



**BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
GOVERNMENT OF THE DISTRICT OF COLUMBIA**



August 1, 2022

VIA ELECTRONIC MAIL

[REDACTED]
Dupont East Civic Action Association

[REDACTED]
[REDACTED]@gmail.com

RE: DCRA's Compliance with District FOIA's Allowable Cost Provisions #OOG-2022-003_AO

Dear [REDACTED]:

This correspondence responds to your complaint (“Complaint”) and advisory opinion request that you submitted on behalf of the Dupont East Civic Action Association (“DECAA”) to the Board of Ethics and Government Accountability, Office of Open Government (“OOG”) on September 23, 2021. The issue for determination is whether the Department of Consumer and Regulatory Affairs’ (“DCRA”) policy of charging document review fees to Freedom of Information Act (“FOIA”) “other-use” requesters, such as DECAA, is permissible under the District of Columbia Freedom of Information Act of 1976¹ (“D.C. FOIA”).

It is the public policy of the District of Columbia government (the “District”) “that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.”² To support the District’s public policy, I am authorized to issue advisory opinions on the implementation of D.C. FOIA, pursuant to section 205c(d) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective October 30, 2018 (D.C. Law 19-124; D.C. Official Code § 1-1162.05c(d)).

After researching this matter, I find that: (1) D.C. FOIA does not allow agencies to assess document review fees to “other-use” requesters, even to determine responsiveness, as DCRA maintains;³ (2) DECAA is within the “other-user” category of requesters; (3) DECAA’s use of the requested records is not for commercial use by an educational or a non-commercial scientific institution for scholarly or scientific research or a representative of the news media; (4) DCRA may only assess DECAA reasonable standard charges for document search and duplication for “other-use” requesters;⁴ and (5) DCRA should grant DECAA’s fee waiver requests because

¹ D.C. Official Code § 2-531 *et seq.*

² D.C. Official Code § 2-531.

³ D.C. Official Code § 2-532(b-1)(3).

⁴ D.C. Official Code § 2-532(b-1).

DECAA's requests meet the legal standard to receive fee waivers. Therefore, DCRA's assessment of document review fees to DECAA violates D.C. FOIA's allowable cost provisions, and its denial of DECAA's fee waiver requests were in error. The analysis below of D.C. FOIA and federal FOIA statutes, case law, and federal FOIA regulations support my findings.

I. BACKGROUND

DECAA is a civic organization registered under section 501(c)(3) of the Internal Revenue Code as a non-profit entity.⁵ DECAA's self-described mission is to promote discussions on transportation, homelessness, and the historical, architectural, and aesthetic value of property and sites in the greater Dupont Circle area of Washington, D.C.⁶ On August 17, 2021, DECAA submitted two D.C. FOIA requests, which DCRA assigned as numbers 2021-FOIA-07389 and 2021-FOIA-07393, to DCRA via the District of Columbia Freedom of Information Act Public Access Portal ("PAL").⁷ In each submission, DECAA describes its requester status, use of the documents for non-commercial purposes, and requests public interest fee waivers. The D.C. FOIA requests are for Building Permit B1907507, records, and all emails to or from the Zoning Administrator from July 23 to July 30, 2021.⁸ The Complaint states that DCRA refused to provide records responsive to DECAA's two D.C. FOIA requests unless DECAA paid \$3860.08 in document review fees.⁹

On September 22, 2021, DCRA sent DECAA D.C. FOIA fee determination letters. The letters detail DCRA's document review costs and deny DECAA's fee waiver requests. Each determination letter states the following: "DCRA is responsible for reviewing all records to determine which records are exempt from disclosure under D.C. Official Code § 2-534 before releasing or allowing inspection by the public and/or copying of the records. The current statute, D.C. Official Code § 2-532(b-2), which is controlling, provides that review costs shall include only the direct costs incurred during the initial examination of a document to determine whether the document must be disclosed or withheld in part as exempt under this section."¹⁰ In response, DECAA sent DCRA several emails objecting to the document review fees that DCRA assessed.

As customary, OOG notified DCRA of the Complaint and provided DCRA with an opportunity to provide OOG with a response to the Complaint in writing. On October 29, 2021, DCRA submitted a written response to OOG. In its response, DCRA agrees that DECAA is an "other-user" under D.C. Official Code § 2-532 (b-1)(3) and because of DECAA's status that limits

⁵ Tax Exempt Organization Search, at apps.irs.gov/app/eos.

⁶ Complaint at 1.

⁷ The PAL is here <https://foia-dc.gov/>.

⁸ 2021-DOIA-07389 - DCRA's complete file for Building Permit B1907507 (Date Range for Record Search: From 03/01/2021 To 08/16/2021). Records concerning Building Permit B1907507 are requested: 1. All comments, correspondence, emails, plans, plats, drawings, re-submitted plans sent to DCRA by the Applicant for Building Permit B1907507. 2. All comments, correspondence, emails, plans, plats, drawings, re-submitted plans sent from DCRA to the Applicant for Building Permit B1907507. 3. All records and documents uploaded to Projectdox by the Applicant for Building Permit B1907507. 4. One copy of all comments, correspondence, plans, plats, and drawings for Building Permit B1907507 listed or referenced in the DCRA Scout system for Building Permit B1907507. Information obtained from PAL; 2021-FOIA-07393 - FOIA for all emails to or from the Zoning Administrator from July 23 thru July 30, 2021, inclusive (Date Range for Record Search: From 07/23/2021 To 07/30/2021). Information obtained from PAL.

⁹ Complaint at 2.

¹⁰ DCRA's September 22, 2021, Fee Determination Letters to DECAA.

“fees to reasonable standard charges for document search and duplication.” However, DCRA maintains “that under D.C. FOIA, it is lawful to charge DECAA fees for the review of documents to determine responsiveness, though not for applicability of exemptions.” DCRA also offered that they would not charge fees for DECAA’s D.C. FOIA requests and rescinded the fee determination letters. DCRA stated it “will revise its fee notices to more clearly delineate the basis for the fee being assessed.”¹¹ Notwithstanding DCRA’s decision to rescind document review fees for DECAA’s requests, the issue of whether, under D.C. FOIA, an agency may lawfully charge document review fees to “other-use” requesters to determine responsiveness is viable. Therefore, I must address this issue. As discussed below, I opine that it is unlawful.

II. DISCUSSION

D.C. FOIA allows District agencies to “establish and collect fees not to exceed the actual cost of searching for, reviewing, redacting, and making copying of records.”¹² Public bodies may provide the requested documents without charge or at a reduced cost after “determining that waiver or reduction of the fee is in the public interest because furnishing the information primarily benefits the general public.”¹³ Any fee schedule adopted by an agency must have the three levels of fees corresponding to the three categories of requesters.¹⁴

DCRA correctly placed DECAA within the “other-use” fee category, where fees are “limited to reasonable standard charges for document search and duplication.”¹⁵ Nonetheless, DCRA’s assessment of document review fees to DECAA was incorrect.

A. D.C. and federal FOIA exclude “other-use” requesters like DECAA from document review fee assessments.

The 2004 amendments to D.C. FOIA conformed its document fees with the federal Freedom of Information Act, 5 U.S.C. § 552 (“federal FOIA”).¹⁶ Therefore, in assessing whether DCRA’s charge of document review fees to DECAA is lawful under D.C. FOIA, we may also consider federal regulations and case law in interpreting the statutes.¹⁷

Under D.C. FOIA and federal FOIA, agencies must determine a requester's fee category to ascertain costs to process requests. Requesters fall into three categories based on how they intend to use the records. The *first* category is commercial use. Agencies may assess commercial users reasonable charges for document search, duplication, and review.¹⁸ The *second* category is for scholarly or scientific purposes by educational institutions, non-commercial scientific institutions, and news media representatives. Agencies may charge these requesters document duplication

¹¹ DCRA’s October 29, 2021, Complaint response.

¹² D.C. Official Code § 2-532(b).

¹³ *Id.*

¹⁴ D.C. Official Code § 2-532(b-1)(1)–(3).

¹⁵ D.C. Official Code § 2-532 (b-1)(3).

¹⁶ Report of the Committee on Government Operations on Bill 1-15-0822 the Documents Administrative Cost Assessment Amendment Act of 2004, at page 1 (Council of the District of Columbia August 27, 2004).

¹⁷ See *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987); *Washington Post Co. v. Minority Bus. Opportunity Comm’n*, 560 A.2d 517, 521 n.5 (D.C. 1989). See also D.C. Official Code § 2-532(b-1)(1) to (3); 5 U.S.C. § 552(a)(4)(A)(ii)(I) to (III).

¹⁸ D.C. Official Code § 2-532(b-1)(1); 5 U.S.C. § 552(a)(4)(A)(ii)(I).

costs.¹⁹ The *third* category is for requests not described in the *first* and *second* categories, or “other-use.” “Other-use” requesters do not use documents for scholarly, scientific or commercial purposes and are not an educational or non-commercial entity or a media representative and are not for commercial use. Agencies may only charge “other-use” requesters duplication and search costs.”²⁰ After identifying DECAA as “other-use” requesters under D.C. FOIA, DCRA could only assess search and duplication costs to DECAA’s requests. Therefore, DCRA’s assessment of document review fees runs afoul of D.C. FOIA requirements. Below I discuss case law that supports this position.

B. Case law establishes that it is unlawful under federal FOIA for an agency to assess document review fees to “other-use” requesters.

Federal case law also explains the nexus between document use, requester categories, and the fees applicable to each type of requester. In *Avondale Industries, Inc. v. National Labor Relations Board*,²¹ the court found a direct correlation between the plaintiff’s business interests and the requested FOIA documents.²² The court determined that Avondale Industries’ use of the requested documents is a “commercial use” because it “furthers the commercial, trade or profit interests” of Avondale Industries.²³ And the “commercial use” allowed NLRB to assess document review fees to Avondale Industries request pursuant to the “commercial use” classification.²⁴ Unlike the requester in *Avondale*, DECAA should not be considered a commercial requester. In this instance, DECAA requests documents for a government-building permit and related emails from a government employee. DECAA intends to use the documents to educate and inform the public, specifically the residents of Dupont Circle. DECAA’s use of the requested records is for the public’s benefit and to promote civic discussion. DECAA’s use of the documents is not to further the “commercial, trade or profit interests” of DECAA. DECAA’s stated use of the documents places them in the “other-use” category of requesters not subject to document review fees. DCRA categorized DECAA as an “other-use” requester. So, under *Avondale*’s framework, DCRA should not assess DECAA or any “other-use” requester document review fees under D.C. FOIA.²⁵ Below, I discuss the federal FOIA regulations that support the unlawfulness of assessing document review fees to “other use” requesters like DECAA.

¹⁹ D.C. Official Code § 2-532(b-1)(2); 5 U.S.C. § 552(a)(4)(A)(ii)(II).

²⁰ D.C. Official Code § 2-532(b-1)(3); 5 U.S.C. § 552(a)(4)(A)(ii)(III); *Harrington v. DOJ*, 2007 U.S. Dist. LEXIS 13230 at *10 n.8 (D.D.C. Feb. 27, 2007).

²¹ *Avondale Indus. v. NLRB*, 1998 U.S. Dist. LEXIS 23945 (E.D. La. Mar. 23, 1998).

²² *Id.* at 13.

²³ *Id.* at 3,14.

²⁴ *Id.* at 15.

²⁵ See also *Schulze v. FBI*, 2015 U.S. Dist. LEXIS 131707, 2015 WL 5732108 at 9, “[A]ny other requests for non-commercial use are subject to both search and duplication fees, but not review fees. § 552(a)(4)(A)(ii)(III).

C. The federal FOIA regulations also expressly provide that it is inappropriate to assess document review fees to requesters like DECAA that fall within the “other-use” category.

The Code of Federal Regulations (“CFR”) implements federal FOIA and provides that agencies may not assess review fees for "other-use" requesters. Still, agencies may charge "other-use" requesters search and duplication fees. The CFR also defines the respective category of fees applicable to each type of requester.

The CFR defines document review as examining a record to determine whether any requested documents are exempt from disclosure.²⁶ Document review involves processing a record for disclosure and doing what is necessary to prepare the records for disclosure, including the process of redacting the record and marking the appropriate exemptions.²⁷ Document search is “looking for and retrieving records responsive to a request and includes page-by-page or line-by-line identification of information within records and the reasonable efforts expended to locate and retrieve information from electronic records.”²⁸ Review fees are part of the process of determining whether any requested documents are exempt from disclosure. Thus, DCRA’s contention “that under D.C. FOIA it was lawful to charge DECAA fees for the review of documents to determine responsiveness, though not for applicability of exemptions,” is contrary to the plain meaning²⁹ and interpretation of the D.C. FOIA and federal FOIA statutes and regulations, and is therefore unlawful.

In this instance, DCRA located 3,543 pages of emails responsive to FOIA request, 2021-FOIA-07389, and 3,458 pages of emails responsive to FOIA request, 2021-FOIA-07393.³⁰ DCRA charged DECAA total document review fees of \$3860.08. Based on the preceding analysis, an agency may only charge FOIA document review fees for a commercial use request.³¹ DECAA is not a commercial use requester and should not have been assessed document review fees for its request by DCRA.³²

Next, I find that DCRA should grant DECAA fee waivers based on the analysis below.

²⁶ 28 CFR § 16.10(b)(7).

²⁷ *Id.*

²⁸ 28 CFR § 16.10(b)(8).

²⁹ “Under FOIA, review costs assessed by agencies shall include only the direct costs incurred during the initial examination of a document to determine whether the documents must be disclosed under FOIA and to withhold any portions exempt from disclosure under FOIA. 5 U.S.C.S. § 552(a)(4)(A)(iv).” [Hall & Assocs. v. EPA, 846 F. Supp. 2d 231, 2012 U.S. Dist. LEXIS 29969, 2012 WL 718504](#) at 12.

³⁰ DCRA’s September 22, 2021, Fee Determination Letters to DECAA.

³¹ OMB Fee Guidelines, 52 Fed. Reg. section 6f and section 7c.

³² D.C. Official Code § 2-532(b-1)(1); 5 U.S.C. § 552(a)(4)(A)(ii)(I); 28 CFR § 16.10(c)(3) See Advisory Opinion [DDOT’s Compliance with D.C. FOIA Cost Provisions](#) – Discussion of Fee Categories; Cost Provisions; Fee Waivers.

D. DECAA’s “other-use” status and intended use of the documents satisfy the D.C. FOIA public interest fee waiver criteria.

DECAA’s D.C. FOIA fee waivers were initially denied by DCRA. Subsequent to the initial denial, DCRA rescinded its fee determination letters denying the request to waive fees. However, we will discuss the initial denials of the fee waivers to provide clarity on the process.

In *Community Legal Services, Inc. v. United States Department of Housing and Urban Development* (“HUD”), the court held that Community Legal Services (“CLS”) satisfied the statutory requirements for a federal FOIA fee waiver.³³ CLS, a non-profit organization, sought a fee waiver seeking documents about a program focused on low-income housing. CLS provided free legal services to low and moderate-income residents, including advising and representing clients on public and subsidized housing matters.

Under the framework outlined in *CLS*, the court considered three elements: (1) whether the subject matter of the request concerns “operations or activities” of the government; (2) whether the requested information is likely to contribute to “public understanding” of those operations or activities; and (3) whether the information is likely to contribute “significantly” to public understanding.³⁴

HUD maintained that *CLS* failed to satisfy the “public understanding” of government operations, an element that must be satisfied for HUD to grant a fee waiver.³⁵ HUD also maintained that *CLS*’s target audience was too small, and *CLS* failed to describe “concrete measures” for disseminating the information.³⁶ The court noted that by its nature, *CLS*’s work is unlikely to reach a larger, general audience because only a segment of the public is interested in its work.³⁷ *CLS* argued that many of Philadelphia’s low and moderate-income families would find the information helpful.³⁸ The court disagreed with HUD by concluding that *CLS* is a respected source of information in its field, that it has multiple means of disseminating information, and the requested information is likely to contribute to public understanding.³⁹ The court held that *CLS* satisfied the requirements for a FOIA fee waiver.

Here, DCRA concludes DECAA failed to meet the first fee waiver requirement for D.C. FOIA requests.⁴⁰ DCRA states that DECAA did not specify how the requested information would benefit the general public in its understanding of government operations.⁴¹ DCRA believes the request for records was specific to residents of ANC 2B, not the general public.⁴²

³³ *Cnty. Legal Servs., v. United States Department HUD*, 405 F.Supp. 2d 553, 2005 U.S. Dist. LEXIS 34203 at 23.

³⁴ *Id.* at 7; (citing *Forest Guardians v. DOI*, 416 F.3d 1173, 2005 U.S. App. LEXIS 14960, 35 ELR 20153 at 1178, 1179, 1180).

³⁵ *Id.* at 8.

³⁶ *Id.*

³⁷ *Id.* at 9.

³⁸ *Id.*

³⁹ *Id.* at 14.

⁴⁰ DCRA’s September 22, 2021, Fee Determination Letters to DECAA.

⁴¹ *Id.*

⁴² *Id.*

However, DECAA is in a similar position as the federal FOIA requester in *CLS*, so the same analysis applies concerning DECAA's qualification for a fee waiver. DECAA stated that it is a non-profit 501(c)(3) organization that promotes open, transparent, inclusive governance by elected officials whose recommendations affect thousands of residents of ANC 2B and other residents of Dupont Circle when it requested a fee waiver. The documents about Building Permit B1907507 and the Zoning Administrator's emails are District government records that will assist the residents of ANC 2B in understanding DCRA's operations and activities. The residents of ANC 2B and the residents of Dupont Circle are a segment of the District interested in DECAA's advocacy work to promote government transparency, similar to the members of the public interested in *CLS*' work. DECAA is a respected source of information in the District, and its website, *keepdupontgreen.org*, disseminates information to a broad audience in and outside the District. A D.C. FOIA request "can qualify for a fee waiver even if the issue is not of interest to the public-at-large. Public understanding is enhanced when information is disclosed to the subset of the public most interested, concerned, or affected by a particular action or matter."⁴³

DECAA qualifies for a fee waiver under the public interest exception because disclosure of the information is likely to contribute significantly to public understanding of operations or activities of DCRA and is not primarily in the commercial interest of DECAA. For these reasons, DCRA should formally grant DECAA fee waivers.

III. CONCLUSION AND RECOMMENDATIONS

D.C. FOIA's regulations require that all agencies, offices, departments, and all persons requesting records under the Act, follow its rules and procedures.⁴⁴ I conclude that DCRA did not adhere to D.C. FOIA or its regulations and should not have assessed review fees for DECAA's D.C. FOIA requests.

While DCRA's placement of DECAA was in the proper fee category, DCRA's assessment of document review fees to an "other-use" requester were unlawful. This is because, under D.C. FOIA, an agency may only assess "other-use" requesters search and duplication fees. In this instance, DCRA should waive all fees and grant DECAA's fee waiver requests. As detailed above, I find that DCRA's actions with DECAA are contrary to D.C. FOIA's allowable cost provisions. The proper action to remedy this situation is to waive DECAA's fees in writing by granting DECAA's requests for fee waivers.

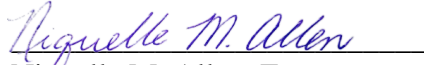
To properly implement D.C. FOIA, I recommend that DCRA revise its policies and practices to specify how it will assess D.C. FOIA fees and determine fee waivers. Adding information to DCRA's FOIA page on response time, fee assessments, requester categories, and commonly used exemptions will significantly benefit the public.⁴⁵

⁴³ *Cnty. Legal Servs.*, at 556 (quoting 32 Cong. Rec. S14,270-01(Sept. 30, 1986)).

⁴⁴ 1 DCMR § 400.1.

⁴⁵ DCRA's FOIA fee page is here <https://dcra.dc.gov/page/foia-fees>

Sincerely,



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