M E M O R A N D U M

TO: T. Jeremy Gunn
David Marwell

FROM: Laura Denk

DATE: June 16, 1995

RE: Dr. Nelson's Proposed Edits to Freedom of Information Act Regulations

FILE: 3.2.4

The following notes discuss Dr. Nelson's proposed changes to the Freedom of Information Act regulations that we sent to the members of the Review Board yesterday. I have incorporated all of Dr. Nelson's changes, except those listed below.

§ 1410.30 Request for waiver or reduction of fees.

In the draft, § 1410.30 covers only those instances in which a requester submits a written request to the Designated FOIA Officer for a waiver or reduction of fees. Subsection (a) outlines the general procedure that the Review Board will follow in accepting requests for fee waivers or reductions. Subsection (b) sets out the information that the requester must give in order to be considered for a fee waiver or reduction. Subsection (c) states the standard that the Review Board will apply in making a determination on fee waivers or reductions. Subsection (d) lists factors that the Review Board must consider in applying the standard stated in subsection (c). Thus, all of § 1410.30 covers the relatively narrow subject that is referenced in the heading.

Dr. Nelson suggests that we should begin § 1410.30 with the statement (made later in the regulations) that "There shall be no charge for document review time and the first 100 pages of reproduction and the first two hours of search time will be furnished without charge."

For the following reasons, I advise that we cannot legally make the changes Dr. Nelson suggests:

(1) The FOIA and the OMB guidelines interpreting portions of the FOIA do not grant Government agencies the discretion to provide the public with Federal Government

resources (staff labor and duplication services) at reduced or no cost.[1]

(2) The FOIA and the OMB guidelines require Government agencies to recover their full allowable direct costs.
   (a) Duplication Services: *Only non-commercial requesters* are entitled to the first 100 pages of duplication at no charge.
   (b) Search time: *Only those requesters who are representatives of the news media or use the documents for scholarly or scientific research use* are entitled to free unlimited search time. *All non-commercial requesters* are entitled to two free hours of search time.
   (c) Review time: *All non-commercial requesters* are entitled to free unlimited review time.

(3) The section involving 100 free pages of duplication and free search time has nothing to do with "request[s] for waiver or reduction of fees."

§ 1410.35(b)(1) Definitions for § 1410.35(b) (Fees for records not available through the Public Reading Room (FOIA requests))

In the draft, § 1410.35(b)(1) defines the following terms: commercial use, direct costs, educational institution, noncommercial scientific institution, and representative of the news media. Dr. Nelson suggests that we eliminate the definitional section entirely because such definitions cause confusion.

Unfortunately, the confusion derives from our statutory obligations, which require us to create three separate categories of requesters, as we do in §§ 1410.35(b)(2)(i), (ii), and (iii), we categorize requesters according to their status as defined in § 1410.35(b)(1).

[1] 5 U.S.C. § 552(4)(A)(i); 52 Fed. Reg. 10012 (1987) ("Agencies should charge fees that recoup the full allowable direct costs they incur" in order to counteract "substantial loss of revenues to the Treasury." *Id.* at 10017-10018.)

Clearly, the easiest way to administer the FOIA would be to have a single set of rules that applies to all requesters. Because we must provide unlimited free search time and review time to certain requesters, the only way to have a single rule would be to only charge requesters for duplication costs. Unfortunately, as I discussed above, the applicable statute and guidelines do not grant Government agencies the discretion to provide unlimited free Government staff time members of the public. The OMB guidelines evidence an awareness that requesters should pay the cost of services which are for their special use so that such costs are not borne by the general taxpaying public.[2]

Thus, given that we cannot eliminate the distinctions among requesters, it seems to make sense to go ahead and define terms such as commercial use.

However, one alternative is that we could define terms such as "commercial use" by incorporating by reference the sections of the OMB guidelines that defines those same terms. The unfortunate result of incorporating another regulation by reference into our regulation is that our regulation then becomes even more "unfriendly" (because a member of the public reading our regulation must look up the OMB guideline to fully understand our categorization of requesters.)

§ 1410.35(b)(8)(iii) and (iv) Fee Schedule: Fees for Search and Review

With reference to the direct costs for staff labor listed in § 1410.35(b)(8)(iii) and (iv) of the draft regulation, Dr. Nelson questioned why search time and review time by managerial staff would cost requesters more than double the amount that search time and review time by professional staff would cost.

As you know, the OMB guidelines give a very specific formula that agencies must use in figuring the amount to charge requesters for staff labor.[3] To simplify billing, the OMB guidelines allows agencies to figure an average rate for each class of employees who might search or review. The amounts listed in the Review Board's proposed regulation were figured by averaging the hourly rate of pay for employees in each class (e.g. administrative, analysis and review, and senior staff) and adding 16% of those amounts to the basic hourly pay rates. Again, the statute and the guidelines do not afford the Review Board the discretion to reduce these costs.

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[2] 52 Fed. Reg. 10012, 10017 (1987).

[3] The guideline states "Employee salaries are clearly a direct cost of providing FOIA services." 52 Fed. Reg. 10012, 10013 (1987). Section 6(c) defines "salary" as the "basic rate of pay for the employee plus 16% of that rate to cover benefits. *Id.* at 10017.

§ 1410.40(c)(2) Processing FOIA requests: Consulting with another agency.

Section 1410.40(c)(2) covers those instances in which the Review Board has created a document in conjunction with another agency and cannot make a decision on the document until it consults with the other agency.

Dr. Nelson's notes in the margin recommend that we simplify the process by referring records that originated in another agency to that agency for processing. As you know, the proposed regulation states that the Review Board will be doing that for documents that originate in other agencies. This section would only apply to those documents that the Review Board may create *in conjunction with* another agency.

Dr. Nelson advises that we not get into the agency "equity" business, as it is a "swamp." As I am eager to avoid swamps, I would be happy to incorporate any suggestions that directly address the question of one document that contains information from both the Review Board and another agency.