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.)

FEES AND FEE WAIVERS

More than two decades ago, the Freedom of Information Reform Act of 1986[1] 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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[293](...continued)
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.

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

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[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 Envtl. Prot. Info. Ctr. v. U.S. Forest Serv., 432 F.3d 945, 947 (9th Cir. 2005) ("FOIA calls for the Office of Management and Budget to promulgate [fee] guidelines for agencies to follow.") (citation omitted); 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").

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 1996[14] 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

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[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).

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-

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[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)).

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) 395-3785.

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-

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[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-

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[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. Dep't 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

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[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).

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

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[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

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[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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[46](...continued)
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).

"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

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[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.

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 context[68] and with regard to non-FOIA matters as well.[69] Indeed, since

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[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]

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[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) (according 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.
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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

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[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-

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[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,

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[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

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[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

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

[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 fees[93] 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-

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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 Dep't 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
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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

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[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

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[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,
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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,

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[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
(continued...)

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

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[102](...continued)
agency, No. 04-0294, 2006 WL 33577 (D.D.C. Feb. 14, 2006); Williams v. U.S. Dep'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. Dep'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. Dep'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); Sliney, 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. Dep't of the Army, (continued...)

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

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[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-
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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]

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[107](...continued)
quester'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]

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[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. Dep't 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 administration 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

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[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); Sliney, 2005 WL 839540, at *4 (characterizing agency's contention that requester failed to exhaust by paying fees as "disingenuous" where agency failed to notify requester of fee at administrative level as required by agency fee regulation), 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); Sliney, 2005 WL 3273567, at *4 (reiterating that where plaintiff neither agreed to pay processing fee nor appealed agency's refusal of his "'installment' plan" offer, administrative exhaustion had not occurred); Antonelli v. ATF, No. 04-1108, 2005 U.S. Dist. LEXIS 17089, at *28 (D.D.C. Aug. 16, 2005) (finding requester's unsuccessful administrative appeal challenging amount of fee to be insufficient to satisfy exhaustion requirement); 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
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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-

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[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 (continued...)

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

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[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-
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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

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[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...)

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

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[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).

light of the legislative history . . . [was] clear."[129] Thus, some seventeen years later, the extent of judicial deference given to agency fee regulations that are based upon the OMB Fee Guidelines still remains unclear.[130]

Fee Waivers

The Freedom of Information Reform Act of 1986[131] established the current fee waiver standard, which in contrast to its predecessor[132] more specifically defines the term "public interest" by providing that fees should be waived or reduced "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."[133] In accordance with this provision, the Department of Justice issued revised fee waiver policy guidance on April 2, 1987 -- which superseded its previous 1983 substantive fee waiver guidance,[134] as well as that issued in 1986 (concerning institutions and rec-

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[129] Nat'l Sec. Archive, 880 F.2d at 1383.

[130] Compare Media Access Project v. FCC, 883 F.2d 1063, 1071 (D.C. Cir. 1989) (stating that agency's interpretation of its own fee regulations "must be given at least some deference"), with Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1313 (D.C. Cir. 2003) (emphasizing that the court owes "no particular deference to the [agency's] interpretation of [the] FOIA") (fee waiver case), Edmonds Inst. v. U.S. Dep't of Interior, 460 F. Supp. 2d 63, 74 n.6 (D.D.C. 2006) (same), Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv., 290 F. Supp. 2d 1226, 1230 (D. Or. 2003) (stating that court owes no particular deference to agency's interpretation of FOIA (citing Judicial Watch, 326 F.3d at 1313)), and Nat'l Sec. Archive, 880 F.2d at 1383 (failing to resolve question of deference owed to agency's fee regulations).

[131] Pub. L. No. 99-570, § 1803, 100 Stat. 3207, 3207-50 (codified as amended at 5 U.S.C. § 552(a)(4)(A)(iii) (2000 & Supp. IV 2004)).

[132] Pub. L. No. 93-502, §§ 1-3, 88 Stat. 1561-64 (1974) (subsequently amended) (authorizing the waiver of fees when it was determined that such action was "in the public interest because furnishing the information can be considered as primarily benefitting the general public").

[133] § 1803, 100 Stat. at 3207-50; cf. Piper v. U.S. Dep't of Justice, 294 F. Supp. 2d 16, 24 (D.D.C. 2003) (explaining, in the context of Exemption 7(C), that disclosure "turn[s] on the nature of the requested document and its relationship to 'the basic purpose of [FOIA] to open agency action to the light of public scrutiny'" (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 772 (1989)), reconsideration denied, No. 98-1161, 2004 WL 764587 (D.D.C. Mar. 26, 2004).

[134] See FOIA Update, Vol. IV, No. 1, at 3-4 (establishing governmentwide fee waiver guidelines consisting of specific criteria developed in numerous court decisions for federal agencies to apply in determining whether public

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ord repositories)[135] -- and it advised agencies of six analytical factors to be considered in applying this statutory fee waiver standard.[136] These six factors were applied and implicitly approved by the Court of Appeals for the Ninth Circuit in McClellan Ecological Seepage Situation v. Carlucci.[137]

The statutory fee waiver standard as amended in 1986 contains two basic requirements -- the public interest requirement and the requirement that the requester's commercial interest in the disclosure, if any, must be less than the public interest in it.[138] Both of these statutory requirements must be satisfied by the requester before properly assessable fees are waived or reduced under the statutory standard.[139] In this regard, of

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[134](...continued)
interest warranted a statutory waiver or reduction of fees).

[135] See FOIA Update, Vol. VII, No. 3, at 4.

[136] See FOIA Update, Vol. VIII, No. 1, at 3-10; see also id. at 10 (specifying that previous "procedural" guidance on fee waiver issues remains in effect); FOIA Update, Vol. IV, No. 1, at 4. But cf. Cmty. Legal Servs., Inc. v. HUD, 405 F. Supp. 2d 553, 557-58 (E.D. Pa. 2005) (suggesting that statutory fee waiver provision does not contain "legal" test).

[137] 835 F.2d 1282, 1286 (9th Cir. 1987); see also, e.g., Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1313-15 (D.C. Cir. 2003); Brown v. U.S. Patent & Trademark Office, 445 F. Supp. 2d 1347, 1358 (M.D. Fla. 2006), aff'd per curiam, No. 06-14716, 2007 WL 446601 (11th Cir. Feb. 13, 2007); Judicial Watch, Inc. v. U.S. Dep't of Transp., No. 02-566, 2005 WL 1606915, at *4 (D.D.C. July 5, 2005); VoteHemp, Inc. v. DEA, 237 F. Supp. 2d 55, 59-66 (D.D.C. 2002); Judicial Watch, Inc. v. U.S. Dep't of Justice, 122 F. Supp. 2d 5, 16-17 (D.D.C. 2000); Pederson v. RTC, 847 F. Supp. 851, 855 (D. Colo. 1994); Sloman v. U.S. Dep't of Justice, 832 F. Supp. 63, 68 (S.D.N.Y. 1993); cf. Cmty. Legal Servs., 405 F. Supp. 2d at 557-58 (considering among other factors in fact-specific case requester's reputation in public and private sector).

[138] 5 U.S.C. § 552(a)(4)(A)(iii) (2000); see also Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv., 290 F. Supp. 2d 1226, 1228 (D. Or. 2003) (recognizing that statute establishes two-part test for fee waiver); VoteHemp, 237 F. Supp. 2d at 58 (reiterating "two-prong analysis" required for fee waiver requests); Department of Justice FOIA Regulations, 28 C.F.R. § 16.11(k) (2006).

[139] See FOIA Update, Vol. VIII, No. 1, at 4; see also Kumar v. U.S. Dep't of Justice, No. 06-714, 2007 U.S. Dist. LEXIS 11144, at *9 (D.D.C. Feb. 16, 2007) (indicating that burden of "showing that disclosure . . . is likely to make a significant contribution to the public's understanding of identifiable operations or activities of the federal government" is on the requester); Brown, 445 F. Supp. 2d at 1354 (stating that the requester "bears the burden of providing information that supports his fee waiver request with the
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course, it is the requester, not the requester's representative or counsel, who must demonstrate his entitlement to a fee waiver.[140] Requests for a waiver or reduction of fees must be considered on a case-by-case basis[141]

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[139](...continued)
initial FOIA request," and noting that the plaintiff provided no authority for the "proposition that an agency must conduct independent research in making a fee waiver determination"); S. Utah Wilderness Alliance v. U.S. Bureau of Land Mgmt., 402 F. Supp. 2d 82, 87 (D.D.C. 2005) (reiterating that requester bears burden of showing entitlement to fee waiver); Judicial Watch, 2005 WL 1606915, at *3 (same); McQueen v. United States, 264 F. Supp. 2d 502, 524 (S.D. Tex. 2003) (reiterating that burden is on requester to prove entitlement to fee waiver), aff'd per curiam in pertinent part, 100 F. App'x 964 (5th Cir. 2004); Citizens Progressive Alliance v. U.S. Bureau of Indian Affairs, 241 F. Supp. 2d 1342, 1366 (D.N.M. 2002) (same); Klamath Water Users Protective Ass'n v. U.S. Dep't of the Interior, No. 96-3077, slip op. at 47 (D. Or. June 19, 1997) (magistrate's recommendation) (observing that burden is on requester to show eligibility for fee waiver), adopted (D. Or. Oct. 16, 1997), rev'd on other grounds, 189 F.3d 1034 (9th Cir. 1999), aff'd on other grounds sub nom. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1 (2001); S.A. Ludsin & Co. v. SBA, No. 96 Civ. 2146, 1997 U.S. Dist. LEXIS 8617, at *10-11 (S.D.N.Y. June 19, 1997) (noting that fee waiver provision contains two requirements and that requester carries burden of proof on both), summary affirmance granted, 162 F.3d 1148 (2d Cir. 1998) (unpublished table decision); Anderson v. DEA, No. 93-253, slip op. at 4 (W.D. Pa. May 11, 1995) (magistrate's recommendation) (stating that burden is on requester to establish fee waiver standard met), adopted (W.D. Pa. June 21, 1995); Sloman, 832 F. Supp. at 67 (acknowledging that two-pronged statutory test should be used to determine when fees should be waived); cf. Cole-El v. U.S. Dep't of Justice, No. 03-1013, slip op. at 11-12 (D.D.C. Aug. 26, 2004) (recognizing that plaintiff bears burden of establishing entitlement to fee waiver, and finding fee in this instance to be "unjustified" due to administrative processing irregularities), 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); Tripp v. DOD, 193 F. Supp. 2d 229, 242 (D.D.C. 2002) (remanding request to agency for further consideration as agency applied incorrect fee waiver standard).

[140] See Dale v. IRS, 238 F. Supp. 2d 99, 107 (D.D.C. 2002) ("A party's counsel is not the 'requester' for purposes of a fee waiver request."); cf. Trulock v. U.S. Dep't of Justice, 257 F. Supp. 2d 48, 52 (D.D.C. 2003) (finding that plaintiff has not exhausted administrative remedies where "blanket" fee waiver request was submitted to agency in plaintiff's counsel's name, not his own); OMB Fee Guidelines, 52 Fed. Reg. 10,012, 10,017-18 (Mar. 27, 1987) (addressing same matter in fee-category context).

[141] See FOIA Update, Vol. VIII, No. 1, at 6; Media Access Project v. FCC, 883 F.2d 1063, 1065 (D.C. Cir. 1989) (remarking that any requester may seek waiver of assessed fees on "case-by-case" basis); Nat'l Sec. Archive v.
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and should address both of the statutory requirements in sufficient detail for the agency to make an informed decision as to whether it can appropriately waive or reduce the fees in question.[142]

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[141](...continued)
DOD, 880 F.2d 1381, 1383 (D.C. Cir. 1989) (dictum) (noting that fee waiver decisions are made on "case-by-case" basis); Edmonds Inst. v. U.S. Dep't of Interior, 460 F. Supp. 2d 63, 75 (D.D.C. 2006) (stating that "applications for fee waivers are considered on a case-by-case basis"); Nat'l Wildlife Fed'n v. Hamilton, No. 95-017-BU, slip op. at 2 (D. Mont. July 15, 1996) (same); see also Judicial Watch, Inc. v. GSA, No. 98-2223, slip op. at 14 (D.D.C. Sept. 25, 2000) (reiterating that prior judicial recognition of requester's "ability to disseminate FOIA-disclosed information is not binding in this case," but that agency should consider requester's "track record" and reputation for disseminating information); Judicial Watch, Inc. v. U.S. Dep't of Justice, No. 99-2315, 2000 WL 33724693, at *5 (D.D.C. Aug. 17, 2000) (noting that requester's "past record in uncovering information is simply irrelevant").

[142] See, e.g., Judicial Watch, 326 F.3d at 1312 (reiterating that requests for fee waivers "must be made with reasonable specificity . . . and based on more than conclusory allegations" (quotation marks and citations omitted)); Prison Legal News v. Lappin, 436 F. Supp. 2d 17, 25 (D.D.C. 2006) (reiterating that the requester bears the initial burden "of identifying, with reasonable specificity, the public interest to be served"); Judicial Watch v. U.S. Dep't of Energy, 310 F. Supp. 2d 271, 290-91 (D.D.C. 2004) (stating that fee waiver requests must be made with "'reasonable specificity'" and be based on more than "'conclusory allegations'" (quoting Judicial Watch, 326 F.3d at 1312)), aff'd in part, rev'd in part on other grounds & remanded, 412 F.3d 125 (D.C. Cir. 2005); McQueen, 264 F. Supp. at 525 (emphasizing that "[c]onclusory statements on their face are insufficient" to prove entitlement to fee waiver); Judicial Watch, Inc. v. U.S. Dep't of Justice, No. 00-0745, slip op. at 14-15 (D.D.C. Feb. 12, 2001) (finding that the plaintiff failed to provide any specific information in support of its general statement that its organization's purpose was to "expose government activities that are contrary to the law"), partial summary judgment granted (D.D.C. Apr. 20, 2001); see also McClellan, 835 F.2d at 1285 (stating that conclusory statements will not support fee waiver request); Judicial Watch, Inc. v. U.S. Dep't of Justice, 133 F. Supp. 2d 52, 54 (D.D.C. 2000) (finding a requester's statements in support of his fee waiver request to be "perfunctory assertions [that] were too 'ephemeral' to satisfy the 'reasonable specificity' standard"). But see Edmonds Inst., 460 F. Supp. 2d at 74 (finding that the plaintiff's failure to "state affirmatively" that it would use "the various means" described in its request in order to disseminate the requested information was not fatal to its fee waiver request); Prison Legal News, 436 F. Supp. 2d at 26 (finding that requester had provided reasonable specificity how requested records would benefit public); cf. Judicial Watch, 326 F.3d at 1314 (concluding that requiring requester to provide "specific plan" for dissemination in addition to its methods of publication would be "pointless specificity"); Judicial Watch, 2005 WL 1606915, at *5 (stating that where
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Further, when a requester fails to provide sufficient information for the agency to make that decision, the agency may of course defer consideration of a fee waiver request in order to ask the requester for all necessary supplemental or clarifying information.[143] As an additional threshold matter, and just as with disclosures made under the FOIA,[144] agencies analyzing fee waiver requests are not strictly bound by previous administrative decisions.[145]

In order to determine whether the first fee waiver requirement has been met -- i.e., that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of government operations or activities[146] -- agencies should consider

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[142](...continued)
requester had detailed its ability to disseminate, its failure to provide specific dissemination plan was not fatal); Judicial Watch, 310 F. Supp. 2d at 291 (same).

[143] See McClellan, 835 F.2d at 1287 (noting that "[t]he fee waiver statute nowhere suggests that an agency may not ask for more information if the requester fails to provide enough"); Citizens, 241 F. Supp. 2d at 1366 (recognizing that the agency "is entitled to ask for more information with regards to a fee waiver request, where the information provided is not sufficient"); cf. Judicial Watch, 326 F.3d at 1315 (concluding that initial request demonstrated eligibility for fee waiver, thus effectively rejecting propriety of agency's request for additional information).

[144] See, e.g., Mobil Oil Corp. v. EPA, 879 F.2d 698, 700-01 (9th Cir. 1989) (discretionary release of document does not require similar release of similar documents).

[145] See, e.g., Judicial Watch, Inc. v. U.S. Dep't of Justice, No. 97-2089, slip op. at 14 (D.D.C. July 14, 1998) (finding, in case at hand, that it was "wholly irrelevant" that requester received fee waivers in other cases); Dollinger v. USPS, No. 95-CV-6174T, slip op. at 7-8 (W.D.N.Y. Aug. 24, 1995) (concluding that agency is not bound by previous decision on fee waiver for similar request from same requester).

[146] See, e.g., Judicial Watch, 326 F.3d at 1312 (stating that the case turns on whether the public interest requirement is met, and noting that the agency's implementing regulation included a "non-exclusive list of factors the agency 'shall consider'" (quoting agency's regulation)); S.A. Ludsin & Co. v. SBA, No. 97-7884, 1998 WL 642416, at *1 (2d Cir. Mar. 26, 1998) (reiterating that first requirement not met when requester "merely paraphrased" fee waiver provision); Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 66 n.11 (D.C. Cir. 1990) (conclusory statements insufficient to make public interest showing); Edmonds Inst., 460 F. Supp. 2d at 74 (noting that the requester's initial fee waiver request "represents the type of overly general, conclusory justification that does not support a fee waiver"); Judicial
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the following four factors,[147] in sequence:

1. First, the subject matter of the requested records, in the context of the request, must specifically concern identifiable "operations or activities

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[146](...continued)
Watch, 310 F. Supp. 2d at 291 n.2 (applying public interest test, and noting that D.C. Circuit decision that applied this test "is binding precedent" (citing Judicial Watch, 326 F.3d at 1312)); Judicial Watch, 122 F. Supp. 2d at 9 (finding that nonprofit group's "general description of [its] organizational mission" failed to identify public interest to be served by release of specific information requested); S.A. Ludsin & Co. v. SBA, No. 96-5972, 1998 WL 355394, at *2 (E.D.N.Y. Apr. 2, 1998) (observing that mere recitation of statute does not satisfy requester's burden); Trueblood v. U.S. Dep't of the Treasury, 943 F. Supp. 64, 69 (D.D.C. 1996) (rejecting contention that public interest requirement met by identifying personal benefit to requester); Sloman, 832 F. Supp. at 68 (finding that public interest requirement is not met merely by quoting statutory standard); cf. S.A. Ludsin, 1998 WL 642416, at *1 (noting that requester's claim that disclosure to it would "create[] revenue for the federal government" does not demonstrate that disclosure "is in the public interest" for fee waiver purposes); Sierra Club Legal Def. Fund v. Bibles, No. 93-35383, slip op. at 3-4 (9th Cir. Aug. 29, 1994) (reasoning that disclosure to a group that is "in the public interest" is not the same as saying that disclosure without fees is likely to contribute to public understanding, and that the requester's status as a public interest law firm does not automatically entitle it to a fee waiver at taxpayer expense); NTEU v. Griffin, 811 F.2d 644, 647 (D.C. Cir. 1987) (observing under previous standard that requester seeking fee waiver bears burden of identifying "public interest" involved); Judicial Watch, Inc. v. U.S. Dep't of Justice, No. 01-0639, slip op. at 7 (D.D.C. Mar. 31, 2003) (admitting that given the evidence on the record at the time of the court's earlier decision -- including the plaintiff's failure to provide evidence "that further, free release of documents" was in the public interest -- "the Court's previous decision improperly shifted the burden of establishing eligibility for a FOIA fee waiver from Plaintiff to Defendant"). But cf. Judicial Watch of Fla., Inc. v. U.S. Dep't of Justice, No. 97-2869, slip op. at 4-5 (D.D.C. Aug. 25, 1998) (despite fact that disclosed information was "not necessarily all new," finding public interest served "by exposing government actions through litigation").

[147] See Judicial Watch, Inc. v. Dep't of Justice, No. 03-5093, 2004 WL 980826, at *18 (D.C. Cir. May 7, 2004) (invoking the agency's four-factor fee waiver test, and stating that "[the] four criteria must be satisfied" in order "for a request to be in the 'public interest'"); Judicial Watch, 326 F.3d at 1312 (applying agency's four-factor analysis of fee waivers, but referring to factors as "non-exclusive list"); Judicial Watch, 310 F. Supp. 2d at 291 n.2 (applying four-factor public interest test; observing that same test used in Judicial Watch, 326 F.3d at 1312, and stating that this decision then "is binding precedent"); Inst. for Wildlife Prot., 290 F. Supp. 2d at 1229 (recognizing that "agency is to consider [four fee waiver] factors in sequence"); VoteHemp, 237 F. Supp. 2d at 59 (same).

of the government."[148] As the D.C. Circuit specifically indicated in applying the predecessor fee waiver standard, "the links between furnishing the requested information and benefitting the general public" should not be "tenuous."[149] Although in most cases records possessed by a federal agency will meet this threshold, the records must be sought for their informative value with respect to specifically identified government operations or activities;[150] a request for access to records for their intrinsic informational

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[148] 5 U.S.C. § 552(a)(4)(A)(iii); see Dollinger, No. 95-CV-6174T, slip op. at 4 (W.D.N.Y. Aug. 24, 1995) (concluding that "government" as used in fee waiver standard refers to federal government); see also Oglesby v. Dep't of Justice, No. 02-0603, slip op. at 4 (D.D.C. Sept. 3, 2002) (finding that a requester's statement that records pertaining to him would show "which [of his] activities were of interest to the Government and what actions it took with respect to them" was conclusory and did not identify "the link between identifiable government operations and the information requested").

[149] NTEU, 811 F.2d at 648; see also *FOIA Post*, "FOIA Counselor Q&A" (posted 1/24/06) (advising on "the meaning of an 'umbrella issue' under the FOIA," and noting that "the term 'umbrella issue' is a relatively new one that has been used by agencies and courts alike to make important distinctions" when considering public benefit in FOIA decisionmaking (citing NTEU)). But see also Forest Guardians v. U.S. Dep't of the Interior, 416 F.3d 1173, 1178 (10th Cir. 2005) (accepting the requester's assertion that the requested records would indirectly pertain to agency policy by "shedding light on the potential influence private groups have over agency policy," and stating that requiring the requester "to provide more concrete factual support for its assertions would be setting the bar too high").

[150] See, e.g., Brown, 445 F. Supp. 2d 1358-59 (finding that allegations made in lawsuits brought against agency did not concern operations or activities of agency); DeCato v. Executive Office for U.S. Attorneys, No. 00-3053, slip op. at 7 (D.D.C. Jan. 2, 2003) (emphasizing that "important[ly], plaintiff does not explain the connection between the requested records about himself" and a governmental activity), summary affirmance granted, No. 03-5044, 2003 WL 22433759, at *1 (D.C. Cir. Oct. 24, 2003); Judicial Watch, Inc. v. Reno, No. 00-0723, 2001 WL 1902811, at *10 (D.D.C. Mar. 30, 2001) (upholding agency's assessment of fees, reasoning that while agency's response to citizen letters regarding Cuban emigré Elian Gonzales would likely contribute to understanding of agency actions, citizen letters to agency on that topic do not), summary judgment granted on other grounds (D.D.C. Sept. 25, 2001); Van Fripp v. Parks, No. 97-0159, slip op. at 10 (D.D.C. Mar. 16, 2000) (characterizing the request as a "fishing expedition that does not relate to defined operations or activities of the [agency]"); S.A. Ludsin, 1997 U.S. Dist. LEXIS 8617, at *14 (holding that disclosure of appraisals of government property do not "in any readily apparent way" contribute to public's understanding of operations or activities of government); Atkin v. EEOC, No. 91-2508, slip op. at 27-28 (D.N.J. Dec. 4, 1992) (finding requested list of agency attorneys and their bar affiliations "clearly

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content alone would not satisfy this threshold consideration.[151]

2. Second, in order for the disclosure to be "likely to contribute" to an understanding of specific government operations or activities, the disclosable portions of the requested information must be meaningfully informative in relation to the subject matter of the request.[152] Requests for infor-

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[150](...continued)
does not concern identifiable government activities or operations"), appeal dismissed for failure to timely prosecute sub nom. Atkin v. Kemp, No. 93-5548 (3d Cir. 1993); Nance v. USPS, No. 91-1183, 1992 WL 23655, at *2 (D.D.C. Jan. 24, 1992) (reiterating that disclosure of illegally cashed money orders will not contribute significantly to public understanding of operations of government); cf. Judicial Watch, 122 F. Supp. 2d at 9 (indicating that "a requester must do more to be eligible for a fee waiver than simply assert that its request somehow relates to government operations"). But see Forest Guardians, 416 F.3d at 1178 (finding that lienholder agreements that derived from private transactions have connection to activities of government where government maintains copies of those records and notifies submitters of agency actions that "might affect" their value); Inst. for Wildlife Prot., 290 F. Supp. 2d at 1231 (ordering fee waiver where requested documents consisted of petitions submitted to agency by outside parties seeking to list particular species as endangered and where requester "theorized" that such petitions were "likely to contain marginal notes" by agency employees whose "opinions are often ignored or overturned" by agency personnel of higher authority); Landmark Legal Found. v. IRS, No. 97-1474, slip op. at 8 (D.D.C. Sept. 22, 2000) (finding that "[although [the] disclosure . . . standing alone may reveal very little about the [agency], this information, coupled with information already in the public domain, may contribute to an understanding of the" agency's operations or activities), partial summary judgment granted on other grounds, 87 F. Supp. 2d 21 (D.D.C. 2000), aff'd, 267 F.3d 1132 (D.C. Cir. 2001).

[151] See FOIA Update, Vol. VIII, No. 1, at 6.

[152] See id.; Carney v. U.S. Dep't of Justice, 19 F.3d 807, 814 (2d Cir. 1994) (stating that it is relevant to consider subject matter of fee waiver request); Larson v. CIA, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (noting that character of information is proper factor to consider); Klein v. Toupin, No. 05-647, 2006 U.S. Dist. LEXIS 32478, at *11-12 (D.D.C. May 24, 2006) (reiterating that conclusory and unsupported assertions of misconduct are not "meaningfully informative" of government operations); McDade v. Executive Office for U.S. Attorneys, No. 03-1946, slip op. at 8-9 (D.D.C. Sept. 29, 2004) (stating that the "informative value of the records to be disclosed" is considered by the agency under this factor, and concluding that the plaintiff had not shown how information that pertained only to himself would be "meaningfully informative about government operations" (citing agency's fee waiver regulation)), summary affirmance granted, No. 04-5378, 2005 U.S. App. LEXIS 15259, at *1 (D.C. Cir. July 25, 2005), cert. denied, 126 S. Ct. 791
(continued...)

mation that is already in the public domain, either in a duplicative or a substantially identical form, may not warrant a fee waiver because the disclosure would not be likely to contribute to an understanding of government operations or activities when nothing new would be added to the public's understanding.[153] Under existing case law, however, there is no clear con-

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[152](...continued)
(2005); VoteHemp, 237 F. Supp. 2d at 61 (rejecting as "rank speculation" plaintiff's allegations that agency had "ulterior motive" when it published interpretive rule); Citizens, 241 F. Supp. 2d at 1366 (reiterating that when applying fee waiver standard, it is relevant to consider subject matter of request); Conklin v. United States, 654 F. Supp. 1104, 1106 (D. Colo. 1987) (finding that mere allegations of agency "oppression" did not justify fee waiver under predecessor fee waiver standard); AFGE v. U.S. Dep't of Commerce, 632 F. Supp. 1272, 1278 (D.D.C. 1986) (finding union's allegations of malfeasance to be too ephemeral to warrant waiver of search fees without further evidence that informative material will be found), aff'd on other grounds, 907 F.2d 203 (D.C. Cir. 1990); cf. NARA v. Favish, 541 U.S. 157, 174 (holding, in the context of Exemption 7(C)'s closely related public interest balancing test, that where the "public interest" asserted is to show negligent or improper performance of the agency officials' duties, "the requester must establish more than a bare suspicion in order to obtain disclosure"), reh'g denied, 541 U.S. 1057 (2004); Crawford-El v. Britton, 523 U.S. 574, 585 (1998) ("Allegations of government misconduct are 'easy to allege and hard to disprove.'" (quoting Crawford-El v. Britton, 93 F.3d 813, 816, 821 (D.C. Cir. 1996))) (non-FOIA case); Cole-El, No. 03-1013, slip op. at 10 (D.D.C. Aug. 26, 2004) (finding in context of Exemption 7(C) analysis that as primary beneficiary of records sought, plaintiff's interest in records did not overcome third-party's privacy interests); Judicial Watch v. Rossotti, No. 01-2672, 2002 WL 31962775, *6 (D. Md. Dec. 16, 2002) (finding, in the context of Exemption 7(C)'s balancing test, that the plaintiff's request for the names of persons who submitted concerns to the IRS about the plaintiff, made to further the plaintiff's investigation into the alleged "'connection between the volunteer tipsters and the retaliatory, political motivation for the unconstitutional audit and investigation,'" did not rise to a FOIA "public interest"), aff'd sub nom. Judicial Watch v. United States, 84 F. App'x 335 (4th Cir. 2004). But see Judicial Watch, 2005 WL 1606915, at *4 (noting that fee waiver request should have been evaluated on "potential contribution" of requested records and not on agency's determination that majority of information was exempt).

[153] See Judicial Watch, Inc., 2004 WL 980826, at *18 (emphasizing that the plaintiff received "thousands of pages of requested documents" but "has made no showing" to counter the government's representations that the requested information "was already in the public domain and thus not likely to contribute significantly to the public's understanding" of a governmental activity; further finding "no basis to conclude that [plaintiff] is entitled to a blanket fee waiver" where the plaintiff did not take issue with the reasonableness of the district court's finding of the public availability of the
(continued...)

[153](...continued)
documents already released; upholding government's refusal to process additional documents without payment of fees); Sierra Club Legal Def. Fund, No. 93-35383, slip op. at 4 (9th Cir. Aug. 29, 1994) (determining that plaintiff failed to explain "how its work would add anything to 'public understanding'" where requested material already widely disseminated and publicized); Carney, 19 F.3d at 815 (observing that "where records are readily available from other sources . . . further disclosure by the agency will not significantly contribute to public understanding"); McClellan, 835 F.2d at 1286 (recognizing new information has more potential to contribute to public understanding); Brown, 445 F. Supp. 2d at 1359-60 (holding that mere assertion that information will likely contribute to public understanding is insufficient under fee waiver factor two; citing with implicit approval an agency regulation specifying that the disclosure of information already in the public domain, such as that found "in open records and available to the public in court documents," is not likely to contribute to public understanding); Judicial Watch, No. 01-0639, slip op. at 7-8 (D.D.C. Mar. 31, 2003) (finding that the plaintiff failed to prove that disclosable documents were "likely to contribute significantly" to the public interest where "a vast majority of the responsive documents . . . were . . . publicly available"); VoteHemp, 237 F. Supp. 2d at 60 (concluding that plaintiff has not shown how requested documents would give public greater understanding of agency policy concerning controlled substance than was already available); Judicial Watch, 2001 WL 1902811, at *10 (sustaining the agency's assessment of fees for duplication of court documents, press clippings, and citizen letters where the material was "'easily accessible and available to everyone else for a fee'" (quoting Durham v. U.S. Dep't of Justice, 829 F. Supp. 428, 434-35 (D.D.C. 1993))); Durham, 829 F. Supp. at 434-35 (denying fee waiver for 2340 pages of public court records), appeal dismissed for failure to timely file, No. 93-5354 (D.C. Cir. Nov. 29, 1994); Sloman, 832 F. Supp. at 68 (stating that public's understanding would not be enhanced to a significant extent where material was previously released to other writers and "more important[ly]" was available in the agency's public reading room "where the public has access and has used the information extensively"); cf. Tax Analysts v. U.S. Dep't of Justice, 965 F.2d 1092, 1094-96 (D.C. Cir. 1992) (finding that news organization was not entitled to attorney fees because, inter alia, requested information was already in public domain). But see Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 35 (D.C. Cir. 1998) ("declin[ing] to hold that the FBI cannot charge . . . any copying fees," but finding the agency's fee waiver analysis "flawed" with regard to summaries of public domain information, information that was repetitious but not asserted to be duplicative, and nonsubstantive administrative information); Prison Legal News, 436 F. Supp. 2d at 24 (concluding that publicly available court documents were "likely dispersed throughout the . . . federal courthouses in this country," thus compelling the conclusion that such records are not "readily available" to the public; further noting that electronic access to requested records on court electronic case filing system was not
(continued...)

sensus yet as to what "is and what is not" considered information in the public domain.[154]

Further, it should be noted that any denial of a fee waiver for records that are said to be already in the public domain is not a denial of access to them under the FOIA, despite what seemingly has been suggested by some courts;[155] rather, such records merely must be paid for by the requester. (For discussions of records considered to be in the "public domain," and the impact of the "public availability" on agency records in other FOIA contexts, see Exemption 1, "Public Domain" Information, below, Exemption 4, Competitive Harm Prong of National Parks, below, and Discretionary Disclosure and Waiver, below).[156]

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[153](...continued)
yet fully implemented nationally).

[154] Schrecker v. Dep't of Justice, 970 F. Supp. 49, 50 (D.D.C. 1997). Compare Forest Guardians, 416 F.3d at 1181 (noting that public availability of information generally weighs against fee waiver), Conner v. CIA, No. 84-3625, slip op. at 2 (D.D.C. Jan. 31, 1986) (upholding denial of fee waiver for records available in agency's public reading room), appeal dismissed for lack of prosecution, No. 86-5221 (D.C. Cir. Jan. 23, 1987), and Blakey v. Dep't of Justice, 549 F. Supp. 362, 364-65 (D.D.C. 1982) (applying same principle under previous statutory fee waiver standard), aff'd, 720 F.2d 215 (D.C. Cir. 1983) (unpublished table decision), with Forest Guardians, 416 F.3d at 1181 (finding that information in courthouses, newspapers, and affidavits, while in the public domain, is "publicly accessible in only the grossest sense"), Friends of the Coast Fork v. U.S. Dep't of the Interior, 110 F.3d 53, 55 (9th Cir. 1997) (holding that availability in agency's public reading room alone does not justify denial of fee waiver), Carney, 19 F.3d at 815 (finding that mere fact records released to others does not mean same information is readily available to public), VoteHemp, 237 F. Supp. 2d at 61 (observing that fee waiver is not necessarily precluded solely on basis that information already is in public domain), Judicial Watch, No. 97-2869, slip op. at 4 (D.D.C. Aug 25, 1998) (same), and Fitzgibbon v. Agency for Int'l Dev., 724 F. Supp. 1048, 1051 & n.10 (D.D.C. 1989) (stating that agencies failed to demonstrate "public's understanding" of information publicly available in public reading rooms and reports to Congress).

[155] See, e.g., Prison Legal News, 436 F. Supp. 2d at 24 (concluding that publicly available court documents were "likely dispersed throughout the . . . federal courthouses in this country" compelling conclusion that such records not "readily available" to public); Forest Guardians, 416 F.3d at 1181 (stating that information found in courthouses, newspapers, and affidavits while in public domain is "publicly accessible in only the grossest sense").

[156] Compare OSHA Data/CIH, Inc. v. U.S. Dep't of Labor, 220 F.3d 153, 163 n.25 (3d Cir. 2000) (agreeing with the agency that "a limited disclosure
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3. Third, the disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons.[157] In the past, courts have generally not defined the "public-at-large" to include the prison population.[158] More recently, courts have considered prisoners as the "public"

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

[157] See Forest Guardian, 416 F.3d at 1179 (emphasizing that "FOIA fee waivers are limited to disclosures that will enlighten more than just the individual requester"); Carney, 19 F.3d at 814 (observing that the relevant inquiry is "whether requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject"); Wagner v. U.S. Dep't of Justice, No. 86-5477, slip op. at 2 (D.C. Cir. Mar. 24, 1987) (reiterating that general public must benefit from release); Cmty. Legal Servs., 405 F. Supp. 2d at 557 (acknowledging that while the requester's limited dissemination methods are unlikely to reach a general audience "there is a segment of the public interested in requester's work"); Judicial Watch, Inc. v. U.S. Dep't of Justice, 185 F. Supp. 2d 54, 59 (D.D.C. 2002) (stating that requester must show that disclosure will contribute to understanding of "reasonably broad audience of persons"); Judicial Watch, 122 F. Supp. 2d at 10 (same); Judicial Watch, 2000 WL 33724693, at *5 (same); Crooker v. Dep't of the Army, 577 F. Supp. 1220, 1223 (D.D.C. 1984) (rejecting fee waiver under previous standard for information of interest to "a small segment of the scientific community," which would not "benefit the public at large"), appeal dismissed as frivolous, No. 84-5089 (D.C. Cir. June 22, 1984); see also NTEU, 811 F.2d at 648 (rejecting "union's suggestion that its size insures that any benefit to it amounts to a public benefit"); Citizens, 241 F. Supp. 2d at 1367 (holding that a requester's intent to release the information obtained "to the media is not sufficient to demonstrate that disclosure would contribute significantly to public understanding"); Fazzini v. U.S. Dep't of Justice, No. 90-C-3303, 1991 WL 74649, at *5 (N.D. Ill. May 2, 1991) (finding that requester cannot establish public benefit merely by alleging he has "corresponded" with members of media and intends to share requested information with them), summary affirmance granted, No. 91-2219 (7th Cir. July 26, 1991).

[158] See, e.g., Wagner, No. 86-5477, slip op. at 2 (D.C. Cir. Mar. 24, 1987) (stating that general public must benefit from release); Cox v. O'Brien, No. 86-1639, slip op. at 2 (D.D.C. Dec. 16, 1986) (upholding denial of fee waiver
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within the meaning of the FOIA,[159] though the issue has not yet been conclusively decided. Further, whether the "public-at-large" encompasses only the population of the United States has not been clearly resolved by the courts either. Only one case has directly raised this issue, one in which it was held that disclosure to a foreign news syndicate that publishes only in Canada satisfies the requirement that it contribute to "public understanding."[160]

As the proper focus must be on the benefit to be derived by the public, any personal benefit to be derived by the requester, or the requester's particular financial situation, are not factors entitling him or her to a fee waiver.[161] Indeed, it is well settled that indigence alone, without a show-

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[158](...continued)
where prisoners, not general public, would be beneficiaries of release).

[159] See Ortloff v. U.S. Dep't of Justice, No. 98-2819, slip op. at 21 (D.D.C. Mar. 22, 2002) (stressing that to qualify him for a fee waiver, the requester's ability to disseminate information "to the general public, or even to a limited segment of the public such as prisoners" must be demonstrated); Van Fripp, No. 97-0159, slip op. at 8 (D.D.C. Mar. 16, 2000) (construing term "public" to include those who are incarcerated); Linn v. U.S. Dep't of Justice, No. 92-1406, 1995 WL 631847, at *14 (D.D.C. Aug. 22, 1995) (rejecting agency's position that dissemination to prison population is not to public at large; statute makes no distinction between incarcerated and nonincarcerated public).

[160] Southam News v. INS, 674 F. Supp. 881, 892-93 (D.D.C. 1987); cf. Edmonds Inst., 460 F. Supp. 2d at 74 n.7 (refraining from addressing the agency's claim that the meaning of "public" for fee waiver purposes "does not include members of the international community" given that there were a sufficient number of U.S.-based organizations involved in supporting the request before the agency). But cf. Reporters Comm., 489 U.S. at 773 (establishing that the core purpose of the FOIA is the people's right "to know what their government is up to") (emphasis added); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (observing that the basic purpose of the FOIA is "to hold the governors accountable to the governed").

[161] See, e.g., McClain v. U.S. Dep't of Justice, 13 F.3d 220, 220-21 (7th Cir. 1993) (stating that a fee waiver was inappropriate when the requester sought to serve a private interest rather than "public understanding of operations or activities of the government"); Carney, 19 F.3d at 816 (finding fee waiver inappropriate for portion of responsive records that concerned processing of plaintiff's own FOIA requests); Kumar, 2007 U.S. Dist. LEXIS 1144, at *11 (private interests of requester not relevant to fee waiver consideration); Klein, 2006 U.S. Dist. LEXIS 32478, at *1, *12 (observing that plaintiff presented no evidence to show how records related to his suspension from practice before agency "would benefit anyone other than himself"); Hicks v. Hardy, No. 04-0769, 2006 WL 949918, at *2 (D.D.C. Apr. 12,
(continued...)

ing of a public benefit, is insufficient to warrant a fee waiver.[162]

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[161](...continued)
2006) (denying fee waiver partly because of requester's personal interest in records); McDade, No. 03-1946, slip op. at 9 (D.D.C. Sept. 29, 2004) (concluding that where intended audience is requester only, third fee waiver factor is not met); McQueen, 264 F. Supp. 2d at 525 (acknowledging that plaintiff asserted more than one basis in support of fee waiver, but concluding that his "primary purposes" served private interests and thus disqualified him on that basis alone); Mells v. IRS, No. 99-2030, 2002 U.S. Dist. LEXIS 24275, at *5-7 (D.D.C. Nov. 21, 2002) (noting that requester's reasons for fee waiver were "overwhelmingly personal in nature" where he claimed that disclosure "would yield exculpatory evidence pertaining to his criminal conviction"); Crooker, 577 F. Supp. at 1223-24 (finding that prison inmate's intent to write book about brother's connection with dangerous toxin was not proper benefit to public); see also Forest Guardians, 416 F.3d at 1179 (stating that records "that may show how, if at all" agency policy is influenced by special interest groups important to public's understanding of government operations); Judicial Watch, 326 F.3d at 1313-14 (emphasizing that contribution to public understanding of agency records related to possible conflict of interest by government official is not dependent on whether conflict actually exists); Ortloff, No. 98-2819, slip op. at 21 (D.D.C. Mar. 22, 2002) (stating questionably that cases are in conflict as to whether public interest is served where requester seeks records to challenge conviction); cf. Appleton v. FDA, 254 F. Supp. 2d 6, 10 n.5 (D.D.C. 2003) (explaining that FOIA does not provide for expedited processing on basis of age of requester). But see Johnson v. U.S. Dep't of Justice, No. 89-2842, slip op. at 3 (D.D.C. May 2, 1990) (stressing that death-row prisoner seeking previously unreleased and possibly exculpatory information was entitled to a partial fee waiver on the rationale that a potential "miscarriage of justice . . . is a matter of great public interest"), summary judgment granted, 758 F. Supp. 2, 5 (D.D.C. 1991) (holding that, ultimately, FBI is not required to review records or else forego FOIA exemption for possibly exculpatory information); see also Pederson, 847 F. Supp. at 856 (concluding that requester's personal interest in disclosure of requested information did not undercut fee waiver request when requester established existence of concurrent public interest); cf. Harper v. DOD, No. 93-35876, 1995 WL 392032, at *2 (9th Cir. July 3, 1995) (explaining that prisoner presented no evidence that requested technical reports might contain exculpatory material which would entitle him to consideration for fee waiver).

[162] See, e.g., DeCato v. Executive Office for the U.S. Attorneys, No. 03-5044, 2003 WL 22433759, at *1 (D.C. Cir. Oct. 24, 2003) (reiterating that "this court has held that indigence is not a justification for waiving fees" (citing Ely v. USPS, 753 F.2d 163, 165 (D.C. Cir. 1985))); Wagner, No. 86-5477, slip op. at 2 (D.C. Cir. Mar. 24, 1987) (observing that "indigency does not ipso facto require a fee waiver"); Ely, 753 F.2d at 165 ("Congress rejected a fee waiver provision for indigents."); Kumar, 2007 U.S. Dist. LEXIS 11144, at *10-11 (recognizing that indigence alone not sufficient to justify
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Additionally, agencies should evaluate the identity and qualifications of the requester -- e.g., expertise in the subject area of the request and ability and intention to disseminate the information to the public -- in order to determine whether the public would benefit from disclosure to that requester.[163] Specialized knowledge may be required to extract, synthesize,

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[162](...continued)
fee waiver (citing Ely, 753 F.2d at 165); McDade, No. 03-1946, slip op. at 7 (D.D.C. Sept. 29, 2004) (same); Durham, 829 F. Supp. at 435 n.10 (finding indigence alone does not constitute adequate grounds for fee waiver); Rodriguez-Estrada v. United States, No. 92-2360, slip op. at 2 (D.D.C. Apr. 16, 1993) (explaining no entitlement to fee waiver on basis of in forma pauperis status under 28 U.S.C. § 1915 (2000); Crooker, 577 F. Supp. at 1224 (holding indigence alone does not automatically entitle requester to fee waiver); see also S. Conf. Rep. No. 93-1200, at 8 (1974), reprinted in 1974 U.S.C.C.A.N. 6285, 6287 (specific fee waiver provision for indigents eliminated; "such matters are properly the subject for individual agency determination in regulations"); cf. United States v. Tyree, No. 2:05-cr-0728, slip op. at 5-6 (E.D. Pa. Mar. 29, 2006) (pointing out that neither Federal Rules of Criminal Procedure nor Brady v. Maryland, 373 U.S. 83 (1963), imposes "affirmative duty" on government to provide free copies of records during discovery) (non-FOIA case).

[163] Compare Brown, 2007 WL 446601, at *2 (determining that the requester's stated purpose of his Web site, its traffic, and the attention it has received "do not establish that he . . . disseminates news to the public at large"), McClain, 13 F.3d at 221 (stating that fee waiver must be assessed in light of identity and objectives of requester), Larson, 843 F.2d at 1483 & n.5 (holding that inability to disseminate information alone is sufficient basis for denying fee waiver request; requester cannot rely on tenuous link to newspaper to establish dissemination where administrative record failed to identify the recipient news media outlet to which he intended to release information, his purpose for seeking requested material, or his . . . contacts with any major newspaper companies"), Brown, 445 F. Supp. 2d at 1360 ("Simply maintaining a website is not disseminating information to a broad audience of interested persons."), Hall v. CIA, No. 04-0814, 2005 WL 850379, at *7 (D.D.C. Apr. 13, 2005) (reiterating that the "'ability to convey information' to others [is] insufficient without some details of how the requester will actually do so" (citations omitted), and viewing the requester's statement that he "'makes pertinent information available to newspapers and magazines' . . . [as] exactly the kind of vague statement that will preclude a fee waiver"), subsequent opinion, No. 04-0814, 2006 WL 197462 (D.D.C. Jan. 25, 2006), Citizens, 241 F. Supp. 2d at 1366 (stating that when applying fee waiver standard, it is relevant to consider ability of requester to disseminate information), Ortloff, No. 98-2819, slip op. at 21 (D.D.C. Mar. 22, 2002) (reiterating that inability to disseminate is fatal to fee waiver request; expressing skepticism about viability of plaintiff's claim of maintaining future Web site on which requested documents could be posted), Anderson, No. 93-253, slip op. at 4 (W.D. Pa. May 11, 1995) (finding requester's
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and effectively convey the information to the public, and requesters certainly vary in their ability to do so.[164]

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[163](...continued)
inability to disseminate fatal to fee waiver), and Larson v. CIA, 664 F. Supp. 15, 19 n.3 (D.D.C. 1987) (stating that "even if" it was appropriately before the court, the court would reject a letter from a newspaper to the requester indicating an interest in "anything you get" on the subject of the request "as evidence of [the requester's] ability to disseminate" because "such a rule would enable requesters to avoid fees simply by asserting an intention to give the released documents to a newspaper"), aff'd, 843 F.2d 1481 (D.C. Cir. 1988), with Forest Guardians, 416 F.3d at 1180 (finding requester's publication of online newsletter and its intent to create interactive Web site using requested records, "among other things," to be sufficient for dissemination purposes), Judicial Watch, 326 F.3d at 1314 (granting fee waiver where requester did not specifically state its intent to disseminate requested information but had presented multiple ways in which it could convey information to public), Carney, 19 F.3d at 814-15 (characterizing dissemination requirement as the ability to reach "a reasonably broad audience of persons interested in the subject" and not the need to "reach a broad cross-section of the public"), Prison Legal News, 436 F. Supp. 2d at 26-27 (viewing viability of requester's Web site as not relevant where estimated readership of requester's newsletter demonstrated ability to disseminate), Cmty. Legal Servs., 405 F. Supp. 2d at 557 n.3 (noting that agency's demand for "detailed numbers" with regard to requester's dissemination plan is not required by at least three other courts), Judicial Watch, 310 F. Supp. 2d at 292 (finding that requester's "litany of means by which it [could] publicize[] information" without any specific representation that it intended to do so in instant case satisfied dissemination requirement), W. Watersheds Project v. Brown, 318 F. Supp. 2d 1036, 1040-41 (D. Idaho 2004) (concluding that the requester had adequately demonstrated its intent and ability "to reach a large audience" through multiple means including its regular newsletter, radio and newspapers, Web site, presentations to diverse groups, and participation in conferences and nationwide public events; stating that the agency's position on dissemination "would set the bar for fee waivers impermissibly high"), Eagle v. U.S. Dep't of Commerce, No. C-01-20591, 2003 WL 21402534, at *3, *5 (N.D. Cal. Apr. 28, 2003) (finding that educator-requester made adequate showing of his ability to disseminate through his proposed distribution of newsletter to Congress, through publication in academic journals, and through publication on Web site), and VoteHemp, 237 F. Supp. 2d at 62 (finding requester's tri-part dissemination plan -- using its Web site, issuing press releases, and communicating with federal and state legislators -- sufficient to show that information would reach public).

[164] See McClellan, 835 F.2d at 1286 (observing that fee waiver request gave no indication of requesters' ability to understand and process information nor whether they intended to actually disseminate it); Cmty. Legal Servs., 405 F. Supp. 2d at 561 (finding with respect to requester's twenty-
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FEES AND FEE WAIVERS

Although established representatives of the news media, as defined in the Uniform Freedom of Information Act Fee Schedule and Guidelines [hereinafter OMB Fee Guidelines],[165] should be readily able to meet this aspect of the statutory requirement by showing their connection to a ready means of effective dissemination,[166] other requesters should be required to describe with greater substantiation their expertise in the subject area and their ability and intention to disseminate the information.[167]

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[164](...continued)
four-point request that "comprehensiveness does not equal complexity"); S. Utah, 402 F. Supp. 2d at 87 (finding that requester's past publication history in area of cultural resources, its recent report on related issues, and its periodic comments to federal agencies on same were sufficient to establish for fee waiver purposes its expertise in "analyzing and disseminating records"); W. Watersheds, 318 F. Supp. 2d at 1038, 1040 (accepting the requester's statement that it could put the requested ecological information -- characterized by the requester as "tedious to read and difficult to understand" -- into a more user-friendly format given its past analysis of similar information, and noting there was no evidence in the record demonstrating that "the information requested was highly technical"); Eagle, 2003 WL 21402534, at *5 (granting a fee waiver and emphasizing that the agency ignored the educational institution requester's intent to review, evaluate, synthesize, and present "the otherwise raw information into a more usable form"); Klamath Water Users Protective Ass'n, No. 96-3077, slip op. at 47 (D. Or. June 19, 1997) (stating that requester provided insufficient information to establish its ability to understand, make use of, and disseminate requested information); S.A. Ludsin, 1997 U.S. Dist. LEXIS 8617, at *16 (finding requester's intention to make raw appraisal data available on computer network, without analysis, to be insufficient to meet public interest requirement); see also FOIA Update, Vol. VIII, No. 1, at 7.

[165] 52 Fed. Reg. at 10,018; cf. Nat'l Sec. Archive, 880 F.2d at 1387 (elaborating on OMB definition of news media representative to include requester organization).

[166] See FOIA Update, Vol. VIII, No. 1, at 8 & n.5; see also Oglesby, No. 02-0603, slip op. at 5 (D.D.C. Sept. 3, 2002) (reiterating that member of news media presumptively meets dissemination factor).

[167] See FOIA Update, Vol. VIII, No. 1, at 8 & n.5; see also, e.g., Oglesby, 920 F.2d at 66 n.11 (explaining that requester's assertion that he was writer and had disseminated in past, coupled with bare statement of public interest, was insufficient to meet statutory standard); McClellan, 835 F.2d at 1286-87 (stating agency may request additional information; finding twenty-three questions not burdensome); Burriss v. CIA, 524 F. Supp. 448, 449 (M.D. Tenn. 1981) (holding that denial of the plaintiff's fee waiver request "based upon mere representation that he is a researcher who plans to write a book" was not abuse of discretion); cf. Edmonds Inst., 460 F. Supp. 2d at 75 (finding that evidence of the requester's past use of FOIA
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Some decisions under the former fee waiver standard suggested that journalists should presumptively be granted fee waivers.[168] The Department of Justice encourages agencies to give special weight to journalistic credentials under this factor,[169] though the statute provides no specific presumption that journalistic status alone is to be dispositive under the fee waiver standard overall and such a presumption would run counter to the 1986 amendments that set forth a special fee category for representatives of the news media.[170] (For a discussion of news media requesters in the context of attorney fee awards under the FOIA, see Tax Analysts v. United

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[167](...continued)
materials "can be relevant to a fee-waiver determination" but that there is no statutory or regulatory requirement that the requester provide it). But see Carney, 19 F.3d at 815 (noting that while the requester had only tentative book publication plans, "fact that he is working on a related dissertation is sufficient evidence . . . that his book will be completed"); S. Utah, 402 F. Supp. 2d at 87-88 (finding requester's specific examples of its involvement in area of cultural resources, including its submission of public comments about impact to such resources on federal land to federal agencies, publication of articles and reports, and use of archaeologists for its work, to be "sufficient evidence" of its expertise in field); W. Watersheds, 318 F. Supp. 2d at 1038, 1040 (stating that where no evidence was presented that the information sought was "highly technical," the requester's past experience analyzing agency records was sufficient to demonstrate its ability to "process the information" and to present it to the public in summarized form); cf. D.C. Technical Assistance Org. v. HUD, 85 F. Supp. 2d 46, 49 (D.D.C. 2000) (suggesting that in "this Information Age, technology has made it possible for almost anyone to fulfill [the fee waiver dissemination] requirement").

[168] See NTEU, 811 F.2d at 649; Goldberg v. U.S. Dep't of State, No. 85-1496, slip op. at 3-4 (D.D.C. Apr. 29, 1986), modified (D.D.C. July 25, 1986); Badhwar v. U.S. Dep't of the Air Force, 615 F. Supp. 698, 708 (D.D.C. 1985); Rosenfeld v. U.S. Dep't of Justice, No. C-85-2247, slip op. at 4-5 (N.D. Cal. Oct. 29, 1985), reconsideration denied (N.D. Cal. Mar. 25, 1986).

[169] See FOIA Update, Vol. VIII, No. 1, at 8; accord FOIA Update, Vol. IV, No. 4, at 14.

[170] 5 U.S.C. § 552(a)(4)(A)(ii)(II); OMB Fee Guidelines, 52 Fed. Reg. at 10,019; see also Hall, 2005 WL 850379, at *7 n.13 (noting that qualification as news media entity "would not automatically" entitle requester to public interest fee waiver); McClain, 13 F.3d at 221 (dictum) (concluding that status as newspaper or nonprofit institution does not lead to automatic waiver of fee); cf. Media Access Project, 883 F.2d at 1065 (remarking that any requester may seek waiver of assessed fees on "case-by-case" basis); Nat'l Sec. Archive, 880 F.2d at 1383 (dictum) (observing that fee waiver decisions are to be made on "case-by-case" basis).

States Department of Justice[171] as discussed in Attorney Fees and Other Sanctions, Attorney Fees and Litigation Costs: Entitlement, below.)

Additionally, in this regard, while nonprofit organizations and public interest groups often are capable of disseminating information, they do not by virtue of their status presumptively qualify for fee waivers; rather they must, like any requester, meet the statutory requirements for a full waiver of all fees.[172]

Further, the requirement that a requester demonstrate a contribution to the understanding of the public at large is not satisfied simply because a fee waiver request is made by a library or other record repository, or by a requester who intends merely to disseminate the information to such an institution.[173] Requests that make no showing of how the information would be disseminated, other than through passively making it available to anyone who might seek access to it, do not meet the burden of demonstrating with particularity that the information will be communicated to the public.[174] These requests, like those of other requesters, should be analyzed to

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[171] 965 F.2d at 1095-96 (holding that litigant's status as news organization does not render award of attorney fees automatic).

[172] 5 U.S.C. § 552(a)(4)(A)(iii); see Forest Guardians, 416 F.3d at 1178 (reiterating that public interest groups "must still satisfy the statutory standard to obtain a fee waiver"); Sierra Club Legal Def. Fund, No. 93-35383, slip op. at 4 (9th Cir. Aug. 29, 1994) (explaining that status as public interest law firm does not entitle requester to fee waiver); McClain, 13 F.3d at 221 (stating that status as newspaper or nonprofit institution does not lead to "automatic" waiver of fee); McClellan, 835 F.2d at 1284 (stating that legislative history makes plain that "public interest" groups must satisfy statutory test); VoteHemp, 237 F. Supp. 2d at 59 (explaining that nonprofit status "does not relieve [the requester] of its obligation to satisfy the statutory requirements for a fee waiver"); Judicial Watch, No. 97-2089, slip op. at 13 (D.D.C. July 14, 1998) (emphasizing that requester's status as public interest group does not entitle it to fee waiver); Nat'l Wildlife Fed'n, No. 95-017-BU, slip op. at 3-4 (D. Mont. July 15, 1996) (finding that public interest groups must satisfy the statutory test and that a requester does not qualify for a fee waiver by "basically" relying on its status "as one of the nation's largest" conservation organizations).

[173] See FOIA Update, Vol. VIII, No. 1, at 8.

[174] See, e.g., Van Fripp, No. 97-0159, slip op. at 12 (D.D.C. Mar. 16, 2000) (emphasizing that placement in library amounts to, "at best, a passive method of distribution" that does not establish entitlement to fee waiver); Klamath Water Users Protective Ass'n, No. 96-3077, slip op. at 47 (D. Or. June 19, 1997) (finding placement in library insufficient in itself to establish entitlement to fee waiver); cf. S.A. Ludsin, 1997 U.S. Dist. LEXIS 8617, at *16 (indicating that requester, who intended merely to make raw appraisal

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identify a particular person or persons who actually will use the requested information in scholarly or other analytic work and then disseminate it to the general public.[175]

4. Fourth, the disclosure must contribute "significantly" to public understanding of government operations or activities.[176] To warrant a waiver or reduction of fees, the public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent.[177] Such a determination must be an objective one; agencies

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[174](...continued)
data available in electronic form, failed to explain how disclosure would provide explanation to public about government activities); see also FOIA Update, Vol. VIII, No. 1, at 8.

[175] See FOIA Update, Vol. VIII, No. 1, at 8.

[176] See 5 U.S.C. § 552(a)(4)(A)(iii); see also Cmty. Legal Servs., 405 F. Supp. 2d at 558 (noting that the statute provides no guidance "as to what constitutes a 'significant' contribution"); McDade, No. 03-1946, slip op. at 9 (D.D.C. Sept. 29, 2004) (paraphrasing with approval the agency's regulation that provides that the "public's understanding of the subject after disclosure must be enhanced significantly when compared to the level of public understanding prior to disclosure"); cf. Favish, 541 U.S. at 172 (emphasizing, in the Exemption 7(C) context, that the requester "must establish a sufficient reason for the disclosure" by showing "that the public interest sought to be advanced is a significant one" and that the information sought is "likely to advance that interest"); *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (advising further on nexus requirement); Tomscha v. GSA, No. 04-4804, 2005 WL 3406575, at *2 (2d Cir. Dec. 12, 2005) (determining, in an Exemption 6 context, that where the requester sought justifications for a federal employee's performance awards but provided no evidence of wrongdoing by the agency in granting such awards, disclosure would not "contribut[e] significantly to the public understanding of the operations or activities of the government") (citations omitted).

[177] See FOIA Update, Vol. VIII, No. 1, at 8; Brown v. U.S. Patent & Trademark Office, No. 06-14716, 2007 WL 446601, at *2 (11th Cir. Feb. 13, 2007) (holding that the requester failed to adequately explain how the requested records were "related to the activities or operations" of the agency or how they "would contribute to the public's understanding of that agency"); Sierra Club Legal Def. Fund, No. 93-35383, slip op. at 4 (9th Cir. Aug. 29, 1994) (concluding that requester failed to explain how disclosure to it "would add anything to 'public understanding' in light of vast amount of material already disseminated and publicized"); Carney, 19 F.3d at 815 (observing that when requested records are readily available from other sources, further disclosure will not significantly contribute to public
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are not permitted to make separate value judgments as to whether any information that would in fact contribute significantly to public understanding of government operations or activities is "important" enough to be made

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[177](...continued)
understanding); Brown, 445 F. Supp. 2d at 1361 (emphasizing that because plaintiff did not address how disclosure of allegations made against agency in litigation is likely to contribute "significantly" to public understanding of agency's operations, he failed factor four); Klein, 2006 U.S. Dist. LEXIS 32478, at *12 (finding that no showing was made of how disclosure "would contribute significantly to public understanding of government operations"); Hall, 2005 WL 850379, at *7 (finding that no showing was made that requested records would "meaningfully enhance" public understanding of subject of request); Judicial Watch, 185 F. Supp. 2d at 62 (finding that the plaintiff failed to describe with specificity how disclosure of "these particular documents will 'enhance' public understanding 'to a significant extent'"); Judicial Watch, 122 F. Supp. 2d at 10 (explaining that the plaintiff's failure to provide information relevant to other fee waiver factors "makes it impossible to determine that disclosing the requested information will significantly contribute to public understanding of that operation or activity"); D.C. Technical Assistance Org., 85 F. Supp. 2d at 49 (noting that while plaintiff demonstrated ability to disseminate information, it failed to establish that disclosure would contribute significantly to public's understanding of government activities or operations); Dollinger, No. 95-CV-6174T, slip op. at 5-6 (W.D.N.Y. Aug. 24, 1995) (finding that routine, generic information "lacks substantial informative value" and would not significantly contribute to public understanding); Sloman, 832 F. Supp. at 68 (stating information previously released to other writers and "more important[ly]" available in agency's reading room will not contribute significantly to public understanding of operations of government); see also Forest Guardians, 416 F.3d at 1181-82 (acknowledging that the significance of the contribution to be made by the "release of the records" at issue "is concededly a close question," and finding that the requester "should get the benefit of the doubt" and therefore is entitled to a fee waiver); Cmty. Legal Servs., 405 F. Supp. 2d at 559 (finding that extent to which requested information already is available, its newness, and whether request is pretext for discovery all were proper considerations in applying "significance factor" where agency's regulation did not address statutory provision). But see W. Watersheds, 318 F. Supp. 2d at 1039 n.2 (finding that significance factor was met where requester's statements that information sought either was not readily available or had never been provided to public were not contradicted in the administrative record by agency); Landmark, No. 97-1474, slip op. at 10 (D.D.C. Sept. 22, 1998) (finding "untenable" agency's position that possible prospective release" of same material by congressional committee diminishes significance of current release); Pedersen, 847 F. Supp. at 855 (finding that despite requesters' failure to specifically assert such significance, widespread media attention referenced in appeal letter sufficient to demonstrate information's significant contribution to public understanding).

public.[178]

Once an agency determines that the "public interest" requirement for a fee waiver has been met -- through its consideration of fee waiver factors one through four -- the statutory standard's second requirement calls for the agency to determine whether "disclosure of the information . . . is not primarily in the commercial interest of the requester."[179] In order to decide whether this requirement has been satisfied, agencies should consider the final two of the six fee waiver factors -- factors five and six -- in sequence:

5. Accordingly, to apply the fifth factor an agency must next determine as a threshold matter whether the request involves any commercial interest of the requester which would be furthered by the disclosure.[180] A "commercial interest" is one that furthers a commercial, trade, or profit interest as those terms are commonly understood.[181] Information sought in furtherance of a tort claim for compensation or retribution for the requester is not considered to involve a "commercial interest."[182] However, not only profit-making corporations but also individuals or other organizations may have a commercial interest to be furthered by the disclosure, depending

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[178] Cf. 132 Cong. Rec. S14,298 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy) (emphasizing that agencies should administer the fee waiver provision in "an objective manner and should not rely on their own, subjective view as to the value of the information"); Cmty. Legal Servs., 405 F. Supp. 2d at 560 (finding that the agency's inferences that the request was a pretext for discovery and the requester's use of "information in advising clients suggests a litigious motive" were speculative where there was no evidence of any pending lawsuits); see also Ettlinger v. FBI, 596 F. Supp. 867, 875 (D. Mass. 1984); FOIA Update, Vol. VIII, No. 1, at 8.

[179] 5 U.S.C. § 552(a)(4)(A)(iii).

[180] See FOIA Update, Vol. VIII, No. 1, at 9 (discussing analysis required to determine whether requester has commercial interest); see also Vote-Hemp, 237 F. Supp. 2d at 64 (citing to the agency's regulation and noting that "agencies are instructed to consider 'the existence and magnitude' of a commercial interest").

[181] See id.; OMB Fee Guidelines, 52 Fed. Reg. at 10,017-18; cf. Am. Airlines, Inc. v. Nat'l Mediation Bd., 588 F.2d 863, 870 (2d Cir. 1978) (defining term "commercial" in Exemption 4 as meaning anything "pertaining or relating to or dealing with commerce").

[182] See McClellan, 835 F.2d at 1285; cf. Detroit Free Press, Inc. v. Dep't of Justice, 73 F.3d 93, 98 (6th Cir. 1996) (stating, in context of attorney fees, that "'news interests should not be considered commercial interests'" when examining commercial benefit to requester (quoting Fenster v. Brown, 617 F.2d 740, 742 n.4 (D.C. Cir. 1979))).

upon the circumstances involved.[183] Agencies may properly consider the requester's identity and the circumstances surrounding the request and draw reasonable inferences regarding the existence of a commercial interest.[184]

When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order subsequently to compare it to the "public interest" in disclosure.[185] In assessing the magnitude of the commercial interest, the agency should reasonably consider the extent to which the FOIA disclosure will serve the requester's identified commercial interest.[186]

6. Lastly the agency must balance the requester's commercial interest against the identified public interest in disclosure and determine which interest is "primary." A fee waiver or reduction must be granted when the public interest in disclosure is greater in magnitude than the requester's commercial interest.[187] Or as one court phrased it when considering the balance to be struck under the predecessor fee waiver standard: "[I]n simple terms, the public should not foot the bill unless it will be the primary beneficiary of the [disclosure]."[188]

Although news gathering organizations ordinarily have a commercial interest in obtaining information, agencies may generally presume that when a news media requester has satisfied the "public interest" standard,

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[183] See OMB Fee Guidelines, 52 Fed. Reg. at 10,013; FOIA Update, Vol. VIII, No. 1, at 9; see also VoteHemp, 237 F. Supp. 2d at 65 (concluding that nonprofit organization, as advocate for free market in controlled substance, had commercial interest in requested records); Judicial Watch, No. 97-2869, slip op. at 5 (D.D.C. Aug. 25, 1998) (stating that nonprofit status "does not determine the character of the information"); cf. Critical Mass Energy Project v. NRC, 830 F.2d 278, 281 (D.C. Cir. 1987) (recognizing that entity's "non-profit status is not determinative" of commercial status) (Exemption 4 case).

[184] See FOIA Update, Vol. VIII, No. 1, at 9; see also VoteHemp, 237 F. Supp. 2d at 65 ("A review of plaintiff's website pages demonstrates that indeed it has a commercial interest in the information it is seeking to obtain."); cf. Tax Analysts, 965 F.2d at 1096 (clarifying that in the context of attorney fees, the status of a requester as a news organization does not "render[] irrelevant the news organization's other interests in the information").

[185] See FOIA Update, Vol. VIII, No. 1, at 9.

[186] Id.

[187] Id.

[188] Burriss, 524 F. Supp. at 449.

that will be the primary interest served.[189] On the other hand, disclosure to private repositories of government records or data brokers may not be presumed to primarily serve the public interest; rather, requests on behalf of such entities can more readily be considered as primarily in their commercial interest, depending upon the nature of the records and their relation to the exact circumstances of the enterprise.[190]

When agencies analyze fee waiver requests by considering these six factors, they can rest assured that they have carried out their statutory obligation to determine whether a waiver is in the public interest.[191] When an agency has relied on factors unrelated to the public benefit standard to deny a fee waiver request, however, courts have found an abuse of discretion.[192] Additionally, when only some of the requested records satisfy the statutory test, a waiver should be granted for those records.[193]

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[189] See FOIA Update, Vol. VIII, No. 1, at 10; see also Nat'l Sec. Archive, 880 F.2d at 1388 (requests from news media entities, in furtherance of their newsgathering function, are not for "commercial use").

[190] See FOIA Update, Vol. VIII, No. 1, at 10; see also Nat'l Sec. Archive, 880 F.2d at 1387-88.

[191] See FOIA Update, Vol. VIII, No. 1, at 10; cf. Friends of the Coast Fork, 110 F.3d at 55 (emphasizing that where agency's regulations provide for multifactor test, it is inappropriate to rely on single factor); Or. Natural Desert Ass'n v. U.S. Dep't of the Interior, 24 F. Supp. 2d 1088, 1095 (D. Or. 1998) (finding that fee waiver denial must fail when agency did not fully follow its multifactor regulation).

[192] See, e.g., Goldberg, No. 85-1496, slip op. at 3-5 (D.D.C. Apr. 29, 1986) (holding that an agency policy of granting a waiver of search fees but not of duplication fees is "both irrational and in violation of the statute"); Idaho Wildlife Fed'n v. U.S. Forest Serv., 3 Gov't Disclosure Serv. (P-H) ¶ 83,271, at 84,056 (D.D.C. July 21, 1983) (emphasizing that reliance on regulation that proscribes granting of fee waiver when records are sought for litigation is abuse of discretion because regulation is overbroad in that it ignores "public interest" in certain litigation); Diamond v. FBI, 548 F. Supp. 1158, 1160 (S.D.N.Y. 1982) (maintaining that agency may not decline to waive fees based merely upon perceived obligation to collect them); Eudey v. CIA, 478 F. Supp. 1175, 1177 (D.D.C. 1979) (stating that agency may not consider quantity of documents to be released).

[193] See 28 C.F.R. § 16.11(k)(4) ("Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver shall be granted for those records."); cf. Samuel Gruber Educ. Project v. U.S. Dep't of Justice, 24 F. Supp. 2d 1, 2 (D.D.C. 1998) (upholding, without discussion, seventy-percent fee waiver granted by agency). But see Schrecker, 970 F. Supp. at 50-51 (granting full fee waiver despite agency's determination that portion of requested information already was in public domain); cf. Camp-

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FEES AND FEE WAIVERS

An analysis of the foregoing factors routinely requires an agency to first assess the nature of the information likely to be released in response to an access request, because the statutory standard speaks to whether "disclosure" of the responsive information will significantly contribute to public understanding.[194] This assessment necessarily focuses on the information that would be disclosed,[195] which in turn logically requires an estimation of the applicability of any relevant FOIA exemption(s).

In an atypical decision, a question of whether an agency should be required to establish at the fee waiver determination stage the precise contours of its anticipated withholdings was raised during the late 1980s in Project on Military Procurement v. Department of the Navy.[196] There the district court seemed to suggest that an agency must defend an anticipated application of FOIA exemptions in the fee waiver context with an index pursuant to the requirements of Vaughn v. Rosen.[197] Such a requirement not only was unprecedented, it also is unworkable -- as it would compel an agency to actually process responsive records at the threshold fee waiver determination stage in order to compile the Vaughn Index; it would turn the normal, longstanding procedure for responding to FOIA/fee waiver requests on its head.[198] Until a fee waiver determination has been made and (if a full fee waiver is not granted) the requester has agreed to pay all the assessable fees, the request is not yet ripe for processing because there has been no compliance with the fee requirements of the FOIA.[199] The de-

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[193](...continued)
bell, 164 F.3d at 35 (finding fault with analysis used by agency to award partial fee waiver; remanding case for reconsideration but declining to hold that agency may not charge any fee).

[194] 5 U.S.C. § 552(a)(4)(A)(iii); see also, e.g., 28 C.F.R. § 16.11(k)(2).

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

[196] 710 F. Supp. 362, 366-68 (D.D.C. 1989).

[197] 484 F.2d 820, 826-28 (D.C. Cir. 1973).

[198] Cf. LaCedra v. Executive Office for U.S. Attorneys, No. 99-0273, slip op. at 1 (D.D.C. Nov. 5, 2003) ("Unless the agency waives fees, the payment of assessed fees or the administrative appeal from the denial of a fee waiver request is a jurisdictional prerequisite to maintaining a FOIA lawsuit.").

[199] See 5 U.S.C. § 552(a)(3); see also, e.g., Pollack v. Dep't of Justice, 49
(continued...)

cision on this issue in Project on Military Procurement would thus yield impracticable results.[200] Indeed, the court in Project on Military Procure-

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[199](...continued)
F.3d 115, 120 (4th Cir. 1995) (finding when the requester refused to commit to pay fees, the agency "had the authority to cease processing [his] request"); Vennes v. IRS, No. 89-5136, slip op. at 2-3 (8th Cir. Oct. 13, 1989) (explaining agency under no obligation to produce material until either requester agrees to pay fee or fee waiver is approved); Casad, 2003 U.S. Dist. LEXIS 13007, at *18 (recognizing that where fee waiver is denied, no action by agency is required until requester agrees to pay fee associated with request); Woodfolk v. DEA, No. 97-0634, slip op. at 2 (D.D.C. Jan. 29, 2002) (finding that agency had no obligation to produce records where requester had neither paid fee nor applied for fee waiver); Daniel v. U.S. Dep't of Justice, No. 99-2423, slip op. at 2 (D.D.C. Mar. 30, 2001) (dismissing complaint for production of records where plaintiff had failed to pay fee after fee waiver was denied), summary affirmance granted, No. 01-5119, 2001 WL 1029156, at *1 (D.C. Cir. Aug 28, 2001); Irons v. FBI, 571 F. Supp. 1241, 1243 (D. Mass. 1983) (upholding regulation requiring payment of fees or waiver of fees before FOIA request is deemed to have been received); cf. Judicial Watch, No. 01-0639, slip op. at 7-8 (D.D.C. Mar. 31, 2003) (recognizing that court's prior opinion "essentially requiring [agency] to process Plaintiff's entire FOIA request for free without requiring Plaintiff to meet its burden of proof" of entitlement to fee waiver was improper); Johnston v. United States, No. 93-CV-5605, 1997 U.S. Dist. LEXIS 597, at *4 (E.D. Pa. Jan. 27, 1997) (upholding agency's decision to make availability of records contingent upon agreement to pay estimated fees); FOIA Update, Vol. XIX, No. 3, at 2 (advising agencies how to count requests closed for nonpayment of fees, for purposes of annual FOIA reports). But see S. Utah, 402 F. Supp. 2d at 88-91 (discounting defendant's claim that majority of information at issue was "patently exempt" under Exemption 3 and that remaining information would be of no public significance, where agency official had "substantial discretion" to disclose or withhold information based on assessment of benefits and risks of such disclosure); Judicial Watch, 310 F. Supp. 2d at 295 (ruling, where the agency granted a fee waiver for all documents other than those to be withheld, that it "'invert[s] the burden of proof'" to require the plaintiff to show that the agency's "contemplated withholdings" are not proper (quoting Project on Military Procurement, 710 F. Supp. at 367)); see also Carney, 19 F.3d at 815 (finding it not proper to deny fee waiver request on basis that records may have been exempt; fee waiver "should be evaluated on face of request"); Wilson v. CIA, No. 89-3356, slip op. at 3-4 (D.D.C. Mar. 25, 1991) (stating that agency may not deny fee waiver request based upon "likelihood" that information will be withheld); cf. Landmark, No. 97-1474, slip op. at 7 (D.D.C. Sept. 22, 1998) (finding it proper to deny fee waiver based on the agency's preliminary determination of exempt status of the records "'only if the request was for patently exempt documents'" (quoting Carney, 19 F.3d at 814)).

[200] See Judicial Watch, Inc., 2004 WL 980826, at *18 (implicitly rejecting (continued...)

ment itself ultimately acknowledged that the government "may be correct" that a fee waiver determination depends in part on applicability of FOIA exemptions to the responsive records.[201]

With limited exceptions,[202] Project on Military Procurement was largely ignored during the next decade. In recent years, however, three district court opinions, all within the D.C. Circuit, have revisited this and have concluded that fee wavier requests should not be evaluated on the basis that the requested records may well ultimately be found to be exempt from disclosure.[203] Additionally, two of these three opinions appear to suggest that an agency should not consider what information will be disclosed to a requester in its analysis of its fee waiver request, but rather that a fee waiver request should be evaluated "based on the face of the request."[204] The language of the statute, however, authorizes agencies to waive or reduce fees only when "disclosure" of the information is likely to contribute significantly to the public's understanding of government op-

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[200](...continued)
plaintiff's "catch-22" argument -- i.e., that it was being asked to identify documents qualifying for fee waiver before getting access to them -- and thus both exposing and logically undermining flawed rationale of Project on Military Procurement); cf., e.g., Favish, 541 U.S. at 172 (evincing Supreme Court's emphasis on "giv[ing] practical meaning" to FOIA provisions).

[201] 710 F. Supp. at 367 n.11.

[202] Carney, 19 F.3d at 815 (finding that the agency's denial of a fee waiver was not proper when made simply on the basis that the requested records "may [be] exempt from disclosure . . . , [because a] fee waiver should be evaluated based on the face of the request and the reasons given by the requester" (citing Project on Military Procurement)); Wilson v. CIA, No. 89-3356, slip op. at 3-4 (D.D.C. Mar. 25, 1991) (stating that agency may not deny fee waiver request based upon "likelihood" that information will be withheld).

[203] S. Utah, 402 F. Supp. 2d at 90 (opining that agency cannot base fee waiver decision on anticipated redactions to responsive records); Judicial Watch, 2005 WL 1606915, at *4 (saying that a fee waver decision should not be made on the basis of the agency's "determination that most of the information was exempt from disclosure"); Judicial Watch, 310 F. Supp. 2d at 295 (same).

[204] Judicial Watch, 2005 WL 1606915, at *4 ("A fee waiver request should be evaluated based on the face of the request and the reasons given by the requester in support of the waiver, 'not on the possibility that the records may ultimately be determined to be exempt from disclosure.'") (citations omitted); Judicial Watch, 310 F. Supp. 2d at 295 (same).

erations.[205] Further, in none of these recent opinions is any consideration given to the fees that would be owed for the processing of records properly withheld.[206]

The FOIA does not explicitly reference any time period within which an agency must resolve a fee waiver issue.[207] The extension of the statutory twenty-working day compliance requirement to include the resolution of fee waiver (and fee) issues, however, is a logical application of the statutory twenty-day provision; indeed, several courts, including the D.C. Circuit, have implicitly approved such application.[208] (For a discussion of when the need to resolve a procedural issue, including a fee-related matter, may extend the time period within which an agency must determine whether to comply with a request, see Procedural Requirements, Time Limits, above.)

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[205] See 5 U.S.C. § 552(a)(4)(A)(iii).

[206] See, e.g., Judicial Watch, 2005 WL 1606915, at *3-11 (simultaneously granting plaintiff full fee waiver for "those records already released" -- approximately twenty percent of responsive records -- and upholding each of agency's claims of exemptions for remainder of processed records, with no consideration given to government's entitlement to reimbursement for processing fees government incurred for those records withheld); see also OMB Fee Guidelines, 52 Fed. Reg. at 10,019 (advising agencies that they may charge for search time even if they "fail to locate the records or if records located are determined to be exempt from disclosure").

[207] See 5 U.S.C. § 552(a)(4)(A).

[208] See Judicial Watch, 326 F.3d at 1311 ("A requester is considered to have constructively exhausted administrative remedies and may seek judicial review immediately if . . . the agency fails to answer the [fee waiver] request within twenty days.") (citations omitted); Judicial Watch, 310 F. Supp. 2d at 293 (commenting that where agency fails to respond to fee waiver request within twenty working days, requester has constructively exhausted administrative remedies and may seek judicial review); Pub. Citizen, Inc. v. Dep't of Educ., 292 F. Supp. 2d 1, 4 (D.D.C. 2003) (stating that "if the agency fails to respond to a waiver request within twenty days, the requester is deemed to have constructively exhausted" administrative remedies); cf. Long v. U.S. Dep't of Justice, 450 F. Supp. 2d 42 (D.D.C.) (finding the defendant's failure to render fee waiver determination within reasonable period of time to be mooted by the agency's ultimate release of records without charge; "'we cannot order the [agency] to do something [it] has already done'" (quoting Better Gov't Ass'n v. Dep't of State, 780 F.2d 86, 91 (D.C. Cir. 1986))), 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); Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice, No. 05-2078, 2006 WL 1518964, at *4 (D.D.C. June 1, 2006) (criticizing agency for time taken in adjudicating fee waiver appeal).

FEES AND FEE WAIVERS

Nor does the FOIA explicitly provide for administrative appeals of denials of requests for fee waivers. Nevertheless, many agencies, either by regulation or by practice, have appropriately considered appeals of such actions.[209] The Courts of Appeals for the D.C. and Fifth Circuits have made it clear, moreover, that appellate administrative exhaustion is required for any adverse determination, including fee waiver denials.[210]

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[209] See, e.g., 28 C.F.R. § 16.9(a) ("If you are dissatisfied with [the agency's] response to your request, you may appeal an adverse determination denying your request . . . ."); see also, e.g., id. at § 16.6(c) (including in its listing of adverse determinations "a denial of a request for a fee waiver").

[210] See Pruitt v. Executive Office for the U.S. Attorneys, No. 01-5453, 2002 WL 1364365, at *1 (D.C. Cir. Apr. 19, 2002) (reiterating that judicial review is not appropriate until requester either appeals fee waiver denial or pays assessed fee); Voinche v. U.S. Dep't of the Air Force, 983 F.2d 667, 669 (5th Cir. 1993) (emphasizing that requester seeking fee waiver under FOIA must exhaust administrative remedies before seeking judicial review); Oglesby, 920 F.2d at 66 & n.11, 71 ("Exhaustion does not occur until fees are paid or an appeal is taken from the refusal to waive fees."); Kumar, 2007 U.S. Dist. LEXIS 11144, at *11 (concluding that plaintiff's failure to make advance payment constituted failure to exhaust); Hall, 2005 WL 850379, at *2 (emphasizing that requester may seek judicial review "only after" exhaustion of administrative remedies through payment of fees or appeal taken from fee waiver denial); Boyd v. Criminal Div., U.S. Dep't of Justice, No. 04-1100, 2005 WL 555412, at *5 (D.D.C. Mar. 9, 2005) (noting that requester's failure to request fee waiver (or pay assessed fee) precluded judicial review); Pub. Citizen, 292 F. Supp. 2d at 4 ("A requester who disagrees with the denial of a waiver must pursue administrative remedies."); Judicial Watch, No. 99-1883, slip op. at 10-12 (D.D.C. Sept. 11, 2003) (concluding that although plaintiff "may have" exhausted its administrative remedies as to other issues, it had failed to administratively exhaust as to agency's denial of fee waiver, so its claims related to fee waiver were not properly before court; rejecting plaintiff's argument that its failure was irrelevant because of claimed entitlement to full waiver of fees); Trulock, 257 F. Supp. 2d at 52-53 (reiterating that where plaintiff has neither appealed fee waiver denial nor paid estimated fee, court cannot address entitlement to fee waiver until plaintiff exhausts administrative remedies with respect to fee issue); see also AFGE, 907 F.2d at 209 (declining consideration of fee waiver request when not pursued during agency administrative proceeding); Schoenman v. FBI, No. 04-2202, 2006 WL 1582253, at *16 (D.D.C. June 5, 2006) (finding agency's voluntary withdrawal of motion to dismiss appropriate where agency denied fee waiver and requester administratively appealed that decision); 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) (determining that because plaintiff failed to exhaust administrative remedies, court need not reach issue of whether requester's purported withdrawal of request was grounds for dismissal); Oguaju v. Executive Office for U.S. Attorneys, No. 00-1930, slip op. at 1 n.1 (D.D.C. Sept. 25, 2003)

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Prior to the 1986 FOIA amendments, the discretionary nature of the FOIA's fee waiver provision led the majority of courts to conclude that the proper standard for judicial review of an agency denial of a fee waiver is whether that decision was arbitrary and capricious,[211] in accordance with the Administrative Procedure Act.[212] This meant that a court could not "replace its own judgment for that of [an agency] without first concluding that the [agency's] decision was completely unreasonable and unfair."[213]

This standard was changed, however, when a specific judicial review

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[210](...continued)
(denying motion for fee waiver by stating that "Court cannot compel agency to waive fees" but rather reviews agency's decision to deny fee waiver), summary affirmance granted, No. 04-5407, 2005 U.S. App. LEXIS 23891 (D.C. Cir. Nov. 3, 2005); Maydak v. U.S. Dep't of Justice, 254 F. Supp. 2d 23, 50 (D.D.C. 2003) (stating that payment or waiver of fees is jurisdictional prerequisite to filing suit); 28 C.F.R. § 16.9(c) (Department of Justice regulation providing for administrative appeal exhaustion before court review); cf. Campbell v. Unknown Power Superintendent of Flathead Irrigation & Power Project, No. 91-35104, slip op. at 3 (9th Cir. Apr. 22, 1992) (explaining exhaustion requirement not imposed when agency ignored fee waiver request). But see Judicial Watch, 2005 WL 1606915, at *3 (finding that constructive exhaustion occurred when agency failed to respond to fee waiver request within statutory time period); Hall, 2005 WL 850379, at *4 n.7 (noting that agency's request for fee deposit subsequent to litigation, and after requester had constructively exhausted administrative remedies, was not grounds for dismissal); Pub. Citizen, 292 F. Supp. 2d at 4 (finding that requester constructively exhausted administrative remedies where agency failed to respond to fee waiver request within twenty working days).

[211] See, e.g., NTEU, 811 F.2d at 647 (stating that agency's denial of fee waiver will be upheld unless finding is arbitrary or capricious); Burke v. U.S. Dep't of Justice, 559 F.2d 1182, 1182 (10th Cir. 1977) (same); Allen v. FBI, 551 F. Supp. 694, 696 (D.D.C. 1982) (same); Diamond, 548 F. Supp. at 1160 (same); Sellers v. Webster, 2 Gov't Disclosure Serv. (P-H) ¶ 81,243, at 81,699 (S.D. Ill. Feb. 6, 1981) (same); Eudey, 478 F. Supp. at 1176 (same); Fellner v. U.S. Dep't of Justice, No. 75-C-430, slip op. at 7 (W.D. Wisc. Apr. 28, 1976) (same); see also McClellan, 835 F.2d at 1248 (noting that for judicial review of fee waivers after the 1986 FOIA amendments "a court no longer applies the 'arbitrary and capricious' standard to an agency's action"); Ely, 753 F.2d at 165; Ettlinger, 596 F. Supp. at 871; cf. Walker v. IRS, No. 86-0073, 1986 WL 12049, at *2 (M.D. Pa. June 16, 1986) (noting that FOIA gives agency broad discretion to waive fees).

[212] 5 U.S.C. §§ 701-706 (2000).

[213] Crooker, 577 F. Supp. at 1224.

provision was included in the FOIA,[214] which provides for the review of agency fee waiver denials according to a de novo standard.[215] Yet this provision also explicitly provides that the scope of judicial review remains limited to the administrative record established before the agency,[216] and thus it is crucial that the agency's fee waiver denial letter create a comprehensive administrative record of all of the reasons for the denial.[217]

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[214] 5 U.S.C. § 552(a)(4)(A)(vii).

[215] See Judicial Watch, 326 F.3d at 1311 (recognizing that review of agency's fee waiver denial is de novo); Campbell, 164 F.3d at 35 (stating that judicial review for action regarding wavier of fees is de novo); Kumar, 2007 U.S. Dist. LEXIS 11144, at *9 (same); Brown, 445 F. Supp. 2d at 1353 (same); Prison Legal News, 436 F. Supp. 2d at 22 (same); Cmty. Legal Servs., 405 F. Supp. 2d at 555 (same); S. Utah, 402 F. Supp. 2d at 87 (same); McDade, No. 03-1946, slip op. at 7 (D.D.C. Sept. 29, 2004) (same); Judicial Watch, 310 F. Supp. 2d at 290 (same); W. Watersheds, 318 F. Supp. 2d at 1039 (same); Inst. for Wildlife Prot., 290 F. Supp. 2d at 1228 (same); Eagle, 2003 WL 21402534, at *2 (same); McQueen, 264 F. Supp. 2d at 424 (same); Crain v. U.S. Customs Serv., No. 02-0341, slip op. at 5 n.5 (D.D.C. Mar. 25, 2003) (noting that "uncertainty present in review of fee status determinations is in contrast to review of denials of fee waiver requests, which must be done [de novo]").

[216] 5 U.S.C. § 552(a)(4)(A)(vii); see also, e.g., Judicial Watch, 326 F.3d at 1311 (stating that review is "limited to the record before the agency"); Campbell, 164 F.3d at 35 (same); Friends of the Coast Fork, 110 F.3d at 55 (stating that court's consideration of fee waiver must be limited to administrative record before agency); Carney, 19 F.3d at 814 (same); AFGE, 907 F.2d at 209 (same); Kumar, 2007 U.S. Dist. LEXIS 11144, at *9 (same); Brown, 445 F. Supp. 2d at 1353 (same); Prison Legal News, 436 F. Supp. 2d at 22, 26 n.4 (rejecting submissions not provided to agency administratively); Cmty. Legal Servs., 405 F. Supp. 2d at 555 (reiterating that review is limited to administrative record before agency); S. Utah, 402 F. Supp. 2d at 87 (same); McDade, No. 03-1946, slip op. at 7 (D.D.C. Sept. 29, 2004) (same); Judicial Watch, 310 F. Supp. 2d at 290 (same); W. Watersheds, 318 F. Supp. 2d at 1039 (same); Eagle, 2003 WL 21402534, at *4 (acknowledging that the agency ordinarily is not permitted "to rely on justifications for its decision that were not articulated during the administrative proceedings," but finding that here the agency was "simply clarifying and explaining" its earlier position); Judicial Watch, 133 F. Supp. 2d at 53 & n.1 (disallowing consideration of information not provided by plaintiff in administrative record).

[217] See, e.g., Friends of the Coast Fork, 110 F.3d at 55 (reiterating that the agency's letter "must be reasonably calculated to put the requester on notice" as to reasons for the fee waiver denial); Larson, 843 F.2d at 1483 (information not part of administrative record may not be considered by district court when reviewing agency fee waiver denial); NTEU, 811 F.2d at

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A requester wishing to challenge an agency's denial of a fee waiver may seek judicial review of the agency's decision.[218] In this regard, agencies should also be aware that a challenge to an agency's fee waiver policy is not automatically rendered moot when the agency reverses itself and grants the specific fee waiver request; courts may still entertain challenges when they concern the legality of the standards used.[219] An agency's belated grant of a fee waiver, however, can render moot a requester's challenge to its fee waiver denial when it is the agency's specific denial that is at issue,[220] not the underlying fee waiver policy used by the agency to

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[217](...continued)
648 (holding that court can consider only information before agency at time of decision); Brown, 445 F. Supp. 2d at 1354 (observing that the "administrative record should consist of those documents which the [agency] used to determine whether Plaintiff's fees should be waived"); Pub. Citizen, 292 F. Supp. 2d at 5 (criticizing the agency for its failure to adjudicate fee waiver by emphasizing that "this Court has no record upon which to evaluate plaintiff's claims that it is entitled to a waiver"); S.A. Ludsin, 1997 U.S. Dist. LEXIS 8617, at *16 (stating that court cannot consider reasons not provided by agency); Fitzgibbon, 724 F. Supp. at 1051 n.10 (finding government's "post hoc rationales" offered in response to lawsuit untimely); see also FOIA Update, Vol. VIII, No. 1, at 10; FOIA Update, Vol. VI, No. 1, at 6.

[218] See 5 U.S.C. § 552(a)(4)(B); see also, e.g., 28 C.F.R. § 16.9(b) (requiring agency to inform requester of right to judicial review of agency's adverse determination); id. at § 16.6(c) (providing that adverse determinations include "a denial of a fee waiver request"); cf. Klein v. U.S. Patent & Trademark Office, No. 97-5285, 1998 U.S. App. LEXIS 4720, at *2 (D.C. Cir. Feb. 9, 1998) (holding that review of fee waiver denial may not be sought in appellate court in first instance); Kansi v. U.S. Dep't of Justice, 11 F. Supp. 2d 42, 43 (D.D.C. 1998) (refusing to consider fee waiver request when it was not raised in Complaint or adequately justified before agency).

[219] See Better Gov't Ass'n, 780 F.2d at 91-92 (concluding that arguments concerning facial validity of fee waiver guidelines not moot when agency intends to apply same standards to future requests); Pub. Citizen v. OSHA, No. 86-705, slip op. at 2-3 (D.D.C. Aug. 5, 1987) (same).

[220] See Hall v. CIA, 437 F.3d 94, 97-100 (D.C. Cir. 2006) (finding that in this "disconcertingly complex" case agency's decision to release documents without payment of fees moots requester's appeal of the fee waiver denial; vacating "each of the district court's decisions to the extent that they relate to the payment of fees"), reh'g denied, No. 04-5235, 2006 U.S. App. LEXIS 11103, at *1 (D.C. Cir. Apr. 19, 2006); Long, 450 F. Supp. 2d at 84 ("Once a fee waiver has been granted, neither the FOIA nor the agency's regulations create an independent right to an adjudication of [media] status."); Prison Legal News, 436 F. Supp. 2d at 27 n.5 (noting that because requester was entitled to blanket fee waiver there was no need to analyze its claimed entitlement to media status); Wilderness Soc'y v. U.S. Dep't of the Interior, No.
(continued...)

make that administrative determination.[221]

With regard to fee waiver matters, agencies should retain the general discretion, though, to consider the cost-effectiveness of their investment of administrative resources in their fee waiver determinations.[222] For additional guidance on any particular fee waiver issue, agency FOIA officers may contact OIP's FOIA Counselor service, at (202) 514-3642.

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[220](...continued)
04-0650, 2005 U.S. Dist. LEXIS 20042, at *26-27 (D.D.C. Sept. 12, 2005) (ruling that agency's reversal of initial decision to deny fee waiver mooted that portion of lawsuit); Judicial Watch, 2005 WL 1606915, at *5 n.2 (finding that where requester was entitled to fee waiver "there was no need to address . . . news media" status); cf. Hall, 437 F.3d at 99 (refusing to consider requester's media status claim when it was rendered moot by agency's voluntary release of documents without requester's payment of fees); Tooley v. Bush, No. 06-306, 2006 WL 3783142, at *11 n.2 (D.D.C. Dec. 21, 2006) (stating that request for fee waiver moot where agencies charged no fees); Long, 450 F. Supp. 2d at 83-84 (resolving that where agency ultimately released records without imposing fee, requester's "arbitrary and capricious" claim with regard to agency's delay in processing fee waiver request was moot); Judicial Watch, 310 F. Supp. 2d at 293 n.3 (explaining that because requester was entitled to full fee waiver "it was unnecessary to determine" its fee category); Long v. ATF, 964 F. Supp. 494, 497-98 (D.D.C. 1997) (holding that there is no "independent right" to fee category determination once fee waiver is granted); Project on Military Procurement, 710 F. Supp. at 368 (finding no need to determine requester category where requester was going to receive full fee waiver).

[221] See Payne Enters. v. United States, 837 F.2d 486, 491-92 (D.C. Cir. 1988) (stating that when a party's lawsuit is a "challenge to the policy or practice" of the agency, such that the agency action reasonably would be expected to "recur" absent judicial review, and not to the specific action taken by the agency in a particular instance, it "cannot be mooted by the release of the specific documents that prompted the suit") (non-fee context).

[222] See Rodriguez v. USPS, No. 90-1886, slip op. at 3 n.1 (D.D.C. Oct. 2, 1991) (suggesting agency "consider" waiving de minimis fee despite requester's failure to comply with exhaustion requirement); see also OMB Fee Guidelines, 52 Fed. Reg. at 10,018 (encouraging agencies, with regard to fee matters, to use "most efficient and least costly methods" to comply with FOIA requests).