



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240



IN REPLY REFER TO:
FOIA Appeal No. 2010-017

MAR - 4 2010

Bruce E. Schundler
47 Four Oaks Road
Bedminster, NJ 07921

Dear Mr. Schundler:

This responds to the November 10, 2009, Freedom of Information Act ("FOIA") *appeal* ("appeal") that you filed with the Department of the Interior ("Department"), which was received November 19, 2009. The Department has assigned your appeal as **Appeal Number 2010-017**. Please cite this number in any future correspondence you send to the Department regarding this appeal.

Your appeal concerns a July 31, 2009, FOIA request that you submitted to the National Park Service ("NPS") seeking seven categories of documents that are generally related to Mesa Verde National Park, which you modified by letter dated November 7, 2009, "in order to render [the request] more cost effective and time efficient." In the modified FOIA request you stated that you have "prioritized [your] request and put the information [you are] seeking in a new numerical order of importance." You requested that "those at Mesa Verde National Park who will be gathering the information start with the first item and work [their] way down the list in numerical order from number 1 to number 7. And when [you] have used up the two hours of free search and review time to which [you are] entitled, please stop. If the total number of copies eventually exceeds [your] entitled 100 pages, [you are] willing to pay up to \$26.00 for any additional copies."

The NPS responded to the modified FOIA request on November 9, 2009, by releasing 23 pages of responsive documents to you. The NPS also advised you that "[it] stopped processing your request after item 3, because [it] had exhausted your two hours of free search time. The \$2.99 cost for copies has been waived because it [is] less than the \$30 minimum charge limit established by DOI in 43 CFR 2.18(a)."

You timely filed the instant appeal. A discussion of the specific issues you identify in the appeal and the Department's determination on each one follows.

ISSUE 1: You challenge the amount of information that you received, claiming that "it is virtually impossible to imagine how it took two hours to process the information [you were] given." You also question whether it could "possibly have taken two hours to gather together what in [your] mind should have taken no more than 30 to 45 minutes at the most---and that would have included printing the information, putting

it in an envelope, and sending it to [you] or [the NPS's acting FOIA Officer] in Denver?"

DECISION: The FOIA authorizes agencies to assess reasonable standard charges for document search, review, and duplication against individuals seeking access to government records.¹ An agency must look at the identity of the requester and the intended use of the information sought to determine which of these fees to assess. In the case of your FOIA request, the NPS determined that you are an "other" requester for fee assessment purposes.² The FOIA authorizes an agency to assess against "other" requesters, such as you, the fees it incurs for document search and duplication. The FOIA also requires agencies to provide "other" requesters with two hours of search time and the first 100 pages of duplication without charge.³

Moreover, the FOIA requires the Office of Management and Budget ("OMB") to issue, among other things, guidelines related to the assessment of FOIA processing fees for agencies to incorporate in their FOIA fee regulations,⁴ which the Department has done in its FOIA regulations ("regulations").⁵ Pursuant to OMB's guidelines, the regulations state that the term "'search' means the process of looking for and retrieving agency records and information responsive to a [FOIA] request (manually or by automated means)."⁶

Here, the NPS has advised the Department (just as it advised you) that its personnel have already exhausted the two hours of search time without charge that you are entitled to as an "other" requester in its processing of items 1 – 3 in the modified FOIA request. The NPS's personnel spent 45 minutes determining where documents that are responsive to the modified FOIA request are located; 25 minutes looking for and retrieving possibly responsive documents from storage; and one hour and 20 minutes searching through its on-site records to locate responsive materials.⁷ The NPS's efforts here in looking for and retrieving documents that are responsive to items 1 – 3 of the modified FOIA request, which totals two hours and 45 minutes, is assessable against you as search time. Thus, it

¹ See 5 U.S.C. § 552(a)(4)(A)(i)-(ii).

² See 5 U.S.C. § 552(a)(4)(A)(ii)(III) and 43 C.F.R. § 2.17(a)(4), both describing "other" requesters.

³ *Id.*

⁴ 5 U.S.C. § 552(a)(4)(A)(i).

⁵ 43 C.F.R. Part 2.

⁶ See 43 C.F.R. § 2.3(u).

⁷ The NPS also advised the Department that its personnel spent 25 minutes performing administrative tasks such as "scanning" and "pdf'ing" responsive documents and "drafting and transmitting email of FOIA documents" to its acting FOIA Officer. Since none of these tasks fall within the regulations' definition of "search," i.e., "looking for and retrieving" responsive agency records, the time NPS personnel spent performing these tasks cannot be assessed against you.

is clear that you have exhausted your entitlement as an “other” requester to two hours of search without charge.

Accordingly, Issue 1 in the appeal is DENIED.

As a final matter on Issue 1, the Department notes that the search time that the NPS expended in processing the modified FOIA request obviously exceeds your entitlement to two hours of search without charge by 45 minutes. However, the NPS cannot assess the fees associated with this overage of search time against you, as you did not provide your written assurance that you would pay any search fees.⁸ Once the NPS exhausted your entitlement to two hours of search time without charge, it should have followed your instruction in the modified FOIA request to stop processing the matter.⁹

ISSUE 2: You challenge the “accuracy and quality of the information that [you] received.” The statements that you make in the appeal to support your challenge on this issue, in essence, question whether additional responsive documents exist for the three items in the modified FOIA request that the NPS did process.

DECISION: It may be that there are additional documents that are responsive to items 1 – 3 of the modified FOIA request. However, you explicitly limited the NPS’s processing of the modified FOIA request to two hours of search. The NPS disclosed to you all of the responsive documents that it located in the two-hour search. If you wanted the NPS to conduct a more comprehensive and extensive search, you should have provided it with your written assurance that you would pay the processing fees, as you were required by the regulations to do.¹⁰ Since you did not do this, the Department concludes that there is no action for it to take on Issue 2 in the appeal.

ISSUE 3: You seek to learn “how the 23 pages [you] received should be characterized: as part of the 100 pages of copying to which [you are] entitled [at] no cost, or towards the \$30.00 threshold before which [requesters] are not charged.”

⁸ See 43 C.F.R. § 2.8(b) (requiring a requester to include in his FOIA request either a request for a fee waiver or a statement “that [he is] willing to pay all fees associated with processing [the] request or that [he is] willing to pay up to a specified amount.”).

⁹ Your instruction to the NPS to stop processing the modified FOIA request is similar to a provision in the regulations, which states that “After the bureau begins processing your request, if it finds that the actual cost will exceed the amount you previously agreed to pay, the bureau will: (i) Stop processing your request; (ii) Promptly notify you of the higher amount and ask you to provide written assurance of payment; and (iii) Give you an opportunity to modify your request to reduce the fee.” 43 C.F.R. § 2.18(b)(2)(i)-(iii). Since you instructed the NPS to stop processing the FOIA request once it exhausted your entitlement to two hours of search time without charge, items (ii) and (iii) in this provision of the regulations are not applicable.

¹⁰ 43 C.F.R. § 2.8(b).

DECISION: The NPS completed its processing of the modified FOIA request and its November 9, 2009, letter to you served as its final response to that matter (as it noted in the letter and you acknowledge in the appeal). The Department finds no reason to address this issue, as it was rendered moot with the NPS's completion of the processing of the modified FOIA request.

ISSUE 4: You request that the Department "consider ordering the management at Mesa Verde National Park to fulfill [your] entire request for no additional charges."

You provide three arguments to support your request on this issue, each of which the Department identifies and addresses in turn.

- 1.) You claim that "[your] second modified request of September 8, 2009, actually was in order, it should have been processed without delay, and the final response [you] received was way over due." You also claim that the NPS "consciously and deliberately tried to frustrate and delay processing a legitimate FOIA request."

RESPONSE: In response to the September 8, 2009, version of the FOIA request, the NPS advised you that the estimated fees associated with its processing totaled \$796.50 and the NPS requested that you provide an advanced payment "prior to the initiation of the final processing of the request."¹¹ Instead of submitting the advanced payment of the processing fees, you further modified the FOIA request on November 7, 2009, "in order to render [the request] more cost effective and time efficient." The fact that you chose to modify your FOIA request in order to avoid paying any processing fees, does not in any way demonstrate that the NPS acted in bad faith in its handling of your FOIA request or that it has "consciously and deliberately tried to frustrate and delay processing a legitimate FOIA request."¹² Moreover, once you further modified your FOIA request on November 7, 2009, the NPS sent you its final response to the matter two days later, which does not support your assertion that the NPS's final response "was way over due."

Accordingly, the Department concludes that your arguments in this aspect of the appeal are without merit.

¹¹ See 43 C.F.R. § 2.18(c)(i)-(ii) (requiring a bureau to obtain an advanced payment of the processing fees where the fees exceed \$250 and the requester has never made a FOIA request to the Department requiring him to pay fees or the requester did not pay a previous FOIA fee promptly).

¹² The Department notes that since you did not submit the requested advanced payment of the processing fees, the September 8, 2009, version of the FOIA request was indeed out of order (as the NPS was not required to begin processing the matter until you resolved all issues regarding fees). See 43 C.F.R. §§ 2.8(b), 2.12(b).

- 2.) You assert that “part of the information for which [you] may have to pay should already be available on the internet...[and] should have been already available as part of a proactive response to the directives and suggestions contained in the President’s memorandum of January 21, 2009, the Attorney General’s memorandum of March 19, 2009, or to the *FOIA Post* promulgated by the Department of Justice’s Office of Information Policy in which it is written: ‘...agencies should anticipate interest in records, should set up systems for identifying and retrieving them, and should post them on their website.’...Essentially [you are] asking: should citizens have to pay for information which is not readily available only because agencies and departments of the government have not responded to the directives and memorandums which have directed that the information should be made readily available?”

RESPONSE: As previously discussed, the FOIA authorizes agencies to assess reasonable standard charges for document search, review, and duplication against individuals seeking access to government records.¹³ There is nothing in any of the materials that you cited that precludes an agency from assessing the appropriate processing fees against a FOIA requester in the event the agency has not placed the requested information on the Internet. Therefore, the Department concludes that your argument on this point is also without merit.

- 3.) You state that “much of the information [you] have requested will already have been compiled at the request of the Office of Inspector General, and it already will be in document form or in some kind of digital format. As such, it really should take very little time to search for the information and provide copies for [you].”

RESPONSE: You have not provided any actual evidence that demonstrates that the NPS has already compiled the documents that you have requested. Your conclusory assertion to the contrary is not sufficient for the Department to conclude otherwise or for the Department to call into question the NPS’s statements regarding the search efforts it asserts that its personnel actually undertook to process items 1 – 3 of the modified FOIA request.

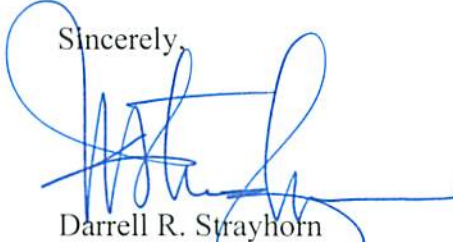
DECISION: Because there is nothing that supports your request that the Department direct the NPS to “fulfill [your] entire request for no additional charges,” Issue 4 in the appeal is DENIED.

¹³ See 5 U.S.C. § 552(a)(4)(A)(i)-(ii).

This completes the Department's response to your appeal. You have a right to seek judicial review of this decision under 5 U.S.C. § 552(a)(4)(B).

If you have any questions, you may call me at (202) 208-5339.

Sincerely,



Darrell R. Strayhorn
FOIA Appeals Officer
Department of the Interior

cc: Charis Wilson, Acting FOIA Officer, NPS
Jack O'Brian, FOIA Officer, Intermountain Regional Office, NPS
Alexandra Mallus, Departmental FOIA Officer