be charged higher fees than would otherwise accrue under a method that uses actual salary rates, this is also offset by the benefits provided to requesters who would otherwise be charged more under an actual salary method. In short, the NRC staff responsible for processing FOIA requests have not, in practice, identified any significant benefits in changing the method of fee recovery currently codified in 10 CFR 9.37. The NRC staff notes that many other agencies utilize the same method.¹¹

Because the FOIA requires that fee schedules are issued "pursuant to notice and receipt of public comment,"¹² the NRC staff recommends performing this update via a direct final rule published concurrently with a companion proposed rule, signed by the Executive Director for Operations.

For the reasons set forth above, the NRC staff requests that the Commission approve the staff's recommendation for the staff to conduct this rulemaking process, as a direct final rule, given the unlikelihood that the NRC will receive a significant adverse comment challenging the underlying premise of the rule or causing the staff to reconsider its necessity, which is to implement the agency's statutory obligation to recover direct costs associated with processing FOIA requests.

The Office of the General Counsel has reviewed this paper and has no legal objection.

SECY, please track.

cc: SECY
OGC
OCA
OPA
OCFO

¹¹ The Departments of Justice, Homeland Security, Health and Human Services, the Environmental Protection Agency, U.S. Securities and Exchange Commission, and Department of Energy use average rates for three tiers of employees similar to the NRC.

¹² 5 U.S.C. § 552(a)(4)(A)(i).

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