



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



May 20, 2022

**VIA ELECTRONIC MAIL**

[REDACTED]  
Dupont East Civic Action Association

[REDACTED]  
[REDACTED]  
[REDACTED]@gmail.com

**RE: DDOT's Compliance with District FOIA  
#OOG-2022-002\_AO**

Dear [REDACTED]:

This correspondence responds to your January 20, 2022, complaint (“Complaint”), on behalf of the Dupont East Civic Action Association (“DECAA”), requesting an advisory opinion from the Office of Open Government, Board of Ethics and Government Accountability (“OOG”) regarding whether the District of Columbia Department of Transportation’s (“DDOT”) policy of charging document review fees to Freedom of Information Act (“FOIA”) requesters, such as DECAA, is permissible under the District of Columbia Freedom of Information Act of 1976<sup>1</sup> (“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.”<sup>2</sup> 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 determined that under D.C. FOIA, DECAA is within the category of requesters for which an agency may not charge document review fees. DECAA’s use of the requested records is not for commercial use or on behalf of an educational or a non-commercial scientific institution for scholarly or scientific research, or a representative of the news media; therefore, DDOT may only assess DECAA “reasonable standard charges for document search and duplication.”<sup>3</sup> Therefore, DDOT’s assessment of document review fees to DECAA violated D.C. FOIA’s allowable cost provisions. The analysis below supports my findings.

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<sup>1</sup> D.C. Official Code § 2-531 *et. seq.*

<sup>2</sup> D.C. Official Code § 2-531.

<sup>3</sup> D.C. Official Code § 2-532(b-1)).

## I. BACKGROUND

DECAA is a civic organization registered under section 501(c)(3) of the Internal Revenue Code as a non-profit organization.<sup>4</sup> 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.<sup>5</sup> On August 19, 2021, DECAA submitted four D.C. FOIA requests to DDOT via the District of Columbia Freedom of Information Act Public Access Portal (“PAL”). DECAA described its requester status, use of the documents, and requested public interest fee waivers in each D.C. FOIA request submission.

DECAA’s Complaint alleges that DDOT charges non-commercial requesters document review fees in violation of D.C. FOIA. The Complaint focused on two of the four D.C. FOIA requests, 2021-FOIA-07488 and 2021-FOIA-07495. These two requests sought DDOT’s records regarding Protected Bike Lanes, the Americans with Disabilities Act (“ADA”), and specific email accounts that mention or refer to the terms outlined in the requests.<sup>6</sup>

The Complaint states that in several conversations, DDOT told DECAA that it has the authority to charge fees for document review and redaction under D.C. FOIA unless the requester is a member of the news media.<sup>7</sup> In its January 4, 2022, letter to DECAA, cited in the Complaint, DDOT addressed the two requests that are the subject of the Complaint and a third D.C. FOIA request<sup>8</sup> it submitted. DDOT provided responsive records related to the third request and explained the processing costs resulted in “total search and review fees [of] \$832.00,” which DDOT “waived as a courtesy.” In that same letter, DDOT stated that the fees would “not be waived for review” of the two D.C. FOIA requests that are the subject of the Complaint.

On January 27, 2022, OOG’s legal staff and I, met with DDOT representatives to discuss the Complaint. As customary, OOG provided an opportunity for DDOT to respond to the

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<sup>4</sup> Tax Exempt Organization Search, at [apps.irs.gov/app/eos](https://apps.irs.gov/app/eos).

<sup>5</sup> Keep Dupont Green, at [keepdupontgreen.org](https://keepdupontgreen.org).

<sup>6</sup> **2021-FOIA-07488** - One copy of all records, letters, public comments, reviews of public comments, studies, plans, surveys, data, and/or emails concerning the establishment or possible establishment of the following: Handicapped accessible parking spaces on either 9<sup>th</sup> Street, NW or 17<sup>th</sup> Street, NW; Handicapped accessible PUDOs on either 9<sup>th</sup> Street, NW or 17<sup>th</sup> Street, NW; Handicapped accessible parking spaces along any cycle track or Protected Bike Lane (PBL) in Washington, DC; and/or, Handicapped accessible PUDOs along any cycle track or Protected Bike Lane (PBL) in Washington, DC. (Date Range for Record Search: From 01/01/2017 to 08/19/2021); **2021-FOIA-07495** - All emails to or from any of the following email accounts: kimberly.vacca@dc.gov; anna.chamberlin@dc.gov; regina.arlotto@dc.gov; william.handsfield2@dc.gov to anyone (whether as sender, receiver, cc or bcc) that mention or refer to the following: 17<sup>th</sup> Street, NW; Bike lane(s) on 17<sup>th</sup> Street, NW; Handicapped accessible parking spaces on 17<sup>th</sup> Street, NW; Handicapped accessible PUDOs on 17<sup>th</sup> Street, NW; and/or, The Americans with Disabilities Act. (Date Range for Record Search: From 01/01/2020 to 08/19/2021). Request descriptions were obtained from PAL.

<sup>7</sup> Complaint at 3.

<sup>8</sup> **2021-FOIA-07487** - All emails to or from any of the following email accounts: Everett.Lott@dc.gov; jeff.marootian@dc.gov; Andrew.Defrank@dc.gov; Laura.MacNeil@dc.gov; mike.goodno@dc.gov; Anovia.daniels@dc.gov; ddot.ada@dc.gov; cesar.barreto@dc.gov; matthew.marcou@dc.gov; Kenny.Marable@dc.gov; jim.sebastian@dc.gov; george.branyan@dc.gov to anyone (whether as sender, receiver, cc or bcc) that mention or refer to the following: 17<sup>th</sup> Street, NW; Bike lane(s) on 17<sup>th</sup> Street, NW; Handicapped accessible parking spaces on 17<sup>th</sup> Street, NW; and/or, The Americans with Disabilities Act. (Date Range for Record Search: From 01/01/2020 to 08/19/2021).

Complaint in writing. On February 4, 2022, DDOT submitted a written response to the Complaint to OOG that addressed DECAA’s four D.C. FOIA requests. DDOT admitted that it informed DECAA that “fees may be charged for the time expended for review and redaction of email documents.” However, DDOT concluded that “FOIA review fees should not be applied to requests submitted on behalf of civic organizations.” Concerning DECAA’s requests, DDOT committed to monitoring the time expended to review responsive documents and agreed that it would not charge fees for the four D.C. FOIA requests submitted by DECAA. DDOT stated that they will continue to process the FOIA requests on a rolling basis throughout the review process and will keep DECAA apprised of their efforts.

In its January 4, 2022, letter to DECAA, DDOT stated it decided to waive document search and review fees of records responsive to DECAA’s third request. Notwithstanding DDOT’s decisions, this advisory opinion addresses the issue below of whether DDOT’s initial decision to charge document review fees for processing DECAA’s first two requests was permissible under D.C. FOIA.

## **II. DISCUSSION**

Under D.C. FOIA, a public body “may establish and collect fees not to exceed the actual cost of searching for, reviewing, redacting, and making copies of records.”<sup>9</sup> The statute also states that the public body may provide the requested documents without charge or at a reduced charge where a public body “determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.”<sup>10</sup> Any fee schedule adopted by a public body must consider the type of requestor seeking the records and the purpose of the request, specifically whether the requests are sought for commercial use.<sup>11</sup>

### **A. Determining Requester Fee Categories and Cost Provisions Under D.C. FOIA and Federal FOIA.**

In 2004, D.C. FOIA was amended to conform its document fee costs with the federal Freedom of Information Act (“federal FOIA”).<sup>12</sup> Therefore, in assessing whether DDOT’s decision to charge DECAA review fees adhered to D.C. FOIA, we may also consider federal case law in construing whether it was lawful since the two statutes are identical.<sup>13</sup>

Under D.C. FOIA and federal FOIA, agencies must first determine a requester’s fee category to ascertain fees that agencies may charge to process requests. Requesters fall into one of three categories based upon the intended use of the records. The *first* category is commercial use. Fees for commercial use may include reasonable charges for document search, duplication, and review.<sup>14</sup> The *second* category is for non-commercial use. These include requests made by

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<sup>9</sup> D.C. Official Code § 2-532(b).

<sup>10</sup> *Id.*

<sup>11</sup> D.C. Official Code § 2-532(b-1)(1) to (3).

<sup>12</sup> 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).

<sup>13</sup> 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).

<sup>14</sup> D.C. Official Code § 2-532(b-1)(1); 5 U.S.C. § 552(a)(4)(A)(ii)(I).

educational institutions, non-commercial scientific institutions, and representatives of the news media. Agencies may charge these requesters document duplication costs.<sup>15</sup> The *third* category is for requests not described in the *first* and *second* categories. The *third* category includes “documents that are not sought for scholarly or scientific purposes by an educational or non-commercial entity, are not sought by a media representative, and are not sought for a commercial use. Requests falling within the *third* category are limited to duplication and search costs.”<sup>16</sup> DECAA falls within the *third* category of requesters because of DECAA’s non-profit status and the organization’s intended use of the documents. Additionally, the requested documents will benefit the public and facilitate government oversight and transparency.

Both D.C. and federal FOIA statutes explain the types of fees that are permissible given the category of the requestor.<sup>17</sup> Case law also explains document use and requester categories. In *Avondale Industries, Inc. v. National Labor Relations Board*, the court provided that the types of fees to be charged differ according to the requester's use of the documents and the requester's status.<sup>18</sup> The *Avondale* court held that if the documents are not sought for commercial use but instead for scholarly or scientific purposes by an educational or non-commercial entity, or if the requester is a representative of the media, then fees are limited to duplication costs.<sup>19</sup> The court also held that if the documents are not sought for scholarly or scientific purposes, are not sought by a media representative, and are not sought for commercial use, then fees are limited to duplication and search costs.<sup>20</sup> The court further held that if the documents requested are sought for commercial use, then fees are limited to duplication, search, and review costs.<sup>21</sup>

Under the framework set forth in this case, the *Avondale* court determined the requester was a “commercial user” because the requester, Avondale Industries, sought disclosure of documents to contest union election results and/or for defending itself in unfair trade practice proceedings.<sup>22</sup> Avondale Industries’ use of the documents was to prevent the union from becoming the sole collective bargaining unit for Avondale Industries’ employees.<sup>23</sup> The court found a direct correlation between the plaintiff’s business interests and the documents requested.<sup>24</sup> Therefore, 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.<sup>25</sup> And the “commercial use” allowed NLRB to assess fees against Avondale Industries pursuant to the “commercial use” classification.<sup>26</sup>

Unlike the requester in *Avondale*, DECAA should not be considered a commercial requester. In this instance, DECAA requested information that would be used to inform the public,

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<sup>15</sup> D.C. Official Code § 2-532(b-1)(2); 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>16</sup> 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, 2007 WL 625853; *Nat'l Sec. Counselors v. CIA*, 931 F. Supp. 2d 77, 85 n.4 (D.D.C. 2013).

<sup>17</sup> D.C. Official Code § 2-532(b-1)(1) to (3); 5 U.S.C. § 552(a)(4)(A)(ii)(I) to (III).

<sup>18</sup> *Avondale Indus v. NLRB*, 1998 U.S. Dist. LEXIS 23945 at \*12 (E.D. La. Mar. 23, 1998).

<sup>19</sup> *Id.* at 12.

<sup>20</sup> *Id.* at 12.

<sup>21</sup> *Id.* at 14.

<sup>22</sup> *Id.* at 15.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

specifically, the residents of Dupont Circle. The documents requested concerned government-related issues. DECAA requested DDOT's records concerning parking, homelessness, transportation, accessibility for individuals with disabilities, and other issues focused on public oversight and transparency. DECAA's use of the requested documents is intended for the public's benefit and to promote civic discussion. DDOT categorized DECAA as a commercial user and charged DECAA review fees, but the use of the documents requested does not further the "commercial, trade or profit interests" of DECAA. DECAA's stated use of the documents places them in the *third* category of requesters where review fees should not be charged to requesters. So, under *Avondale's* framework, DDOT should not have charged DECAA fees for its D.C. FOIA request.

**B. DECAA's Organizational Status and Intended Use of the Record Qualifies for a Fee Waiver.**

Based on the rule established in *Avondale* above, DDOT should have categorized DECAA as a non-commercial user that is entitled to a FOIA fee waiver or a reduction of fees. The reason for this categorization is due to DECAA's intended use of the requested records and DECAA's requester status. Each of DECAA's D.C. FOIA requests to DDOT included fee waiver requests that describe DECAA as a non-profit organization seeking records that will be used to primarily benefit the public and facilitate public oversight of the government, especially concerning issues of transportation, parking, and accessibility under the ADA in the greater Dupont Circle area.

The *Avondale* requester's interest in seeking documents was a direct correlation with its business interest. The *Avondale* requester's purpose was to use the documents to defend itself in unfair trade practice proceedings.<sup>27</sup> Therefore, the court determined *Avondale Industries'* use of the requested documents to be "commercial use."<sup>28</sup> DECAA's requests for documents does not further a commercial or profitable interest for the non-profit organization. DECAA seeks disclosure of the documents to keep the public informed of government activity in the Dupont Circle area and DECAA intends to further citizen oversight of government operations. DECAA is a non-profit civic association whose use for the requested documents are not described in the *first* and *second* category of requesters, which allows for DECAA's proper classification in the third request category. In this instance, DECAA qualifies for a fee waiver based on its requester status and intended use of the documents.

Although the Complaint does not ask OOG to address DDOT's initial decision to waive fees for some, but not all of DECAA's requests, District agencies have the authority to "waive all or part of any fee when it is deemed to be either in the agency's interest or the interest of the public."<sup>29</sup> The determination on whether to waive fees, however, may be made only after an agency has properly determined the types of fees it may charge a requestor under D.C. FOIA.

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> 1 DCMR § 408.9.

Congress amended the federal FOIA to “remove the roadblocks and technicalities which have been used by various federal agencies to deny waivers or reductions of fees under FOIA.”<sup>30</sup> Legislative history “demonstrates that Congress intended independent researchers, journalists, and public interest watchdog groups to have inexpensive access to government records in order to provide essential public disclosure.<sup>31</sup> Moreover, in the 1986 amendments to federal FOIA, Congress ensured that when such requesters demonstrated a minimal showing of their legitimate intention to use the requested information in a way that contributes to public understanding of the operations of government agencies, no fee attaches to their request.<sup>32</sup>

### C. DDOT Should Grant DECAA’s Request for a Fee Waiver.

When a fee waiver is requested, two requirements must be met before fees may be waived or reduced. A FOIA requester must (1) show that disclosure of the information is likely to contribute significantly to public understanding of the operations or activities of the government and (2) is not primarily in the commercial interest of the requester.<sup>33</sup> If both requirements are satisfied, agencies are encouraged to grant a FOIA requester a fee waiver or a reduction of their fees.

DECAA provided statements<sup>34</sup> requesting fee waivers for each request submitted to DDOT on August 19, 2021. The statements discussed DECAA’s non-profit status and the organization’s purpose of promoting civic discussion and the promotion of open and transparent governance by elected officials. The fee waivers state, “the release of records DECAA seeks primarily benefits the general public and facilitates public oversight of our government, especially with respect to issues of transportation, parking and accessibility under the ADA in the greater Dupont Circle area.<sup>35</sup> DECAA requested that all fees be waived and stated that it was willing to pay up to \$100.00, per request, if fees were assessed.<sup>36</sup> DDOT notified DECAA on January 4, 2022, that “fees will not be waived for review of the remaining request results, 2021-FOIA-07488 and 2021-FOIA-07495” but DDOT did not provide justifications for the denials. DDOT did acknowledge in the February 2, 2022, letter to OOG that “no fees will be charged for these four FOIA requests.”

Fee waiver requests should be analyzed on a case-by-case basis. Agencies should take into consideration the following factors when assessing whether to grant or deny a fee waiver request: (1) the subject matter of the request; (2) the informative value of the information to be disclosed; (3) the contribution to an understanding of the subject by the public likely to result from disclosure; and (4) the significance of the contribution to public understanding.<sup>37</sup> DECAA’s fee waiver requests demonstrate that its request for records is in the public interest. The requested records concern operations or activities of DDOT; (2) the requested information specifically identified important government issues concerning the disabled community, transportation, parking spaces,

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<sup>30</sup> *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. S16496 (October 15, 1986)).

<sup>31</sup> *Inst. for Wildlife Prot. v. United States Fish & Wildlife Serv.*, 290 F. Supp. 2d 1226, 1232 (D. OR. 2003).

<sup>32</sup> *Id.*

<sup>33</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>34</sup> 1 DCMR § 408.10.

<sup>35</sup> Information obtained for PAL.

<sup>36</sup> *Id.*

<sup>37</sup> *Inst. for Wildlife Prot.* at 1229.

and bike lanes; (3) the disclosure of the information will allow DECAA to meaningfully inform the thousands of residents of ANC 2B and others community members who reside within the boundaries of ANC 2B regarding the operations and activities of DDOT; and (4) the requested information will contribute “significantly” to public understanding of DDOT’s operations and current activities.

In this instance, 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 DDOT and is not primarily in the commercial interest of DECAA.” DECAA is a non-profit civic association whose mission is to inform the community of the activities of the government. And DECAA describes how the requested information would be used to contribute to the general public’s understanding. To comply with D.C. FOIA, DDOT’s responses to DECAA’s D.C. FOIA requests that are the subject of this Complaint, should include a formal statement to the requester that DDOT is granting DECAA’s fee waiver request.

DDOT may find it helpful to publish D.C. FOIA guidelines on DDOT’s webpage to educate and inform FOIA requesters. The guidance would give FOIA requesters access to DDOT’s D.C. FOIA policies and procedures which would help alleviate requester confusion and allow for clear expectations when requests are submitted. DDOT should also publish criteria that address D.C. FOIA fees, requester fee categories, and factors for fee waiver determinations.<sup>38</sup> A clear explanation of DDOT’s application of D.C. FOIA would benefit the public because it would provide a clear statement of the rules and increase the public’s understanding of the D.C. FOIA process.

### **III. CONCLUSION**

D.C. FOIA regulations state that its rules and procedures are to be followed by all agencies, offices, departments, and all persons requesting records pursuant to the Act.<sup>39</sup> I conclude that in this instance, DDOT did not adhere to D.C. FOIA or its regulations and should not have assessed review fees for DECAA’s FOIA requests.

While DDOT’s initial determination mistakenly placed DECAA in an incorrect requestor fee category, DDOT has subsequently acknowledged that the requests at issue from DECAA fall within the *third* category of requests where review fees should not be assessed. The fees charged to DECAA should have been waived. As detailed above, I find that DDOT’s actions with DECAA violated the allowable costs under D.C. FOIA. 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 DDOT revise its procedures and guidelines on D.C. FOIA Fees and Fee Waiver determinations and publish the agency’s revised policies on the Open Government and FOIA page of its website.<sup>40</sup> For example, DDOT should publish information describing DDOT’s guidelines for determining when FOIA fees should be

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<sup>38</sup> 5 U.S.C. § 552 (a)(4)(A)(i).

<sup>39</sup> 1 DCMR § 400.1.

<sup>40</sup> These items may be assessed under the “About” tab on DDOT’s website here <https://ddot.dc.gov/>

waived or reduced. Publishing FOIA guidance may also serve as a reference point for links to the D.C. FOIA statute, regulations, policies, and other helpful resources for FOIA requesters.

Sincerely,



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Niquelle M. Allen, Esq.  
Director of Open Government  
Board of Ethics and Government Accountability

cc: Karen R. Calmeise, Hearings/FOIA Officer, DDOT