

FEES AND FEE WAIVERS

vide a FOIA requester with the "best copy available" of a record,²⁹⁴ an agency should address in its correspondence any problem with the quality of its photocopy of a disclosed record.²⁹⁵

Finally, a requester has the right to administratively appeal any adverse determination an agency makes on his or her FOIA request.²⁹⁶ Under Department of Justice regulations, for example, adverse determinations include: denials of records in full or in part; "no records" responses; denials of requests for fee waivers; and denials of requests for expedited treatment.²⁹⁷ An agency must make a determination on an administrative appeal within twenty working days after its receipt.²⁹⁸ An administrative appeal decision upholding an adverse determination must also inform the requester of the provisions for judicial review of that determination in the federal courts.²⁹⁹ (For discussions of the various aspects of judicial review of agency action under the FOIA, see Litigation Considerations, below.)

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More than two decades ago, the Freedom of Information Reform Act of 1986¹ brought significant changes to the way in which fees are now assessed under the FOIA. A new fee structure was established, including a

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low).

²⁹⁴ See McDonnell v. United States, 4 F.3d 1227, 1262 n.21 (3d Cir. 1993) ("Of course, we anticipate that [plaintiff] will receive the best possible reproduction of the documents to which he is entitled."); Giles v. U.S. Dep't of Justice, No. 00-1497, slip op. at 5 (D.D.C. June 4, 2001) (accepting that agency provided plaintiff with "best copies available" even though plaintiff asserted that they were "unreadable"); see also FOIA Update, Vol. XVI, No. 3, at 5 (advising agencies that "before providing a FOIA requester with a photocopy of a record that is a poor copy or is not entirely legible," they should "make reasonable efforts to check for any better copy of a record that could be used to make a better photocopy for the requester").

²⁹⁵ See FOIA Update, Vol. XVI, No. 3, at 5 (advising of procedures to be used in cases involving poor photocopies of records); cf. FOIA Post, "The Limits of Agency Translation Obligations Under the FOIA" (posted 12/1/04) (distinguishing "legibility" from "translatability" of disclosed records).

²⁹⁶ 5 U.S.C. § 552(a)(6)(A); see Oglesby, 920 F.2d at 63-71.

²⁹⁷ 28 C.F.R. § 16.6(c).

²⁹⁸ 5 U.S.C. § 552(a)(6)(A)(ii).

²⁹⁹ Id. § 552(a)(6)(A)(ii).

¹ Pub. L. No. 99-570, §§ 1801-04, 100 Stat. 3207.

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new provision authorizing agencies to assess "review" charges when processing records in response to a commercial-use request.² Specific fee limitations and restrictions were placed on the assessment of certain fees both in general as well as for certain categories of requesters.³ Additionally, the 1986 FOIA amendments replaced the statutory fee waiver provision with a revised standard.⁴ These revised fee and fee waiver provisions were made effective as of mid-1987, but required implementing agency regulations to become fully effective.⁵

Under the FOIA Reform Act, the Office of Management and Budget was charged with the responsibility of promulgating, pursuant to notice and receipt of public comment, a "uniform schedule of fees"⁶ for individual agencies to follow when promulgating their FOIA fee regulations.⁷ In March 1987, OMB issued its Uniform Freedom of Information Act Fee Schedule and Guidelines [hereinafter OMB Fee Guidelines].⁸ As mandated by the 1986 FOIA amendments, agencies are obligated to conform their fee schedules to these guidelines.⁹

The FOIA Reform Act also required agencies to promulgate specific "procedures and guidelines for determining when such fees should be

² § 1803, 100 Stat. at 3207-49.

³ See id. at 3207-50.

⁴ Id.

⁵ Id. § 1804(b), 100 Stat. at 3207-50; see also FOIA Update, Vol. VIII, No. 1, at 2 (advising agencies that until implementing regulations were in place, they "should give FOIA requesters the full benefits of both . . . old and new" statutory provisions).

⁶ 5 U.S.C. § 552(a)(4)(A)(i) (2000 & Supp. IV 2004); see Env'tl. 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); cf. 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").

⁷ § 1803, 100 Stat. at 3207-49 (codified as amended at 5 U.S.C. § 552(a)(4)(A)(i)); see Media Access Project, 883 F.2d at 1069 (finding that the FOIA expressly mandates that OMB establish a fee schedule and guidelines for statutory fee categories).

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

⁹ 5 U.S.C. § 552(a)(4)(A)(i); see also 52 Fed. Reg. at 10,015 (explaining that issuance of governmentwide fee schedule is precluded by language of FOIA Reform Act requiring "each agency's fees to be based upon its direct reasonable operating costs of providing FOIA services").

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waived or reduced.¹⁰ The Department of Justice, in accordance with its statutory responsibility to encourage agency compliance with the FOIA,¹¹ developed new governmentwide policy guidance on the waiver of FOIA fees, to replace its previously issued guidance implementing the predecessor statutory fee waiver standard.¹² In April 1987, to assist federal agencies in addressing fee waivers in their revised FOIA fee regulations, the Department of Justice issued its New FOIA Fee Waiver Policy Guidance to the heads of all federal departments and agencies, which remains in effect.¹³ While the Electronic Freedom of Information Act Amendments of 1996¹⁴ made no direct changes to either the fee or fee waiver provisions of the FOIA,¹⁵ several of those amendments can have an effect on fee matters.¹⁶ In November 2002, the limited but significant amendment to the FOIA made by the Intelligence Authorization Act of 2003,¹⁷ which was confined in scope to agencies within the intelligence community, had no direct effect on either the fee or fee waiver provisions.¹⁸ (For discussions of this amendment, see Introduction, above, and Procedural Requirements, FOIA Requesters, above.)

More recently, Executive Order 13,392,¹⁹ issued on December 14, 2005 and entitled "Improving Agency Disclosure of Information," places strong emphasis on the improvement of FOIA operations throughout the executive branch through greater efficiency of the FOIA administrative process and

¹⁰ § 1803, 100 Stat. at 3207-49.

¹¹ See 5 U.S.C. § 552(e); see also FOIA Update, Vol. XIX, No. 3, at 6; FOIA Update, Vol. XIV, No. 3, at 8.

¹² See FOIA Update, Vol. VIII, No. 1, at 1-2; FOIA Update, Vol. VII, No. 3, at 3; FOIA Update, Vol. IV, No. 1, at 3-4.

¹³ See FOIA Update, Vol. VIII, No. 1, at 3-10; Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 41-50 (Dec. 1987); see also, e.g., Department of Justice FOIA Regulations, 28 C.F.R. § 16.11 (2006) (example of fee regulation).

¹⁴ Pub. L. No. 104-231, 110 Stat. 3048 (codified as amended at 5 U.S.C. § 552).

¹⁵ 5 U.S.C. § 552(a)(4)(A).

¹⁶ See, e.g., 5 U.S.C. § 552(a)(3)(B) (providing for information to be disclosed in requester's choice of form or format if "readily reproducible" by agency).

¹⁷ Pub. L. No. 107-306, 116 Stat. 2383 (2002).

¹⁸ See also FOIA Post, "FOIA Amended by Intelligence Authorization Act" (posted 12/23/02) (describing breadth and impact of 2002 FOIA amendment).

¹⁹ Exec. Order No. 13,392, 70 Fed. Reg. 75,373 (Dec. 14, 2005).

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better customer service within each federal agency.²⁰ These two policy goals may be accomplished in part through increased use of proactive disclosures and by improvements in the use of automated processing, and in time they can be expected to have an impact on the administration of both the FOIA's fee and fee waiver provisions.²¹

Fees

As amended by the Freedom of Information Reform Act of 1986, the FOIA provides for three levels of fees that may be assessed in response to FOIA requests according to categories of FOIA requesters.²² Within each fee level, the statute provides for limitations on the types of fees that an agency may assess.²³ An agency's determination of the appropriate fee level for an individual requester is dependent upon the identity of the re-

²⁰ Id. at Sec. 1(b), (c), (d).

²¹ See *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (Potential Improvement Areas #2 and #6); Attorney General's Report to the President Pursuant to Executive Order 13,392, Entitled "Improving Disclosure of Information," at 7-8, available at http://www.usdoj.gov/oip/ag_report_to_president_13392.pdf (observing that agencies "overwhelmingly recognized the value" of making proactive disclosures and embraced the use of automated processing either through "the establishment or the upgrading of automated systems" in their FOIA Improvement Plans).

²² 5 U.S.C. § 552(a)(4)(A)(ii)(I)-(III) (2000 & Supp. IV 2004); see Long v. U.S. Dep't of Justice, 450 F. Supp. 2d 42, 82 (D.D.C.) (acknowledging that FOIA provides for three levels of fees), amended by 457 F. Supp. 2d 30 (D.D.C. 2006), amended further on reconsideration, Nos. 00-0211 & 02-2467, 2007 WL 293508 (D.D.C. Feb. 2, 2007), stay granted (D.D.C. Feb. 13, 2007); Hall v. CIA, No. 04-0814, 2005 WL 850379, at *6 (D.D.C. Apr. 13, 2005) (referencing three categories of fees that may be assessed under FOIA), subsequent opinion, No. 04-0814, 2006 WL 197462 (D.D.C. Jan. 25, 2006); McDade v. Executive Office for U.S. Attorneys, No. 03-1946, slip op. at 6 n.3 (D.D.C. Sept. 29, 2004) (recognizing that statute provides for three levels of fees), summary affirmance granted to agency, No. 04-5378, 2005 U.S. App. LEXIS 15259, at *1 (D.C. Cir. July 25, 2005), cert. denied, 126 S. Ct. 791 (2005).

²³ See 5 U.S.C. § 552(a)(4)(A)(ii)(I)-(III); Long, 450 F. Supp. 2d at 82 (recognizing limitations on fees imposed by statutory provisions); McDade, No. 03-1946, slip op. at 6 n.3 (D.D.C. Sept. 29, 2004) (noting statutory limitations on charging fees); see also Eagle v. U.S. Dep't of Commerce, No. C-01-20591, 2003 WL 21402534, at *4 (N.D. Cal. Apr. 28, 2003) (observing that the statutory limitations on the types of fees that may be charged do not per se disqualify a requester from obtaining a fee waiver under 5 U.S.C. § 552(a)(4)(A)(iii)).

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quester and the intended use of the information sought.²⁴ The limitations placed on the types of fees that may be assessed are not the statutory equivalent of fee "waivers"²⁵ inasmuch as an agency cannot "waive" what it may not charge in the first place by statutory preclusion.²⁶ Rather, they are best characterized as statutory fee "limitations" in accordance with the structure of the statute.²⁷ (For a discussion of fee waivers under the FOIA, see Fee Waivers, below.)

The following discussion summarizes the FOIA's fee provisions. The Uniform Freedom of Information Act Fee Schedule and Guidelines [hereinafter OMB Fee Guidelines],²⁸ which provide general principles for how agencies should set fee schedules and make fee determinations, and 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 try to direct them to OMB's Office of Information and Regulatory Affairs, Information Policy and Technology Branch, at (202) 395-3647.

The first level of fees provided for by the FOIA encompasses charges for document search, review, and duplication, which are applicable "when records are requested for commercial use."²⁹ The OMB Fee Guidelines de-

²⁴ See 5 U.S.C. § 552(a)(4)(A)(ii); see also *FOIA Update*, Vol. VIII, No. 1, at 4.

²⁵ See 5 U.S.C. § 552(a)(4)(A)(iii).

²⁶ *Id.* § 552(a)(4)(A)(ii).

²⁷ See 5 U.S.C. § 552(a)(4)(A)(ii) (specifying in each fee level that "fees shall be limited to" search, review, and duplication (level one), duplication (level two), or search and duplication (level three)) (emphasis added); see also *Judicial Watch v. U.S. Dep't of Energy*, 310 F. Supp. 2d 271, 289 (D.D.C. 2004) (recognizing proper statutory distinction between "fee limitations" and "fee waivers"), *aff'd in part, rev'd in part on other grounds & remanded*, 412 F.3d 125 (D.C. Cir. 2005); *Eagle*, 2003 WL 21402534, at *2 (same).

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

²⁹ 5 U.S.C. § 552(a)(4)(A)(ii)(I); see *Gavin v. SEC*, No. 04-4522, 2006 U.S. Dist. LEXIS 75227, at *14 (D. Minn. Oct. 16, 2006) (reiterating that commercial-use requester pays for search, review, and duplication costs); see also *Avondale Indus. v. NLRB*, No. 96-1227, slip op. at 14 n.4 (E.D. La. Mar. 20, 1998) (noting that case law is "sparse" as to what constitutes "commercial use"). See generally *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32 (1999) (upholding state statute that denied commercial publishers

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fine the term "commercial use" as "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,"³⁰ which can include furthering those interests through litigation.³¹ 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.³² Agen-

²⁹(...continued)

access to arrest records but permitted journalists access to same records; tangentially raising questions as to how to define "commercial user" and "journalist" in electronic age) (non-FOIA case).

³⁰ OMB Fee Guidelines, 52 Fed. Reg. at 10,017-18; see Avondale, No. 96-1227, slip op. at 14 (E.D. La. Mar. 20, 1998) (embracing OMB's definition of "commercial use"); cf. OSHA Data/CIH, Inc. v. U.S. Dept of Labor, 220 F.3d 153, 160 (3d Cir. 2000) (observing that under the 1986 FOIA amendments "commercial users shoulder more of the costs of FOIA requests"); Vote-Hemp, 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); 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 to be supported by administrative record before agency at time of its decision).

³¹ 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).

³² 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 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 relevant to "commercial user" determination); 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); 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 documents to contest union election results to be commercial use); cf. Rozet, 59 F. Supp. 2d at 57 (discounting plaintiff's assertion that infor-

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cies are encouraged to seek additional information or clarification from the requester when the intended use is not clear from the request itself.³³

Charges for document "search" include all the time spent looking for responsive material, including page-by-page or line-by-line identification of material within documents.³⁴ Additionally, agencies may charge for search time even if they fail to locate any records responsive to the request or even if the records located are subsequently determined to be exempt from disclosure.³⁵ Searches for responsive records should be done in the "most

³²(...continued)

mation was not of commercial interest where timing and content of requests in connection with other non-FOIA litigation conclusively demonstrated otherwise).

³³ See OMB Fee Guidelines, 52 Fed. Reg. at 10,018 (specifying that where the "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, 450 F. Supp. 2d at 85 (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); Brown v. U.S. Patent & Trademark Office, 445 F. Supp. 2d 1347, 1354 (M.D. Fla. 2006) (observing in a fee waiver context that the requester provided no authority for the "proposition that an agency must conduct independent research" to make its determination), aff'd per curiam, No. 06-14716, 2007 WL 446601 (11th Cir. Feb. 13, 2007).

³⁴ See OMB Fee Guidelines, 52 Fed. Reg. at 10,017.

³⁵ 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 defendants' 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. U.S. Dep't of Justice, 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); cf. Stabasefski v. United States, 919 F. Supp. 1570, 1573 (M.D. Ga. 1996) (holding that requester has no entitlement to reimbursement of copying fees when agency redacts portions of requested records).

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efficient and least expensive manner."³⁶ As defined by the Electronic Freedom of Information Act Amendments of 1996,³⁷ the term "search" means locating records or information either "manually or by automated means"³⁸ and requires agencies to expend "reasonable efforts" in electronic searches, if requested to do so by requesters willing to pay for that search activity.³⁹

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]."⁴⁰ Review time thus includes processing the documents

³⁶ OMB Fee Guidelines, 52 Fed. Reg. at 10,017; accord Exec. Order No. 13,392, Sec. 2(b)(i), 70 Fed. Reg. 75,373 (Dec. 14, 2005) (placing strong emphasis on FOIA efficiency); Presidential Memorandum for Heads of Departments and Agencies Regarding the Freedom of Information Act, 29 Weekly Comp. Pres. Doc. 1999 (Oct. 4, 1993), reprinted in *FOIA Update*, Vol. XIV, No. 3, at 3 ("Federal departments and agencies should handle requests for information in a customer-friendly manner."); see also *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (explaining that "Executive Order 13,392 calls upon all federal agencies to improve their FOIA operations with both efficiency and customer service"); Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001) [hereinafter Attorney General Ashcroft's FOIA Memorandum], reprinted in *FOIA Post* (posted 10/15/01) (emphasizing that the citizenry has "a strong interest" in "efficient" government functioning).

³⁷ Pub. L. No. 104-231, 110 Stat. 3048 (codified as amended at 5 U.S.C. § 552).

³⁸ 5 U.S.C. § 552(a)(3)(D).

³⁹ *Id.* at § 552(a)(3)(C); see also *FOIA Update*, Vol. XVIII, No. 1, at 6 (analyzing 1996 FOIA amendment that requires agencies to "make reasonable efforts" to search for records electronically); Department of Justice FOIA Regulations, 28 C.F.R. § 16.11(b)(8) (2006) (stating that process of searching includes using "reasonable efforts to locate and retrieve information from records maintained in electronic form or format"); 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, the cost equivalent of two hours of manual search is provided without charge).

⁴⁰ 5 U.S.C. § 552(a)(4)(A)(iv); see also *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 814 n.2 (2d Cir. 1994) (noting that fee for document review is properly chargeable to commercial requesters); *Gavin*, 2006 U.S. Dist. LEXIS 75227, at *17-18 (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 ex-

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for disclosure, i.e., doing all that is necessary to prepare them for release,⁴¹ but it does not include time spent resolving general legal or policy issues regarding the applicability of particular exemptions or reviewing on appeal exemptions that already are applied.⁴² Records that have been withheld in full under a particular exemption that is later determined not to apply, however, may be "reviewed again to determine the application of other exemptions not previously considered."⁴³ Further, that subsequent review is properly chargeable to the requester as well.⁴⁴

Under the 1986 FOIA amendments, "duplication" charges represent the reasonable "direct costs" of making copies of documents.⁴⁵ The OMB Fee Guidelines specifically require that agencies establish an "average agency-wide, per-page charge for paper copy reproduction."⁴⁶ Copies

⁴⁰(...continued)

emption which is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered" and, further, that the "costs for such a subsequent review would be properly assessable"). 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, in fact-specific case, 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).

⁴¹ See *OSHA Data*, 220 F.3d at 168 (concluding in case of first impression that review fees include, in context of business-submitter information, costs of mandatory predisclosure notification to companies and evaluation of their responses by agency for purpose of determining applicability of exemption to companies' submitted business information); see also *FOIA Post*, "The Limits of Agency Translation Obligations Under the FOIA" (posted 12/1/04) (treating costs of translation of non-English records into English for purposes of applying FOIA exemptions as "part of agency's 'review' costs," which can be charged to commercial-use requester). But see *Snyder v. DOD*, No. C 03-4992, slip op. at 3 (N.D. Cal. Apr. 29, 2005) (reducing fee by \$7.33, and finding that limited portion of activities described -- including updating workload-tracking database with request information -- did not encompass "review time" within meaning of FOIA).

⁴² See OMB Fee Guidelines, 52 Fed. Reg. at 10,017, 10,018.

⁴³ Id. at 10,018.

⁴⁴ See id.

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

⁴⁶ See OMB Fee Guidelines, 52 Fed. Reg. at 10,017, 10,018 (detailing ele-
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can take various forms, including paper copies, microforms, or machine-readable documentation.⁴⁷ As further required by the Electronic FOIA amendments,⁴⁸ which were enacted a decade later, 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.⁴⁹ For copies prepared by computer, such as printouts, disks, or other electronic media, agencies should charge the actual costs of production of that medium.⁵⁰ Agencies should consult with their technical support staff for assistance in determining their actual costs associated with producing copies of various types of media.⁵¹ In this regard, it is standard practice that duplication charges are assessed only for those copies that are released, not for any responsive record withheld in its entirety.⁵² (For further discussions of agency responsibilities when searching for or producing responsive records under the Electronic FOIA amendments, see Procedural Requirements, Searching for Records, above, and Procedural Requirements, Responding to FOIA Requests, above.)

The second level of fees limits charges to document duplication costs only, "when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media."⁵³ FOIA requesters falling into one or more of these three subcategories of requesters under the 1986 FOIA amendments enjoy a complete

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ments included in direct costs of duplication).

⁴⁷ See OMB Fee Guidelines, 52 Fed. Reg. at 10,017.

⁴⁸ Pub. L. No. 104-231, 110 Stat. 3048.

⁴⁹ 5 U.S.C. § 552(a)(3)(B); see FOIA Update, Vol. XVIII, No. 1, at 5-6 (advising agencies on new format disclosure obligations); FOIA Update, Vol. XVII, No. 4, at 2 (same); see also Exec. Order No. 13,392, Sec. 3(a)(iii)(A) (addressing use of "information technology" to respond to FOIA requests); FOIA Post, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (Potential Improvement Area #7) (discussing potential use of World Wide Web to receive and respond to requests); FOIA Update, Vol. XIX, No. 1, at 6 (encouraging agencies to consider providing records in multiple forms as matter of administrative discretion if requested to do so).

⁵⁰ See OMB Fee Guidelines, 52 Fed. Reg. at 10,018; see also 28 C.F.R. § 16.11(c)(2); FOIA Update, Vol. XI, No. 3, at 4 & n.25.

⁵¹ 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").

⁵² See generally OMB Fee Guidelines, 52 Fed. Reg. at 10,017-19.

⁵³ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

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"exemption" from the assessment of search and review fees.⁵⁴ Their requests, like those made by any FOIA requester, still must "reasonably describe" the records sought in order to not impose upon an agency "an unreasonably burdensome search."⁵⁵ (For a further discussion of this requirement, see Procedural Requirements, Proper FOIA Requests, above.)

The OMB Fee Guidelines define "educational institution" to include various categories of schools, as well as institutions of higher learning and vocational education.⁵⁶ This definition is limited, however, by the requirement that the educational institution be one "which operates a program or programs of scholarly research."⁵⁷ To qualify for inclusion in this fee category, the request must serve a scholarly research goal of the institution, not an individual goal.⁵⁸ 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."⁵⁹

The definition of a "representative of the news media" refers to any person actively gathering information of current interest to the public for an organization that is organized and operated to publish or broadcast news to the general public.⁶⁰ Further, the OMB Guidelines specifically define "news" as "information that is about current events or that would be of current interest to the public."⁶¹ The Court of Appeals for the District of Columbia Circuit has elaborated upon this by holding that "a representative of the news media is, in essence, 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

⁵⁴ See 132 Cong. Rec. S14,298 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy) (referring to requesters within the second level of fees as receiving the benefits of "the most favorable fee provision").

⁵⁵ AFGE v. U.S. Dep't of Commerce, 907 F.2d 203, 209 (D.C. Cir. 1990) (quoting Goland v. CIA, 607 F.2d 339, 353 (D.C. Cir. 1978)).

⁵⁶ See OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

⁵⁷ 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).

⁵⁸ See OMB Fee Guidelines, 52 Fed. Reg. at 10,014 (distinguishing institutional from individual requests through use of examples).

⁵⁹ Id. at 10,018.

⁶⁰ Id.

⁶¹ Id.

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work to an audience.⁶² In reaching its decision, the D.C. Circuit relied in large part on the legislative history of the 1986 FOIA amendments,⁶³ not finding the term "representative of the news media . . . self-evident [in] what [it] covers."⁶⁴ During the next decade, this category of FOIA requesters received scant additional attention by the courts.⁶⁵

In more recent years, however, perhaps partly due to the passage of the Electronic FOIA amendments,⁶⁶ in conjunction with the ushering in of the "Information Age,"⁶⁷ there has been renewed interest in the question of what constitutes a "representative of the news media" both in the FOIA context⁶⁸ and with regard to non-FOIA matters as well.⁶⁹ Indeed, since

⁶² Nat'l Sec. Archive, 880 F.2d at 1387; *see also* Elec. Privacy Info. Ctr. v. DOD, 241 F. Supp. 2d 5, 14 (D.D.C. 2003) (explaining that the fact that an entity distributes its publication "via Internet to subscribers' email addresses does not change the [news media] analysis"); *cf.* Hall, 2005 WL 850379, at *6 (finding that the organization's statement that "news media status is pled," without mentioning the specific activities in which it is engaged, "misstates the burden that a party seeking a fee limitation . . . must carry . . . [o]therwise, every conceivable FOIA requester could simply declare itself a 'representative of the news media' to circumvent fees").

⁶³ *See* Nat'l Sec. Archive, 880 F.2d at 1385-87.

⁶⁴ *See id.* at 1385; *see also* 132 Cong. Rec. H9464 (daily ed. Oct. 8, 1986) (statement of Rep. English) (referring to "written explanatory materials that would have been included in a committee report" and that acknowledge that "no definition of 'news media' has been included in the [1986 FOIA amendments]").

⁶⁵ *See* Hosp. & Physician Publ'g, 1999 WL 33582100, at *4 (finding that the requester qualified under the test of National Security Archive as a "representative of the news media"); *cf.* Tax Analysts v. U.S. Dep't of Justice, 965 F.2d 1092, 1095 (D.C. Cir. 1992) (noting that, in the context of attorney fees, the plaintiff "is certainly a news organization").

⁶⁶ Pub. L. No. 104-231, 110 Stat. 3048.

⁶⁷ D.C. Technical Assistance Org. v. HUD, 85 F. Supp. 2d 46, 49 (D.D.C. 2000) (commenting on changes wrought by "Information Age"); *see also* Randall P. Bezanson, Taxes on Knowledge in America 2-3 (Univ. of Pa. Press 1994) (stating that "technology will force us to reexamine many of the most basic assumptions we hold about the role and, indeed, the meaning of the press").

⁶⁸ *See, e.g.*, Brown, 445 F. Supp. 2d at 1356-57 (observing that at least two entities previously granted media status by courts had (unlike plaintiff) prior history of publication and had gathered information from several sources); Hall, 2005 WL 850379, at *6 (applying standard set forth in Nat'l Sec. Archive, 880 F.2d at 1387, as well as in agency regulation defining

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2000, no fewer than eleven district court FOIA opinions have been issued (ten within the D.C. Circuit) on the "news media" question, and eight of those involved the same plaintiff organization. In the majority of these decisions, the court found that the organization before it was not such an entity.⁷⁰

⁶⁸(...continued)

news media representative); Elec. Privacy Info. Ctr., 241 F. Supp. 2d at 14 n.7 (explaining that while the plaintiff qualified as a news media entity, "the Court is not convinced that a website is, by itself, sufficient to qualify a FOIA requester as a 'representative of the news media,'" and reasoning that virtually all organizations and many individuals in the metropolitan area have Web sites, "but certainly all are not entitled to news media status for fee determinations").

⁶⁹ Cf. In re Grand Jury Subpoenas, No. 01-20745, slip op. at 2, 5-6 (5th Cir. Aug. 17, 2001) (upholding contempt-of-court charge against "aspiring freelance writer" for failure to obey federal grand jury subpoenas, and finding that she was not in any event entitled to claim "journalist's privilege" in the case) (non-FOIA case); Tripp v. DOD, 284 F. Supp. 2d 50, 55-58 (D.D.C. 2003) (accordng newspaper status to military publication for purposes of First Amendment analysis, and finding that author of article was engaged in "newsgathering" activities entitling her to invoke "reporters privilege") (separate non-FOIA opinion in case brought under FOIA). See generally David A. Anderson, Freedom of the Press, 80 Tex. L. Rev. 429, 435-45 (2002) (discussing what constitutes "the press," and noting differences between information providers and providers of news).

⁷⁰ See Brown, 445 F. Supp. 2d at 1356-57 (holding that the plaintiff who provided no evidence of employment by a news organization or that he is a "freelance" journalist as defined by the agency's regulation, and has "not demonstrated a 'firm intention' of creating or publishing an editorialized work," does not qualify as a representative of the news media); Hall, 2005 WL 850379, at *6 (finding that the 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 a prior district court decision on the same issue, adopting "the reasoning and conclusions set forth" therein, and holding that the plaintiff organization before it is not a representative of the news media), rev'd on other grounds, 326 F.3d 1309 (D.C. Cir. 2003); Judicial Watch, Inc. v. U.S. Dep't of Justice, 185 F. Supp. 2d 54, 59 (D.D.C. 2002) (concluding that the 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. U.S. Dep't of Justice, No. 00-0745, slip op. at 15 (D.D.C. Feb. (continued...))

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In addition to their reliance on the framework established by D.C. Circuit in National Security Archive, these numerous decisions also relied on the implementing regulations for the fee limitations/fee category portion of the statute.⁷¹ Despite the direction taken (and given) by the District Court

⁷⁰(...continued)

12, 2001) (finding that the plaintiff organization is not "an entity organized to publish or broadcast news," and stating that the organization's "vague intention" to use the 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. U.S. Dep't of Justice, 122 F. Supp. 2d 13, 21 (D.D.C. 2000) (same); Judicial Watch, Inc. v. U.S. Dep't of Justice, 122 F. Supp. 2d 5, 12 (D.D.C. 2000) (commenting that by its own admission the 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. U.S. Dep't of Justice, 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 the requester for news media status; concluding that if the 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"). But see Elec. Privacy Info. Ctr., 241 F. Supp. 2d at 9 (concluding that the publication activities of a public interest research center -- which included both print and other media -- satisfied the definition of "representative of the news media" under the agency's FOIA regulation); Judicial Watch, Inc. v. U.S. Dep't of Justice, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding that the requester qualified as a representative of the news media, but observing that the 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 the "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 the requirements of the collateral order doctrine" for purposes of appeal).

⁷¹ See 28 C.F.R. § 16.11; see also, e.g., Brown, 445 F. Supp. 2d at 1357 (relying heavily on agency's regulation defining representative of news media and "freelance" journalist); Hall, 2005 WL 850379, at *6 (applying standard set forth in Nat'l Sec. Archive, 880 F.2d at 1387, as well as in agency regulation defining news media representative); Judicial Watch, 185 F. Supp. 2d at 58-59 (noting that the agency, in accordance with congression-

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for the District of Columbia on this issue though, it is likely to remain a somewhat unsettled area of law until it can be addressed by the D.C. Circuit, and other circuit courts as the issue develops, as well. Thus far, 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.⁷² 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.⁷³ In contrast, the Court of Appeals for the Eleventh Circuit recently 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.⁷⁴

The D.C. Circuit did make clear at the time of its decision in National Security Archive, however, that the 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.⁷⁵ This fee category, though, includes freelance journalists, when they can demonstrate a solid basis for expecting the information disclosed to be published by a news organiza-

⁷¹(...continued)

al directive, promulgated regulations that define "representative of the news media"; Judicial Watch, 122 F. Supp. 2d at 20 (considering the agency's regulatory definition of "representative of the news media" in its analysis, and finding to be "perhaps of utmost importance" the fact that the plaintiff organization "does not define itself as 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, 122 F. Supp. 2d at 12 (same); Judicial Watch, 2000 WL 33724693, at *3 (referring to and quoting from the agency's promulgated definition of "representative of the news media").

⁷² Brown, 2007 WL 446601; 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).

⁷³ 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").

⁷⁴ Brown, 2007 WL 446601, at *2 (concluding that requester's "status as the publisher of a website does not make him a representative of the news media").

⁷⁵ Nat'l Sec. Archive, 880 F.2d at 1387; Hall, 2005 WL 850379, at *6 (finding plaintiff's activities to be more akin to those of middleman).

tion.⁷⁶

It is well settled 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."⁷⁷ A request from a representative of the news media that does not support its news-dissemination function, however, should not be accorded the favored fee treatment of this subcategory.⁷⁸

Further, a request that is made to support an endeavor that merely makes the information received available to the public (or others) is not sufficient to qualify it for placement in this fee category.⁷⁹ Under the FOIA,

⁷⁶ See OMB Fee Guidelines, 52 Fed. Reg. at 10,018 (stating that for freelancers, publication contract with news organization would be "clearest" proof for inclusion in news media category but that agencies may consider "past publication record" in this regard); Brown, 445 F. Supp. 2d at 1356-57 (finding that the 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, in a fact-specific case, the defendant to apply news media status to the plaintiff even though the plaintiff had not gathered news in the past but expressed intention to do so in the future; noting that the requester represented that the 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").

⁷⁷ OMB Fee Guidelines, 52 Fed. Reg. at 10,019; accord FOIA Update, Vol. VIII, No. 1, at 10; see also Nat'l Sec. Archive, 880 F.2d at 1387-88; 28 C.F.R. § 16.11(b)(6) (Department of Justice fee regulation defining "representative of the news media"); cf. Tax Analysts, 965 F.2d at 1096 (remarking that in the 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").

⁷⁸ 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 affirmatively that "not every organization with its own newsletter will necessarily qualify for news media status" and that, to qualify, a newsletter "must disseminate actual 'news' to the public, rather than solely self-promoting articles about that organization").

⁷⁹ See Nat'l Sec. Archive, 880 F.2d at 1386 (finding that "making information available to the 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

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once a requester has gathered information of interest to the public it must, in some manner, "use its editorial skills to turn the raw materials into a distinct work" in order to qualify as a representative of the news media.⁸⁰ In the first case to construe this subcategory of requesters, the requester's status was not in dispute but rather where the news organization performed its media function. There the court held that even a foreign news service may qualify as a representative of the news media.⁸¹

The third level of fees, which applies to all requesters who do not fall within either of the preceding two fee levels, consists of reasonable charges for document search and duplication,⁸² as was provided for in the statutory FOIA fee provision that was in place before the 1986 FOIA amendments.

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 intended use that determines the level of fees.⁸³ When such information is not readily apparent from the request itself, agencies should seek clarification from the requester before assigning a requester to a specific requester category.⁸⁴

An agency of course need not undertake a "fee category" analysis in any instance in which it has granted a full fee waiver.⁸⁵ Similarly, there is

⁷⁹(...continued)
as representative of news media).

⁸⁰ Id. at 1387; cf. Elec. Privacy Info. Ctr., 241 F. Supp. 2d at 12 ("Labels and titles alone . . . do not govern" the qualification for media status; rather, "the organization's substantive activities control.").

⁸¹ Southam News v. INS, 674 F. Supp. 881, 892 (D.D.C. 1987).

⁸² See 5 U.S.C. § 552(a)(4)(A)(ii)(III).

⁸³ See OMB Fee Guidelines, 52 Fed. Reg at 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.").

⁸⁴ See id. at 10,013, 10,018 (explaining that under the FOIA Reform Act agencies will spend more time "determining what the requester intends to do with the records sought").

⁸⁵ See Carney, 19 F.3d at 814 n.3 (doubting requester's status as "news media" but stating that there was no need to resolve issue given his entitlement to fee waiver); 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. U.S. Dep't of Transp., 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.

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simply 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.⁸⁶ 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.⁸⁷ Agencies also should be alert to the fact that a requester's category can change over time.⁸⁸

Additionally, 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.⁸⁹ In this regard, agencies should strive to use the "most efficient and least costly" means of complying with a request.⁹⁰ This may include the

⁸⁵(...continued)

ATF, 964 F. Supp. 494, 498, 499 (D.D.C. 1997) (same); Project on Military Procurement v. Dept't of the Navy, 710 F. Supp 362, 368 (D.D.C. 1989) (same).

⁸⁶ See 5 U.S.C. § 552(a)(4)(A)(i)(I)-(III).

⁸⁷ See, e.g., Long, 450 F. Supp. 2d at 85 (concluding that "any declaration" by the court of a 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).

⁸⁸ 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).

⁸⁹ OMB Fee Guidelines, 52 Fed. Reg. at 10,018; see, e.g., 28 C.F.R. § 16.11(f) (Department of Justice fee regulation); cf. OMB Fee Guidelines, 52 Fed. Reg. at 10,016 (specifying that charges for ordinary packaging and mailing are to be borne by government); FOIA Update, Vol. XII, No. 2, at 4 ("[T]he effective administration of the FOIA relies quite heavily upon agency transmittal of disclosable record copies to FOIA requesters by mail.").

⁹⁰ See OMB Fee Guidelines, 52 Fed. Reg. at 10,018; see also Exec. Order No. 13,392, Sec. 3 (outlining several areas of FOIA administration to be considered by agencies in development of their FOIA Improvement Plans, including changes that will make processing of FOIA requests more streamlined and efficient); FOIA Post, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (detailing the "potential improvement areas" of Executive Order 13,392, and emphasizing that "each agency should . . . consider its own individual circumstances in identifying particular areas in which it can improve its administration of the FOIA in accordance with Ex-

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use of contractor services, as long as an agency does not relinquish responsibilities it alone must perform, such as making fee waiver determinations.⁹¹ 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."⁹²

The fee structure also includes restrictions both on the assessment of certain fees⁹³ and on the authority of agencies to ask for an advance payment of a fee.⁹⁴ 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.⁹⁵ In addition, except with respect to commer-

⁹⁰(...continued)

ecutive Order 13,392"); FOIA Update, Vol. XVI, No. 1, at 1-2 (stressing importance of cost-efficiency to overall process of FOIA administration); Attorney General Ashcroft's FOIA Memorandum, reprinted in FOIA Post (posted 10/15/01) (stressing importance of "efficien[cy]" in government); Info. Handling Servs., Inc. v. Def. Automated Printing Servs., 338 F.3d 1024, 1027 (D.C. Cir. 2003) (referencing cost comparison required by 10 U.S.C.A. § 2462 (1998 & West Supp. 2006) to determine whether government could produce documents at lower costs than private sector) (non-FOIA case).

⁹¹ See OMB Fee Guidelines, 52 Fed. Reg. at 10,018; see also FOIA Update, Vol. IV, No. 1, at 2 (citing applicable Comptroller General decisions).

⁹² OMB Fee Guidelines, 52 Fed. Reg. at 10,018; cf. FOIA Post, "The Use of Contractors in FOIA Administration" (posted 9/30/04) (noting that encouraging agencies to extend "contracting out" beyond the duplication of records is in accordance with Comptroller General decisions, and observing that "the trend clearly is in favor of allowing contractors to do any work that does not require 'discretionary decision-making'"); FOIA Update, Vol. IV, No. 1, at 2 (recounting early efforts by some agencies to use contractors for duplication services under the FOIA, and encouraging agencies to extend "the concept of contracting out").

⁹³ Compare 132 Cong. Rec. H9464 (daily ed. Oct. 8, 1986) (statement of Rep. English) (remarking that the restrictive statutory provisions were designed "to prevent agencies from using procedural ploys over fees to discourage requesters or delay the disclosure of information"), with Dept of Justice v. Tax Analysts, 492 U.S. 136, 146 (1989) (going so far, in the context of requested materials "that are readily available elsewhere," as to pragmatically observe that "the fact that the FOIA allows agencies to [properly] recoup the costs of processing requests from the requester may discourage recourse to the FOIA," but nonetheless viewing that as a preferable result in such instances).

⁹⁴ See 5 U.S.C. § 552(a)(4)(A)(iv)-(v).

⁹⁵ Id. § 552(a)(4)(A)(iv)(I); see also OMB Fee Guidelines, 52 Fed. Reg. at (continued...)

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cial-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.⁹⁶ These two provisions work 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.⁹⁷

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).⁹⁸ Agencies

⁹⁵(...continued)
10,018.

⁹⁶ See 5 U.S.C. § 552(a)(4)(A)(iv)(II); see also OMB Fee Guidelines, 52 Fed. Reg. at 10,018-19; 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 records), renewed motion for summary judgment granted to agency, No. 04-0769, 2006 WL 949918 (D.D.C. Apr. 12, 2006); Pietrangelo v. U.S. Dep't of the Army, No. 2:04-CV-44, slip op. at 14 (D. Vt. Mar. 7, 2005) (quoting with implicit approval the agency's fee regulation requiring the requester to commit to pay fees in excess of the statutory allowances, and noting that if the requester fails to state a "willingness to pay . . . then the request need not be processed"), summary affirmance granted, 155 F. App'x 526 (2d Cir. 2005) (unpublished table decision).

⁹⁷ See 5 U.S.C. § 552(a)(4)(A)(iv)(I); see also OMB Fee Guidelines, 52 Fed. Reg. at 10,018; see, e.g., 28 C.F.R. § 16.11(d)(4) (Department of Justice fee regulation establishing fee threshold below which no fee will be charged).

⁹⁸ See 5 U.S.C. § 552(a)(4)(A)(v); see also OMB Fee Guidelines, 52 Fed. Reg. at 10,020; 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); Pietrangelo, 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."); Idema v. U.S. Attorney, E. Dist. of N.C., No. 03-2493, slip op. at 2 (D.D.C. Feb. 25, 2005) (determining that there was no improper withholding where agency regulation required payment in advance
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certainly may require requesters to make written agreements to pay the estimated or actual fees necessary to process a request as a condition precedent to a request being deemed received by the agency.⁹⁹ Estimated

⁹⁸(...continued)

of processing once total fee exceeded \$250 but requester had not paid such fee); McDade, No. 03-1946, slip op. at 6 (D.D.C. Sept. 29, 2004) (citing with implicit approval agency regulation requiring requester to make advance payment before agency processes request once fees exceed \$250); Jeanes v. U.S. Dep't of Justice, 357 F. Supp. 2d 119, 123 (D.D.C. 2004) (citing with implicit approval the agency's regulation requiring an 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 pending); Voinche v. FBI, No. 99-1931, slip op. at 6-7 (D.D.C. Nov. 17, 2000) (upholding agency's request for advance payment on basis of both statute and agency regulation where fees exceeded \$250); 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. Dep't of Justice, 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).

⁹⁹ See Kumar v. U.S. Dep't of Justice, No. 06-714, 2007 U.S. Dist. LEXIS 11144, at *6-7 (D.D.C. Feb. 16, 2007) (impliedly approving agency fee regulations with regard to notification to requester of fee estimate, requirement for commitment in writing by requester to pay anticipated fee, and agency's ability to require advance payment in certain circumstances); Hinojosa v. Dep't of Treasury, No. 06-0215, 2006 WL 2927095, at *4 (D.D.C. Oct. 11, 2006) (implicitly approving agency's requirement that requester make "firm promise" to pay fees); McDade, No. 03-1946, slip op. at 6 (D.D.C. Sept. 29, 2004) (citing with implicit approval agency's regulation requiring written agreement to pay fees before request is considered received); Dale, 238 F. Supp. 2d at 107 (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, 2006 WL 2927095, at *4-5 (finding that requesters' commitment to pay up to \$50 per request "appears to satisfy" requirement of "firm promise" to pay); Baker & Hostetler LLP v. U.S. Dep't of Commerce,
(continued...)

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fees, though, are not intended to be used to discourage requesters from exercising their access rights under the FOIA.¹⁰⁰ And an agency that fails to follow its own regulations which require furnishing requesters with notice of the estimated fees necessary to process a FOIA request and of their obligation to provide a written agreement to pay those fees may be precluded from collecting the full fee, if at all, from the requester.¹⁰¹

The statutory restriction prohibiting a demand for advance payments does not of course prevent agencies from requiring payment before records which have been processed are released.¹⁰² Most notably in this regard,

⁹⁹(...continued)

No. 02-2522, slip op. at 30 (D.D.C. Mar. 31, 2004) (stating that where agency's fee determination found reasonable and law firm had expressed "willingness" to pay reasonable search and production fees, request for order directing plaintiff to pay remaining fees "presumably unnecessary").

¹⁰⁰ 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, but finding that propriety of fees assessed for records subject to prior court action cannot be put into question in current action); see also S. Rep. No. 93-864, at 11-12 (1974) (indicating that statutory fee waiver provision was amended to deter agencies from using fees to discourage requesters).

¹⁰¹ See, e.g., 28 C.F.R. § 16.3(c); 28 C.F.R. § 16.11(e); cf. Sliney v. Fed. Bureau of Prisons, No. 04-1812, 2005 WL 839540, at *4 (D.D.C. Apr. 11, 2005) (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), renewed motion for summary judgment granted, No. 04-1812, 2005 WL 3273567, at *4 (D.D.C. Sept. 28, 2005) (resolving that agency had corrected defect and that requester failed to exhaust administrative remedies with regard to processing fee); Cole-El v. U.S. Dep't of Justice, No. 03-1013, slip op. at 11-12 (D.D.C. Aug. 26, 2004) (finding search fee "unjustified" due to inadequacy of searches performed by agency), aff'd per curiam on other grounds sub nom. Cole v. U.S. Dep't of Justice, No. 04-5329, 2005 U.S. App. LEXIS 7358 (D.C. Cir. Apr. 27, 2005).

¹⁰² 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); Kong On Imp. & Exp. Co. v. U.S. Customs & Border Prot. Bureau, No. 04-2001, 2005 WL 1458279, at *1 (D.D.C. June 20, 2005) (citing with implicit approval agency's fee regulation that required payment before release of processed records); Farrugia v. Executive Office for U.S. Attorneys, 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

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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.¹⁰³ The OMB Fee Guidelines should be consulted for additional guidance on aggregating requests.¹⁰⁴

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."¹⁰⁵ Thus, when documents responsive

¹⁰²(...continued)

agency, No. 04-0294, 2006 WL 33577 (D.D.C. Feb. 14, 2006); Williams v. U.S. Dept't of Justice, No. 01-1009, slip op. at 3 (D.D.C. Jan. 22, 2003) (noting that agency may properly require payment before processed records are released); Voinche v. CIA, No. 98-1883, 2000 U.S. Dist. LEXIS 14291, at *13-14 (D.D.C. Sept. 27, 2000) (same); Taylor v. U.S. Dept't of the Treasury, No. A-96-CA-933, 1996 U.S. Dist. LEXIS 19909, at *5 (W.D. Tex. Dec. 17, 1996) (same); Crooker v. ATF, 882 F. Supp. 1158, 1162 (D. Mass. 1995) (finding no obligation to provide records until current and past due fees paid); see also, e.g., 28 C.F.R. § 16.11(i)(1) ("Payment owed for work already completed (i.e., a prepayment before copies are sent to the requester) is not an advance payment."); cf. Lee v. U.S. Dept't of Justice, 235 F.R.D. 274, 285 (W.D. Pa. 2006) (finding the agency's proposal to search a large number of district offices designated by the requester "three offices at a time" and, after the requester's payment was made for searching those three offices, "repeating the process until all districts had been searched," is permissible); Slaney, 2005 WL 3273567, at *4 (noting that no authority supported the plaintiff's proposal that his suggested "installment plan" for paying fees "constitutes an agreement to pay the total fee"); Hall, 2005 WL 850379, at *5 (finding that the requester's rationale for not paying fees -- i.e., that he did not "wish to buy a pig in a poke" -- did not "entitle him to resuscitate his previously filed, now-dismissed action"). 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).

¹⁰³ See OMB Fee Guidelines, 52 Fed. Reg. at 10,019; see also 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).

¹⁰⁴ OMB Fee Guidelines, 52 Fed. Reg. at 10,019-20.

¹⁰⁵ 5 U.S.C. § 552(a)(4)(A)(vi); see, e.g., Oglesby v. U.S. Dept't of the Army, (continued...)

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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.¹⁰⁶ This may at times result in the assessment of fees that are higher than those that would otherwise be chargeable under the FOIA,¹⁰⁷ but it ensures that such fees are properly borne by

¹⁰⁵(...continued)

79 F.3d 1172, 1177 (D.C. Cir. 1996) (stating that NARA's enabling statute, 44 U.S.C. § 2116 (2000), qualifies "as the genre of fee-setting provision not to be 'supersede[d]' under the FOIA's subsection (vi)" with regard to "the costs of making . . . reproductions of materials transferred to [requester's] custody"); see also *FOIA Post*, "NTIS: An Available Means of Record Disclosure" (posted 8/30/02; supplemented 9/23/02) (describing how the National Technical Information Service "occupies a special status" with respect to making records available to the public, pursuant to 1986 FOIA amendments, 5 U.S.C. § 552(a)(4)(A)(vi)); National Technical Information Act, 15 U.S.C. §§ 1151-57 (2000) (providing for dissemination of technological, scientific, and engineering information to business and industry); OMB Fee Guidelines, 52 Fed. Reg. at 10,017, 10,018; cf. *Envtl. Prot. Info. Ctr.*, 432 F.3d at 947, 948 (finding the FOIA's superseding fee provision to be "ambiguous," relying instead on OMB's Guidelines that discuss that provision, and determining that the FOIA's reference to "a statute specifically providing for setting the level of fees" means "any statute that specifically requires a government agency . . . to set the level of fees" and not one that simply allows it to do so (quoting OMB Fee Guidelines) (emphasis added)).

¹⁰⁶ 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 "statutor[il]y-based fee schedule programs . . . such as the NTIS [National Technical Information Service]"); 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); cf. *SDC Dev. Corp. v. Mathews*, 542 F.2d 1116, 1120 (9th Cir. 1976) (in decision predating 1986 FOIA amendments and turning on issue of "agency records," holding that records for which charges were specifically authorized by another statute were not required to be made available under FOIA). But see *Envtl. Prot. Info. Ctr.*, 432 F.3d at 948-49 (holding that a statute permitting the agency to sell maps and Geospatial Information System data "at not less than the estimated [reproduction] cost," or allowing the agency "to make other disposition of such . . . materials," was not a "superseding fee statute" given the discretionary nature of the agency's authority to charge fees, and recognizing that court's decision "may be at odds" with the D.C. Circuit's decision in *Oglesby*, 79 F.3d 1172).

¹⁰⁷ 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 agency's return of re-
(continued...)

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the requester and not by the general public.¹⁰⁸

Given the increasing availability of low-cost and free government information through the Internet and other electronic sources,¹⁰⁹ it remains to be seen whether those agencies with such statutorily based fee schedules -- and which do not receive appropriated funds to support their record-distribution services, but are required by law to be self-sustaining -- will continue to be viable sources of government information.¹¹⁰ 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.¹¹¹ Although this question has been raised, it has not yet been explicitly decided by an appellate court.¹¹²

¹⁰⁷(...continued)
requester's \$210 check for anticipated FOIA fees).

¹⁰⁸ See OMB Fee Guidelines, 52 Fed. Reg. at 10,017.

¹⁰⁹ See Exec. Order No. 13,392, Sec. 3 (providing that review of each agency's FOIA operations should include an examination of agency's use of information technology and review of policies and practices relating to availability of information through Web sites); see also *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (potential improvement areas).

¹¹⁰ See, e.g., id. at 10,018 (recognizing National Technical Information Service as "statutorily-based" government record distribution program). See generally White House Memorandum for Heads of Executive Departments and Agencies Concerning Safeguarding Information Related to Homeland Security (Mar. 19, 2002), reprinted in *FOIA Post* (posted 3/21/02) (recognizing sensitivity of records distributed through Defense Technical Information Center (commonly known as "DTIC"), Department of Defense counterpart to National Technical Information Service).

¹¹¹ See *Envtl. Prot. Info. Ctr.*, 432 F.3d at 946, 948 (recognizing the FOIA's superseding fee provision as an "exception to the fee waiver provision of the FOIA," but stating that the statute in question did not qualify under the exception).

¹¹² Compare *Oglesby*, 79 F.3d at 1178 (refusing to rule on district court's finding that NARA's fee provision is exempt from FOIA's fee waiver requirement, because appellant 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 *Envtl. Prot. Info. Ctr.*, 432 F.3d at 946, 948 (recognizing the FOIA's superseding fee provision as an "exception to the fee waiver provision of the FOIA," and stating that "only statutes setting mandatory fees" meet that exception), and *St. Hilaire v. Dep't of Justice*, No. 91-
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The FOIA requires that requesters follow the agency's published rules for making FOIA requests, including those pertaining to the payment of authorized fees.¹¹³ Requesters have been found not to have exhausted their administrative remedies when fee requirements have not been met,¹¹⁴

¹¹²(...continued)

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

¹¹³ See 5 U.S.C. § 552(a)(3)(B); 28 C.F.R. § 16.11(e); Hinojosa, 2006 WL 2927095, at *4 (stating that a request must comply with the FOIA and with the 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"); see also Judicial Watch v. U.S. Dept of Justice, No. 99-1883, slip op. at 16 (D.D.C. Sept. 11, 2003) (finding agency's closure of request proper where requester neither committed to pay processing fees nor made advance payment of fees as required by agency's fee regulations); Irons v. FBI, 571 F. Supp. 1241, 1243 (D. Mass. 1983); cf. Oglesby, 920 F.2d at 66; Lee, 235 F.R.D. at 285 (granting summary judgment on portion of defendant's motion that concerned requester's failure to comply with agency regulations governing where to send FOIA request) (non fee context); Casad v. HHS, No. 01-1911, 2003 U.S. Dist. LEXIS 13007, at *16-17 (D.D.C. June 20, 2003) (approving necessity of further response by requester in order to inform agency whether to proceed with request once agency advised requester of costs); DeCato v. Executive Office for U.S. Attorneys, No. 00-3053, slip op. at 4-5 & n.4 (D.D.C. Jan. 2, 2003) (emphasizing that the plaintiff's offer to pay fees under his "alternate payment plan" is not construed as his written agreement to pay the fees" as required by the agency's regulation), summary affirmance granted, No. 03-5044, 2003 WL 22433759, at *1 (D.C. Cir. Oct. 24, 2003); Dale, 238 F. Supp. 2d at 107 (dismissing case because plaintiff failed to make "firm commitment" to pay fees); O'Meara, 1998 WL 123984, at *1 ("Congress intended people making FOIA requests to bear the costs of processing such requests" unless they qualify for fee waiver). 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).

¹¹⁴ See, e.g., Trenerry v. IRS, No. 95-5150, 1996 WL 88459, at *2 (10th Cir. Mar. 1, 1996) (explaining exhaustion includes payment of FOIA fees); Antonelli v. ATF, No. 04-1180, 2006 U.S. Dist. LEXIS 90923, at *6 (D.D.C. Dec. 18, 2006) (stating that fee exhaustion is jurisdictional prerequisite); Kemmerly, 2006 WL 2990122, at *1 (reiterating that requester's decision to

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¹¹⁴(...continued)

await agency's delayed response requires actual exhaustion of administrative remedies before filing suit); Keen, 2006 U.S. Dist. LEXIS 71860, at *5 (concluding that where requester challenged portion of fee assessed by agency but did not dispute nor pay remainder, there was no exhaustion of administrative remedies as to unpaid portion; noting that requester provided no authority for proposition that until administrative appeal was adjudicated he had no legal obligation "to make [any] payment"); Dinsio, 445 F. Supp. 2d at 311 (determining that plaintiff was barred from seeking judicial review due to failure to agree to pay fees); Sells v. Executive Office for U.S. Attorneys, No. 06-0077, 2006 U.S. Dist. LEXIS 58446, at *4-5 (D.D.C. Aug. 21, 2006) (stating that exhaustion requirement was not met where plaintiff failed to pay or commit to pay fees); Ivey v. Snow, No. 05-1095, 2006 WL 2051339, at *4 (D.D.C. July 20, 2006) (finding that because plaintiff failed to pay fees or request waiver he had not exhausted administrative remedies); Green v. DEA, No. 03-2268, 2006 WL 826466, at *1 (D.D.C. Mar. 29, 2006) (reiterating that exhaustion of administrative remedies -- in this instance by paying assessed fees -- is "condition precedent" to filing FOIA suit); Antonelli v. ATF, No. 04-1108, 2006 WL 141732, at *3 (D.D.C. Jan. 18, 2006) (same), partial summary judgment granted, No. 04-1108, 2006 WL 695905, at *5 (D.D.C. Mar. 17, 2006) (same); Trani v. U.S. Dep't of Justice, No. 04-0399, 2005 WL3276178, at *1 (D.D.C. July 22, 2005) (stating that in absence of fee waiver request, failure to pay or to commit to pay is grounds for dismissal for failure to exhaust); Smith v. IRS, No. 2:94-CV-989, slip op. at 2 (D. Utah Mar. 24, 1999) (concluding that no exhaustion existed where requester failed to pay fees); see also 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); Loomis v. U.S. Dep't of Energy, No. 96-CV-149, slip op. at 9-10 (N.D.N.Y. Mar. 9, 1999) (stating that exhaustion occurred where plaintiff agreed to pay initial estimate for identified records which agency subsequently found covered only portion of fees), summary affirmance granted, 21 F. App'x 80 (2d Cir. 2000); Stanley v. DOD, No. 93-CV-4247 (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); cf. OSHA Data, 220 F.3d at 168 (affirming district court's dismissal where requester was unable to pay \$1.7 million estimated fee); Graves v. EEOC, No. 02-6842, slip op. at 23 (C.D. Cal. Apr. 1, 2004) (ruling that there is no improper withholding where requester did not pay required fee), aff'd, 144 F. App'x 626 (9th Cir. 2005); Judicial Watch v. FBI, 190 F. Supp. 2d 29, 33 n.7 (D.D.C. 2002) (declining to consider plaintiff's belated willingness to pay fees where court concluded that it lacked jurisdiction due to plaintiff's failure to exhaust). But see Wiggins v. Nat'l Credit Union Admin., No. 05-2332, 2007 U.S. LEXIS 6367, *12-13 (D.D.C. Jan. 30, 2007) (finding that, despite the requester's "apparent failure" to exhaust for nonpayment of processing fee, the Court may review merits of the

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including taking an appeal of an adverse fee determination.¹¹⁵ A requester's obligation to comply with the agency's fee requirements does not cease after litigation has been initiated under the FOIA.¹¹⁶ (For a further

¹¹⁴(...continued)

FOIA claim where the responsive records already had been released as "no purpose would be served by having this matter delayed until the [requester] pays the required fee"); cf. Hemmings, 2005 WL 975626, at *3 (denying government's motion to dismiss where plaintiff tendered payment shortly after government filed its motion; stating that case law "suggests that his nonpayment of FOIA fees may be cured by payment" -- in particular, where, as here, agency gave no deadline by which to do so); Sloney, 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), subsequent opinion granting summary judgment to agency, 2005 WL 3273567, at *4 (resolving ultimately that agency had corrected defect and that requester failed to exhaust with regard to processing fee).

¹¹⁵ 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."); 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); Sloney, 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); Thorn v. United States, No. 04-1185, 2005 WL 3276285, at *3 (D.D.C. Aug. 11, 2005) (concluding that the plaintiff failed to exhaust because he "neither paid required fees . . . nor appealed the initial agency determinations"); Jeanes, 357 F. Supp. 2d at 122 (reiterating that exhaustion does not occur until either fees are paid or appeal is taken from fee waiver denial); Tinsley v. Comm'r, No. 3:96-1769-P, 1998 WL 59481, at *4 (N.D. Tex. Feb. 9, 1998) (finding that because 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, in fact-specific case, that 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).

¹¹⁶ See Pollack v. Dep't of Justice, 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); Kemmerly, 2006 WL 2990122, at *2 (emphasizing that whether the request for payment is made by the agency pre- or post-litigation, "the plaintiff has an obligation to pay" (quoting Trueblood (continued...)

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discussion of the exhaustion 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.¹¹⁷ Nor does the FOIA provide for penalties to be assessed against an agency or its administrators for delays in refunding a requester's overpayment.¹¹⁸ In addition, ab-

¹¹⁶(...continued)

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. U.S. Dep't of Justice, 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. U.S. Dep't of Justice, 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").

¹¹⁷ See Stabasefski, 919 F. Supp. at 1573 (stating that FOIA does not provide for reimbursement of fees when agency redacts portions of records that are released). But see FOIA Update, Vol. IV, No. 1, at 2 (explaining to agencies and assuring requesters that if requester prevails on administrative appeal, "fees previously paid will be reimbursed").

¹¹⁸ See Johnson v. Executive Office for U.S. Attorneys, 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
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sent specific statutory authority allowing an agency (or a subdivision of it) to do so,¹¹⁹ all fees collected in the course of providing FOIA services are to be deposited into the Treasury of the United States.¹²⁰

Because the FOIA Reform Act was silent with respect to the standard and scope of judicial review of FOIA fee issues, including a requester's fee category,¹²¹ the standard and scope of review should remain the same as that under the predecessor statutory fee provision -- i.e., agency action should be upheld unless it is found to be "arbitrary or capricious," in accordance with the Administrative Procedure Act.¹²² Perhaps due to this

¹¹⁸(...continued)

agency or its employees), aff'd, 310 F.3d 771 (D.C. Cir. 2002); cf. FOIA Update, Vol. IV, No. 1, at 4 (providing for reimbursement of fees previously paid where requester ultimately prevails on fee waiver or fee reduction issue).

¹¹⁹ 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. § 379(f) (2000)) (authorizing FDA to "retain all fees charged for [FOIA] requests"); see also FOIA Update, Vol. XIII, No. 2, at 1, 9 n.30 (recounting Justice Department testimony that explained to Senate multiple practical difficulties with such legislative proposals).

¹²⁰ See OMB Fee Guidelines, 52 Fed. Reg. at 10,012, 10,017 (reminding agencies that funds collected for providing FOIA services must be deposited into general revenues of United States and not into agency accounts).

¹²¹ See 5 U.S.C. § 552(a)(4)(A)(vii) (establishing revised de novo/administrative record standard and scope of review for fee waiver issues); cf. Hall, 2005 WL 850379, at *6 n.10 (deciding sua sponte, inasmuch as there was no administrative action to review because agency made no decision with regard to fee limitation, that plaintiffs failed to show "eligibility for fee limitations based on news media status").

¹²² 5 U.S.C. §§ 701-706 (2000); see Snyder, No. C 03-4992, slip op. at 13-14 (N.D. Cal. Feb. 2, 2005) (agreeing that the FOIA does not provide a cause of action for a fee issue but observing that the plaintiff "surely states a claim under the Administrative Procedure Act['s] . . . more deferential [i.e., to agency] arbitrary and capricious standard of review"), subsequent opinion (N.D. Cal. Apr. 29, 2005); Judicial Watch, 122 F. Supp. 2d at 20 (applying arbitrary and capricious standard of review "based on [court's] prior analysis" in Judicial Watch, 122 F. Supp. 2d at 11); Judicial Watch, 122 F. Supp. 2d at 11 (acknowledging that standard of review for fee issue is not "as well settled" as other areas of FOIA but that this issue is "not difficult" under well-established principle of statutory construction; reasoning that because the FOIA Reform Act "only changed the standard of review for fee-waiver decisions, this court presumes that Congress retained the arbitrary and capricious standard of review for fee-category decisions"); Trainer v. IRS, No. 90-
(continued...)

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lack of statutory clarity, the appropriate standard of review has yet to be clearly established in the decisions that have considered this issue.¹²³ Despite statutory language that seems to specify to the contrary,¹²⁴ 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.¹²⁵ As for the

¹²²(...continued)

C-444-B, 1993 WL 56534, at *6 (N.D. Okla. Oct. 28, 1993) (finding assessed fees reasonable, in accordance with agency regulations, and not arbitrary and capricious); see also Rozet, 59 F. Supp. 2d at 56 n.2 (D.D.C. 1999) (noting that before 1986, courts reviewed all FOIA fee issues under arbitrary and capricious standard); cf. Long, 964 F. Supp. at 497 (finding plaintiff's allegation that assessment of fees was arbitrary and capricious was mooted by subsequent grant of fee waiver). But see Judicial Watch, 133 F. Supp. 2d at 53 (stating that agency's argument that arbitrary and capricious standard applies to requester's fee category "is unsupported").

¹²³ 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 the agency's denial of media status), Judicial Watch, 2002 WL 535803, at *5 & nn. 6-7 (same), and Rozet, 59 F. Supp. 2d at 56 (emphasizing that although denial 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 the appropriate standard of review for the media category but applying the de novo standard "because review under the de novo standard or under some more deferential standard leads to the same conclusion" in the 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 the "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).

¹²⁴ See 5 U.S.C. § 552(a)(4)(A)(vii) ("[I]n any action by a requester regarding the waiver of fees . . . the court shall determine the matter de novo.") (emphasis added).

¹²⁵ See, e.g., Judicial Watch, No. 00-0745, slip op. at 14-15 (D.D.C. Feb. (continued...))

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scope of the court's review, it should be limited to the administrative record before the agency at the time of its decision, not some new record made before the reviewing court.¹²⁶

In 1989, in an important case brought in the D.C. Circuit,¹²⁷ the government argued that the defendant agency's interpretation of the 1986 fee amendments to the FOIA, reflected by the agency's implementing regulations, was owed great deference under the rule established by the Supreme Court in Chevron USA, Inc. v. Natural Resources Defense Council.¹²⁸ The D.C. Circuit avoided addressing the judicial review issue, however, by finding that with reference to the underlying fee issue, "the statute, read in

¹²⁵(...continued)

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).

¹²⁶ See Crain, No. 02-0341, slip op. at 7 (D.D.C. Mar. 25, 2003) (saying 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 F. Supp. 2d at 12 (stating that scope of court's review is limited to administrative record); Judicial Watch, 122 F. Supp. 2d at 20 (same); see also NTEU v. Griffin, 811 F.2d 644, 648 (D.C. Cir. 1987) (stating that the reasonableness of the agency's position "depends on the information before it at the time of its decision") (fee waiver case); cf. Camp v. Pitts, 411 U.S. 138, 142 (1973) ("In applying [the arbitrary and capricious] standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.") (non-FOIA case); IMS, P.C. v. Alvarez, 129 F.3d 618, 623 (D.C. Cir. 1997) ("It is a widely accepted principle of administrative law that the courts base their review of an agency's actions on the materials that were before the agency at the time its decision was made.") (non-FOIA case); Hall, 2005 WL 850379, at *6 n.10 (deciding issue of fee limitation sua sponte inasmuch as there was no administrative action to review because agency had made no decision).

¹²⁷ See Nat'l Sec. Archive, 880 F.2d at 1383.

¹²⁸ 467 U.S. 837, 844 (1984) (emphasizing that where the agency's statutory interpretation "fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, [the court] give[s that] judgment 'controlling weight'" (non-FOIA case).

