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Open Source America's Operating System

"It's Not Just A Good Idea—It's The Law!"

May 21, 2009

The Honorable James C. Duff, Director
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, DC 20544

Dear Mr. Duff:

This is a request under the Freedom of Information Act, [5 U.S.C. 552](#). While the Administrative Office of the United States Courts is not directly subject to the requirements of the Freedom of Information Act, other exempt agencies uniformly subscribe to the "intent and spirit" of the FOIA and respond in a routine fashion to requests for information.

For example, while the Smithsonian Institution is exempt from the FOIA. *Dong v. Smithsonian Institution*, [125 F.3d 877](#), D.C. Cir. 1997. However, the Regents have promulgated a formal procedure including an appeals mechanism. [Smithsonian Directive 807](#), February 4, 2009. Likewise, the Government Accountability Office has a similar policy: "While GAO is not subject to the Freedom of Information Act, GAO's disclosure policy follows the spirit of the act consistent with its duties and functions and responsibility to the Congress." 4 C.F.R. 81.1. Similar procedures have been defined by organizations such as the Library of Congress. 36 C.F.R. 703.1.

Compliance with the "intent and spirit" of the FOIA is a matter under your discretion as Director if you determine the creation of such procedures are in the "public interest." [28 U.S.C. 604\(f\)](#). A formal process for public records requests is a standard Best Current Practice and I would urge you to adopt such a policy. Even if such a policy is not adopted, you have the authority under Title 28 of the U.S. Code to grant this specific request at your discretion.

Request for Specific Records

I am trying to determine how much money the United States Government is spending on access to federal court documents and other primary legal materials. Specifically, I am requesting copies of:

- Any memoranda or budgetary documents that detail the total amount actually received or the amount forecast to be received from the Executive or Legislative Branches of the United States Government to access the PACER system run by the Administrative Office of the Courts. I am interested in how much was received or was forecast to be received in the period from 2000 to the present, as well as budget items for future fiscal periods.

- Any agreements, contracts, or memoranda of understanding between entities in the Legislative or Executive Branches of the United States Government and the Administrative Office of the Courts governing access to the PACER system by United States Government employees.
- Any contracts, memoranda, or budgetary materials detailing the specific agreements and amount of money spent by or received by the Administrative Office of the Courts with commercial legal information providers such as Thomson WestLaw or the Reed Elsevier LexisNexis service. I am looking for documentation of both your contracts to access the commercial services and your contracts from these commercial services to access your PACER system. In particular, I am interested in any in-kind contributions by either party as well as any restrictions on use of data or other provisions and whether the retail providers are received reduced fees for access to the PACER system.

Request for News Media Fee Status

Public.Resource.Org asks that we not be charged search or review fees for this request because we qualify as a “representative of the news media” pursuant to the FOIA and 28 C.F.R. 16.11(b)(6).

Public.Resource.Org, Inc. is a 501(c)(3) public charity chartered to create public works projects on the Internet with a particular focus on making government information more broadly available without fee to any and all users. Public.Resource.Org has been certified as a “news media” requester for the purposes of obtaining and publishing high-resolution video from the United States Congress Recording Studio and we are engaged in a Joint Venture with the National Technical Information Service (“NTIS”) under Agreement No. NTIS-1832 to assist in more broadly disseminating materials from NTIS onto the Internet. Documents from this current FOIA request will be promptly published, joining over 32.4 million pages of U.S. government documents we have made available on the Internet.

Due to our extensive publication activities, Public.Resource.Org is a “representative of the news media” under the FOIA and agency regulations. As such, this request is subject only to duplication fees after the first 100 pages. However, all duplication fees should be waived, as discussed below, because disclosure of the information requested above is in the public interest.

Request for a Public Interest Fee Waiver

Public.Resource.Org is entitled to a waiver of duplication fees because disclosure of the requested information is in the public interest within the meaning of 5 U.S.C. 552(a)(4)(a)(iii) and 28 C.F.R. 16.11(k). To determine whether a request meets this standard, agencies determine whether “[d]isclosure of the requested information is likely to contribute significantly to public understanding of the operations or activities of the government,” and whether such disclosure “is not primarily in the commercial interest of the requester.” 28 C.F.R. 16.11(k)(i), (ii). This request clearly satisfies these criteria.

First, this request concerns “the operations or activities of the government.” 28 C.F.R. 16.11(k)(2)(i). The agency’s access to legal research materials produced by the government constitutes government operations or activities.

Second, disclosure of the requested information will “contribute to an understanding of government operations or activities.” 28 C.F.R. 16.11(k)(2)(ii) (internal quotation marks

omitted). Public.Resource.Org has requested information that will publicly reveal the nature and contents of the access to primary legal materials.

Third, the requested material will “contribute to public understanding” of limitations of access to legal materials. 28 C.F.R. 16.11(k)(2)(iii) (internal quotation marks omitted). This information will contribute not only to Public.Resource.Org’s understanding of access to primary legal materials by government lawyers, but to the understanding of a broad audience of persons interested in the subject, since Public.Resource.Org will make the records available to the public at no cost.

Fourth, the disclosure will “contribute significantly” to the public’s knowledge and understanding of how much government spends to access public domain materials. 28 C.F.R. 16.11(k)(2)(iv) (internal quotation marks omitted). Disclosure of the requested information will permit the public to access the requested records for free.

Furthermore, a fee waiver is appropriate here because Public.Resource.Org has no commercial interest in the disclosure of the requested records. 28 C.F.R. 16.11(k)(3). Public.Resource.Org is a 501(c)(3) nonprofit organizations and will derive no commercial benefit from the information at issue here.

Thank you for your consideration of this request. If you have any questions or concerns, please do not hesitate to contact me at (707) 827-7290. As the FOIA provides, I will anticipate a determination on this request from your office within 20 working days.

Respectfully yours,

Carl Malamud
President & CEO
Public.Resource.Org

cc: Hon. Senator Joseph I. Lieberman, Chairman
U.S. Senate Committee on Homeland Security and Governmental Affairs

Hon. Congressman Edolphus Towns, Chairman
U.S. House Committee on Oversight and Government Reform