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Bedminster, NJ 07921
November 7, 2009

Ms. Charis Wilson, MLS, CRM
Acting NPS FOIA Officer
12795 W. Alameda Parkway
PO Box 25287
Denver, CO 80225-0287

Re: IMR/09-145 **version to be determined or assigned**

Dear Ms. Wilson:

Thank you for prompt reply to my letter. Thank you also for making clear exactly what I still had to do to resolve all the issues regarding the scope or nature of my request.

In response to your email (dated November 6, 2009), I am resubmitting my FOIA request for a fourth time in a slightly modified and restated way. Hopefully this will resolve the only remaining impediment to the processing of my RFI.

From what you wrote, I believe the only remaining impediment is that I did not specify exactly how much I was willing to pay for duplication costs. This is because I had written I would be "willing to pay any reasonable cost" for copies above the 100 free copies to which I am entitled.....instead of saying essentially that I would be willing to pay all fees or that I would be willing to pay any fees up to a monetary limit. Specifically, you had written:

Since you did not request a fee waiver your request must either include statement of a willingness to pay all fees or specify a monetary limit. Since you did not, the National Park Service has no choice but to prepare a fee estimate and obtain your approval for all fees, before we can begin processing your request. In addition, in accordance with 43 CFR 2.18(c), should the estimated amount total more than \$250, we are required to obtain payment in full from you before we can begin processing your request, as we have no indication of your having paid fees for previous requests.

Consequently, in my restated RFI, I have written:

*"...when I have used up the two hours of free search and review time to which I am entitled, please stop. If the total number of copies eventually exceeds my entitled amount of 100 pages, **I am willing to pay up to \$26.00 for any additional copies.**"*

Later in the RFI, I restate this by writing:

"...let me restate my self-imposed limits: you should spend no more than two hours on my request at this time for search and review (e.g. no more than the two hours of free time to which I am entitled) and you should duplicate however many pages can be duplicated for the \$26.00 I have offered to pay for copies beyond the 100 pages of free duplication to which I am entitled."

For the record, however, let me state that I disagree with your reading and interpretation of the regulations, especially of 43 CFR 2.18.

In 43 CFR 2.18 which focuses specifically on “How are fees assessed and collected?” the regulations say:

§ 2.18 How are fees assessed and collected?

*(a) Threshold for charging fees. Except in those situations covered by §2.16(b)(2), **the bureau will not charge you if the fee is \$30 or less.***

(b) Notice of anticipated fees.

*(1) **Unless** you have been granted a fee waiver or have previously agreed to pay all the fees associated with your request, or **the anticipated fee is \$30 or less**, the bureau will:*

(i) Promptly notify you of the estimated costs and ask you to provide written assurance of payment of all fees or fees up to a designated amount; and

(ii) Give you an opportunity to modify your request at that time to reduce the fee.

(2) 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.

*(c) Advance payment. (1) **The bureau will require advance payment when the estimated fee is over \$250 and—***

(i) You have never made a FOIA request to DOI requiring you to pay fees; or

(ii) You did not pay a previous FOIA fee promptly.

(These quotes come from the <http://ecfr.gpoaccess.gov/> website which contains the Code of Federal Regulations current as of November 5, 2009--- not from the 2003 version to which you had directed me in your email. Nevertheless, I believe there are no major differences between the 2003 version and the most current one.)

I am not a lawyer, nevertheless, my reading of the current regulation would suggest that Mesa Verde National Park could have duplicated up 330 pages before we would have reached the \$30.00 threshold clearly described in 43 CFR 2.18 (a) and (b). My calculations are based on the following:

100 pages could have been duplicated for no cost.

230 pages could have been duplicated before the total duplication costs would have exceeded \$30.00. (This calculation is based on the DOI’s current FOIA Search and Review Fees schedule of \$0.13/page for duplication.)

In my second modified and restated RFI, I had limited the amount of time for search and review to two hours---e.g. to the two hours of free time to which I was entitled. And so there would have been no fees for search and review time associated with my request.

Consequently, the only fees that could or would have been charged for my second modified and restated RFI dated September 8, 2009, would have been those related to the cost of duplicating copies at \$0.13/page. And quite frankly, I suspect no one calculates the number of pages that I have requested to be more than 330 pages!

For the cost of duplication to have exceeded an estimate of \$250 ---the 43 CFR 2.18 (c) threshold to which both you and Jack O'Brian refer--- it means the estimated number of copies to fulfill my request would have had to be over 2,023 pages. (1923 pages at \$0.13/page=\$249.99. Add the 100 free pages and you end up with 2,023 pages of copying.)

All of which is to say that any reasonable estimate of what it would have taken to fulfill my second modified and restated RFI dated September 8, 2009 would not have reached the \$250 threshold which requires prepayment, and that the request probably could have been fulfilled without reaching the \$30 threshold limit which triggers 43 CFR 2.18 (b).

Consequently, if my reading of 43 CFR 2.18 is correct, then my second modified RFI should have been processed with no delay, my third modified and restated RFI also should have been processed with no delay, and by now I really should have received at least some of the information I have been requesting.

Again, I am not a lawyer, but I suspect that neither the spirit and intent of 43 CFR 2.18, nor the actual words of the regulation itself, would allow a delay in fulfilling my RFI just because the estimated amount of time required to fulfill the request was 13.5 hours. To be sure, since I had specifically stated I did not want the park to spend more than my two hours of entitled free time, the number of estimated hours to fulfill the RFI beyond those first two free hours becomes a mute point and cannot be used as a trigger for 43 CFR 2.18 (c).

Of course, I admit that I may be wrong in my conclusions. There may be other sections of the federal codes which have modified or nullified 43 CFR 2.18, or there may be case law or legal precedent which has led you and Jack O'Brian to ignore 43 CFR 2.18 (a) and (b) and led you to quote only 43 CFR 2.18 (c). If there are other amendments or if there is existing case law to preclude applying the regulations as written, I do apologize.

On the other hand, if there are no further amendments to 43 CFR 2.18 and if there is no case law that explains why you have taken the approach you and Mr. O'Brian have taken, then I have to hope it's simply because you haven't had many RFI's which are like mine, or that you might have momentarily forgotten the precise language of 43 CFR 2.18 (a) and (b). Otherwise, one could conclude that you both have been using misinterpretations of the Code of Federal Regulations to avoid the quick and timely processing of a legitimate FOIA request. Furthermore, one would hope that any misinterpretations were not intentional and/or conscious.

And so once again I am upset, and I have to ask:

How are you all complying with the President's memorandum of January 21, 2009, that...."all agencies should adopt a presumption in favor of disclosure..." and that "agencies should take affirmative steps to

make information public. “ How does the process through which we are going comply with the Secretary of Interior’s memorandum of July 2, 2009, in which he described a new presumption of openness and a “new era of open Government?” Or, when the Secretary writes: “FOIA professionals should be mindful of their obligation to work “in a spirit of cooperation” with FOIA requesters, as President Obama has directed.” **The Secretary goes on to write: “Unnecessary bureaucratic hurdles have no place in the “new era of open Government” that the President has proclaimed.”**

In contrast to a spirit of openness and transparency, or a new spirit of cooperation, I continue to feel just the opposite.

I also continue to be amazed at how much executive, managerial time has been devoted to the process of not processing my basic request. Why didn’t Jack O’Brian’s first response of August 28, 2009 simply explain that I could get no more than two hours of free search and review time and no more than 100 pages of free duplication, **and** that I should be very specific in how much I was willing to pay---especially if the total amount would be more than the threshold amounts? And why didn’t he direct me to a current version of 43 CFR 2.18 so that I could prepare my RFI so that it could fulfill all the mandatory requirements? Or, why not just get on the phone and in just a few minutes we could have resolved any outstanding issues and kept the process along?

Needless to say, although I disagree with your interpretation of 43 CFR 2.18, I still thank you for your quick response to my letter and for your effort to clarify what I had to do to before my RFI could proceed. I thank you for your efforts, I appreciate what you are doing to fulfill the requirements of the Freedom of Information Act and the directives of the President, and I look forward to hearing from you and to receiving the information I have requested soon.

Looking ahead,

Bruce E. Schundler

cc: Jack O’Brian Intermountain Regional FOIA Officer
Allexandra Mallus FOIA Officer of the Department of Interior in Washington, D.C.
John R. Snyder National Park Service