

May 28, 2016

Karen V. Gregory  
Secretary  
Federal Maritime Commission  
800 North Capitol Street NW  
Washington, DC 20573-0001

**Docket No. 16-06, Comments on “Update of User Fees”**

These comments are hereby submitted in response to the proposed rule issued on May 27, 2016.

**1) Rule §503.50(c)(1)(ii) should be eliminated rather than modified as in the Proposed Rule, to avoid ambiguity, improve clarity and conform to typical federal agency practice.**

Proposed Rule §503.50(c)(1)(ii), though it is a simple modification of the existing rule, nevertheless contains some ambiguity. It is ambiguous because it could be read that there will be no charge unless the amount of search is at least \$27, or else (as was presumably intended) it could be read that all requests shall be charged at least \$27 of search fees, which would be a more straightforward description.

This ambiguity in the rules is further exacerbated by the fact that under the statute, two hours of search time that is provided at no charge to noncommercial requesters in the fee category “all other requesters”, and also the de minimis fee provisions of existing rule §503.50(b)(2)(v). In short, its removal offers the opportunity for simplification and improved clarity in the rules, and conformance with typical agency practice.

Furthermore, I am unacquainted with any other federal agency that institutes a minimum search charge of one hour for FOIA requests. Better conformance with agency typical practice would be to eliminate this provision, as well as to reduce ambiguity regarding the de minimis fees provision in existing rule §503.50(b)(2)(v), and to adhere to the policy objectives of that rule, which is derived from the FOIA statute: No FOIA fee may be charged by an agency if the government's cost of collecting and processing the fee is likely to equal or exceed the amount of the fee itself. See 5 U.S.C. § 552(a)(4)(A)(iv)(I); see also Uniform Freedom of Information Act Fee Schedule and Guidelines [hereinafter OMB Fee Guidelines], 52 Fed. Reg. 10,012, 10,018 (Mar. 27, 1987).

**2) Rule Section 503.50(c)(3)(iii) imposing a minimum copying charge should be deleted for the same reasons as described above.**

The minimum charge for copying appears to be at odds with the policy objectives of the de minimis fees rule, and eliminating this provision would improve clarity, reduce ambiguity and likely impose less cost on both the agency and the requesters.

Furthermore, to the best of my knowledge, no other federal agency seems to have established a minimum duplication charge for FOIA requests. Eliminating this provision would improve conformance with agency typical practice.

**3) Certain portions of proposed Section 503.50(c)(3)(i) and (ii) should not be adopted as they do not reflect the statutory provisions nor the OMB FOIA Fee Guidelines.**

The current FOIA page duplication fees are 5 cents per page (one side) for duplication performed by the requesting party (c)(3)(i), and 5 cents per page plus an hourly charge if performed by Commission personnel (c)(3)(ii). The proposed FOIA page duplication fees raise these fees by 100%, to 10 cents per page.

According to the OMB Fee Guidelines at 10,017-18 (see supra), duplication charges represent the reasonable "direct costs" of making copies of documents.

In recent years, the national and governmental cost of xerographic duplication exclusive of staff time has been decreasing, not increasing. Typical contract costs to support a copy machine in an office usually amounts to a fraction of a penny per page. Taking into consideration paper and toner and electricity, the cost is below two cents per page. The Commission likely has a contract with a vendor that provides copying machines. The Commission's photoduplication contracts might very well show the cost exclusive of staff time of closer to one cent per page than ten cents per page.

The proposed rulemaking provides no evidence that any specific inquiry was made into these particular direct costs. In addition, it should be noted that the notice of rulemaking does not clearly signal that a doubling of costs is being imposed or explain the rationale. A 100 percent increase is not adequately represented by its description in the proposed rulemaking as "an upward adjustment".

Therefore, without some examination of these costs, and without some sort of justification, it would be arbitrary and capricious to simply double the duplication fees.

It should be noted that other agencies have raised their per page FOIA duplication fees over the years, but have engaged in that practice by simply stair-stepping upward over time, or comparing with their agency peers rather than actually looking at real costs. The justification relies solely on a canvass of other agencies when the data is actually readily available from one or more current Commission contracts.

In short, the OMB guidelines mandate that costs be based on reasonable direct costs, and so the correct criteria is what are the actual per page duplication costs rather than what other agencies are charging. It would be appropriate to actually look at these direct costs before imposing an arbitrary increase of any magnitude, much less one of \$100%. Short of such examination, leaving the duplication fees at their current levels (apart from the change in the hourly staff rate) seems most appropriate.

The reasoning that contributed to this change is described in the section of the rulemaking labeled: Fee Assessment Methodology, which says that fee adjustments are computed based on methodology established by the Office of Budget and Finance. This Methodology is based on direct and indirect labor costs (emphasis added). This may have contributed to an inappropriate assessment of cost changes for duplication costs because the OMB Fee Guidelines (applicable to all federal agencies) specifically dictate that FOIA duplication costs, for example, be assessed only for direct costs and not for indirect costs. The “multiplier” that erroneously incorporated indirect costs may have mistakenly been applied to this particular adjustment.

**4) The duplication fees in Subpart H at §503.69(b)(1) should be kept the same for the reasons described above.**

As described above, as there is no real rationale provided for the change in duplication fees, and because there is no evidence that there has been any examination of the actual per page direct cost of xerographic duplication at the commission as described in its photoduplication machine contracts, the proposed change in §503.69(b)(1) should be left at its current level of five cents per page.

**5) The underlying basis for the rule change in §515.34 is unclear; if the RPI is available online as stated, it is not apparent where it is located.**

The rulemaking describing the change to proposed rule Section 515.34 (Regulated Persons Index) seems unclear. It reads: The Commission proposes repealing the user fee for obtaining a copy of the Regulated Persons Index given that it is currently available on the Commission's Web site. The proposed rule adds the

following sentence: “The database is available at no charge on the Commission’s Web site at [www.fmc.gov](http://www.fmc.gov)”.

However, on the Commission’s website, there is no evidence of the RPI available from the menu. Furthermore, the applicable section says this:

[http://www.fmc.gov/resources/regulated\\_persons\\_index.aspx](http://www.fmc.gov/resources/regulated_persons_index.aspx)

*Regulated Persons Index*

*The Regulated Persons Index (RPI) contains the names, addresses and phone/fax numbers of ocean carriers, ocean transportation intermediaries (freight forwarders and NVOCCs), conferences and marine terminal operators regulated by the Federal Maritime Commission. RPI data is collected from documentation filed with the Commission. Portions of the RPI are designated for internal and administrative use only and are generally not available. The remainder of the RPI contains public information and is sold on diskette in either dBaseIII or ASCII format. In addition, the RPI is now available in Excel and Access forms and on CD as well as diskette.*

Thank you for reviewing these comments.

Respectfully,

Michael Ravnitzky  
1905 August Drive  
Silver Spring, MD 20902