



Fees and Fee Waivers

Introduction

The Freedom of Information Act provides for the charging of fees "applicable to the processing of requests,"¹ and sets limitations and restrictions on the assessment of certain fees.² A separate provision provides for the waiver or reduction of fees if the statutory fee waiver standard is satisfied.³ These provisions had remained largely unchanged since their passage as part of the 1986 FOIA amendments⁴ which established the majority of the present fee-related provisions.

The most recent amendments to the FOIA, enacted as part of the OPEN Government Act of 2007,⁵ which was signed into law on December 31, 2007, changed several FOIA provisions regarding fees. Section 3 of those amendments, Protection of Fee Status for News Media, discussed below, defines the requester subcategory "representative of the news media" as well as defines other fee related terms.⁶ Further, section 6 places restrictions on an agency's ability to collect certain fees if it fails to respond to a FOIA request within the

¹ 5 U.S.C. § 552(a)(4)(A)(i) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) (emphasizing that the Freedom of Information Act reflects a "profound national commitment to ensuring an open Government" and directing agencies to "adopt a presumption in favor of disclosure"); accord Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009), available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>; *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

² 5 U.S.C. § 552(a)(4)(A)(ii), (iv)-(vi), (viii).

³ Id. § 552(a)(4)(A)(iii).

⁴ Freedom of Information Reform Act of 1986, Pub. L. No. 90-570, §§ 1801-04, 100 Stat. 3207.

⁵ Pub. L. No. 110-175, 121 Stat. 2524.

⁶ Id. § 3.

statutory time frame, unless the exceptions to this provision are met.⁷ (For a further discussion of section 6 of the OPEN Government Act, see Procedural Requirements, Time Limits, above.)

Fees

Congress charged OMB with the responsibility of providing a "uniform schedule of fees" for agencies to follow when promulgating their FOIA fee regulations.⁸ OMB did so in its Uniform Freedom of Information Act Fee Schedule and Guidelines [hereinafter OMB Fee Guidelines] issued in March 1987.⁹ Under the FOIA, each agency is required to publish regulations "specifying the schedule of fees" applicable to processing requests and must conform its schedule to the guidelines promulgated by OMB.¹⁰

The following discussion summarizes the FOIA's fee provisions.¹¹ The OMB Fee Guidelines,¹² which provide general principles for how agencies should set fee schedules and make fee determinations, and which include definitions of statutory fee terms, discuss these provisions in greater, authoritative detail. Anyone with a FOIA fee (as opposed to fee waiver) question should consult these guidelines in conjunction with the appropriate agency's FOIA regulations for the records at issue. Agency personnel should attempt to resolve such fee questions by consulting first with their FOIA officers. Whenever fee questions cannot be resolved in that way, agency FOIA officers should direct their questions to OMB's Office of Information and Regulatory Affairs, Information Policy Branch, at (202) 395-6466.

Requester Categories

The FOIA provides for three categories of requesters: commercial use requesters; educational institutions, noncommercial scientific institutions, and representatives of the news media; and finally, all requesters who do not fall within either of the preceding two categories.¹³ An agency's determination of the appropriate category for an individual requester is dependent upon the intended use of the information sought, and also, for some categories,

⁷ Id. § 6; see FOIA Post "OIP Guidance: New Limitations on Assessing Fees" (posted 11/18/08).

⁸ 5 U.S.C. § 552(a)(4)(A)(i) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see Envtl. Prot. Info. Ctr. v. U.S. Forest Serv., 432 F.3d 945, 947 (9th Cir. 2005) ("FOIA calls for the Office of Management and Budget to promulgate [fee] guidelines for agencies to follow.") (citation omitted); Media Access Project v. FCC, 883 F.2d 1063, 1069 (D.C. Cir. 1989) (rejecting plaintiff's claim that OMB's authority is limited to establishing "price list").

⁹ 52 Fed. Reg. 10,012 (Mar. 27, 1987).

¹⁰ 5 U.S.C. § 552(a)(4)(A)(i).

¹¹ See 5 U.S.C. § 552(a)(4)(A)(i)-(ii), (iv)-(vi), (viii).

¹² See 52 Fed. Reg. at 10,012.

¹³ See 5 U.S.C. § 552(a)(4)(A)(ii)(I)-(III) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

on the identity of the requester.¹⁴

The first such category, commercial-use requesters, is defined by the OMB Fee Guidelines as those who seek records for "a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is being made,"¹⁵ which can include furthering those interests through litigation.¹⁶ Designation of a requester as a "commercial-use requester," therefore, will turn on the use to which the requested information would be put, rather than on the identity of the requester.¹⁷ Agencies

¹⁴ See 5 U.S.C. § 552(a)(4)(A)(ii); see also Uniform Freedom of Information Act Fee Schedule and Guidelines [hereinafter OMB Fee Guidelines], 52 Fed. Reg. 10,012, 10,013 (Mar. 27, 1987) (explaining that inclusion in commercial use category is not controlled by identity "but the use to which [requesters] will put the information obtained").

¹⁵ OMB Fee Guidelines, 52 Fed. Reg. at 10,017-18; see also Research Air, Inc. v. Kempthorne, 589 F. Supp. 2d 1, 10 (D.D.C. 2008) (concluding that requester's intent to use records to oppose suspension of his pilot card was primarily in requester's commercial interest) (fee waiver context); Consumers' Checkbook v. HHS, 502 F. Supp. 2d 79, 89 (D.D.C. 2007) (suggesting that nonprofit's charging of fees to distribute some of its products was in commercial interest of plaintiff, but public interest in records sought outweighed that interest) (fee waiver context); Crain v. U.S. Customs Serv., No. 02-0341, slip op. at 7 (D.D.C. Mar. 25, 2003) (finding requester's status as commercial-use requester supported by administrative record before agency at time of its decision); VoteHemp, Inc. v. DEA, 237 F. Supp. 2d 59, 65 (D.D.C. 2002) (concluding that nonprofit organization, as advocate for free market in controlled substance, had commercial interest in requested records) (fee waiver context); Avondale Indus. v. NLRB, No. 96-1227, slip op. at 14 n.4 (E.D. La. Mar. 20, 1998) (embracing OMB's definition of "commercial use" and noting that case law is "sparse" as to what constitutes "commercial use"); cf. OSHA Data/CIH, Inc. v. U.S. Dep't of Labor, 220 F.3d 153, 160 (3d Cir. 2000) (observing that under 1986 FOIA amendments "commercial users shoulder more of the costs of FOIA requests").

¹⁶ See Rozet v. HUD, 59 F. Supp. 2d 55, 57 (D.D.C. 1999) (finding commercial interest where requester sought documents to defend his corporations in civil fraud action). But see McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1285 (9th Cir. 1987) (finding no commercial interest in records sought in furtherance of requesters' tort claim); Muffoletto v. Sessions, 760 F. Supp. 268, 277-78 (E.D.N.Y. 1991) (finding no commercial interest when records were sought to defend against state court action to recover debts).

¹⁷ See OMB Fee Guidelines, 52 Fed. Reg. at 10,018 (stating that agencies must determine the use to which a requester will put the documents requested); see also Rozet, 59 F. Supp. 2d at 57 (discounting plaintiff's assertion that information was not of commercial interest where timing and content of requests in connection with other non-FOIA litigation conclusively demonstrated otherwise); Comer v. IRS, No. 97-CV-76329, 1999 U.S. Dist. LEXIS 16268, at *12 (E.D. Mich. Sept. 30, 1999) (reiterating that requester's motives in seeking records is relevant to "commercial user" determination); S.A. Ludsin & Co. v. SBA, No. 96 CV 5972, 1998 WL 355394, at *2 (E.D.N.Y. Apr. 2, 1998) (finding requester who sought documents to enhance prospect of securing government contract to be commercial requester); Avondale, No. 96-1227, slip op. at 14 (E.D. La. Mar. 20, 1998) (finding company's intent to use requested

(continued...)

are encouraged to seek additional information or clarification from the requester when the intended use is not clear from the request itself.¹⁸

The second requester category consists of requesters who seek records for a noncommercial use and who qualify as one of three distinct subcategories of requesters: those who are affiliated with an educational institution, those who are part of a noncommercial scientific institution, and those who are representatives of the news media.¹⁹

The OMB Fee Guidelines define "educational institution" to include various schools, as well as institutions of higher learning and vocational education.²⁰ This definition is limited, however, by the requirement that the educational institution be one "which operates a program or programs of scholarly research."²¹ To qualify for inclusion in this fee subcategory, the request must serve a scholarly research goal of the institution, not an individual goal.²² Thus, a student seeking inclusion in this subcategory, who "makes a request in furtherance of the completion of a course of instruction is carrying out an individual research goal," and would not qualify as an educational institution requester.²³

The definition of a "noncommercial scientific institution" refers to a "noncommercial" institution that is "operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry."²⁴

¹⁷(...continued)

documents to contest union election results to be commercial use); cf. Hosp. & Physician Publ'g v. DOD, No. 98-CV-4117, 1999 WL 33582100, at *5 (S.D. Ill. June 22, 1999) (stating that requester's past commercial use of such records is not relevant to present case), remanded per joint stipulation, No. 99-3152 (7th Cir. Feb. 24, 2005) (remanding for purposes of adoption of parties' settlement agreement and dismissal of case).

¹⁸ See OMB Fee Guidelines, 52 Fed. Reg. at 10,018 (specifying that where "use is not clear from the request . . . agencies should seek additional clarification before assigning the request to a specific category"); see also McClellan, 835 F.2d at 1287 ("Legislative history and agency regulations imply that an agency may seek additional information when establishing a requester's category for fee assessment."); cf. Long v. DOJ, 450 F. Supp. 2d 42, 85 (D.D.C. 2006) (finding moot requester's challenge to agency's authority to request certain information in order to make fee category determination where no fee ultimately was assessed).

¹⁹ See 5 U.S.C. § 552(a)(4)(A)(ii)(II).

²⁰ See OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

²¹ Id.; see Nat'l Sec. Archive v. DOD, 880 F.2d 1381, 1383-85 (D.C. Cir. 1989) (approving implementation of this standard in DOD regulation).

²² See OMB Fee Guidelines, 52 Fed. Reg. at 10,014 (distinguishing institutional from individual requests through use of examples).

²³ Id. at 10,014.

²⁴ Id. at 10,018.

As to the third type of requester in this category, "representative of the news media," Congress has now included a definition directly in the FOIA statute.²⁵ With the passage of the OPEN Government Act²⁶ and some twenty-one years after the term was first included in the statute,²⁷ Congress, borrowing from both the Court of Appeals for the District of Columbia Circuit's opinion in National Security Archive v. DOD²⁸ and the OMB Fee Guidelines²⁹ has now statutorily defined a "representative of the news media." This subcategory includes "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience."³⁰ Additionally, Congress incorporated into the statutory definition the OMB Fee Guidelines' definition of "news" as "information that is about current events or that would be of current interest to the public."³¹ The new statutory definition also addresses the potential growth of alternative news media entities by providing a non-exclusive list of media entities.³² Finally, the statutory definition specifies that freelance journalists shall be considered representatives of the news media if they "can demonstrate a solid basis for expecting publication through [a news media] entity, whether or not the journalist is actually employed by the entity."³³

²⁵ OPEN Government Act of 2007, Pub. L. No. 110-175, § 3, 121 Stat. 2524.

²⁶ Pub. L. No. 110-175, 121 Stat. 2524.

²⁷ See Freedom of Information Reform Act of 1986, Pub. L. No. 90-570, §§ 1801-04, 100 Stat. 3207.

²⁸ 880 F.2d 1381, 1387 (D.C. Cir. 1989) (defining "representative of the news media").

²⁹ OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

³⁰ OPEN Government Act § 3; see Nat'l Sec. Archive v. DOD, 880 F.2d at 1387 (defining representative of the news media as "a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience"); see also Elec. Privacy Info. Ctr. v. DOD, 241 F. Supp. 2d 5, 14 (D.D.C. 2003) (explaining that fact that entity distributes its publication "via Internet to subscribers' email addresses does not change the [news media] analysis"); cf. Hall v. CIA, No. 04-00814, 2005 WL 850379, at *6 (D.D.C. Apr. 13, 2005) (finding organization's statement that "news media is pled," without mentioning specific activities in which it is engaged, "misstates the burden that a party . . . must carry . . . [o]therwise, every conceivable FOIA requester could simply declare itself a 'representative of the news media' to circumvent fees").

³¹ OPEN Government Act § 3; see also OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

³² OPEN Government Act § 3 ("[e]xamples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of 'news') who make their products available for purchase by or subscription by or free distribution to the general public").

³³ OPEN Government Act § 3; see OMB Fee Guidelines, 52 Fed. Reg. at 10,018 (stating that for freelancers, publication contract with news organization would be "clearest" proof for
(continued...)

To date, there have been no new cases addressing the statutory definition codified by the Open Government Act. Pre-dating the amendment to the statute, the term "representative of the news media," was the subject of a number of FOIA opinions, many of which held that the plaintiff before it was not such an entity,³⁴ and several opinions, including the D.C.

³³(...continued)

inclusion in news media category but that agencies may consider "past publication record" in this regard); see also Brown v. U.S. Patent & Trademark Office, 445 F. Supp. 2d 1347, 1356-57 (M.D. Fla. 2006) (finding that plaintiff has not shown "that he is a freelance journalist with a 'solid basis for expecting publication'" (quoting agency regulation). But see Hosp. & Physician Publ'g, 1999 WL 33582100, at *3, *5 (ordering agency to apply news media status to plaintiff even though plaintiff had not gathered news in past but expressed intention to do so in future; noting that requester represented that information received "will eventually be disseminated to the news media," that it will "not receive any income from its news gathering activities," and that "any windfall to the commercial aspect of its business will be negligible").

³⁴ See Brown, 445 F. Supp. 2d at 1356-57 (holding that plaintiff who provided no evidence of employment by news organization or evidence that he was "freelance" journalist as defined by agency's regulation, has "not demonstrated 'firm intention' of creating or publishing an editorialized work," and does not qualify as representative of news media), aff'd per curiam, 226 F. App'x 866 (11th Cir. 2007); Hall, 2005 WL 850379, at *6 (finding that plaintiff's endeavors, including "'research contributions . . . email newsletters' . . . and a single magazine or newspaper article" were more akin to those of a middleman or information vendor; determining that second plaintiff offered only conclusory assertion that it was representative of news media and "mentioned no specific activities [that it] conducted"); Judicial Watch, Inc. v. Rossotti, No. 01-1612, 2002 WL 535803, at *5 (D.D.C. Mar. 18, 2002) (finding persuasive prior district court decision on same issue, adopting "the reasoning and conclusions set forth" therein, and holding that plaintiff organization before it is not a representative of news media), rev'd on other grounds, 326 F.3d 1309 (D.C. Cir. 2003); Judicial Watch, Inc. v. DOJ, 185 F. Supp. 2d 54, 59 (D.D.C. 2002) (concluding that plaintiff organization did not qualify for media status as it was not organized to broadcast or publish news and was "at best a type of middleman or vendor of information that representatives of the news media can utilize when appropriate"); Judicial Watch, Inc. v. DOJ, No. 00-0745, slip op. at 15 (D.D.C. Feb. 12, 2001) (finding that plaintiff organization is not "an entity that is organized and operated to publish or broadcast news," and stating that organization's "vague intention" to use requested information is not specific enough "to establish the necessary firm intent to publish that is required [in order] to qualify as a representative of the news media"), partial summary judgment granted, slip op. at 22 (D.D.C. Apr. 20, 2001) (repeating that plaintiff's "vague intentions" to use requested information are insufficient to establish media status); Judicial Watch, Inc. v. DOJ, 122 F. Supp. 2d 13, 21 (D.D.C. 2000) (same); Judicial Watch, Inc. v. DOJ, 122 F. Supp. 2d 5, 12 (D.D.C. 2000) (commenting that by its own admission requester is not an entity that is organized and operated to publish or broadcast news (quoting from definition found at 28 C.F.R. § 16.11(b)(6))); Judicial Watch, Inc. v. DOJ, No. 99-2315, 2000 WL 33724693, at *3-4 (D.D.C. Aug. 17, 2000) (stating that letting reporters view documents collected from government, faxing them to newspapers, and appearing on television or radio does not qualify requester for news media status; concluding that if requester's "vague intentions" to publish future reports "satisfied FOIA's requirements, any entity could transform itself into a 'representative of the news media' by including a single strategic sentence in its request"); cf.

(continued...)

Circuit's decision in National Security Archive v. DOD,³⁵ have held that the plaintiff organizations qualified for status as representatives of the news media.³⁶

The D.C. Circuit also held in National Security Archive that merely making the information received available to the public (or others) was not sufficient to qualify a requester for placement in this fee category.³⁷ Additionally, the same court noted that a request from

³⁴(...continued)

Nat'l Sec. Archive v. DOD, 880 F.3d 1381, 1387 (D.C. Cir. 1989) (noting that term "representative of the news media" excludes "private librar[ies]" or "private repositories" of government records or middlemen such as "information vendors [or] data brokers" who request records for use by others).

³⁵ 880 F.2d 1381 (D.C. Cir. 1989).

³⁶ See id. at 1387; see also Ctr. for Pub. Integrity v. HHS, No. 06-1818, 2007 WL 2248071, at *5 (D.D.C. Aug. 3, 2007) (finding that investigative reporting organization qualified as "representative of new media" under agency regulations and OMB Guidelines as it intended to use information sought as basis for articles and press releases, that its staff was comprised of investigative journalists, that information received would be posted in organization's newsletter, and that it had demonstrated its past journalistic efforts that "had garnered various awards"); Elec. Privacy Info. Ctr., 241 F. Supp. 2d at 9 (concluding that publication activities of public interest research center -- which included both print and other media -- satisfied definition of "representative of the news media" under agency's FOIA regulation); Judicial Watch, Inc. v. DOJ, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding that requester qualified as representative of news media, but observing that test for same that is set forth in National Security Archive did not "apparently anticipate[] the evolution of the Internet or the morphing of the 'news media' into its present indistinct form," thereby suggesting that under National Security Archive "arguably anyone with [a] website" could qualify for media status, and concluding that "if such a result is intolerable . . . the remedy lies with Congress"), appeal dismissed per curiam, No. 01-5019, 2001 WL 800022, at *1 (D.C. Cir. June 13, 2001) (ruling that "district court's order holding that appellee is a representative of the news media for purposes of [the FOIA] is not final in the traditional sense and does not meet requirements of the collateral order doctrine" for purposes of appeal); Hosp. & Physician Publ'g, 1999 WL 33582100, at *4 (finding that requester qualified under test of National Security Archive as a "representative of the news media"); cf. Tax Analysts v. DOJ, 965 F.2d 1092, 1095 (D.C. Cir. 1992) (noting that, in context of attorney fees, plaintiff "is certainly a news organization"); Nat'l Sec. Archive v. CIA, 564 F. Supp. 2d 29, 34-37 (D.D.C. 2008) (finding plaintiff's claim of entitlement to news media status under Nat'l Sec. Archive v. DOD moot where agency informed court that all future noncommercial FOIA requests submitted by plaintiff would be accorded news media status), subsequent opinion granting plaintiff's motion for reconsideration, 584 F. Supp. 2d 144, 147 (D.D.C. 2008) (holding that despite agency's recent assurances to court, agency's continued placement of plaintiff into a category other than "news media" is in violation of D.C. Circuit law, and issuing order that agency "must treat [plaintiff] as a representative of the news media for all pending and future noncommercial FOIA requests").

³⁷ See Nat'l Sec. Archive, 880 F.2d at 1386 (finding that "making information available to the
(continued...)

a representative of the news media that does not support its news-dissemination function should not be accorded the favored fee treatment of this subcategory.³⁸ The District Court for the District of Columbia has found that even a foreign news service may qualify as a representative of the news media under the FOIA.³⁹

The only other circuit courts to have had before them the question of whether a FOIA requester was properly categorized as a representative of the news media are the Courts of Appeals for the Seventh and Eleventh Circuits.⁴⁰ In the Seventh Circuit, the Court did not reach the issue because the appeal was resolved through settlement, letting stand the district court's finding that the requester before it qualified for news media status.⁴¹ In contrast, the Court of Appeals for the Eleventh Circuit concluded in a brief opinion, which affirmed the district court's more extensive findings, that the requester before it was not a representative of the news media.⁴²

Lastly, the OMB Fee Guidelines provide that a request from a representative of the news media that supports a news-dissemination function "shall not be considered to be a request that is for a commercial use."⁴³

The third and final category of requesters consists of all requesters who do not fall

³⁷(...continued)

public . . . is insufficient to establish an entitlement to preferred [fee] status"); see also Hall, 2005 WL 850379, at *6 (stating that plaintiff's endeavors "may establish" him as "vendor of information" but not as representative of news media).

³⁸ See Nat'l Sec. Archive, 880 F.2d at 1387 (stating that "there is no reason to treat an entity with news media activities in its portfolio . . . as a 'representative of the news media' when it requests documents . . . in aid of its nonjournalistic activities"); cf. Elec. Privacy Info. Ctr., 241 F. Supp. 2d at 14 n.6 (stating that "not every organization with its own newsletter will necessarily qualify for news media status" and that, to qualify, newsletter "must disseminate actual 'news' to the public, rather than solely self-promoting articles about that organization").

³⁹ See Southam News v. INS, 674 F. Supp. 881, 892 (D.D.C. 1987).

⁴⁰ Brown v. U.S. Patent & Trademark Office, 226 F. App'x 866 (11th Cir. 2007); Hosp. & Physician Publ'g, No. 99-3152 (7th Cir. Feb. 24, 2005) (remanding for purposes of adoption of parties' settlement agreement and dismissal of case).

⁴¹ Hosp. & Physician Publ'g, 1999 WL 33582100, at *3 (ordering defendant to apply news media status to plaintiff even though it had not gathered news in past, nor did so at time of litigation, but had expressed its intention to "begin gathering news for dissemination . . . to news media via free news releases").

⁴² Brown, 226 F. App'x 866 (concluding that requester's "status as the publisher of a website does not make him a representative of the news media").

⁴³ OMB Fee Guidelines, 52 Fed. Reg. at 10,019; cf. Tax Analysts, 965 F.2d at 1096 (remarking in context of attorney fees, "[i]f newspapers and television news shows had to show the absence of commercial interests before they could win attorney[] fees in FOIA cases, very few, if any, would ever prevail").

within either of the preceding two categories.⁴⁴

When any FOIA request is submitted by someone on behalf of another person -- for example, by an attorney on behalf of a client -- it is nevertheless the underlying requester's identity and/or intended use that determines the requester category for fee purposes.⁴⁵ When such information is not readily apparent from the request itself, agencies "should seek additional clarification" from the requester before assigning a requester to a specific requester category.⁴⁶

An agency need not undertake a "fee category" analysis in any instance in which it has granted a full fee waiver.⁴⁷ Similarly, there is no need to determine a requester's fee category whenever the only assessable fee is a duplication fee, as that type of fee is properly chargeable to all three categories of requesters.⁴⁸ Nor is an agency required to establish at an earlier date a requester's proper fee category with regard to any future FOIA requests that it might make.⁴⁹ Agencies also should be alert to the fact that a requester's category can

⁴⁴ See 5 U.S.C. § 552(a)(4)(A)(ii)(III); see also Harrington v. DOJ, No. 06-0254, 2007 WL 625853, at *3 n.8 (D.D.C. Feb. 27, 2007) (explaining that because "[n]othing in the record suggests a commercial use or a non-commercial use by a scientific or educational institution" and given that plaintiff is not "a representative of the news media," plaintiff is properly classified into third category of requesters).

⁴⁵ See OMB Fee Guidelines, 52 Fed. Reg. at 10,013-14, 10,017-18; see also Dale v. IRS, 238 F. Supp. 2d 99, 107 (D.D.C. 2002) ("A party's counsel is not the 'requester' for purposes of a fee waiver request.").

⁴⁶ See OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

⁴⁷ See Carney v. DOJ, 19 F.3d 807, 814 n.3 (2d Cir. 1994) (doubting requester's status as "news media" but stating that there was no need to resolve issue given his entitlement to fee waiver); Duggan v. SEC, No. 06-10458, 2007 WL 2916544, at *9 (D. Mass. July 12, 2007) (magistrate's recommendation) (finding that given agency's decision to waive all fees, requester's fee category (and fee waiver) claims are moot), adopted, (D. Mass. July 27, 2008), aff'd on other grounds, 227 F. App'x 16 (1st Cir. May 15, 2008); Prison Legal News v. Lappin, 436 F. Supp. 2d 17, 27 (D.D.C. 2006) (finding "no need to analyze" entitlement to news media status where plaintiff was entitled to full fee waiver); Judicial Watch, Inc. v. DOT, No. 02-566, 2005 WL 1606915, at *5 n.2 (D.D.C. July 5, 2005) (same); Judicial Watch, 310 F. Supp. 2d at 293 n.3 (same); Long v. ATF, 964 F. Supp. 494, 498, 499 (D.D.C. 1997) (same); Project on Military Procurement v. Dep't of the Navy, 710 F. Supp 362, 368 (D.D.C. 1989) (same).

⁴⁸ See 5 U.S.C. § 552(a)(4)(A)(ii); see also OMB Fee Guidelines, 52 Fed. Reg. at 10,017.

⁴⁹ See, e.g., Long, 450 F. Supp. 2d at 85 (concluding that "any declaration" by the court of requester's fee status for future requests was not ripe, and that denial of "such a determination does not preclude a favorable outcome in the future, not least of all because an entity's status can change"); Long, 964 F. Supp. at 498, 499 (rejecting plaintiff's request for declaratory judgment as to requester category when no fee was at issue, and finding that question was not ripe as to future requests).

change over time.⁵⁰

Types of Fees

The FOIA provides for three types of fees that may be assessed in response to FOIA requests: search, review, and duplication.⁵¹ The fees that may be charged to a particular requester are dependant upon the requester's fee category.

The first requester category, commercial use requesters, are assessed all three types of fees.⁵² The second requester category, those determined to be educational or noncommercial scientific institutions, or representatives of the news media, are assessed only duplication fees.⁵³ Requesters in the third category, those who do not fall within either the first or second requester category, are assessed both search fees and duplication fees.⁵⁴ OMB recognized that costs would necessarily vary from agency to agency and directed that each agency promulgate regulations specifying the specific charges for search,⁵⁵ review,⁵⁶ and duplication⁵⁷ fees.

"Search" fees include all the time spent looking for responsive material, including page-by-page or line-by-line identification of material within documents.⁵⁸ Additionally, agencies may charge for search time even if they fail to locate any records responsive to the request or

⁵⁰ See Nat'l Sec. Archive, 880 F.2d at 1388 (stating that court's determination of requester's news media status is "not chiselled in granite"); Long, 450 F. Supp. 2d at 85 (indicating that "an entity's status can change"); Long, 964 F. Supp. at 498 (same).

⁵¹ 5 U.S.C. § 552(a)(4)(A)(ii)(I)-(III) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; 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).

⁵² See 5 U.S.C. § 552(a)(4)(A)(ii)(I); see also OMB Fee Guidelines, 52 Fed. Reg. at 10,017.

⁵³ See 5 U.S.C. § 552(a)(4)(A)(ii)(II).

⁵⁴ See § 552(a)(4)(A)(ii)(III).

⁵⁵ OMB Fee Guidelines, 52 Fed. Reg. at 10,018 ("agencies should charge at the salary rate[s] [i.e. basic pay plus 16 percent] of the employee[s] making the search" or, "where a homogeneous class of personnel is used exclusively . . . agencies may establish an average rate for the range of grades typically involved").

⁵⁶ Id. at 10,017-18 (in addition to collecting full "direct costs" (as defined by OMB) incurred by agency when reviewing responsive documents, if "a single class of reviewers is typically involved in the review process, agencies may establish a reasonable agency-wide average and charge accordingly").

⁵⁷ Id. at 10,018 ("Agencies shall establish an average agency-wide, per-page charge for paper copy reproduction of documents.").

⁵⁸ See OMB Fee Guidelines, 52 Fed. Reg. at 10,017.

even if the records located are subsequently determined to be exempt from disclosure.⁵⁹ The OMB Guidelines direct that searches for responsive records should be done in the "most efficient and least expensive manner."⁶⁰ The term "search" means locating records or information either "manually or by automated means"⁶¹ and requires agencies to expend "reasonable efforts" in electronic searches, if requested to do so by requesters willing to pay for that search activity.⁶²

The "review" costs which may be charged to commercial-use requesters consist of the "direct costs incurred during the initial examination of a document for the purposes of determining whether [it] must be disclosed [under the FOIA]."⁶³ Review time thus includes processing the documents for disclosure, i.e., doing all that is necessary to prepare them for release,⁶⁴ but it does not include time spent resolving general legal or policy issues regarding

⁵⁹ See *id.* at 10,019; see also TPS, Inc. v. Dep't of the Air Force, No. C 01-4284, 2003 U.S. Dist. LEXIS 10925, at *8-9 (N.D. Cal. Mar. 28, 2003) ("The fact that you did not receive any records from [the agency] . . . does not negate your responsibility to pay for programming services provided to you in good faith, at your request with your agreement to pay applicable fees." (quoting with approval exhibit to defendant's declaration)); Guzzino v. FBI, No. 95-1780, 1997 WL 22886, at *4 (D.D.C. Jan. 10, 1997) (upholding agency's assessment of search fees to conduct search for potentially responsive records within files of individuals "with names similar to" requester's when no files identifiable to requester were located), appeal dismissed for lack of prosecution, No. 97-5083 (D.C. Cir. Dec. 8, 1997); Linn v. DOJ, No. 92-1406, 1995 WL 417810, at *13 (D.D.C. June 6, 1995) (holding that there is no entitlement to refund of search fees when search unproductive).

⁶⁰ OMB Fee Guidelines, 52 Fed. Reg. at 10,017.

⁶¹ 5 U.S.C. § 552(a)(3)(D).

⁶² *Id.* at § 552(a)(3)(C); see also FOIA Update, Vol. XVIII, No. 1, at 6 ("OIP Guidance: Amendment Implementation Questions") (analyzing 1996 FOIA amendment that requires agencies to "make reasonable efforts" to search for records electronically); *cf.* OMB Fee Guidelines, 52 Fed. Reg. at 10,018, 10,019 (providing that agencies should charge "the actual direct cost of providing [computer searches]," but that for certain requester categories, cost equivalent of two hours of manual search is provided without charge).

⁶³ 5 U.S.C. § 552(a)(4)(A)(iv); see also Carney, 19 F.3d at 814 n.2 (noting that fee for document review is properly chargeable to commercial requesters); Gavin v. SEC, No. 04-4522, 2006 U.S. Dist. LEXIS 75227, at *17-18 (D. Minn. Oct. 13, 2006) (finding that agency's court-ordered initial review of documents was chargeable to commercial-use requester); OMB Fee Guidelines, 52 Fed. Reg. at 10,018 (clarifying that records "withheld under an exemption which is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered" and, further, that "costs for such a subsequent review would be properly assessable").

⁶⁴ See OSHA Data, 220 F.3d at 168 (concluding that review fees include, in the context of business-submitted information, costs of mandatory predislosure notification to companies and evaluation of their responses by agency for purpose of determining applicability of
(continued...)

the applicability of particular exemptions or reviewing on appeal exemptions that already are applied.⁶⁵ The OMB Fee Guidelines provide that records that have been withheld in full under a particular exemption that is later determined during administrative proceedings not to apply may be "reviewed again to determine the application of other exemptions not previously considered"⁶⁶ and review fees assessed accordingly.⁶⁷

Under the FOIA, "duplication" charges represent the reasonable "direct costs" of making copies of documents.⁶⁸ Copies can take various forms, including paper copies or machine-readable documentation.⁶⁹ As further required by the FOIA, agencies must honor a requester's choice of form or format if the record is "readily reproducible" in that form or format with "reasonable efforts" by the agency.⁷⁰

For paper copies, the OMB Fee Guidelines specifically require that agencies establish an "average agency-wide, per-page charge for paper copy reproduction."⁷¹ For non-paper copies, such as printouts, disks, or other electronic media, agencies should charge the actual costs of production of that medium.⁷² For any of these forms of duplication, agencies should consult with their technical support staff for assistance in determining their actual costs associated with producing the copies in the various media sought.⁷³

In addition to charging the costs provided by agency implementing regulations for

⁶⁴(...continued)
exemption to companies' submitted business information).

⁶⁵ See OMB Fee Guidelines, 52 Fed. Reg. at 10,017, 10,018.

⁶⁶ Id. at 10,018. But see AutoAlliance Int'l v. U.S. Customs Serv., No. 02-72369, slip op. at 7-8 (E.D. Mich. July 31, 2003) (finding that where agency did not review all responsive documents during initial review -- and charged no fee -- it effectively waived agency's ability to charge commercial requester review fees for agency's "thorough review" conducted at administrative appeal level inasmuch as statute limits such fees to "initial examination" only).

⁶⁷ OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

⁶⁸ 5 U.S.C. § 552(a)(4)(A)(iv); see OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

⁶⁹ See OMB Fee Guidelines, 52 Fed. Reg. at 10,017.

⁷⁰ 5 U.S.C. § 552(a)(3)(B); see FOIA Update, Vol. XVIII, No. 1, at 5-6 ("OIP Guidance: Amendment Implementation Questions") (advising agencies on format disclosure obligations); FOIA Update, Vol. XVII, No. 4, at 2 ("Congress Enacts FOIA Amendments") (same).

⁷¹ See OMB Fee Guidelines, 52 Fed. Reg. at 10,017, 10,018 (detailing elements included in direct costs of duplication).

⁷² See id. at 10,018; FOIA Update, Vol. XI, No. 3, at 4 & n.25 ("Department of Justice Report on 'Electronic Record' FOIA Issues, Part II").

⁷³ See OMB Fee Guidelines at 10,017-18 (advising agencies to "charge the actual cost, including computer operator time, of production of [a computer] tape or printout").

searching, reviewing, and duplicating records, the OMB Fee Guidelines authorize the recovery of the full costs of providing all categories of requesters with "special services" that are not required by the FOIA, such as when an agency complies with a request for certifying records as true copies or mailing records by express mail.⁷⁴ In this regard, OMB directed agencies to use the "most efficient and least costly" means of complying with a request.⁷⁵ This may include the use of contractor services, as long as an agency does not relinquish responsibilities it alone must perform, such as making fee waiver determinations.⁷⁶ With regard to any contractor services that agencies may employ, the OMB Fee Guidelines provide that agencies should ensure that the cost to the requester "is no greater than it would be if the agency itself had performed the task."⁷⁷

Fee Restrictions

The FOIA includes restrictions both on the assessment of certain fees⁷⁸ and on the authority of agencies to ask for an advance payment of a fee.⁷⁹ 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.⁸⁰ In addition, except with respect to commercial-use requesters, agencies must provide the first one hundred pages of duplication, as well as the first two hours of search time, without cost to the requester.⁸¹ These two provisions work

⁷⁴ OMB Fee Guidelines, 52 Fed. Reg. at 10,018; see, e.g., DOJ Fee Regulations, 28 C.F.R. § 16.11(f); cf. OMB Fee Guidelines, 52 Fed. Reg. at 10,016 (specifying that charges for ordinary packaging and mailing are to be borne by government).

⁷⁵ See OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

⁷⁶ See OMB Fee Guidelines, 52 Fed. Reg. at 10,018 ("Agencies are encouraged to contract with private sector services to locate, reproduce and disseminate records in response to FOIA requests when that is the most efficient and least costly method.").

⁷⁷ OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

⁷⁸ See 5 U.S.C. § 552 (a)(4)(A)(iv)(I)-(II) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

⁷⁹ See id.

⁸⁰ See id. § 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).

⁸¹ See 5 U.S.C. § 552(a)(4)(A)(iv)(II); OMB Fee Guidelines, 52 Fed. Reg. at 10,018-19; see also Carlson v. USPS, No. 02-05471, 2005 WL 756573, at *8 (N.D. Cal. Mar. 31, 2005) (upholding requester's statutory entitlement to two hours of search time and 100 pages of duplication without cost regardless of whether remainder of responsive records were to be processed); cf. Trupei v. DEA, No. 04-1481, 2005 WL 3276290, at *3 (D.D.C. Sept. 27, 2005) (upholding agency's refusal to expend additional search time without payment of fees where statutory allowance of two hours was already exceeded); Hicks v. Hardy, No. 04-0769, slip op. at 2 (D.D.C. Sept. 25, 2005) (observing that agency had apprised requester that "100-page limit on free releases" was reached and that commitment was needed to pay for remaining responsive

(continued...)

together so that, except with respect to commercial-use requesters, agencies should not begin to assess fees until after they provide this amount of free search and duplication; the assessable fee for any requester then must be greater than the agency's cost to collect and process it in order for the fee actually to be charged.⁸²

Agencies also may not require a requester to make an advance payment, i.e., payment before work is begun or continued on a request, unless the agency first estimates that the assessable fee is likely to exceed \$250, or unless the requester has previously failed to pay a properly assessed fee in a timely manner (i.e., within thirty days of the billing date).⁸³ Estimated fees, though, are not intended to be used to discourage requesters from exercising their access rights under the FOIA.⁸⁴

The statutory restriction generally prohibiting a demand for advance payments does

⁸¹(...continued)

records), renewed motion for summary judgment granted to agency, No. 04-0769, 2006 WL 949918 (D.D.C. Apr. 12, 2006).

⁸² See 5 U.S.C. § 552(a)(4)(A)(iv)(I); OMB Fee Guidelines, 52 Fed. Reg. at 10,018; see, e.g., DOJ Fee Regulations, 28 C.F.R. § 16.11(d)(4) (establishing fee threshold below which no fee will be charged);.

⁸³ See 5 U.S.C. § 552(a)(4)(A)(v); OMB Fee Guidelines, 52 Fed. Reg. at 10,020; see also O'Meara v. IRS, No. 97-3383, 1998 WL 123984, at *1-2 (7th Cir. Mar. 17, 1998) (upholding agency's demand for advance payment when fees exceeded \$800); Antonelli v. ATF, 555 F. Supp. 2d 16, 23 (D.D.C. 2008) (stating that "under DOJ regulations, plaintiff's failure to pay fees to which he had agreed within 30 days of the billing date provided an adequate basis for defendant to require" advance payment); Brunsilus v. DOE, 514 F. Supp. 2d 30, 34-36 (D.D.C. 2007) (citing agency's regulation allowing collection of fees before processing when they exceed \$250 and concluding "request is not considered received until the payment is in the agency's possession"); Emory v. HUD, No. 05-00671, 2007 WL 641406, at *4 (D. Haw. Feb. 23, 2007) (same); Pietrangelo v. U.S. Dep't of the Army, No. 2:04-CV-44, slip op. at 14 (D. Vt. Mar. 7, 2005) ("Fees may be estimated by the agency and demanded in advance if the fee will exceed \$250."); Jeanes v. DOJ, 357 F. Supp. 2d 119, 123 (D.D.C. 2004) (citing agency's regulation requiring advance fee payment noting that "the request shall not be considered received and further work will not be done on it until required payment is received" (quoting 28 C.F.R. § 16.11(i)(4))); TPS, Inc., 2003 U.S. Dist. LEXIS 10925, at *8-9 (upholding agency's refusal to process further requests until all outstanding FOIA debts were paid), appeal dismissed voluntarily, No. 03-15950 (9th Cir. May 24, 2007)); Rothman v. Daschle, No. 96-5898, 1997 U.S. Dist. LEXIS 13009, at *2 (E.D. Pa. Aug. 20, 1997) (upholding agency's request for advance payment when fees exceeded \$250); Mason v. Bell, No. 78-719-A, slip op. at 1 (E.D. Va. May 16, 1979) (finding dismissal of FOIA case proper when plaintiffs failed to pay fees to other federal agencies for prior requests). But cf. Ruotolo v. DOJ, 53 F.3d 4, 9-10 (2d Cir. 1995) (suggesting that agency should have processed request up to amount offered by requesters rather than state that estimated cost "would greatly exceed" \$250 without providing an amount to be paid or offering assistance in reformulating request).

⁸⁴ See Hall v. CIA, No. 04-0814, 2006 WL 197462, at *3 & n.4 (D.D.C. Jan. 25, 2006) (recognizing that it would be improper for agencies to inflate fees to discourage requests).

not prevent agencies from requiring payment before actually releasing records which have been processed.⁸⁵ When an agency reasonably believes that a requester is attempting to divide a request into a series of requests for the purpose of avoiding the assessment of fees, the agency may aggregate those requests and charge accordingly.⁸⁶ The OMB Fee Guidelines should be consulted for additional guidance on aggregating requests.⁸⁷

The FOIA also provides that FOIA fees are superseded by "fees chargeable under a statute specifically providing for setting the level of fees for particular types of records."⁸⁸

⁸⁵ See Strout v. U.S. Parole Comm'n, 40 F.3d 136, 139 (6th Cir. 1994) (finding that agency regulation requiring payment before release of processed records does not conflict with statutory prohibition against advance payment); Farrugia v. EOUSA, 366 F. Supp. 2d 56, 57 (D.D.C. 2005) (explaining that where requested records are already processed, payment may be required by agency before sending them), subsequent opinion granting summary judgment to agency, No. 04-0294, 2006 WL 33577 (D.D.C. Feb. 14, 2006); Taylor v. U.S. Dep't of the Treasury, No. A-96-CA-933, 1996 U.S. Dist. LEXIS 19909, at *5 (W.D. Tex. Dec. 17, 1996) (explaining that agency regulation requires payment before records can be released); cf. Lee v. DOJ, 235 F.R.D. 274, 285 (W.D. Pa. 2006) (finding agency's proposal to search large number of district offices designated by requester "three offices at a time" and, after requester's payment was made for searching those three offices, "repeating the process until all districts had been searched," is permissible); Sliney v. BOP, No. 04-1812, 2005 WL 3273567, at *4 (D.D.C. Sept. 28, 2005) (noting that no authority supported plaintiff's proposal that his suggested "installment plan" for paying fees "constitutes an agreement to pay the total fee"), subsequent opinion granting summary judgment to agency, 2005 WL 3273567, at *4 (resolving ultimately that requester failed to exhaust with regard to processing fee). But cf. Hemmings v. Freeh, No. 95-0738, 2005 WL 975626, at *3 (D.D.C. Apr. 25, 2005) (criticizing government's exhaustion argument as "form over substance" where none of its several requests for fee payment -- ultimately made by plaintiff after government filed motion to dismiss -- provided any "hard and fast deadline" for doing so).

⁸⁶ See OMB Fee Guidelines, 52 Fed. Reg. at 10,019; see also Smith v. BOP, 517 F. Supp. 2d 451, 453-54 (D.D.C. 2007) (finding it reasonable to "aggregate plaintiff's separate requests . . . submitted over the course of three weeks" for similar documents); Atkin v. EEOC, No. 91-2508, slip op. at 20-21 (D.N.J. Dec. 4, 1992) (finding agency's decision to aggregate requests proper; reasonable for agency to believe that thirteen requests relating to same subject matter submitted within three-month period were made by requester to evade payment of fees), appeal dismissed for failure to timely prosecute sub nom. Atkin v. Kemp, No. 93-5548 (3d Cir. Dec. 6, 1993).

⁸⁷ OMB Fee Guidelines, 52 Fed. Reg. at 10,019-20.

⁸⁸ 5 U.S.C. § 552(a)(4)(A)(vi); see OMB Fee Guidelines, 52 Fed. Reg. at 10,017-18; see also Oglesby v. U.S. Dep't of the Army, 79 F.3d 1172, 1177-78 (D.C. Cir. 1996) (stating that NARA's enabling statute, 44 U.S.C. § 2116 (2006), qualifies "as the genre of fee-setting provision" that supersedes FOIA's fee provisions); cf. Env'tl. Prot. Info. Ctr., 432 F.3d at 947, 948 (finding FOIA's superseding fee provision to be "ambiguous," relying instead on OMB's Guidelines that discuss that provision, and determining that FOIA's reference to "a statute specifically providing for setting the level of fees" means "any statute that specifically requires a
(continued...)

Thus, when documents responsive to a FOIA request are maintained for distribution by an agency according to a statutorily based fee schedule, requesters should obtain the documents from that source and pay the applicable fees in accordance with the fee schedule of that other statute.⁸⁹ This may at times result in the assessment of fees that are higher than those that would otherwise be chargeable under the FOIA,⁹⁰ but it ensures that such fees are properly borne by the requester and not by the general public.⁹¹

The superseding of FOIA fees by the fee provisions of another statute raises a related question as to whether an agency with a statutorily based fee schedule for particular types of records is subject to the FOIA's fee waiver provision in those instances where it applies an alternate fee schedule.⁹² Although this question has been raised, it has not yet been explicitly decided by an appellate court.⁹³

⁸⁸(...continued)

government agency . . . to set the level of fees" and not one that simply allows it to do so (quoting OMB Fee Guidelines) (emphasis added)).

⁸⁹ See OMB Fee Guidelines, 52 Fed. Reg. at 10,012-13, 10,017-18 (implementing 5 U.S.C. § 552(a)(4)(A)(vi), and advising agencies to "inform requesters of the steps necessary to obtain records from those sources"); *id.* at 10,017 (contemplating "statutory-based fee schedule programs . . . such as the NTIS [National Technical Information Service]"); see also Wade v. Dep't of Commerce, No. 96-0717, slip op. at 5-6 (D.D.C. Mar. 26, 1998) (concluding that fee was "properly charged by NTIS" under its fee schedule). But see Env'tl. Prot. Info. Ctr., 432 F.3d at 948-49 (holding that statute permitting agency to sell maps and Geospatial Information System data "at not less than the estimated [reproduction] cost," or allowing agency "to make other disposition of such . . . materials," was not "superseding fee statute" given discretionary nature of agency's authority to charge fees, and recognizing that court's decision "may be at odds" with D.C. Circuit's decision in Oglesby, 79 F.3d 1172).

⁹⁰ See, e.g., Wade, No. 96-0717, slip op. at 2, 6 (D.D.C. Mar. 26, 1998) (approving assessment of \$1300 fee pursuant to National Technical Information Service's superseding fee statute and noting cost of \$210 in anticipated FOIA fees).

⁹¹ See OMB Fee Guidelines, 52 Fed. Reg. at 10,017.

⁹² See Env'tl. Prot. Info. Ctr., 432 F.3d at 946, 948 (recognizing FOIA's superseding fee provision as "exception to the fee waiver provision of the FOIA," but stating that statute in question did not qualify as a superseding fee statute).

⁹³ Compare Oglesby, 79 F.3d at 1178 (refusing to rule on plaintiff's argument that a superseding fee statute does not exempt agency from making FOIA fee waiver determination, because plaintiff failed to raise argument in timely manner), and Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 70 n.17 (D.C. Cir. 1990) (declining to reach fee waiver issue because plaintiff failed to exhaust administrative remedies), with Env'tl. Prot. Info. Ctr., 432 F.3d at 946, 948 (recognizing FOIA's superseding fee provision as "exception to the fee waiver provision of the FOIA"), and St. Hilaire v. DOJ, No. 91-0078, slip op. at 4-5 (D.D.C. Sept. 10, 1991) (avoiding fee waiver issue because requested records were made publicly available), summary judgment granted to agency, (D.D.C. Mar. 18, 1992), aff'd per curiam, No. 92-5153

(continued...)

The FOIA requires that requesters follow the agency's published rules for making FOIA requests, including those pertaining to the payment of authorized fees.⁹⁴ Requesters have been found not to have exhausted their administrative remedies when they fail to satisfy the FOIA's fee requirements,⁹⁵ such as failing to file an administrative appeal of an adverse fee determination⁹⁶ or failing to agree to pay estimated fees.⁹⁷ Courts, however, have not required

⁹³(...continued)

(D.C. Cir. Apr. 28, 1994).

⁹⁴ See 5 U.S.C. § 552(a)(3)(B); Harrington v. DOJ, No. 06-0254, 2007 WL 625853, at *3 (D.D.C. Feb. 27, 2007) (citing agency's regulation that request not deemed received "until the requester agrees in writing to pay the anticipated total fee"); Hinojosa, 2006 WL 2927095, at *4 (stating that request must comply with FOIA and with agency's requirements, "including a firm promise to pay applicable processing fees"); Dinsio v. FBI, 445 F. Supp. 2d 305, 311 (W.D.N.Y. 2006) (reiterating that requester is required to follow agency rules "for requesting, reviewing and paying for documents"). But cf. Keen v. FBI, No. 98-2658, slip op. at 4-5 (D.D.C. July 9, 2002) (magistrate's recommendation) (finding request "wrongfully terminated" where agency failed to advise requester that request would be closed if he did not respond to agency's letter that notified him of fees and suggested that he narrow scope of request), adopted, (D.D.C. Aug. 26, 2002), renewed motion for summary judgment granted to agency, No. 98-2658, 2006 U.S. Dist. LEXIS 71860 (D.D.C. Sept. 29, 2006).

⁹⁵ See, e.g., Trenerry v. IRS, No. 95-5150, 1996 WL 88459, at *2 (10th Cir. Mar. 1, 1996) (explaining that exhaustion includes payment of FOIA fees); McLaughlin v. DOJ, No. 07-2347, 2009 WL 428925, at *3 (D.D.C. Feb. 23, 2009) (finding no exhaustion where plaintiff admitted to nonpayment of fees); Skrzypek v. Dep't of Treasury, 550 F. Supp. 2d 71, 73-74 (D.D.C. 2008) (concluding that plaintiff had not exhausted administrative remedies when he admitted to not having paid assessed fees); Antonelli, 555 F. Supp. 2d at 23 (stating "payment or waiver of assessed fees or an administrative appeal from the denial of a fee waiver request is a prerequisite to filing a FOIA lawsuit"); Smith, 517 F. Supp. 2d at 455 (finding that because requester's fee waiver was properly denied, exhaustion by paying fees required prior to seeking judicial review of agency action); Bansal v. DEA, No. 06-3946, 2007 WL 551515, at *4 (E.D. Pa. Feb. 16, 2007) (stating "[p]laintiff has failed to exhaust administrative remedies because he has not paid the required fees"); Dinsio, 445 F. Supp. 2d at 311 (determining that plaintiff was barred from seeking judicial review due to failure to agree to pay fees).

⁹⁶ See, e.g., Oglesby, 920 F.2d at 66 & n.11, 71 ("Exhaustion does not occur until the required fees are paid or an appeal is taken from the refusal to waive fees."); Smith, 517 F. Supp. 2d at 454 (dismissing plaintiff's aggregation claim "because plaintiff did not exhaust this claim at the administrative level" by appealing agency's determination); Gonzalez v. ATF, No. 04-2201, 2005 WL 3201009, at *6 (D.D.C. Nov. 9, 2005) (finding that requester's inaction -- i.e., that he never paid assessed fee nor appealed agency's refusal of fee waiver denial -- precludes judicial review of request); Sliney, 2005 WL 3273567, at *4 (reiterating that where plaintiff neither agreed to pay processing fee nor appealed agency's refusal of his "'installment' plan" offer, administrative exhaustion had not occurred); Antonelli v. ATF, No. 04-1108, 2005 U.S. Dist. LEXIS 17089, at *28 (D.D.C. Aug. 16, 2005) (finding requester's unsuccessful administrative appeal challenging amount of fee to be insufficient to satisfy exhaustion requirement); Tinsley v. Comm'r, No. 3:96-1769-P, 1998 WL 59481, at *4 (N.D. Tex. Feb. 9, 1998) (finding that because

(continued...)

exhaustion where an agency has failed in some way to fully comply with its own regulations.⁹⁸ A requester's obligation to comply with the agency's fee requirements does not cease after litigation has been initiated under the FOIA.⁹⁹ (For a further discussion of the exhaustion

⁹⁶(...continued)

plaintiff failed to appeal fee waiver denial, exhaustion was not achieved). But cf. Payne v. Minihan, No. 97-0266, slip op. at 34 n.17 (D.N.M. Apr. 30, 1998) (holding plaintiff was not required to exhaust by appealing fee waiver denial when requester's right to sue already was perfected on different issue), summary judgment granted, (D.N.M. Oct. 27, 1999), aff'd, 232 F.3d 902 (10th Cir. 2000) (unpublished table decision).

⁹⁷ See Research Air, Inc. v. Kempthorne, 589 F. Supp. 2d 1, 10 & n.6 (D.D.C. 2008) (concluding that because requester did not commit to pay assessed fee, "agency properly refused to process his FOIA requests"); Brunsilus, 514 F. Supp. 2d at 34 (citing agency regulation allowing agency to treat request as not received once fees are determined or estimated to exceed \$25 until requester agrees to pay fees); Dale v. IRS, 238 F. Supp. 2d 99, 107 (D.D.C. 2002) (dismissing case because plaintiff failed to make "firm commitment" to pay fees); cf. Kemmerly v. U.S. Dep't of Interior, No. 06-2386, 2006 WL 2990122, at *1 (E.D. La. Oct. 17, 2006) (finding requester's agreement to pay "reasonable fees" to be insufficient under FOIA and agency's implementing regulation); Hall, 2005 WL 850379, at *5 n.9 (noting that although plaintiff characterized agency's six-figure fee estimate as "ludicrous," he sought neither accounting nor relief from estimated fees from court). But see Hinojosa v. Dep't of Treasury, No. 06-0215, 2006 WL 2927095, at *4-5 (D.D.C. Oct. 11, 2006) (finding that requesters' commitment to pay up to \$50 per request "appears to satisfy" requirement of "firm promise" to pay).

⁹⁸ See, e.g., Thomas v. HHS, 587 F. Supp. 2d 114, 117 (D.D.C. 2008) (concluding that plaintiff had constructively exhausted because agency's demand for payment of search fees came after litigation filed); Kishore v. DOJ, 575 F. Supp. 2d 243, 252-53 (D.D.C. 2008) (reaching merits of FOIA claim finding that even though requester had not paid assessed fees, subsequent agency actions dispensed with necessity of exhaustion); Bansal, 2007 WL 551515, at *6 (E.D. Pa. Feb. 16, 2007) (refusing to grant agency's motion for summary judgment for failure to pay fees as agency had not shown it had complied with its regulation requiring notification when fees are estimated to exceed \$25); Hicks, No. 04-0769, slip op. at 4 (D.D.C. Sept. 26, 2005) (finding that agency's failure to provide appeal rights -- in letter dated ten months after date of request and after litigation ensued -- defeated agency's exhaustion argument based on failure to pay fees); Sliney, 2005 WL 839540, at *4 (characterizing agency's contention that requester failed to exhaust by paying fees as "disingenuous" where agency failed to notify requester of fee at administrative level as required by agency fee regulation); Stanley v. DOD, No. 93-CV-4247, slip op. at 11 (S.D. Ill. July 28, 1998) (stating that agency's failure to inform plaintiff of right to administratively appeal its fee estimate amounted to constructive exhaustion where agency's regulations allowed appeal of such estimates); see also Kishore v. DOJ, 575 F. Supp. 2d 243, 252-53 (D.D.C. 2008) (reaching merits of FOIA claim even though plaintiff had not paid assessed fees as plaintiff's filing suit prompted agency to correct processing errors).

⁹⁹ See Pollack v. DOJ, 49 F.3d 115, 119-20 (4th Cir. 1995) (providing that commencement of FOIA action does not relieve requester of obligation to pay for documents); Harrington, 2007 (continued...)

requirement, including exhaustion of "fee" issues, see *Litigation Considerations, Exhaustion of Administrative Remedies*, below.)

Further, the Act contains no provision for reimbursement of fees if the requester is dissatisfied with the agency's response.¹⁰⁰ Nor does the FOIA provide for penalties to be assessed against an agency or its administrators for delays in refunding a requester's overpayment.¹⁰¹ In addition, absent specific statutory authority allowing an agency (or a subdivision of it) to do so,¹⁰² all fees collected in the course of providing FOIA services are to

⁹⁹(...continued)

WL 625853, at *2 (same); Kemmerly, 2006 WL 2990122, at *2 (emphasizing that whether request for payment is made by agency pre- or post-litigation, "the plaintiff has an obligation to pay" (quoting Trueblood v. U.S. Dep't of the Treasury, 943 F. Supp. 64, 68 (D.D.C. 1996))); Gavin, 2006 U.S. Dist. LEXIS 75227, at *16 (stating that FOIA fees may be assessed post-litigation); Hicks, 2006 WL 949918, at *2 (same); Pietrangelo, No. 2:04-CV-44, slip op. at 13 (D. Vt. Mar. 7, 2005) (explaining that constructive exhaustion based on agency's failure to respond "did not relieve [requester] of statutory obligation to pay any and all fees" (quoting Pollack, 49 F.3d at 119)); Jeanes, 357 F. Supp. 2d at 123 (observing that although plaintiff did not receive notice of fees until after litigation ensued, obligation to pay fees remained); Maydak v. DOJ, 254 F. Supp. 2d 23, 50 (D.D.C. 2003) (noting that plaintiff is still obligated to pay fee or seek waiver even if agency's fee assessment is made after plaintiff files suit); Goulding v. IRS, No. 97 C 5628, 1998 WL 325202, at *9 (N.D. Ill. June 8, 1998) (finding plaintiff's constructive exhaustion did not relieve his obligation to pay authorized fees), summary judgment granted, No. 97 C 5628 (N.D. Ill. July 30, 1998) (restating that plaintiff's failure to comply with fee requirements is fatal to claim against government); Trueblood v. U.S. Dep't of the Treasury, 943 F. Supp. 64, 68 (D.D.C. 1996) (stating even if request for payment not made until after litigation commences, that fact does not relieve requester of obligation to pay reasonably assessed fees); cf. Pub. Citizen, Inc. v. Dep't of Educ., 292 F. Supp. 2d 1, 5 (D.D.C. 2003) (disallowing assessment of fees after litigation ensued where agency failed to inform requester that fees were in excess of amount to which it agreed, failed to give notice that fees would exceed \$250 as required by regulation, and failed to address request for fee waiver); Judicial Watch of Fla., Inc. v. DOJ, No. 01-0212, slip op. at 3 (D.D.C. Oct. 19, 2001) (finding that plaintiff, through its actions, including its ambiguous response to court's order to notify agency of its intent with regard to payment of fees, "constructively abandoned its FOIA request").

¹⁰⁰ See Stabasefski, 919 F. Supp. at 1573 (stating that the FOIA does not provide for reimbursement of fees when agency redacts portions of records that are released).

¹⁰¹ See Johnson v. EOUSA, No. 98-0729, 2000 U.S. Dist. LEXIS 6095, at *8 (D.D.C. May 2, 2000) (observing that despite delay in refunding overpayment, FOIA does not provide for award of damages to requester, nor does delay rise to level of constitutional violation by agency or its employees), aff'd, 310 F.3d 771 (D.C. Cir. 2002).

¹⁰² See Food and Drug Administration Revitalization Act, Pub. L. No. 101-635, § 201, 104 Stat. 4584 (1990) (codified as amended at 21 U.S.C. § 379f(a)(2) (2006)) (authorizing FDA to "retain all fees charged for [FOIA] requests").

be deposited into the Treasury of the United States.¹⁰³

The appropriate standard of judicial review for fee issues has yet to be clearly established in the decisions that have considered this issue.¹⁰⁴ The majority of courts that have reviewed fee issues under the FOIA have applied a single review standard (i.e., de novo review) to both fee and fee waiver matters, and they have done so with little or no discussion.¹⁰⁵ As for the scope of the review, courts have limited their review to the administrative record before the agency at the time of its decision.¹⁰⁶ The extent of judicial

¹⁰³ See OMB Fee Guidelines, 52 Fed. Reg. at 10,012, 10,017 (directing that funds collected for providing FOIA services must be deposited into general revenues of United States and not into agency accounts).

¹⁰⁴ Compare Hall, 2005 WL 850379, at *6 n.10 (acknowledging that there is "some dispute" as to review standard for fee limitation based on news media status (citing Judicial Watch, 122 F. Supp. 2d at 11-12 (applying arbitrary and capricious standard), and Judicial Watch, 133 F. Supp. 2d at 53 (applying de novo standard))), Crain, No. 02-0341, slip op. at 5 & n.5 (D.D.C. Mar. 25, 2003) (stating that there is uncertainty within D.C. Circuit as to standard of review regarding fee category status), Judicial Watch, 185 F. Supp. 2d at 59 (conceding that there is "some disagreement as to the correct standard" for review of agency's denial of media status), and Rozet, 59 F. Supp. 2d at 56 (emphasizing that although denials of fee waiver requests are reviewed de novo, "the appropriate standard of review for an agency determination of fee status under FOIA . . . has not been decided in this Circuit"), with Brown, 445 F. Supp. 2d at 1356 (acknowledging some disagreement as to appropriate standard of review for media category but applying de novo standard "because review under the de novo standard or under some more deferential standard leads to the same conclusion" in instant case), Elec. Privacy Info. Ctr., 241 F. Supp. 2d at 9 (concluding that "the statutory language, judicial authority, and [FOIA Reform Act's] legislative history . . . support the view that determinations regarding preferred fee status are reviewed de novo" while acknowledging that at least one recent court has applied "arbitrary and capricious" standard), and Hosp. & Physician Publ'g, 1999 WL 33582100, at *2 (stating in single sentence that court review of fee category is de novo, yet citing to statutory provision for de novo review of fee waivers).

¹⁰⁵ See, e.g., Judicial Watch, No. 00-0745, slip op. at 14-15 (D.D.C. Feb. 12, 2001) (applying de novo standard to both fee category and fee waiver issues) (same); Judicial Watch, 133 F. Supp. 2d at 53 (rejecting government's argument that arbitrary and capricious standard applied to matter of fee category; undertaking de novo review on both fee and fee waiver issues); Judicial Watch, 2000 WL 33724693, at *3-4 (applying de novo standard to fee category and fee waiver issues); cf. Hosp. & Physician Publ'g, 1999 WL 33582100, at *2 (using de novo standard for media issue, without discussion).

¹⁰⁶ See Stewart v. Dept. of the Interior, 554 F.3d 1236, 1243 (10th Cir. 2009) (declining, as did district court, to rely on affidavit submitted by agency because it "was not contained in the administrative record"); Ctr. for Pub. Integrity, 2007 WL 2248071, at *5 & n.3 (limiting administrative record to include those website pages actually viewed by agency instead of incorporating requester's entire website as suggested by plaintiff); Crain, No. 02-0341, slip op. at 7 (D.D.C. Mar. 25, 2003) (stating that "this Court's review of fee categorization is limited to the record that was before the agency at the time it made its decision"); Judicial Watch, 122

(continued...)

deference given to agency fee regulations that are based upon the OMB Fee Guidelines still remains unclear.¹⁰⁷

Fee Waivers

The fee waiver standard of the Freedom of Information Act,¹⁰⁸ provides that fees should be waived or reduced "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."¹⁰⁹ To implement this standard, the Department of Justice issued fee waiver policy guidance¹¹⁰ advising agencies of six analytical factors to be considered in applying this statutory fee waiver standard.¹¹¹ These six factors have been applied and implicitly approved by the Court of Appeals for the Ninth Circuit in McClellan Ecological Seepage Situation v. Carlucci,¹¹² and again within the same circuit some ten years later.¹¹³ More recently, the Courts of Appeals for the Tenth and District of Columbia Circuits have referenced and applied these multiple factors to the fee waiver matters before them.¹¹⁴

¹⁰⁶(...continued)

F. Supp. 2d at 12 (stating that scope of court's review is limited to administrative record).

¹⁰⁷ Compare Media Access Project, 883 F.2d at 1071 (stating that agency's interpretation of its own fee regulations "must be given at least some deference"), and Pietrangelo v. U.S. Dep't of the Army, 2007 U.S. Dist. LEXIS 46495, at *16 (same) (quoting Media Access Project, 883 F.2d at 1071), with Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1313 (D.C. Cir. 2003) (emphasizing that court owes "no particular deference to the [agency's] interpretation of FOIA") (fee waiver case), Physicians Comm. for Responsible Med. v. HHS, 480 F. Supp. 2d 119, 122 n.3 (D.D.C. 2007) (noting that while no deference was owed agency's interpretation of FOIA, court would apply agency's regulation because it was not in controversy and plaintiff had relied upon it in its request) (fee waiver context), and Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv., 290 F. Supp. 2d 1226, 1230 (D. Or. 2003) (stating that court owes no particular deference to agency's interpretation of FOIA (citing Judicial Watch, 326 F.3d at 1313)).

¹⁰⁸ 5 U.S.C. § 552(a)(4)(A)(iii) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

¹⁰⁹ Id.

¹¹⁰ See 5 U.S.C. § 552(e)(6).

¹¹¹ See FOIA Update, Vol. VIII, No. 1, at 3-10 ("OIP Guidance: New Fee Waiver Policy Guidance").

¹¹² 835 F.2d 1282, 1285-86 (9th Cir. 1987).

¹¹³ See Friends of the Coast Fork v. U.S. Dep't of the Interior, 110 F.3d 53, 55 (9th Cir. 1997) (noting that agency had "promulgated a multi-factor balancing test to assist in evaluating the statutory standard").

¹¹⁴ See Stewart v. U.S. Dep't of the Interior, 554 F.3d 1236, 1242 (10th Cir. 2009) (stating that
(continued...))

The statutory fee waiver standard contains two basic requirements: the public interest requirement (consisting of fee waiver factors one through four); and the requirement that the requester's commercial interest in the disclosure, if any, must be less than the public interest in it (consisting of fee waiver factors five and six).¹¹⁵ Both of these statutory requirements must be satisfied by the requester before properly assessable fees are waived or reduced under the statutory standard.¹¹⁶ Requests for a waiver or reduction of fees must be considered on a case-by-case basis¹¹⁷ inasmuch as the information sought varies from request to

¹¹⁴(...continued)

agency "established several [fee waiver] criteria that must be met . . . to obtain a fee waiver"); Judicial Watch, Inc. v. DOJ, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (stating that "for a request to be in the 'public interest,' four criteria must be satisfied," citing agency's multi-factor fee waiver regulation); see also, e.g., Brown v. U.S. Patent & Trademark Office, 445 F. Supp. 2d 1347, 1358-61 (M.D. Fla. 2006) (applying six factors agency considers in making fee waiver determinations), aff'd per curiam, No. 06-14716, 2007 WL 446601 (11th Cir. Feb. 13, 2007); cf. Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1313-15 (D.C. Cir. 2003) (applying agency's multi-factor public interest test but noting that no particular deference is owed to agency's interpretation of FOIA) (citation omitted).

¹¹⁵ See 5 U.S.C. § 552(a)(4)(A)(iii); see also Larson v. CIA, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (per curiam) (recognizing that "fee waiver test provides two-pronged analysis"); FedCure v. Lappin, 602 F. Supp. 2d 197, 201 (D.D.C. 2009) (stating that statute "prescribes a two-pronged test that the requester must satisfy"); Brown, 445 F. Supp. 2d at 1358 (referencing two-part test used for fee waiver determinations); Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv., 290 F. Supp. 2d 1226, 1228 (D. Or. 2003) (observing that statute establishes two-part test for fee waiver); Sloman v. DOJ, 832 F. Supp. 63, 68 (S.D.N.Y. 1993) (acknowledging statutory "two-pronged test" to be used for fee waiver determinations); DOJ Fee Waiver Regulation, 28 C.F.R. § 16.11(k) (2008).

¹¹⁶ See FOIA Update, Vol. VIII, No. 1, at 4 ("OIP Guidance: New Fee Waiver Policy Guidance"); see also Friends of the Coast Fork, 110 F.3d at 55 (reiterating that "requesters bear the initial burden of satisfying the statutory and regulatory standards for a fee waiver" (citing McClellan, 835 F.2d at 1284-85)); Ctr. for Medicare Advocacy v. HHS, 577 F. Supp. 2d 221, 239 (D.D.C. 2008) (noting that "courts employ a two part test to determine whether the requester has satisfied [its] burden"); In Def. of Animals v. NIH, 543 F. Supp. 2d 83, 97 (D.D.C. 2008) (noting that "requester bears initial burden" of meeting two-prong statutory test); Brown, 445 F. Supp. 2d at 1354 (stating that requester "bears the burden of providing information that supports his fee waiver request with the initial FOIA request"); McQueen v. United States, 264 F. Supp. 2d 502, 524 (S.D. Tex. 2003) (same), aff'd per curiam in pertinent part, 100 F. App'x 964 (5th Cir. 2004); Citizens Progressive Alliance v. U.S. Bureau of Indian Affairs, 241 F. Supp. 2d 1342, 1366 (D.N.M. 2002) (same); S.A. Ludsin & Co. v. SBA, No. 96 Civ. 2146, 1997 U.S. Dist. LEXIS 8617, at *10-11 (S.D.N.Y. June 19, 1997) (noting that fee waiver provision contains two requirements and that requester carries burden of proof on both), summary affirmance granted, 162 F.3d 1148 (2d Cir. 1998) (unpublished table decision); Anderson v. DEA, No. 93-253, slip op. at 4 (W.D. Pa. May 11, 1995) (magistrate's recommendation) (stating that burden is on requester to establish fee waiver standard met), adopted, (W.D. Pa. June 21, 1995).

¹¹⁷ See Media Access Project v. FCC, 883 F.2d 1063, 1065 (D.C. Cir. 1989) (remarking that
(continued...))

request.¹¹⁸ Further, requesters should address both of the statutory requirements in sufficient detail for the agency to make an informed decision as to whether it can appropriately waive or reduce the fees in question.¹¹⁹ In this regard, it is the requester, or the requester through an attorney or other representative, who must demonstrate his entitlement to a fee waiver and not the representative's possible entitlement.¹²⁰ To the extent that an agency in its fee waiver analysis does not consider a factor or factors addressed by the requester in its request, courts generally have construed that factor as not at issue and thus conceded.¹²¹

When a requester fails to provide sufficient information for the agency to make a fee waiver decision, the agency may defer consideration of the fee waiver request in order to ask

¹¹⁷(...continued)

any requester may seek waiver of assessed fees on "case-by-case" basis); Nat'l Sec. Archive v. DOD, 880 F.2d 1381, 1383 (D.C. Cir. 1989) (dictum) (noting that statute provides for fee waivers on "case-by-case" basis); Nat'l Wildlife Fed'n v. Hamilton, No. 95-017-BU, slip op. at 2 (D. Mont. July 15, 1996) (same); FOIA Update, Vol. VIII, No. 1, at 6 ("OIP Guidance: New Fee Waiver Policy Guidance").

¹¹⁸ See, e.g., Judicial Watch, Inc. v. DOJ, No. 99-2315, 2000 WL 33724693, at *5 (D.D.C. Aug. 17, 2000) ("Under the FOIA, the analysis focuses on the subject and impact of the particular disclosure, not the record of the requesting party.").

¹¹⁹ See, e.g., Judicial Watch, 326 F.3d at 1312 (reiterating that requests for fee waivers "must be made with reasonable specificity . . . and based on more than conclusory allegations") (quotation marks and internal citations omitted); McClellan, 835 F.2d at 1285 (stating that conclusory statements will not support fee waiver request); In Def. of Animals, 543 F. Supp. 2d at 109 (same); Jarvik v. CIA, 495 F. Supp. 2d 67, 73 (D.D.C. 2007) (stating that requester "must pinpoint the type of government activity he is investigating"); Prison Legal News, 436 F. Supp. 2d 17, 26 (D.D.C. 2006) (finding that requester had provided reasonable specificity as to how records about events within agency's facilities would benefit public); McQueen, 264 F. Supp. at 525 (emphasizing that "[c]onclusory statements on their face are insufficient" to prove entitlement to fee waiver).

¹²⁰ See Dale v. IRS, 238 F. Supp. 2d 99, 107 (D.D.C. 2002) ("A party's counsel is not the 'requester' for purposes of a fee waiver request."); cf. Trulock v. DOJ, 257 F. Supp. 2d 48, 52 (D.D.C. 2003) (finding that plaintiff failed to exhaust where "blanket" fee waiver request was submitted to agency in plaintiff's counsel's name, not his own); Uniform Freedom of Information Act Fee Schedule and Guidelines [hereinafter OMB Fee Guidelines], 52 Fed. Reg. 10,012, 10,018 (Mar. 27, 1987) (addressing same matter in fee category context).

¹²¹ See, e.g., Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Educ., 593 F. Supp. 2d 261, 269-270 (D.D.C. 2009) (noting that by not addressing plaintiff's assertion that its requests "were not primarily in its commercial interest," defendant conceded point); Physicians Comm. for Responsible Med. v. HHS, 480 F. Supp. 2d 119, 122 (D.D.C. 2007) (deciding that because agency did not raise any argument with regard to "commercial interest prong," plaintiff's commercial interest is not at issue).

the requester for necessary supplemental or clarifying information.¹²² As recently amended by the OPEN Government Act,¹²³ the FOIA now expressly provides that an agency may request additional information from the requester "if necessary to clarify with the requester issues regarding fee assessment."¹²⁴ (For a discussion of when it is appropriate to make such an inquiry, see Procedural Requirements, Time Limits, above.)

As an additional threshold matter, agencies analyzing fee waiver requests are not strictly bound by previous administrative decisions.¹²⁵

In order to determine whether the first fee waiver requirement has been met -- i.e., that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of government operations or activities¹²⁶ --

¹²² See, e.g., McClellan, 835 F.2d at 1287 (noting that "[t]he fee waiver statute nowhere suggests that an agency may not ask for more information if the requester fails to provide enough"; finding twenty-three questions posed by agency not burdensome); Citizens, 241 F. Supp. 2d at 1366 (recognizing that agency "is entitled to ask for more information with regard to a fee waiver request, where the information provided is not sufficient"); cf. OMB Fee Guidelines, 52 Fed. Reg. at 10,018 (specifying same in context of fee issue). But see Judicial Watch, 326 F.3d at 1315 (concluding that initial request demonstrated with reasonable specificity requester's eligibility for fee waiver, thus rejecting propriety of agency's request for additional information).

¹²³ OPEN Government Act § 6.

¹²⁴ Id.

¹²⁵ See, e.g., Judicial Watch, Inc., 2000 WL 33724693, at *5 (noting that requester's "past record in uncovering information [through use of FOIA] is simply irrelevant"); Judicial Watch, Inc. v. DOJ, No. 97-2089, slip op. at 14 (D.D.C. July 14, 1998) (finding, in case at hand, that it was "wholly irrelevant" that requester received fee waivers in other cases); Dollinger v. USPS, No. 95-CV-6174T, slip op. at 7-8 (W.D.N.Y. Aug. 24, 1995) (concluding that agency is not bound by previous decision on fee waiver for similar request from same requester); cf. Judicial Watch, Inc. v. GSA, No. 98-2223, slip op. at 14 (D.D.C. Sept. 25, 2000) (reiterating that although prior judicial recognition of requester's "ability to disseminate FOIA-disclosed information is not binding," agency should consider requester's "track record" and reputation for disseminating information).

¹²⁶ See, e.g., Judicial Watch, 326 F.3d at 1312 (stating that case turns on whether public interest requirement is met, and noting that agency's implementing regulation included "non-exclusive list of factors the agency 'shall consider'" (quoting agency's regulation)); S.A. Ludsin & Co. v. SBA, No. 97-7884, 1998 WL 642416, at *1 (2d Cir. Mar. 26, 1998) (reiterating that first requirement not met when requester "merely paraphrased" fee waiver provision); Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 66 n.11 (D.C. Cir. 1990) (conclusory statements insufficient to make public interest showing); Ctr. for Biological Diversity v. OMB, 546 F. Supp. 2d 722, 727 (N.D. Cal. 2008) (finding request was in "the public interest" and thus qualified for fee waiver where requester established why records were sought, what it intended to do with them, to whom it would give records, and "the [subject matter] expertise of [its] membership"); Judicial
(continued...)

agencies should consider the following four factors,¹²⁷ collectively referred to as the "public interest requirement," in sequence:

First, the subject matter of the requested records, in the context of the request, must specifically concern identifiable "operations or activities of the government."¹²⁸ Although in most cases records possessed by a federal agency will meet this threshold, the records must be sought for their informative value with respect to specifically identified government operations or activities;¹²⁹ a request for access to records for their intrinsic informational

¹²⁶(...continued)

Watch, Inc. v. DOJ, 122 F. Supp. 2d 5, 9 (D.D.C. 2000) (finding that nonprofit group's "general description of [its] organizational mission" failed to identify public interest to be served by release of specific information requested); Sloman, 832 F. Supp. at 68 (finding that public interest requirement is not met merely by quoting statutory standard); cf. Sierra Club Legal Def. Fund v. Bibles, No. 93-35383, slip op. at 3-4 (9th Cir. Aug. 29, 1994) (reasoning that requester's status as public interest law firm does not automatically entitle it to fee waiver at taxpayer expense). But cf. Judicial Watch of Fla., Inc. v. DOJ, No. 97-2869, slip op. at 4-5 (D.D.C. Aug. 25, 1998) (despite fact that disclosed information was "not necessarily all new," finding public interest served "by exposing government actions through litigation").

¹²⁷ See Judicial Watch, Inc., 365 F.3d at 1126 (D.C. Cir. 2004) (invoking agency's four-factor fee waiver test, and stating that "[the] four criteria must be satisfied" in order "for a request to be in the 'public interest'"); Judicial Watch, 326 F.3d at 1312 (applying agency's four-factor analysis of fee waivers, but referring to factors as "non-exclusive list"); In Def. of Animals, 543 F. Supp. 2d at 108-09 (applying agency's four-factor public interest test set forth in its regulations); Physicians Comm. for Responsible Med., 480 F. Supp. 2d at 122 (acknowledging defendant's use of four-part regulatory test to determine furtherance of public interest); Inst. for Wildlife Prot., 290 F. Supp. 2d at 1229 (recognizing that "agency is to consider [four fee waiver] factors in sequence").

¹²⁸ 5 U.S.C. § 552(a)(4)(A)(iii); see Brown v. U.S. Patent & Trademark Office, 226 F. App'x 866, 869 (11th Cir. 2007) (holding that requester failed to adequately explain how requested records were "related to the activities or operations" of agency); Oglesby v. DOJ, No. 02-0603, slip op. at 4 (D.D.C. Sept. 3, 2002) (finding that requester's statement that records pertaining to him would show "which [of his] activities were of interest to the Government and what actions it took with respect to them" was conclusory and did not identify "the link between identifiable government operations and the information requested"); FOIA Update, Vol. VIII, No. 1, at 6 ("OIP Guidance: New Fee Waiver Policy Guidance"); cf. NTEU v. Griffin, 811 F.2d 644, 648 (D.C. Cir. 1987) (finding that "the links between furnishing the requested information and benefitting the general public" should not be "tenuous") (predecessor fee waiver standard); Dollinger, No. 95-CV-6174T, slip op. at 4 (W.D.N.Y. Aug. 24, 1995) (concluding that "government" as used in fee waiver standard refers to federal government).

¹²⁹ See, e.g., Brown, 445 F. Supp. 2d 1358-59 (finding that the allegations made in lawsuits brought against agency did not concern operations or activities of agency); Judicial Watch, Inc. v. Reno, No. 00-0723, 2001 WL 1902811, at *10 (D.D.C. Mar. 30, 2001) (upholding agency's assessment of fees, reasoning that while agency's response to citizen letters regarding Cuban emigré Elian Gonzales would likely contribute to understanding of agency actions, incoming

(continued...)

content alone would not satisfy this threshold consideration.¹³⁰ However, when a federal agency has in some manner used records that came into its possession that ordinarily would not in and of themselves be reflective of the operations of the government, some courts have found them to concern the operations or activities of the government.¹³¹

Second, in order for the disclosure to be "likely to contribute" to an understanding of specific government operations or activities, the disclosable portions of the requested information must be meaningfully informative in relation to the subject matter of the request.¹³² Requests for information that is already in the public domain, either in a

¹²⁹(...continued)

citizen letters to agency on that topic do not), summary judgment granted on other grounds, (D.D.C. Sept. 25, 2001); S.A. Ludsin, 1997 U.S. Dist. LEXIS 8617, at *14 (holding that disclosure of appraisals of government property do not "in any readily apparent way" contribute to public's understanding of operations or activities of government); Atkin v. EEOC, No. 91-2508, slip op. at 27-28 (D.N.J. Dec. 4, 1992) (finding requested list of agency attorneys and their bar affiliations "clearly does not concern identifiable government activities or operations"), appeal dismissed for failure to timely prosecute sub nom. Atkin v. Kemp, No. 93-5548 (3d Cir. 1993); Nance v. USPS, No. 91-1183, 1992 WL 23655, at *2 (D.D.C. Jan. 24, 1992) (reiterating that disclosure of illegally cashed money orders will not contribute significantly to public understanding of operations of government).

¹³⁰ See FOIA Update, Vol. VIII, No. 1, at 6 ("OIP Guidance: New Fee Waiver Policy Guidance").

¹³¹ See Forest Guardians, 416 F.3d 1173, 1178 (10th Cir. 2005) (finding that lienholder agreements that derived from private transactions have connection to activities of government where government maintains copies of those records and notifies submitters of agency actions that "might affect" their value); Schoenman v. FBI, 604 F. Supp. 2d 174, 192 (D.D.C. 2009) (finding that records that originated outside government are not "categorically ineligible" for fee waiver when they are "targeted and collected" by agency); Ctr. for Medicare Advocacy, 577 F. Supp. 2d at 240-41 (finding that although certain documents sought were "submitted by private parties seeking to do business with the federal government" they "were reviewed by the agency" as part of its considerations and thus concern activities of government); cf. Inst. for Wildlife Prot., 290 F. Supp. 2d at 1231 (ordering fee waiver where requested documents consisted of petitions submitted to agency by outside parties seeking to list particular species as endangered and where requester "theorized" that such petitions were "likely to contain marginal notes" by agency employees whose "opinions are often ignored or overturned" by agency personnel of higher authority).

¹³² 5 U.S.C. § 552 (a)(4)(A)(iii); see Carney v. DOJ, 19 F.3d 807, 814 (2d Cir. 1994) (stating that it is relevant to consider subject matter of fee waiver request); Larson, 843 F.2d at 1483 (noting that character of information is proper factor to consider); Manley v. Dep't of the Navy, No. 1:07-cv-721, 2008 WL 4326448, at *4 (S.D. Ohio Sept. 22, 2008) (quoting with approval agency's regulation requiring "assessment of the 'the substantive content of the record . . . to determine whether disclosure is meaningful'"); Klein v. Toupin, No. 05-647, 2006 U.S. Dist. LEXIS 32478, at *11-12 (D.D.C. May 24, 2006) (reiterating that conclusory and unsupported assertions of misconduct are not "meaningfully informative" of government operations);

(continued...)

duplicative or a substantially identical form, or responsive files that consist largely of routine administrative information in comparison with a limited amount of substantive information, may not warrant a full fee waiver because the disclosure would not be likely to contribute to an understanding of government operations or activities when nothing new or substantive about the agency's activities would be added to the public's understanding.¹³³ There is no clear consensus among the courts as to what is and what is not considered information in the public domain.¹³⁴ (For discussions of records considered to be in the "public domain," and the

¹³²(...continued)

VoteHemp, Inc. v. DEA, 237 F. Supp. 2d 59, 61 (D.D.C. 2002) (rejecting as "rank speculation" plaintiff's allegations that agency had "ulterior motive" when it published interpretive rule, thus concluding that plaintiff "failed to establish that the disclosure it seeks has informative value"); AFGE v. U.S. Dept of Commerce, 632 F. Supp. 1272, 1278 (D.D.C. 1986) (finding union's allegations of malfeasance to be too ephemeral to warrant waiver of search fees without further evidence that informative material will be found), aff'd on other grounds, 907 F.2d 203 (D.C. Cir. 1990); FOIA Update, Vol. VIII, No. 1, at 6 ("OIP Guidance: New Fee Waiver Policy Guidance").

¹³³ See Judicial Watch, Inc., 365 F.3d at 1127 (upholding denial of "blanket fee waiver," emphasizing that plaintiff failed to counter government's representations that requested information "was already in the public domain"); Sierra Club Legal Def. Fund, No. 93-35383, slip op. at 4 (9th Cir. Aug. 29, 1994) (determining that plaintiff failed to explain "how its work would add anything to 'public understanding'" where requested material already widely disseminated and publicized); Carney, 19 F.3d at 815 (observing that "where records are readily available from other sources . . . further disclosure by the agency will not significantly contribute to public understanding"); McClellan, 835 F.2d at 1286 (recognizing new information has more potential to contribute to public understanding); Bansal v. DEA, No. 06-3946, 2007 WL 551515, at *5 (E.D. Pa. Feb. 16, 2007) (observing that allegations that records sought "are proof of corrupt government practices" to support fee waiver were raised during requester's criminal prosecution and thus are "already on the public record"); Brown, 445 F. Supp. 2d at 1359-60 (applying agency regulation that specified that "disclosure of information that already is in the public domain," such as that found "in open records and available to the public in court documents "would not be likely to contribute" to public understanding); Sloman, 832 F. Supp. at 68 (stating that public's understanding would not be enhanced to significant extent where material was previously released to other writers and "more important[ly]" was available in agency's public reading room "where the public has access and has used the information extensively"); cf. Campbell v. DOJ, 164 F.3d 20, 36 n.16 (D.C. Cir. 1998) (suggesting that something less than full fee waiver "might apply to records or files that are uncommonly large or that contain only a few substantive documents relative to the volume of administrative information"). But see Schoenman, 604 F. Supp. 2d at 191 (finding persuasive observation of D.C. Circuit that "the presence of administrative material within files that also contain substantive documents does not justify charging fees for the non-substantive clutter" (quoting Campbell v. DOJ, 164 F.3d at 36)); cf. Citizens for Responsibility & Ethics in Wash. v. HHS, 481 F. Supp. 2d 99, 112 (D.D.C. 2006) (considering agency's characterization of agency contracts sought by requesters as of "routine administrative nature" irrelevant where public interest in understanding such agency activities demonstrated).

¹³⁴ See Schrecker v. DOJ, 970 F. Supp. 49, 51 n.3 (D.D.C. 1997) ("The fact that some of the
(continued...)

impact of the "public availability" on agency records in other FOIA contexts, see Exemption 1, Waiver of Exemption Protection," below; Exemption 4, Competitive Harm Prong of National Parks, below; and Discretionary Disclosure and Waiver, below.)¹³⁵

Third, the disclosure must contribute to "public understanding"¹³⁶ as opposed to the individual understanding of the requester or a narrow segment of interested persons.¹³⁷ Over

¹³⁴(...continued)

information is available in the FBI reading room does not necessarily render it public domain." (citing Fitzgibbon v. AID, 724 F. Supp. 1048 (D.D.C. 1989)); cf. Manley, 2008 WL 4326448, at *4 (recognizing that "extent to which the information already exists in the public domain is relevant in assessing [factor two]," but finding that defendant had failed to substantiate that requested information in this instance was publicly available). Compare Judicial Watch, 2001 WL 1902811, at *10 (sustaining agency's assessment of fees for duplication of court documents, press clippings, and citizen letters where material was "easily accessible and available to everyone else for a fee" (quoting Durham v. DOJ, 829 F. Supp. 428, 434-35 (D.D.C. 1993))), and Durham, 829 F. Supp. at 434-35 (denying fee waiver for 2340 pages of public court records), appeal dismissed for failure to timely file, No. 93-5354 (D.C. Cir. Nov. 29, 1994), with Friends of the Coast Fork, 110 F.3d at 55 (9th Cir. 1997) (holding that availability in agency's public reading room alone does not justify denial of fee waiver), Carney, 19 F.3d at 815 (finding that mere fact records released to others does not mean same information is readily available to public), and In Def. of Animals, 543 F. Supp. 2d at 111 (commenting that courts "have been reluctant to treat information that is technically available, through a reading room or upon a FOIA request, as part of the public domain").

¹³⁵ Compare OSHA Data/CIH, Inc. v. U.S. Dep't of Labor, 220 F.3d 153, 163 n.25 (3d Cir. 2000) (agreeing with agency that "a limited disclosure to a limited audience" at private sector worksite "is surely insufficient" to render data publicly available), and N.Y. Times v. U.S. Dep't of Labor, 340 F. Supp. 2d 394, 401-02 & n.9 (S.D.N.Y. 2004) (finding that required postings of government information by private employers at their work sites for limited periods of time does not make such postings "public") (in context of Exemption 4 analysis of confidential business information), with Cottone v. Reno, 193 F.3d 550, 554 (D.C. Cir. 1999) (identifying documents that have been "disclosed and preserved in a permanent public record" within public domain doctrine) (waiver of exemption case).

¹³⁶ 5 U.S.C. § 552(a)(4)(A)(iii); see FOIA Update, Vol. VIII, No. 1, at 7-8 ("OIP Guidance: New Fee Waiver Policy Guidance").

¹³⁷ See Forest Guardians, 416 F.3d at 1179 (emphasizing that "FOIA fee waivers are limited to disclosures that will enlighten more than just the individual requester"); Carney, 19 F.3d at 814 (observing that relevant inquiry is "whether requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject"); Cnty. Legal Servs. v. HUD, 405 F. Supp. 2d 553, 557 (E.D. Pa 2005) (acknowledging that while requester's limited dissemination methods are unlikely to reach general audience "there is a segment of the public interested in requester's work"); Citizens, 241 F. Supp. 2d at 1367 (holding that requester's intent to release information obtained "to the media is not sufficient to demonstrate that disclosure would contribute significantly to public understanding"); Judicial Watch, Inc. v. DOJ, 185 F. Supp. 2d 54, 59 (D.D.C. 2002) (stating that requester must show that disclosure

(continued...)

two decades ago, courts did not generally define the "general public" to include the prison population.¹³⁸ Since then, however, the limited number of courts that have addressed this issue, have found prisoners to be the "public" within the meaning of the FOIA.¹³⁹ Only one case has directly addressed the issue of whether the "public" encompasses only the population of the United States.¹⁴⁰ In that case the court held that disclosure to a foreign news syndicate that published only in Canada satisfied the requirement that it contribute to "public understanding."¹⁴¹

As the proper focus must be on the benefit to be derived by the public, any personal benefit to be derived by the requester, or the requester's particular financial situation, are not considerations entitling him or her to a fee waiver.¹⁴² Indeed, it is well settled that indigence

¹³⁷(...continued)

will contribute to understanding of "reasonably broad audience of persons"); Fazzini v. DOJ, No. 90-C-3303, 1991 WL 74649, at *5 (N.D. Ill. May 2, 1991) (finding that requester cannot establish public benefit merely by alleging he has "corresponded" with members of media and intends to share requested information with them), summary affirmance granted, No. 91-2219 (7th Cir. July 26, 1991). But see FedCure, 602 F. Supp. 2d at 202-03 (rejecting agency's "small audience" argument, finding that plaintiff's dissemination to "federal inmates, their families and others," constitutes "sufficiently broad audience" interested in subject).

¹³⁸ See, e.g., Wagner v. DOJ, No. 86-5477, slip op. at 2 (D.C. Cir. Mar. 24, 1987) (stating that general public must benefit from release); Cox v. O'Brien, No. 86-1639, slip op. at 2 (D.D.C. Dec. 16, 1986) (upholding denial of fee waiver where prisoners, not general public, would be beneficiaries of release).

¹³⁹ See Ortloff v. DOJ, No. 98-2819, slip op. at 21 (D.D.C. Mar. 22, 2002) (stressing that to qualify for fee waiver, requester's ability to disseminate information "to the general public, or even to a limited segment of the public such as prisoners" must be demonstrated); Linn v. DOJ, No. 92-1406, 1995 WL 631847, at *14 (D.D.C. Aug. 22, 1995) (rejecting agency's position that dissemination to prison population is not to public at large; statute makes no distinction between incarcerated and nonincarcerated public).

¹⁴⁰ See Southam News v. INS, 674 F. Supp. 881 (D.D.C. 1987).

¹⁴¹ Id. at 892-93; cf. Edmonds Inst. v. U.S. Dep't of Interior, 460 F. Supp. 2d 63, 74 n.7 (D.D.C. 2006) (refraining from addressing agency's claim that meaning of "public" for fee waiver purposes "does not include members of the international community" given that there were sufficient number of U.S.-based organizations involved in supporting request before agency).

¹⁴² See, e.g., Carney, 19 F.3d at 816 (finding fee waiver inappropriate for portion of responsive records that concerned processing of plaintiff's own FOIA requests); McClain v. DOJ, 13 F.3d 220, 220-21 (7th Cir. 1993) (stating that fee waiver not merited when requester sought to serve private interest rather than "public understanding of operations or activities of the government"); Cotton v. Stine, No. 6:07-98, 2008 U.S. Dist. LEXIS 93149, at *1-2 (E.D. Ky. Nov. 14, 2008) (finding no indication of public benefit where prisoner sought fee waiver for papers lost during his transfer to another facility); Bansal, 2007 WL 551515, at *5 (observing that records needed to perfect appeal of requester's criminal conviction "primarily serves his

(continued...)

alone, without a showing of a public benefit, is insufficient to warrant a fee waiver.¹⁴³

Additionally, agencies should evaluate the identity and qualifications of the requester -- e.g., his or her expertise in the subject area of the request and ability and intention to disseminate the information to the public -- in order to determine whether the public would benefit from disclosure to that requester.¹⁴⁴ Specialized knowledge may be required to

¹⁴²(...continued)

own interests"); Klein, 2006 U.S. Dist. LEXIS 32478, at *1, *12 (finding that plaintiff presented no evidence to show how records related to his suspension from practice before agency "would benefit anyone other than himself"); McQueen, 264 F. Supp. 2d at 525 (acknowledging that although plaintiff asserted more than one basis in support of fee waiver, his "primary purposes" served private interests and disqualified him on that basis alone); Mells v. IRS, No. 99-2030, 2002 U.S. Dist. LEXIS 24275, at *5-7 (D.D.C. Nov. 21, 2002) (noting that requester's reasons for fee waiver were "overwhelmingly personal in nature" where he claimed that disclosure "would yield exculpatory evidence pertaining to his criminal conviction"). But see Johnson v. DOJ, No. 89-2842, slip op. at 3 (D.D.C. May 2, 1990) (stressing that death-row prisoner seeking previously unreleased and possibly exculpatory information was entitled to partial fee waiver on rationale that potential "miscarriage of justice . . . is a matter of great public interest"), summary judgment granted, 758 F. Supp. 2, 5 (D.D.C. 1991) (holding that, ultimately, FBI not required to review records or forego FOIA exemption for possibly exculpatory information); see also Pederson v. RTC, 847 F. Supp. 851, 856 (D. Colo. 1994) (concluding that requester's personal interest in disclosure of requested information did not undercut fee waiver request when requester established existence of concurrent public interest).

¹⁴³ See, e.g., Brunsilius v. DOE, No. 07-5362, 2008 U.S. App. LEXIS 15314, at *2 (D.C. Cir. July 16, 2008) (per curiam) (emphasizing that "[a]ppellant's indigence and his private litigation interest are not valid bases for waiving fees under FOIA"); Ely v. USPS, 753 F.2d 163, 165 (D.C. Cir. 1985) ("Congress rejected a fee waiver provision for indigents."); Cotton, 2008 U.S. Dist. LEXIS 93149, at *1-2 (reiterating that Congress has "rejected fee waiver provision for indigents" and that fee waiver denials for records on self "will be upheld despite requester's indigence"); Emory v. HUD, No. 05-00671, 2007 WL 641406, at *4 (D. Haw. Feb. 23, 2007) (stating that order granting in forma pauperis status is not waiver of FOIA fee requirement in agency regulation); Bansal, 2007 WL 551515, at *6 (finding "no special provision" in statute for "reduced fees based on indigence or incarcerated status"); Rodriguez-Estrada v. United States, No. 92-2360, slip op. at 2 (D.D.C. Apr. 16, 1993) (explaining no entitlement to fee waiver on basis of in forma pauperis status under 28 U.S.C. § 1915 (2000)); see also S. Conf. Rep. No. 93-1200, at 8 (1974), reprinted in 1974 U.S.C.C.A.N. 6285, 6287 (proposed fee waiver provision for indigents eliminated; "such matters are properly the subject for individual agency determination in regulations").

¹⁴⁴ Compare Brunsilius, 2008 U.S. App. LEXIS 15314, at *2 (finding no entitlement to fee waiver where plaintiff failed to "demonstrate his ability to disseminate . . . to the general public"), Brown, 226 F. App'x at 868-69 (determining that requester's stated purpose of his website, its traffic, and attention it has received "do not establish that he . . . disseminates news to the public at large"), McClain, 13 F.3d at 221 (stating that fee waiver must be assessed in light of identity and objectives of requester), Larson, 843 F.2d at 1483 & n.5

(continued...)

extract, synthesize, and effectively convey the information to the public, and requesters vary in their ability to do so.¹⁴⁵

¹⁴⁴(...continued)

(holding that inability to disseminate information alone is sufficient basis for denying fee waiver request; requester cannot rely on tenuous link to newspaper to establish dissemination where administrative record "failed to identify recipient news media outlet to which he intended to release information, his purpose for seeking requested material, or his . . . contacts with any major newspaper companies"), Hall v. CIA, No. 04-0814, 2005 WL 850379, at *7 (D.D.C. Apr. 13, 2005) (viewing requester's statement that he "makes pertinent information available to newspapers and magazines' . . . [as] exactly the kind of vague statement that will preclude a fee waiver", subsequent opinion, No. 04-0814, 2006 WL 197462 (D.D.C. Jan. 25, 2006), Citizens, 241 F. Supp. 2d at 1366 (stating that when applying fee waiver standard, it is relevant to consider ability of requester to disseminate information), and Anderson, No. 93-253, slip op. at 4 (W.D. Pa. May 11, 1995) (finding requester's inability to disseminate fatal to fee waiver), with Forest Guardians, 416 F.3d at 1180 (finding requester's publication of online newsletter and its intent to create interactive website using requested records, "among other things," to be sufficient for dissemination purposes), Judicial Watch, 326 F.3d at 1314 (granting fee waiver where requester did not specifically state its intent to disseminate requested information but had presented multiple ways in which it could convey information to public), Carney, 19 F.3d at 814-15 (characterizing dissemination requirement as ability to reach "a reasonably broad audience of persons interested in the subject" and not need to "reach a broad cross-section of the public"), Manley, 2008 WL 4326448, at *6 (same) (quoting Carney, 19 F.3d at 815), Consumers' Checkbook v. HHS, 502 F. Supp. 2d 79, 87-88 (D.D.C. 2007) (determining requester's dissemination plan adequate where requester had broad base of subscribers for its publication, coverage of its press releases by "numerous major media outlets," and ongoing relationship with local television station), Cnty. Legal Servs., 405 F. Supp. 2d at 557 n.3 (noting that agency's demand for "detailed numbers" with regard to requester's dissemination plan is not required by at least three other courts), W. Watersheds Project v. Brown, 318 F. Supp. 2d 1036, 1040-41 (D. Idaho 2004) (concluding that requester had adequately demonstrated its intent and ability "to reach a large audience" through multiple means including its regular newsletter, radio and newspapers, website, presentations to diverse groups, and participation in conferences and nationwide public events, and Eagle v. U.S. Dep't of Commerce, No. C-01-20591, 2003 WL 21402534, at *3, *5 (N.D. Cal. Apr. 28, 2003) (finding that educator-requester made adequate showing of his ability to disseminate through his proposed distribution of newsletter to Congress, through publication in academic journals, and through publication on website).

¹⁴⁵ See McClellan, 835 F.2d at 1286 (observing that fee waiver request gave no indication of requesters' ability to understand and process information nor whether they intended to actually disseminate it); S. Utah, 402 F. Supp. 2d at 87 (finding that requester's past publication history in area of cultural resources, its recent report on related issues, and its periodic comments to federal agencies on same were sufficient to establish for fee waiver purposes its expertise in "analyzing and disseminating records"); W. Watersheds, 318 F. Supp. 2d at 1038, 1040 (accepting requester's statement that it could put requested ecological information -- characterized by requester as "tedious to read and difficult to understand" -- into more user-friendly format given its past analysis of similar information, and noting there was no evidence in record demonstrating that "the information requested was highly (continued...)

Although representatives of the news media, as defined by the FOIA,¹⁴⁶ are not "automatically" entitled to a fee waiver¹⁴⁷ they are generally able to meet this aspect of the statutory requirement by showing their ability to disseminate information.¹⁴⁸ Other requesters may be asked to describe their expertise in the subject area and their ability and intention to disseminate the information if this is not evident from the administrative record.¹⁴⁹ (For a further discussion of news media requesters as defined by the OPEN Government Act, see Fee and Fee Waivers, Fees, Requester Categories, above.)

¹⁴⁵(...continued)

technical"); Eagle, 2003 WL 21402534, at *5 (granting fee waiver and emphasizing that agency ignored educational institution requester's intent to review, evaluate, synthesize, and present "the otherwise raw information into a more usable form"); S.A. Ludsin, 1997 U.S. Dist. LEXIS 8617, at *16 (finding requester's intention to make raw appraisal data available on computer network, without analysis, to be insufficient to meet public interest requirement); see also FOIA Update, Vol. VIII, No. 1, at 7 ("OIP Guidance: New Fee Waiver Policy Guidance"). But see FedCure, 602 F. Supp. 2d at 205 (explaining that any dissemination of "highly technical" information where none is currently available, "regardless of [requester's] plan for interpreting the information," will enhance public's understanding of it).

¹⁴⁶ 5 U.S.C. § 552(a)(4)(A)(ii)(III).

¹⁴⁷ See McClain, 13 F.3d at 221 (dictum) (concluding that status as newspaper or nonprofit institution does not lead to automatic waiver of fee); Hall, 2005 WL 850379, at *7 n.13 (noting that qualification as news media entity "would not automatically" entitle requester to public interest fee waiver).

¹⁴⁸ See FOIA Update, Vol. VIII, No. 1, at 8 & n.5 ("OIP Guidance: New Fee Waiver Policy Guidance"); see also Oglesby, No. 02-0603, slip op. at 5 (D.D.C. Sept. 3, 2002) (reiterating that member of news media presumptively meets dissemination factor).

¹⁴⁹ See Edmonds Inst., 460 F. Supp. 2d at 75 (finding that evidence of requester's past use of FOIA materials "can be relevant to a fee-waiver determination" but that there is no statutory or regulatory requirement that requester provide it); FOIA Update, Vol. VIII, No. 1, at 8 & n.5 ("OIP Guidance: New Fee Waiver Policy Guidance") ("Where not readily apparent to an agency, requesters should be asked to describe specifically their qualifications, the nature of their research, the purposes for which they intend to use the requested information, and their intended means of dissemination to the public."). Compare Oglesby, 920 F.2d at 66 n.11 (explaining that requester's assertion that he was writer and had disseminated in past, coupled with bare statement of public interest, was insufficient to meet statutory standard), with Carney, 19 F.3d at 815 (noting that while requester had only tentative book publication plans, "fact that he is working on a related dissertation is sufficient evidence . . . that his book will be completed"), S. Utah, 402 F. Supp. 2d at 87-88 (finding requester's specific examples of its involvement in area of cultural resources, including its submission of public comments about impact to such resources on federal land to federal agencies, publication of articles and reports, and use of archaeologists for its work, to be "sufficient evidence" of its expertise in field), and W. Watersheds, 318 F. Supp. 2d at 1038, 1040 (stating that where no evidence was presented that information sought was "highly technical," requester's past experience analyzing agency records was sufficient to demonstrate its ability to "process the information" and to present it to public in summarized form).

Additionally in this regard, while nonprofit organizations and public interest groups often are capable of disseminating information, they do not presumptively qualify for fee waivers; rather they must, like any requester, meet the statutory requirements for a full waiver of all fees.¹⁵⁰

Requesters who make no showing of how the information would be disseminated, other than through passively making it available to anyone who might seek access to it, do not meet the burden of demonstrating with particularity that the information will be communicated to the public.¹⁵¹

Fourth, the disclosure must contribute "significantly" to public understanding of government operations or activities.¹⁵² To warrant a waiver or reduction of fees, the public's

¹⁵⁰ See Forest Guardians, 416 F.3d at 1178 (reiterating that public interest groups "must still satisfy the statutory standard to obtain a fee waiver"); Sierra Club Legal Def. Fund, No. 93-35383, slip op. at 4 (9th Cir. Aug. 29, 1994) (explaining that status as public interest law firm does not entitle requester to fee waiver); McClain, 13 F.3d at 221 (stating that status as newspaper or nonprofit institution does not lead to "automatic" waiver of fee); McClellan, 835 F.2d at 1284 (stating that legislative history makes plain that "public interest" groups must satisfy statutory test); VoteHemp, 237 F. Supp. 2d at 59 (explaining that nonprofit status "does not relieve [the requester] of its obligation to satisfy the statutory requirements for a fee waiver"); Nat'l Wildlife Fed'n, No. 95-017-BU, slip op. at 3-4 (D. Mont. July 15, 1996) (finding that public interest groups must satisfy statutory test and that requester does not qualify for fee waiver by "basically" relying on its status "as one of the nation's largest" conservation organizations).

¹⁵¹ See, e.g., Van Fripp v. Parks, No. 97-0159, slip op. at 12 (D.D.C. Mar. 16, 2000) (emphasizing that placement in library amounts to, "at best, a passive method of distribution" that does not establish entitlement to fee waiver); Klamath Water Users Protective Ass'n, No. 96-3077, slip op. at 47 (D. Or. June 19, 1997) (finding placement in library insufficient in itself to establish entitlement to fee waiver); see also FOIA Update, Vol. VIII, No. 1, at 8 ("OIP Guidance: New Fee Waiver Policy Guidance") (advising agencies that such requests should be analyzed to identify particular person or persons who actually will use requested information in scholarly or other analytic work and then disseminate it to general public).

¹⁵² See 5 U.S.C. § 552(a)(4)(A)(iii); see also Stewart, 554 F.3d at 1244 (denying fee waiver where plaintiffs failed to demonstrate how search for documents not yet known to exist would "reveal additional or different information" than that already provided, stating that court could not determine "how such information would 'contribute significantly to public understanding'"); Brown, 226 F. App'x at 869 (finding that requester failed to explain how disclosure would be "likely to contribute significantly to public understanding"); Natural Res. Def. Council v. EPA, 581 F. Supp. 2d 491, 501 (S.D.N.Y. 2008) (stating that public's understanding of agency's decisionmaking "will be significantly enhanced by learning about the nature and scope of [agency] communications with commercial interests"; no allegation of agency impropriety by requester necessary); Bansal, 2007 WL 551515, at *5 (noting that records needed to perfect appeal of requester's criminal conviction insufficient basis on which to conclude that disclosure would contribute significantly to public understanding of government operations); FOIA Update, Vol. VIII, No. 1, at 8 ("OIP Guidance: New Fee Waiver

(continued...)

understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent.¹⁵³ Such a determination must be an objective one; agencies are not permitted to make separate value judgments as to whether any information that would in fact contribute significantly to public understanding of government operations or activities is "important" enough to be made public.¹⁵⁴

¹⁵²(...continued)

Policy Guidance"); cf. Cnty. Legal Servs., 405 F. Supp. 2d at 558-59 (while observing that neither statute nor agency's regulation provided guidance on "what constitutes a 'significant' contribution," other courts have considered "current availability" and "newness of information sought" under this factor).

¹⁵³ See Sierra Club Legal Def. Fund, No. 93-35383, slip op. at 4 (9th Cir. Aug. 29, 1994) (concluding that requester failed to explain how disclosure to it "would add anything to 'public understanding' in light of vast amount of material already disseminated and publicized"); Carney, 19 F.3d at 815 (observing that when requested records are readily available from other sources, further disclosure will not significantly contribute to public understanding); FedCure, 602 F. Supp. 2d at 205 (explaining that any dissemination of "highly technical" information where none is currently available, will enhance public's understanding of it); McDade v. EOUSA, No. 03-1946, slip op. at 9 (D.D.C. Sept. 29, 2004) (paraphrasing with approval agency's regulation that provides that "public's understanding of the subject after disclosure must be enhanced significantly when compared to level of public understanding prior to disclosure"), summary affirmance granted to agency, No. 04-5378, 2005 U.S. App. LEXIS 15259, at *1 (D.C. Cir. July 25, 2005); W. Watersheds, 318 F. Supp. 2d at 1039 n.2 (finding that significance factor was met where requester's statements that information sought either was not readily available or had never been provided to public were not contradicted in administrative record by agency); Judicial Watch, 185 F. Supp. 2d at 62 (finding that plaintiff failed to describe with specificity how disclosure of "these particular documents will 'enhance' public understanding 'to a significant extent'"); FOIA Update, Vol. VIII, No. 1, at 8 ("OIP Guidance: New Fee Waiver Policy Guidance"); cf. Forest Guardians, 416 F.3d at 1181-82 (acknowledging that significance of contribution to be made by "release of the records" at issue "is concededly a close question," and finding that requester "should get the benefit of the doubt" and therefore is entitled to fee waiver); Cnty. Legal Servs., 405 F. Supp. 2d at 559 (finding that extent to which requested information already is available, its newness, and whether request is pretext for discovery all were proper considerations in applying "significance factor" where agency's regulation did not address statutory provision); Pederson, 847 F. Supp. at 855 (finding that despite requesters' failure to specifically assert such significance, widespread media attention referenced in appeal letter sufficient to demonstrate information's significant contribution to public understanding).

¹⁵⁴ See 132 Cong. Rec. S14,298 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy) (emphasizing that agencies should administer fee waiver provision in "an objective manner and should not rely on their own, subjective view as to the value of the information"); cf. Cnty. Legal Servs., 405 F. Supp. 2d at 560 (finding that agency's inference that requester's use of "information in advising clients suggests a litigious motive" was speculative given that requester's services include counseling as well as litigation and there was no evidence of any pending lawsuits against agency); FOIA Update, Vol. VIII, No. 1, at 8 ("OIP Guidance: New

(continued...)

Once an agency determines that the "public interest" requirement for a fee waiver has been met -- through its consideration of fee waiver factors one through four -- the statutory standard's second requirement calls for the agency to determine whether "disclosure of the information . . . is not primarily in the commercial interest of the requester."¹⁵⁵ In order to decide whether this requirement has been satisfied, agencies should consider the final two fee waiver factors -- factors five and six -- in sequence:

Accordingly, to apply the fifth factor an agency must next determine as a threshold matter whether the request involves any "commercial interest of the requester" which would be furthered by the disclosure.¹⁵⁶ A commercial interest is one that furthers a commercial, trade, or profit interest as those terms are commonly understood.¹⁵⁷ Information sought in furtherance of a tort claim for compensation or retribution for the requester is not considered to involve a "commercial interest."¹⁵⁸ Furthermore, not only profit-making corporations but also individuals or other organizations may have a commercial interest to be furthered by disclosure, depending upon the circumstances involved, in particular "the use to which [the requester] will put the information obtained."¹⁵⁹ Agencies may properly consider the

¹⁵⁴(...continued)
Fee Waiver Policy Guidance").

¹⁵⁵ 5 U.S.C. § 552(a)(4)(A)(iii).

¹⁵⁶ Id.; see FOIA Update, Vol. VIII, No. 1, at 9 ("OIP Guidance: New Fee Waiver Policy Guidance") (discussing analysis that is required to determine whether requester has commercial interest); see also VoteHemp, 237 F. Supp. 2d at 64 (citing to agency's regulation and noting that "agencies are instructed to consider 'the existence and magnitude' of a commercial interest").

¹⁵⁷ See OMB Fee Guidelines, 52 Fed. Reg. at 10,017-18 (defining "commercial interest"); cf. Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983) ("Information is commercial if it relates to commerce, trade, or profit.") (Exemption 4 context); Am. Airlines, Inc. v. Nat'l Mediation Bd., 588 F.2d 863, 870 (2d Cir. 1978) (defining term "commercial" in Exemption 4 as meaning anything "pertaining or relating to or dealing with commerce").

¹⁵⁸ See McClellan, 835 F.2d at 1285; Martinez v. SSA, No. 07-cv-01156, 2008 WL 486027, at *4 (D. Colo. Feb. 18, 2008) (restating that "claims for damages do not constitute commercial interest . . . when grounded in tort"); cf. Detroit Free Press, Inc. v. DOJ, 73 F.3d 93, 98 (6th Cir. 1996) (stating, in context of attorney fees, that "news interests should not be considered commercial interests" when examining commercial benefit to requester (quoting Fenster v. Brown, 617 F.2d 740, 742 n.4 (D.C. Cir. 1979))).

¹⁵⁹ OMB Fee Guidelines, 52 Fed. Reg. at 10,013; see FOIA Update, Vol. VIII, No. 1, at 9-10 ("OIP Guidance: New Fee Waiver Policy Guidance"); see also Research Air, Inc. v. Kempthorne, 589 F. Supp. 2d 1, 2, 10 (D.D.C. 2008) (finding that records pertaining to aircraft incident involving requester, who was president and sole owner of corporate plaintiff, would benefit his commercial interests); VoteHemp, 237 F. Supp. 2d at 65 (concluding that nonprofit organization, as advocate for free market in controlled substance, had commercial interest in requested records); cf. Critical Mass Energy Project v. NRC, 830 F.2d 278, 281 (D.C. Cir. 1987)

(continued...)

requester's identity and the circumstances surrounding the request and draw reasonable inferences regarding the existence of a commercial interest.¹⁶⁰

When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order subsequently to compare it to the "public interest" in disclosure.¹⁶¹ In assessing the magnitude of the commercial interest, the agency should reasonably consider the extent to which the FOIA disclosure will serve the requester's identified commercial interest.¹⁶²

Lastly the agency must balance the requester's commercial interest against the identified public interest in disclosure and determine which interest is "primary."¹⁶³ A fee waiver or reduction must be granted when the public interest in disclosure is greater in magnitude than the requester's commercial interest.¹⁶⁴

¹⁵⁹(...continued)

(recognizing that entity's "non-profit status is not determinative" of commercial status) (Exemption 4 case).

¹⁶⁰ See FOIA Update, Vol. VIII, No. 1, at 9 ("OIP Guidance: New Fee Waiver Policy Guidance"); see also Martinez, 2008 WL 486027, at *3-4 (analyzing class action representatives' commercial interest in records regarding amount paid by federal government to state government as reimbursement to class members, to include legal fees awarded to members, and concluding that it did not constitute "an interest in commerce, trade or profit"); VoteHemp, 237 F. Supp. 2d at 65 ("reiterating defendants' argument that plaintiff's website had "direct links to the websites of companies that sell hemp products" and solicit donations to "the industry's legal effort," and concluding that "plaintiff has a commercial interest in the information it is seeking"); cf. Tax Analysts v. DOJ, 965 F.2d 1092, 1096 (D.C. Cir. 1992) (clarifying that in context of attorney fees, status of requester as news organization does not "render[] irrelevant the news organization's other interests in the information").

¹⁶¹ See FOIA Update, Vol. VIII, No. 1, at 9 ("OIP Guidance: New Fee Waiver Policy Guidance").

¹⁶² See id.; see also VoteHemp, 237 F. Supp. 2d at 65 ("A review of plaintiff's Web site pages demonstrates that indeed it has a commercial interest in the information it is seeking to obtain.").

¹⁶³ See 5 U.S.C. § 552(a)(4)(A)(iii) (providing that disclosure cannot be "primarily in the commercial interest of the requester"); see Research Air, Inc., 589 F. Supp. 2d at 3, 10 (finding that requester's use of documents to challenge suspension of pilot's card was "primarily to benefit [requester's] commercial interests"); VoteHemp, 237 F. Supp. 2d at 65-66 (noting that agency "should consider the primary interest in disclosure," and concluding that while "[t]he private, commercial benefit to [requester] is clear[, t]he public benefit, however, is not" (quoting S.A. Ludsin & Co. v. SBA, No. 96-2146, 1997 WL 337469, at *7 (S.D.N.Y. June 19, 1997))); FOIA Update, Vol. VIII, No. 1, at 9 ("OIP Guidance: New Fee Waiver Policy Guidance").

¹⁶⁴ See Consumers' Checkbook, 502 F. Supp. 2d at 89 (finding that while requester charges fees, this "does not outweigh the advancement of the public interest here," taking into
(continued...)

Although news gathering organizations ordinarily have a commercial interest in obtaining information, agencies may generally presume that when a news media requester has satisfied the "public interest" standard, that will be the primary interest served.¹⁶⁵ On the other hand, disclosure to private repositories of government records or data brokers may not be presumed to primarily serve the FOIA public interest; rather, requests on behalf of such entities might be considered as primarily in their commercial interest, depending upon the nature of the records and their relation to the exact circumstances of the enterprise.¹⁶⁶

When agencies analyze fee waiver requests by considering these six factors, courts have found that they have carried out their statutory obligation to determine whether a waiver is in the public interest.¹⁶⁷ Additionally, when only some of the requested records satisfy the statutory test, waiver has been upheld for just those records,¹⁶⁸ but some courts have found

¹⁶⁴(...continued)

consideration that requester "does not accept any advertising," its nonprofit status, its full funding through sales of certain of its products, and through consumer donations); FOIA Update, Vol. VIII, No. 1, at 9 ("OIP Guidance: New Fee Waiver Policy Guidance") (noting that determining whether requester's identified commercial interest is primary "requires the balancing of the requester's commercial interest against the public interest in disclosure that has been identified").

¹⁶⁵ See FOIA Update, Vol. VIII, No. 1, at 10 ("OIP Guidance: New Fee Waiver Policy Guidance"); see also Nat'l Sec. Archive, 880 F.2d at 1388 (requests from news media entities, in furtherance of their newsgathering function, are not for "commercial use"); cf. Tax Analysts, 965 F.2d at 1096 ("That the entity 'was not motivated simply by altruistic instincts' obviously does not mean that [it] is not a news organization If newspapers and television news shows had to show the absence of commercial interests before they could win attorney's fees in FOIA cases, very few, if any, would ever prevail." (internal citation omitted)).

¹⁶⁶ See FOIA Update, Vol. VIII, No. 1, at 10 ("OIP Guidance: New Fee Waiver Policy Guidance"); see also Nat'l Sec. Archive, 880 F.2d at 1387-88 (finding private libraries and private repositories "not to be within preferred [requester] category" and that in instant case, requester before it did not "make FOIA requests as an agent for others who want access to government documents [but] for its own purposes," and therefore could not be construed as "data broker").

¹⁶⁷ See, e.g., Smith v. BOP, 517 F. Supp. 2d 451, 454-55 (D.D.C. 2007) (holding that agency correctly decided requester failed to satisfy factors found in agency regulation when requester did not specify public interest involved, identify government activity relevant to request, explain how disclosure would contribute to public understanding of it, or state his intent and ability to disseminate requested information); see also FOIA Update, Vol. VIII, No. 1, at 10 ("OIP Guidance: New Fee Waiver Policy Guidance"); cf. Friends of the Coast Fork, 110 F.3d at 55 (emphasizing that where agency's regulations provide for multifactor test, it is inappropriate to rely on single factor); Or. Natural Desert Ass'n v. U.S. Dep't of the Interior, 24 F. Supp. 2d 1088, 1095 (D. Or. 1998) (finding that fee waiver denial must fail when agency did not fully follow its multifactor regulation).

¹⁶⁸ See Samuel Gruber Educ. Project v. DOJ, 24 F. Supp. 2d 1, 2 (D.D.C. 1998) (upholding, in (continued...))

that a full waiver is appropriate.¹⁶⁹

Because the statutory standard speaks to whether "disclosure" of the responsive information will significantly contribute to public understanding,¹⁷⁰ an analysis of the foregoing factors routinely requires an agency to first assess the nature of the information likely to be released in response to an access request. This assessment necessarily focuses on the information that would be disclosed,¹⁷¹ which in turn logically requires an estimation of the applicability of any relevant FOIA exemption(s).

The question of whether an agency should be required to establish the precise contours of its anticipated withholdings at the fee waiver determination stage was raised during the late 1980s in Project on Military Procurement v. Department of the Navy.¹⁷² There the district court suggested that an agency submit an index pursuant to the requirements of Vaughn v. Rosen¹⁷³ to defend the denial of a fee waiver based on anticipated application of FOIA exemptions.¹⁷⁴

¹⁶⁸(...continued)

case involving in excess of 80,000 pages of responsive records, seventy-percent fee waiver granted by agency); cf. Campbell, 164 F.3d at 35-37 (finding, where agency awarded partial fee waiver, that it had not carried its burden in denying waiver for public domain, repetitious, and administrative information in files, remanding for agency to "recalculate its fee waiver ratio" but specifically "declin[ing] to hold" that FBI cannot charge any copying fee").

¹⁶⁹ See Schoenman, 604 F. Supp. 2d at 191 (D.D.C. 2009) (finding that "the presence of administrative material within files that also contain substantive documents does not justify charging fees for the non-substantive clutter" (quoting Campbell, 164 F.3d at 36)); Schrecker, 970 F. Supp. at 50-51 (granting full fee waiver where agency provided no "strong evidence" that portion of requested information already was in public domain).

¹⁷⁰ 5 U.S.C. § 552(a)(4)(A)(iii); see also, e.g., DOJ Fee Waiver Regulation, 28 C.F.R. § 16.11(k)(2).

¹⁷¹ See Hall, 2005 WL 850379, at *7 (reiterating that FOIA fee waiver provision is applicable to "properly disclosed documents"); Judicial Watch, 2000 WL 33724693, at *5 (explaining that "under the FOIA, the [fee waiver] analysis focuses on the subject and impact of the particular disclosure"); Van Fripp, No. 97-159, slip op. at 10 (D.D.C. Mar. 16, 2000) (stating that "reviewing agencies and courts should consider . . . whether the disclosable portions of requested information are meaningfully informative in relation to the subject matter requested" (citing agency's fee waiver regulation)).

¹⁷² 710 F. Supp. 362, 366-68 (D.D.C. 1989).

¹⁷³ 484 F.2d 820, 826-28 (D.C. Cir. 1973).

¹⁷⁴ See 710 F. Supp. at 367 n.11 (noting that government "may be correct" that fee waiver determination depends in part on applicability of FOIA exemptions to responsive records, and stating that it "suggested that defendant [either] submit a Vaughn Index or . . . produce the documents it seeks to withhold for in camera inspection" so that court could "determine both the nondisclosure and fee waiver issues").

Since Project on Military Procurement, several district court opinions have concluded that fee waiver requests should not take into consideration the fact that records may ultimately be found to be exempt from disclosure.¹⁷⁵ Additionally, the majority of these opinions specify that a fee waiver request should be evaluated "on the face of the request."¹⁷⁶ The fee waiver provision, however, authorizes agencies to waive or reduce fees when "disclosure of the information is likely to contribute significantly to the public's understanding of government operations" (emphasis added).¹⁷⁷

The FOIA does not explicitly reference any time period within which an agency must resolve a fee waiver issue.¹⁷⁸ The statutory twenty-working day time period to respond to a request has been applied to resolution of fee waiver (and fee) issues by several courts,

¹⁷⁵ See Carney, 19 F.3d at 815 (finding that agency's denial of fee waiver was not proper when made simply on basis that requested records "may [be] exempt from disclosure . . . , [because a] fee waiver should be evaluated based on the face of the request and the reasons given by the requester" (citing Project on Military Procurement, 710 F. Supp. at 367)); Citizens for Responsibility & Ethics in Wash. v. DOJ, 602 F. Supp. 2d 121, 125 (D.D.C. 2009) ("Fee-waiver requests are [not] evaluated . . . on the possibility of eventual exemption from disclosure.") (citations omitted); Ctr. for Medicare Advocacy, 577 F. Supp. 2d at 241 (fee waiver decision should not be based on "possibility that the records may ultimately be determined to be exempt from disclosure" (quoting Judicial Watch, Inc. v. DOT, No. 02-566, 2005 WL 1606915, at *4 (D.D.C. July 5, 2005))) (remaining citations and quotations omitted); Ctr. for Biological Diversity, 546 F. Supp. 2d at 729 (rejecting agency's rationale for fee waiver denial based on its argument that "given its unique role as a deliberative agency that advises the President about proposed regulations makes this the rare case" when responsive documents were "patently exempt" from disclosure); S. Utah, 402 F. Supp. 2d at 90 (deciding that agency cannot base fee waiver decision on anticipated redactions to responsive records); Judicial Watch, 2005 WL 1606915, at *4 (stating that fee waiver decision should not be made on basis of agency's "determination that most of the information was exempt from disclosure"); Judicial Watch, 310 F. Supp. 2d at 295 (same); Wilson v. CIA, No. 89-3356, slip op. at 3-4 (D.D.C. Mar. 25, 1991) (stating that agency may not deny fee waiver request based upon "likelihood" that information will be withheld); cf. Schoenman, 604 F. Supp. 2d at 190-91 (finding that agency improperly concluded that "certain records are not qualified for a fee waiver because they contain exempt material," rejecting defendants' distinction between asserted exemptions for records already processed as in instant case and "anticipated" exemptions, stating that "this distinction is not one that courts have necessarily relied on").

¹⁷⁶ See, e.g., Carney, 19 F.3d at 815 (finding that "fee waiver should be evaluated based on the face of the request and the reasons given by the requester" (citing Project on Military Procurement, 710 F. Supp. at 367)); Citizens for Responsibility & Ethics in Wash., 602 F. Supp. 2d at 125 (emphasizing that "[f]ee-waiver requests are evaluated based on the face of the request") (citations omitted); Ctr. for Medicare Advocacy, 577 F. Supp. 2d at 241 (same) (quoting Judicial Watch, 2005 WL 1606915, at *4)); Ctr. for Biological Diversity, 546 F. Supp. 2d at 730 (finding that fee waiver "should be evaluated based on the face of the request and the reasons given by the requester" (quoting Carney, 19 F.3d at 815)).

¹⁷⁷ See 5 U.S.C. § 552(a)(4)(A)(iii).

¹⁷⁸ See 5 U.S.C. § 552(a)(4)(A).

including the D.C. Circuit.¹⁷⁹

The FOIA also does not explicitly provide for administrative appeals of denials of requests for fee waivers. Nevertheless, many agencies, either by regulation or by practice, have considered appeals of such actions.¹⁸⁰ The Courts of Appeals for the D.C. and Fifth Circuits have made it clear, moreover, that appellate administrative exhaustion (i.e., filing an administrative appeal) is required for any adverse determination, including fee waiver denials.¹⁸¹ However, courts have found that where the agency fails to address a pending fee waiver request before a requester proceeds to litigation under a constructive exhaustion theory, actual appellate administrative exhaustion by the requester is not required.¹⁸² (For a discussion of constructive exhaustion of administrative remedies, see *Litigation Considerations, Exhaustion of Administrative Remedies*, below.)

¹⁷⁹ See Judicial Watch, 326 F.3d at 1311 ("A requester is considered to have constructively exhausted administrative remedies and may seek judicial review immediately if . . . the agency fails to answer the [fee waiver] request within twenty days.") (citations omitted); Judicial Watch, 310 F. Supp. 2d at 293 (commenting that where agency fails to respond to fee waiver request within twenty working days, requester has constructively exhausted administrative remedies and may seek judicial review); Pub. Citizen, Inc. v. Dep't of Educ., 292 F. Supp. 2d 1, 4 (D.D.C. 2003) (stating that "if the agency fails to respond to a waiver request within twenty days, the requester is deemed to have constructively exhausted" administrative remedies).

¹⁸⁰ See, e.g., DOJ FOIA Regulations, 28 C.F.R. § 16.6(c) (including in its listing of adverse determinations "a denial of a request for a fee waiver"); Dep't of State FOIA Regulations, 22 C.F.R. § 171.51 (2009) (appeals of denials of fee waivers and reductions); DOT FOIA Regulations, 49 C.F.R. § 7.21 (2008) (procedures for appealing decisions not to disclose records or waive fees).

¹⁸¹ See Pruitt v. EOUSA, No. 01-5453, 2002 WL 1364365, at *1 (D.C. Cir. Apr. 19, 2002) (reiterating that judicial review is not appropriate until requester either appeals fee waiver denial or pays assessed fee); Voinche v. U.S. Dep't of the Air Force, 983 F.2d 667, 669 (5th Cir. 1993) (emphasizing that requester seeking fee waiver under FOIA must exhaust administrative remedies before seeking judicial review); Oglesby, 920 F.2d at 66 & n.11, 71 ("Exhaustion does not occur until fees are paid or an appeal is taken from the refusal to waive fees."); Judicial Watch v. DOJ, No. 99-1883, slip op. at 10-12 (D.D.C. Sept. 11, 2003) (concluding that although plaintiff "may have" exhausted its administrative remedies as to other issues, it had failed to administratively exhaust as to agency's denial of fee waiver, so its claims related to fee waiver were not properly before court; see also AFGE, 907 F.2d 203, 209 (D.C. Cir. 1990) (declining consideration of fee waiver request when not pursued during agency administrative proceeding); In Def. of Animals, 543 F. Supp. 2d at 97 (noting that nonpayment of fees did not preclude judicial review where plaintiff had timely appealed its fee waiver denial).

¹⁸² See Judicial Watch, 326 F.3d at 1310 (reiterating in fee waiver context that when requester has "constructively exhausted" due to agency's failure to timely respond to request he "may seek judicial review immediately"); Judicial Watch, 2005 WL 1606915, at *3 (finding that requester "may proceed directly to federal court to enforce . . . a de novo review of a fee waiver request" where he did not timely receive agency decision on request).

As part of the Freedom of Information Reform Act of 1986,¹⁸³ a specific judicial review provision for fee waivers was added to the FOIA,¹⁸⁴ which provides for the review of agency fee waiver denials according to a de novo standard, yet explicitly provides that the scope of judicial review remains limited to the administrative record established before the agency.¹⁸⁵ Thus, courts have not permitted either party to supplement the record or offer new argument or rationale for seeking a fee waiver or for denying such a request.¹⁸⁶

An agency's belated grant of a fee waiver, however, can render moot a requester's

¹⁸³ Pub. L. No. 99-570, 100 Stat. 3207.

¹⁸⁴ See 5 U.S.C. § 552(a)(4)(A)(vii).

¹⁸⁵ See *id.*; see also Stewart, 554 F.3d at 1241 (reiterating that review of agency's fee waiver decision is de novo "and is limited to the record before the agency"); Judicial Watch, 326 F.3d at 1311 (same); Carney, 19 F.3d at 814 (same); Schoenman, 604 F. Supp. 2d at 188 (same); Manley, 2008 WL 4326448, at *2 (same); Brown, 445 F. Supp. 2d at 1353 (same); Cnty. Legal Servs., 405 F. Supp. 2d at 555 (same); W. Watersheds, 318 F. Supp. 2d at 1039 (same); Inst. for Wildlife Prot., 290 F. Supp. 2d at 1228 (same); McQueen, 264 F. Supp. 2d at 424 (same); *cf.* Physicians Comm. for Responsible Med., 480 F. Supp. 2d at 121 n.2 (dismissing separate challenge to fee waiver denial brought under APA's arbitrary and capricious standard, emphasizing that FOIA provides adequate remedy); Eagle, 2003 WL 21402534, at *2, *4 (stating that Court reviews fee waiver decisions de novo; acknowledging that agency ordinarily is not permitted "to rely on justifications for its decision that were not articulated during the administrative proceedings" but finding that here agency was "simply clarifying and explaining" its earlier position).

¹⁸⁶ See, e.g., Friends of the Coast Fork, 110 F.3d at 55 (reiterating that agency's letter "must be reasonably calculated to put the requester on notice" as to reasons for fee waiver denial); Larson, 843 F.2d at 1483 (information not part of administrative record may not be considered by district court when reviewing agency fee waiver denial); Manley, 2008 WL 4326448, at *3 (concluding that when agency administratively determined that plaintiff's request met factor one, it could not raise "post hoc rationalization . . . to deny plaintiff's request on this first factor" during litigation); Physicians Comm. for Responsible Med., 480 F. Supp. 2d at 121 n.1 (disallowing plaintiff's submission of affidavit that was not part of administrative record); Citizens for Responsibility & Ethics in Wash., 481 F. Supp. 2d at 107 n.1 (refusing to take into account material submitted by both parties that were not before agency when administrative appeal considered); Brown, 445 F. Supp. 2d at 1354 (observing that "administrative record should consist of those documents which [agency] used to determine whether Plaintiff's fees should be waived"); Pub. Citizen, 292 F. Supp. 2d at 5 (criticizing agency for its failure to adjudicate fee waiver by emphasizing that "this Court has no record upon which to evaluate plaintiff's claims that it is entitled to a waiver"); see also Ctr. for Pub. Integrity v. HHS, No. 06-1818, 2007 WL 2248071, at *5 (D.D.C. Aug. 3, 2007) (noting that "mere inclusion" of web address in request insufficient to include all information on website as part of administrative record) (requester category context); FOIA Update, Vol. VIII, No. 1, at 10 ("OIP Guidance: New Fee Waiver Policy Guidance"); FOIA Update, Vol. VI, No. 1, at 6 ("OIP Guidance: FOIA Counselor) (answering question of whether agency can supplement its rationale for denying fee waiver after requester files suit).

challenge to its fee waiver denial when it is the agency's specific denial that is at issue.¹⁸⁷ Likewise, a grant of a full fee waiver makes it unnecessary for the court to evaluate a requester's claim that it should be placed in a particular fee category.¹⁸⁸

For additional guidance on any particular fee waiver issue, agency FOIA officers may contact OIP's FOIA Counselor service at (202) 514-3642.

¹⁸⁷ See Hall v. CIA, 437 F.3d 94, 99 (D.C. Cir. 2006) (agency's determination to release records without requester's payment "moots the requester's arguments that a denial of a fee waiver was substantially incorrect"), reh'g denied, No. 04-5235, 2006 U.S. App. LEXIS 11103, at *1 (D.C. Cir. Apr. 19, 2006); Schoenman v. FBI, 573 F. Supp. 2d 119, 136 (D.D.C. 2008) (same); Duggan v. SEC, No. 06-10458, 2007 WL 2916544, at *1 (D. Mass. July 12, 2007) (magistrate's recommendation) (reasoning that where fee not charged, fee waiver moot), adopted, (D. Mass. July 27, 2008), aff'd on other grounds, 227 F. App'x 16 (1st Cir. May 15, 2008); Wilderness Soc'y v. U.S. Dep't of the Interior, No. 04-0650, 2005 U.S. Dist. LEXIS 20042, at *26-27 (D.D.C. Sept. 12, 2005) (ruling that agency's reversal of initial decision to deny fee waiver mooted that portion of lawsuit); cf. Long v. DOJ, 450 F. Supp. 2d 42, 62 (D.D.C. 2006) (finding defendant's failure to render fee waiver determination within reasonable period of time mooted by agency's ultimate release of records without charge; "we cannot order the [agency] to do something [it] has already done" (quoting Better Gov't Ass'n v. Dep't of State, 780 F.2d 86, 91 (D.C. Cir. 1986))) (appeal pending).

¹⁸⁸ See Long, 450 F. Supp. 2d at 84 ("Once a fee waiver has been granted, neither the FOIA nor the Department's regulations create an independent right to an adjudication of [media] status."); Prison Legal News, 436 F. Supp. 2d at 27 n.5 (noting that because requester was entitled to blanket fee waiver there was no need to analyze its claimed entitlement to media status); cf. Hall, 437 F.3d at 99 (refusing to consider requester's media status claim when it was rendered moot by agency's voluntary release of documents without requester's payment of fees).