



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410-0500

OFFICE OF GENERAL COUNSEL

New FOIA Regulations

On March 15, 2007, the Department published in the Federal Register ([72 Fed. Reg. 12540](#)) changes to its FOIA regulations at 24 C.F.R. part 15. The changes to the regulations are discussed in detail in the preambles to both this final rule, and the proposed rule published on October 5, 2006 ([71 Fed. Reg. 58994](#)). The regulation changes accomplish the objectives identified in the Federal Register Notices and described briefly below.

The changes incorporate several necessary technical corrections to the regulations, as well as conforming corrections to reflect the realignment of FOIA processing functions within HUD Headquarters from the Office of General Counsel to the Office of Administration, Office of the Executive Secretariat. The new regulations also modify HUD's policy with respect to the use of FOIA contractors to make it clear that when HUD contracts with third parties to provide FOIA processing services, the cost to requesters will be no greater than if HUD processes the records itself. Finally, the new regulations expand the number of factors to be considered in a fee waiver request to more closely follow Department of Justice guidelines and case law developments.

Significantly, the new regulation revises the FOIA fee schedule. Specific hourly rates for search and review of both professional and clerical categories have been removed, and the charge for duplication has been increased from \$0.15 to \$0.18 per page. In place of the old hourly rates is the following language: "Actual salary rate of employee involved, plus 16 percent of salary rate." This language is adopted for consistency with Office of Management and Budget (OMB) Fee Guidelines issued in 1987¹, directing that "[a]gencies should charge fees that recoup the full allowable direct costs they incur" and defining "direct costs" as provided below:

'direct costs' means those expenditures which an agency actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) . . . (52 Fed. Reg. 10012, 100017-10018, March 27, 1987).

The regulation change allows HUD to update its FOIA fees on an annual basis (without time consuming annual changes to the regulations) to more accurately reflect the hourly charges HUD actually incurs to comply with the FOIA, in order to recoup the full allowable direct costs incurred in responding to FOIA requests, as required by the OMB Fee Guidelines. The previous rates (\$16.35/hour for clerical time and \$37.00/hour for professional time, and duplication charges of \$0.15/page) were implemented in 1995 and do not reflect costs in today's dollars, including the current salaries of HUD employees.

¹ The agency is required to follow OMB Guidelines. 5 U.S.C. § 552(a)(4)(A)(i) states in part that "each agency shall promulgate regulations . . . specifying the schedule of fees applicable to the processing of requests . . . Such schedule shall conform to the guidelines which shall be promulgated . . . by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies."

Program offices will merely have to provide the GS grade and step of each employee involved in responding to a FOIA request in order for FOIA personnel to determine the appropriate hourly rate to charge a requester for search and review, along with the estimated number of hours. FOIA liaisons and processors can obtain current General Schedule salary tables on OPM's website at <http://www.opm.gov/oca/07tables/indexGS.asp>.

The FOIA Division of the Office of General Counsel has been advised that the existing ACORN system requires fees to be entered into the system based on the old hourly rates and duplication costs that cannot be altered by ACORN users. It has also been brought to our attention that the \$25.00 per minute charge for central processing unit (CPU) time still remains in the ACORN system despite that rate having been eliminated by regulation change dated January 22, 2001 (66 Fed. Reg. 6964); the regulation now provides for the "direct cost of conducting the search" for "computer run time". 24 C.F.R. § 15.110(c)(6) (2007). We have requested the FOIA Office in the Office of Executive Secretariat to make the required necessary changes to the ACORN system to properly allow for the input of the new FOIA fees by users, or to allow for the manual calculation of fees, and also for elimination of the \$25.00 per minute charge for CPU time. Until such time as these changes are effected, fees for FOIA processing will have to be computed manually.

If you have any questions concerning this memorandum, please contact Attorney Michael Montagne at (202) 402-5550.