



## **Fees and Fee Waivers**

### **Introduction**

The Freedom of Information Act provides for the charging of fees "applicable to the processing of requests,"<sup>1</sup> and sets limitations and restrictions on the assessment of certain fees.<sup>2</sup> A separate provision provides for the waiver or reduction of fees if the statutory fee waiver standard is satisfied.<sup>3</sup> The OPEN Government Act of 2007<sup>4</sup> added additional provisions regarding fees, notably section 3 of that Act defined the requester subcategory "representative of the news media."<sup>5</sup> Further, section 6 placed restrictions on an agency's ability to collect certain fees if the agency failed to respond to a FOIA request within the statutory time frame, unless certain exceptions were met.<sup>6</sup> The most recent fee-related amendments to the FOIA, enacted as part of the FOIA Improvement Act of 2016, established further restrictions on the charging of certain fees when the FOIA's time limits are not met, unless certain exceptions to that prohibition are satisfied.<sup>7</sup> (For further discussion of the fee-related changes made by the FOIA Improvement Act of 2016, see Fee Restrictions below)

### **Fees**

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<sup>1</sup> [5 U.S.C. § 552\(a\)\(4\)\(A\)\(i\) \(2012 & Supp. V 2017\)](#).

<sup>2</sup> See [id. § 552\(a\)\(4\)\(A\)\(ii\), \(iv\)-\(vi\), \(viii\)](#).

<sup>3</sup> See [id. § 552\(a\)\(4\)\(A\)\(iii\)](#).

<sup>4</sup> [Pub. L. No. 110-175, 121 Stat. 2524](#).

<sup>5</sup> [Id. § 3](#).

<sup>6</sup> [Id. § 6](#); see OIP Guidance: [New Limitations on Assessing Fees](#) (posted 11/18/08).

<sup>7</sup> FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538; see OIP Guidance: [Prohibition on Assessing Certain Fees When the FOIA's Time Limits Are Not Met](#) (posted 10/19/16); see also OIP Guidance: [Decision Tree for Assessing Fees](#) (posted 10/19/2016).

Congress charged OMB with the responsibility of providing a "uniform schedule of fees" for agencies to follow when promulgating their FOIA fee regulations.<sup>8</sup> OMB did so in its Uniform Freedom of Information Act Fee Schedule and Guidelines [hereinafter OMB Fee Guidelines] issued in March 1987.<sup>9</sup> Agency personnel with FOIA fee questions should contact OMB's Office of Information and Regulatory Affairs, Information Policy Branch.

Under the FOIA, each agency is required to publish regulations "specifying the schedule of fees" applicable to processing requests and must conform its schedule to the guidelines promulgated by OMB.<sup>10</sup> The following discussion summarizes the FOIA's fee provisions.<sup>11</sup>

### **Requester Categories**

The FOIA provides for three categories of requesters: 1) commercial use requesters; 2) educational institutions, noncommercial scientific institutions, and representatives of the news media; and finally, 3) all requesters who do not fall within either of the preceding two categories.<sup>12</sup>

The first such category, commercial-use requesters, is defined by the OMB Fee Guidelines as those who seek records for "a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is being made."<sup>13</sup> Designation of a requester as a "commercial-use requester," therefore,

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<sup>8</sup> [5 U.S.C. § 552\(a\)\(4\)\(A\)\(i\) \(2012 & Supp. V 2017\)](#); see *Env'tl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 432 F.3d 945, 947 (9th Cir. 2005) ("FOIA calls for the Office of Management and Budget to promulgate [fee] guidelines for agencies to follow.") (citation omitted); *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").

<sup>9</sup> [52 Fed. Reg. 10,012](#) (Mar. 27, 1987).

<sup>10</sup> *Id.* [§ 552\(a\)\(4\)\(A\)\(i\)](#); see also OIP Guidance: [Template for Agency FOIA Regulations](#) (posted 2016, updated 2/22/2017) (discussing fee-specific regulations in section X).

<sup>11</sup> See *id.* [§ 552\(a\)\(4\)\(A\)\(i\)-\(ii\), \(iv\)-\(vi\), \(viii\)](#).

<sup>12</sup> See *id.* [§ 552\(a\)\(4\)\(A\)\(ii\)\(I\)-\(III\)](#).

<sup>13</sup> [Uniform Freedom of Information Act Fee Schedule and Guidelines](#) [hereinafter OMB Fee Guidelines], 52 Fed. Reg. 10,012, 10,017-18 (Mar. 27, 1987); see, e.g., *Research Air, Inc. v. Kempthorne*, 589 F. Supp. 2d 1, 10 (D.D.C. 2008) (concluding that requester's intent to use records to oppose suspension of his pilot card was primarily in requester's commercial interest) (fee waiver context); *Consumers' Checkbook v. HHS*, 502 F. Supp. 2d 79, 89 (D.D.C. 2007) (suggesting that nonprofit's charging of fees to distribute some of its products was in commercial interest of plaintiff, but public interest in records sought outweighed that interest) (fee waiver context), *rev'd on other grounds* 554 F.3d 1046 (D.C. Cir. 2009); *VoteHemp, Inc. v. DEA*, 237 F. Supp. 2d 55, 65 (D.D.C. 2002) (concluding that nonprofit

will turn on the use to which the requested information would be put, rather than on the identity of the requester.<sup>14</sup> The OMB Fee Guidelines encourage agencies to seek additional information or clarification from the requester when the intended use is not clear from the request itself.<sup>15</sup>

The second requester category consists of requesters who seek records for a noncommercial use and who qualify as one of three distinct subcategories of requesters: those who are affiliated with an educational institution, those who are part of a noncommercial scientific institution, and those who are representatives of the news media.<sup>16</sup>

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organization, as advocate for free market in controlled substance, had commercial interest in requested records) (fee waiver context); cf. OSHA Data/CIH, Inc. v. U.S. Dep't of Labor, 220 F.3d 153, 160 (3d Cir. 2000) (observing that under 1986 FOIA amendments "commercial users shoulder more of the costs of FOIA requests"). Compare 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), with 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) and 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).

<sup>14</sup> See OMB Fee Guidelines, 52 Fed. Reg. at 10,013 (explaining that inclusion in commercial use category is not controlled by identity "but the use to which [requesters] will put the information obtained"); see also Rozet, 59 F. Supp. 2d at 57 (discounting plaintiff's assertion that information was not of commercial interest where timing and content of requests in connection with other non-FOIA litigation conclusively demonstrated otherwise); Comer v. IRS, No. 97-CV-76329, 1999 WL 1022210, at \*4 (E.D. Mich. Sept. 30, 1999) (reiterating that requester's motives in seeking records is relevant to "commercial user" determination); S.A. Ludsin & Co. v. SBA, No. 96 CV 5972, 1998 WL 355394, at \*2 (E.D.N.Y. Apr. 2, 1998) (finding requester who sought documents to enhance prospect of securing government contract to be commercial requester); cf. Hosp. & Physician Publ'g v. DOD, No. 98-CV-4117, 1999 WL 33582100, at \*5 (S.D. Ill. June 22, 1999) (stating that requester's past commercial use of such records is not relevant to present case), remanded per joint stipulation, No. 99-3152 (7th Cir. Feb. 24, 2005) (remanding for purposes of adoption of parties' settlement agreement and dismissal of case).

<sup>15</sup> See OMB Fee Guidelines, 52 Fed. Reg. at 10,018 (specifying that where "use is not clear from the request . . . agencies should seek additional clarification before assigning the request to a specific category"); see also McClellan, 835 F.2d at 1287 ("Legislative history and agency regulations imply that an agency may seek additional information when establishing a requester's category for fee assessment."); cf. Long v. DOJ, 450 F. Supp. 2d 42, 85 (D.D.C. 2006) (finding moot requester's challenge to agency's authority to request certain information in order to make fee category determination where no fee ultimately was assessed).

<sup>16</sup> See 5 U.S.C. § 552(a)(4)(A)(ii)(II).

### Educational Institution

The OMB Fee Guidelines define "educational institution" to include various schools, as well as institutions of higher learning and vocational education, "which operate[] a program or programs of scholarly research."<sup>17</sup> To qualify for inclusion in this fee subcategory, the Guidelines specify that the request must serve a scholarly research goal of the institution, not an individual goal.<sup>18</sup> While historically professors were the most likely individuals to fall into this category,<sup>19</sup> the D.C. Circuit clarified in Sack v. DOD that "[s]tudents who make FOIA requests to further their coursework or other school-sponsored activities are eligible for reduced fees under FOIA."<sup>20</sup> The court made clear, however, that to qualify for this fee category the student requester must seek the information in connection with his or her role at the educational institution and that agencies may ask for reasonable verification of the student's enrolled status.<sup>21</sup>

### Noncommercial Scientific Institution

The definition of a "noncommercial scientific institution" refers to a "noncommercial" institution that is "operated solely for the purpose of conducting

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<sup>17</sup> [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,018; 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); cf. Long v. DHS, 113 F. Supp. 3d 100, 104 (D.D.C. 2015) (concluding that research data center associated with university qualified as educational institution as "nothing in the FOIA statute or its implementing regulations limits the definition of 'educational institution' to an entity with only one location or source of funding").

<sup>18</sup> See [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,018.

<sup>19</sup> See [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,014 (explaining that "request from a professor of geology at a State university" requesting records "related to soil erosion, written on letterhead of the Department of Geology" would qualify); see also Long, 113 F. Supp. 3d at 104-05 (finding that professors who make request for records "for use in their search at a university research center . . . [are] entitled to a presumption of educational status," while further noting that subscription service "does not disqualify [professors] from educational requester status so long as the request is being made to further [their] scholarly mission and not principally to enable it to sell the raw data to third parties").

<sup>20</sup> Sack v. DOD, 823 F.3d 687, 688-92 (D.C. Cir. 2016) (explaining that "[l]ike teachers, students do research, seek background information for paper topics, gather primary documents, write papers, publish, and contribute to the development and dissemination of knowledge within the school and to the outside world").

<sup>21</sup> Id. (specifying that requester cannot seek information for personal or commercial use, and that agency may seek some assurance that student is making request in connection with coursework or other school-sponsored activity, such as by providing copies of student ID and course syllabus).

scientific research the results of which are not intended to promote any particular product or industry."<sup>22</sup>

### Representative of the News Media

As part of the OPEN Government Act of 2007,<sup>23</sup> Congress borrowed from both the Court of Appeals for the District of Columbia Circuit's opinion in National Security Archive v. DOD<sup>24</sup> and the OMB Fee Guidelines<sup>25</sup> to statutorily define the term "representative of the news media."<sup>26</sup> This subcategory includes "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience."<sup>27</sup> Additionally, Congress incorporated into the statutory definition the OMB Fee Guidelines' definition of "news" as "information that is about current events or that would be of current interest to the public."<sup>28</sup> The statutory definition also addresses the potential growth of alternative news media entities by providing a non-exclusive list of media entities.<sup>29</sup> Finally, the statutory definition specifies that freelance journalists shall be considered representatives of the news media if they "can demonstrate a solid basis for expecting publication through [a news media] entity, whether or not the journalist is actually employed by the entity."<sup>30</sup>

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<sup>22</sup> [OMB Fee Guidelines at 10.018](#).

<sup>23</sup> See Pub. L. No. 110-175, 121 Stat. 2524 § 3 (codified at 5 U.S.C. § 552(a)(4)(A)(ii)).

<sup>24</sup> 880 F.2d 1381, 1387 (D.C. Cir. 1989) (defining "representative of the news media").

<sup>25</sup> [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,018.

<sup>26</sup> See Cause of Action v. FTC, 799 F.3d 1108, 1120 (D.C. Cir. 2015) (noting that Congress omitted "organized and operated" language when it enacted the statutory definition of "representative of the news media" in OPEN Government Act of 2007).

<sup>27</sup> [5 U.S.C. § 552\(a\)\(4\)\(A\)\(ii\)](#); see Nat'l Sec. Archive v. DOD, 880 F.2d at 1387 (defining representative of the news media as "a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience"); see also Elec. Privacy Info. Ctr. v. DOD, (D.D.C. 2003) (explaining that fact that entity distributes its publication "via the Internet to subscribers' e-mail addresses does not change the [news media] analysis").

<sup>28</sup> [5 U.S.C. § 552\(a\)\(4\)\(A\)\(ii\)](#); see also [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,018.

<sup>29</sup> [5 U.S.C. § 552\(a\)\(4\)\(A\)\(ii\)](#) ("[e]xamples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of 'news') who make their products available for purchase by or subscription by or free distribution to the general public").

<sup>30</sup> *Id.* [§ 552\(a\)\(4\)\(A\)\(ii\)](#); 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

The OMB Fee Guidelines provide that a request from a representative of the news media that supports a news-dissemination function "shall not be considered to be a request that is for a commercial use."<sup>31</sup>

Since the passage of the OPEN Government Act, there have been few cases addressing the "representative of the news media" category.<sup>32</sup> In 2015, the D.C. Circuit analyzed the statutory definition and held that the "first, operative sentence of the definition, "consists of five criteria that a requester must satisfy."<sup>33</sup> Specifically, a "requester must: (1) gather information of potential interest (2) to a segment of the public; (3) use its editorial skills to turn the raw materials into a distinct work; and (4) distribute that work (5) to an audience."<sup>34</sup> Additionally, the D.C. Circuit noted, this fee category "applies only to records that "are not sought for commercial use."<sup>35</sup>

The court explained that in making a determination as to whether an entity qualifies as a representative of the news media, agencies should "focus[] on the nature of

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

<sup>31</sup> OMB Fee Guidelines, 52 Fed. Reg. at 10,019; cf. Liberman v. DOT, 227 F. Supp. 3d 1, 12-13, 19-20 (D.D.C. 2016) (finding that "so long as [a] representative of the news-media is requesting the particular documents at issue in service of the entity's new-dissemination activities – as opposed to some other internal, commercial (i.e., non-journalistic) function – the 'commercial use' provision does not prevent that representative from receiving a fee waiver, even if the entity is (or is affiliated with) a for-profit enterprise").

<sup>32</sup> See Liberman, 227 F. Supp. 3d at 11-12 (concluding that online blogger of for-profit entity qualified as representative of news media); Long v. DHS, 113 F. Supp. 3d 100, 106 (D.D.C. 2015) (noting that "incorporating information from a range of sources . . . is not essential for news media status"); Serv. Women's Action Network v. DOD, 888 F. Supp. 2d 282, 288 (D. Conn. 2012) (finding that because plaintiffs "have submitted an extensive list of past publications and adequately allege that they intend to publish" work regarding subject of requested records, plaintiffs are representatives of news media); ACLU of Wash. v. DOJ, No. C09-0642RSL, 2011 WL 887731, at \*10 (W.D. Wash. Mar. 10, 2011) (quoting statutory definition and declaring that ACLU "qualifies as a representative of the news media" without further analysis).

<sup>33</sup> Cause of Action v. FTC, 799 F.3d 1108, 1120 (D.C. Cir. 2015).

<sup>34</sup> Id. (quoting 5 U.S.C. § 552(a)(4)(A)(ii)).

<sup>35</sup> Id. (quoting 5 U.S.C. § 552(a)(4)(A)(ii)(II)).

the requester, not the request" as the statutory "provision requires that the request be 'made by' a representative of the news media." <sup>36</sup> Additionally, the court made it clear that a requester need not gather information from multiple sources to qualify as a news media representative; rather, a "distinct work" can be created based only on FOIA released documents.<sup>37</sup> Furthermore, the court noted, because the size of the "audience" is not prescribed in the statute, even disseminating to a small readership will suffice.<sup>38</sup> The court opined that "posting content to a public website can qualify as a means of distributing it – notwithstanding that readers have to affirmatively access the content, rather than have it delivered to their doorsteps or beamed into their homes unbidden."<sup>39</sup> Significantly, the court also held there is no basis to require that an entity be "organized and operated" to disseminate news to the public in order to qualify as a representative of a news organization.<sup>40</sup> The court found that the "news-media provision requires a fact-based determination of whether a particular requester's description of its past record, current operations, and future plans jointly suffice to qualify it as a representative of the news media."<sup>41</sup>

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.<sup>42</sup> 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

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<sup>36</sup> *Id.* at 1121 (noting that "the statute[] focus[es] on requesters, rather than requests" and so "newspaper reporter, for example, is a representative of the news media regardless of how much interest there is in the story for which he or she is requesting information").

<sup>37</sup> *Id.* at 1121-1122 (explaining that "[a] substantive press release or editorial comment can be a distinct work based on the underlying material, just as a newspaper article about the same documents would be – and its composition can involve 'a significant degree of editorial discretion'").

<sup>38</sup> *Id.* at 1122, 1124 (noting that term "'an audience' contemplates that the work is distributed to more than a single person. . . [b]ut beyond requiring that a person or entity have readers (or listeners or viewers), the statute does not specify what size the audience must be").

<sup>39</sup> *Id.* at 1123 (noting that statutory definition itself recognizes that means of distribution will change over time).

<sup>40</sup> *Id.* at 1125 (holding that there is no basis for adding an "'organized and operated'" requirement to statutory definition after Congress omitted such requirement, originally derived from 1987 OMB Guidelines, in 2007 FOIA Amendments).

<sup>41</sup> *Id.* at 1124.

<sup>42</sup> *Brown v. U.S. Patent & Trademark Office*, 226 F. App'x 866 (11th Cir. 2007); *Hosp. & Physician Publ'g*, No. 99-3152 (7th Cir. Feb. 24, 2005) (remanding for purposes of adoption of parties' settlement agreement and dismissal of case).

status.<sup>43</sup> In contrast, the Court of Appeals for the Eleventh Circuit concluded in a brief opinion, which affirmed the district court's more extensive findings, that the requester before it was not a representative of the news media.<sup>44</sup>

### All Other Requesters

The third and final category of requesters consists of all requesters who do not fall within either of the preceding two categories.<sup>45</sup>

### Fee Category Considerations

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 the underlying requester's identity and/or intended use that determines the requester category for fee purposes.<sup>46</sup> When such information is not readily apparent from the request itself, the OMB Fee Guidelines provide that agencies "should seek additional clarification" from the requester before assigning a requester to a specific requester category.<sup>47</sup>

An agency need not undertake a "fee category" analysis in any instance in which it has granted a full fee waiver.<sup>48</sup> Similarly, there is no need to determine a requester's fee

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<sup>43</sup> 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").

<sup>44</sup> Brown, 226 F. App'x at 868 (concluding that requester's "status as the publisher of a website does not make him a representative of the news media").

<sup>45</sup> See 5 U.S.C. § 552(a)(4)(A)(ii)(III); see also Harrington v. DOJ, No. 06-0254, 2007 WL 625853, at \*3 n.8 (D.D.C. Feb. 27, 2007) (explaining that because "[n]othing in the record suggests a commercial use or a non-commercial use by a scientific or educational institution" and given that plaintiff is not "a representative of the news media," plaintiff is properly classified into third category of requesters).

<sup>46</sup> See OMB Fee Guidelines, 52 Fed. Reg. at 10,013-14, 10,017-18; cf. 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).

<sup>47</sup> See OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

<sup>48</sup> See Carney v. DOJ, 19 F.3d 807, 814 n.3 (2d Cir. 1994) (doubting requester's status as "news media" but stating that there was no need to resolve issue given his entitlement to fee waiver); Duggan v. SEC, No. 06-10458, 2007 WL 2916544, at \*9 (D. Mass. July 12, 2007) (magistrate's recommendation) (finding that given agency's decision to waive all fees, requester's fee category (and fee waiver) claims are moot), adopted, (D. Mass. July 27, 2008), aff'd on other grounds, 277 F. App'x 16 (1st Cir. May 15, 2008); Prison Legal News v. Lappin, 436 F. Supp. 2d 17, 27 (D.D.C. 2006) (finding "no need to analyze" entitlement to news media status where plaintiff was entitled to full fee waiver); Judicial Watch, Inc. v. DOT, No. 02-566, 2005 WL



category whenever the only assessable fee is a duplication fee, as that type of fee is properly chargeable to all three categories of requesters,<sup>49</sup> 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 requester might make,<sup>50</sup> given that a requester's category can change over time.<sup>51</sup>

### **Types of Fees**

The FOIA provides for three types of fees that may be assessed in response to FOIA requests: search, review, and duplication.<sup>52</sup> The fees that may be charged to a particular requester are dependent upon the requester's fee category.

Requesters who fall within the first requester category, commercial use requesters, are assessed all three types of fees.<sup>53</sup> Requesters falling within the second requester category, those determined to be educational or noncommercial scientific institutions, or representatives of the news media, are assessed only duplication fees.<sup>54</sup> Requesters in the third category, those who do not fall within either the first or second requester category,

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1606915, at \*5 n.2 (D.D.C. July 5, 2005) (same); Judicial Watch, 310 F. Supp. 2d 271, 293 n.3 (D.D.C. 2004) (same); Long v. ATF, 964 F. Supp. 494, 498, 499 (D.D.C. 1997) (same); Project on Military Procurement v. Dep't of the Navy, 710 F. Supp 362, 368 (D.D.C. 1989) (same).

<sup>49</sup> See [5 U.S.C. § 552\(a\)\(4\)\(A\)\(ii\)](#); see also [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,017.

<sup>50</sup> See, e.g., Long v. DHS, 113 F. Supp. 3d 100, 108 (D.D.C. 2015) (declining to issue declaratory judgment as to fee status, indicating that "[a]gencies must make an independent fee status determination for each request"); Long, 450 F. Supp. 2d at 85 (concluding that "any declaration" by the court of requester's fee status for future requests was not ripe, and that denial of "such a determination does not preclude a favorable outcome in the future, not least of all because an entity's status can change"); Long, 964 F. Supp. at 498, 499 (rejecting plaintiff's request for declaratory judgment as to requester category when no fee was at issue, and finding that question was not ripe as to future requests).

<sup>51</sup> 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). But see Long, 113 F. Supp. at 105 (noting that while requester's history is not dispositive, because agency offered nothing to suggest that educational requester had "altered its research methodology since the agency last granted it preferred requester status," agency "erred in concluding that [requester] did not demonstrate an intended scholarly use for the requested records").

<sup>52</sup> [5 U.S.C. § 552\(a\)\(4\)\(A\)\(ii\)\(I\)-\(III\) \(2012 & Supp. V 2017\)](#); see also [Uniform Freedom of Information Act Fee Schedule and Guidelines](#) [hereinafter OMB Fee Guidelines], 52 Fed. Reg. 10,012, 10,018 (Mar. 27, 1987).

<sup>53</sup> See [5 U.S.C. § 552\(a\)\(4\)\(A\)\(ii\)\(I\)](#); see also [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,017.

<sup>54</sup> See [5 U.S.C. § 552\(a\)\(4\)\(A\)\(ii\)\(II\)](#).

are assessed both search fees and duplication fees.<sup>55</sup> OMB recognized that costs would necessarily vary from agency to agency and directed that each agency promulgate regulations specifying the specific charges for search,<sup>56</sup> review,<sup>57</sup> and duplication<sup>58</sup> fees.

"Search" fees include all the time spent looking for responsive material, including if necessary page-by-page or line-by-line identification of material within documents.<sup>59</sup> 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.<sup>60</sup> The OMB Guidelines direct that searches for responsive records should be done in the "most efficient and least expensive manner."<sup>61</sup> The term "search" means locating records or information either "manually or by automated means"<sup>62</sup> and requires agencies to expend "reasonable efforts" in electronic searches, if requested to do so by requesters willing to pay for that search activity.<sup>63</sup>

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<sup>55</sup> See [id. § 552\(a\)\(4\)\(A\)\(ii\)\(III\)](#).

<sup>56</sup> [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,018 ("agencies should charge at the salary rate[s] [i.e. basic pay plus 16 percent] of the employee[s] making the search" or, "where a homogeneous class of personnel is used exclusively . . . agencies may establish an average rate for the range of grades typically involved").

<sup>57</sup> [Id. at 10,017-18](#) (in addition to collecting full "direct costs" (as defined by OMB) incurred by agency when reviewing responsive documents, if "a single class of reviewers is typically involved in the review process, agencies may establish a reasonable agency-wide average and charge accordingly").

<sup>58</sup> [Id. at 10,018](#) ("Agencies shall establish an average agency-wide, per-page charge for paper copy reproduction of documents.").

<sup>59</sup> See [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,017.

<sup>60</sup> See [id. at 10,019](#); see also [TPS, Inc. v. Dep't of the Air Force](#), No. C 01-4284, 2003 U.S. Dist. LEXIS 10925, at \*8-9 (N.D. Cal. Mar. 28, 2003) ("The fact that you did not receive any records from [the agency] . . . does not negate your responsibility to pay for programming services provided to you in good faith, at your request with your agreement to pay applicable fees." (quoting with approval exhibit to defendant's declaration)); [Guzzino v. FBI](#), No. 95-1780, 1997 WL 22886, at \*4 (D.D.C. Jan. 10, 1997) (upholding agency's assessment of search fees to conduct search for potentially responsive records within files of individuals "with names similar to" requester's when no files identifiable to requester were located), [appeal dismissed for lack of prosecution](#), No. 97-5083 (D.C. Cir. Dec. 8, 1997); [Linn v. DOJ](#), No. 92-1406, 1995 WL 417810, at \*13 (D.D.C. June 6, 1995) (holding that there is no entitlement to refund of search fees when search unproductive).

<sup>61</sup> [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,017.

<sup>62</sup> [5 U.S.C. § 552\(a\)\(3\)\(D\)](#).

<sup>63</sup> [Id. at § 552\(a\)\(3\)\(C\)](#); see also [FOIA Update, Vol. XVIII, No. 1](#), at 6 ("OIP Guidance: Amendment Implementation Questions") (analyzing 1996 FOIA amendment that requires

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]." <sup>64</sup> Review time thus includes processing the documents for disclosure, i.e., doing all that is necessary to prepare them for release, <sup>65</sup> 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. <sup>66</sup> The OMB Fee Guidelines provide that records that have been withheld in full under an exemption that is later determined to no longer apply may be "reviewed again to determine the application of other exemptions not previously considered" <sup>67</sup> and that review fees "for such a subsequent review would be properly assessable." <sup>68</sup>

Under the FOIA, "duplication" charges represent the reasonable "direct costs" of making copies of documents. <sup>69</sup> Copies can take various forms, including paper copies or

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agencies to "make reasonable efforts" to search for records electronically); cf. [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,018, 10,019 (providing that agencies should charge "the actual direct cost of providing [computer searches]," but that for certain requester categories, cost equivalent of two hours of manual search is provided without charge).

<sup>64</sup> [5 U.S.C. § 552\(a\)\(4\)\(A\)\(iv\)](#); see also *Carney v. DOJ*, 19 F.3d 807, 814 n.2 (2d Cir. 1994) (noting that fee for document review is properly chargeable to commercial requesters); *Gavin v. SEC*, No. 04-4522, 2006 WL 2975310, at \*5 (D. Minn. Oct. 16, 2006) (finding that agency's court-ordered initial review of documents was chargeable to commercial-use requester);

<sup>65</sup> See *OSHA Data/CIH, Inc. v. U.S. Dep't of Labor*, 220 F.3d 153, 168 (3d Cir. 2000) (concluding that review fees include, in the context of commercial information submitted by outside entity, costs of conducting mandatory predisclosure notification under Exec. Order No. 12,600 and evaluation of companies' responses by agency for purpose of determining applicability of exemption to companies' submitted commercial information); *Nelson v. U.S. Army*, No. 10 C 1735, 2011 WL 710977, at \*5-6 (N.D. IL Feb. 22, 2011) (noting that cost of submitter notice required under Exec. Order No. 12,600 is chargeable to commercial use requester).

<sup>66</sup> See [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,017, 10,018.

<sup>67</sup> *Id.* at 10,018. But see *Hall & Associates v. EPA*, 846 F. Supp. 2d 231, 240 (D.D.C. 2012) (concluding that when administrative appellate authority determined agency "improperly withheld documents in its first response" agency cannot "make its production of the originally improperly withheld documents contingent upon further payment from the requester under the theory that the work done in an effort to cure its initial inadequate response is still part of the 'initial review'").

<sup>68</sup> [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,018.

<sup>69</sup> [5 U.S.C. § 552\(a\)\(4\)\(A\)\(iv\)](#); see [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,018.

machine-readable documentation.<sup>70</sup> As further required by the FOIA, agencies must honor a requester's choice of form or format if the record is "readily reproducible" in that form or format with "reasonable efforts" by the agency.<sup>71</sup>

For paper copies, the OMB Fee Guidelines specifically require that agencies establish an "average agency-wide, per-page charge for paper copy reproduction."<sup>72</sup> For non-paper copies, such as disks or other electronic media, the Guidelines provide that agencies should charge the actual costs of production of that medium.<sup>73</sup> For any of these forms of duplication, agencies should consult with their technical support staff for assistance in determining their actual costs associated with producing the copies in the various media sought.<sup>74</sup>

In addition to charging the costs provided by agency implementing regulations for searching, reviewing, and duplicating records, the OMB Fee Guidelines authorize the recovery of the full costs of providing all categories of requesters with "special services" that are not required by the FOIA, such as when an agency agrees to certify records as true copies or mails records by express mail.<sup>75</sup>

The OMB Guidelines provide that agencies may use contractor services, as long as an agency does not relinquish responsibilities it alone must perform, such as making fee waiver determinations.<sup>76</sup> With regard to any contractor services that agencies may

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<sup>70</sup> See [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,017.

<sup>71</sup> [5 U.S.C. § 552\(a\)\(3\)\(B\)](#); see [FOIA Update, Vol. XVIII, No. 1](#), at 5-6 ("OIP Guidance: Amendment Implementation Questions") (advising agencies on format disclosure obligations); [FOIA Update, Vol. XVII, No. 4](#), at 2 ("Congress Enacts FOIA Amendments") (same).

<sup>72</sup> See [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,017, 10,018 (detailing elements included in direct costs of duplication).

<sup>73</sup> See [id.](#) at 10,018; [FOIA Update, Vol. XI, No. 3](#), at 4 & n.25 ("Department of Justice Report on 'Electronic Record' FOIA Issues, Part II").

<sup>74</sup> 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"); see also [Nat'l Sec. Counselors v. DOJ](#), 848 F.3d 467, 471-72 (D.C. Cir. 2017) (finding that agency sufficiently explained policy of releasing 500 pages per CD as agencies are not "required to adopt the lowest-cost method of responding to requests," but remanding to determine whether fees assessed exceeded direct costs of agency in preparing CDs).

<sup>75</sup> [Id.](#) at 10,018; [cf.](#) [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,016 (specifying that charges for ordinary packaging and mailing are to be borne by government).

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

employ, the OMB Fee Guidelines require that agencies ensure that the cost to the requester "is no greater than it would be if the agency itself had performed the task."<sup>77</sup>

### **Fee Restrictions**

The FOIA includes restrictions both on the assessment of certain fees<sup>78</sup> and on the authority of agencies to ask for an advance payment of a fee.<sup>79</sup> 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.<sup>80</sup> In addition, except with respect to commercial-use requesters, agencies must provide the first one hundred pages of duplication, as well as the first two hours of search time, without cost to the requester.<sup>81</sup> 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 the fee in order for it actually to be charged.<sup>82</sup>

The FOIA also restricts agencies from assessing certain fees when the FOIA's time limits are not met, unless certain exceptions are satisfied.<sup>83</sup> Specifically, no search fees may be charged to "all other" or "commercial use" requesters and no duplication fees may

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<sup>77</sup> Id.

<sup>78</sup> See [5 U.S.C. § 552\(a\)\(4\)\(A\)\(iv\)\(I\)-\(II\), \(viii\) \(2012 & Supp. V 2017\)](#).

<sup>79</sup> See id.; see generally OIP Guidance: [Guidance for Agency FOIA Regulations](#) (posted 2016, updated 2/22/2017); OIP Guidance: [Template for Agency FOIA Regulations](#) (posted 2016, updated 2/22/2017).

<sup>80</sup> See id. [§ 552\(a\)\(4\)\(A\)\(iv\)\(I\)](#); see also [Uniform Freedom of Information Act Fee Schedule and Guidelines](#) [hereinafter OMB Fee Guidelines], 52 Fed. Reg. 10,012, 10,018 (Mar. 27, 1987).

<sup>81</sup> See [5 U.S.C. § 552\(a\)\(4\)\(A\)\(iv\)\(II\)](#); [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,018-19; see also [Carlson v. USPS](#), 142 F.3d 440, 440-41 (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. [Skinner v. DOJ](#), 744 F. Supp. 2d 185, 196-97 (D.D.C. 2010) (concluding that requester's lack of response to agency's fee estimate does not preclude release of 100 pages free of charge to requester); [Trupej 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).

<sup>82</sup> See [5 U.S.C. § 552\(a\)\(4\)\(A\)\(iv\)\(I\)](#); [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,018; see, e.g., [DOJ Fee Regulations, 28 C.F.R. § 16.10\(d\)\(5\)](#) (establishing fee threshold below which no fee will be charged).

<sup>83</sup> See [5 U.S.C. § 552\(a\)\(4\)\(a\)\(viii\)](#); OIP Guidance: [Prohibition on Assessing Certain Fees When the FOIA's Time Limits Are Not Met](#) (posted 10/19/2016).

be charged to requesters in preferred fee categories, i.e., representatives of the news media, and educational or noncommercial scientific institutions, unless one of the three exceptions to the prohibition is met.<sup>84</sup> First, if unusual circumstances apply and the agency provided timely written notice to the requester, the agency has ten additional days to process the request and can assess fees as usual.<sup>85</sup> Second, if agencies determine that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, they can charge fees as usual if they provide timely written notice of unusual circumstances, provide the requester with the opportunity to limit the scope of the request, offer the services of its FOIA Public Liaison and the Office of Government Information Services, and have discussed with the requester (or made three good-faith attempts to do so) how they could narrow the scope of their request.<sup>86</sup> Finally, if a court has determined that exceptional circumstances exist, an agency can assess fees as usual for the length of the time provided by court order.<sup>87</sup>

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).<sup>88</sup> The District Court of the District of Columbia has recognized that

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<sup>84</sup> [5 U.S.C. § 552\(a\)\(4\)\(A\)\(viii\)\(I\)](#); see also OIP Guidance: [Prohibition on Assessing Certain Fees When the FOIA's Time Limits Are Not Met](#) (posted 10/19/2016).

<sup>85</sup> [5 U.S.C. § 552\(a\)\(4\)\(viii\)\(II\)\(aa\)](#).

<sup>86</sup> *Id.* at [§ 552\(a\)\(4\)\(viii\)\(II\)\(bb\)](#).

<sup>87</sup> *Id.* at [§ 552\(a\)\(4\)\(viii\)\(II\)\(cc\)](#).

<sup>88</sup> See [5 U.S.C. § 552\(a\)\(4\)\(A\)\(v\)](#); [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,020; see also [O'Meara v. IRS](#), No. 97-3383, 1998 WL 123984, at \*1-2 (7th Cir. Mar. 17, 1998) (upholding agency's demand for advance payment when fees exceeded \$800); [Morales v. Pension Benefit Guar. Corp.](#), No. L-10-1167, 2011 WL 253407, at \*3 (D. Md. Jan. 26, 2012) (finding that because requester "had previously failed to pay a properly assessed balance, [agency] was entitled to advance payment or reasonable assurances that [requester] would pay"); [Chaplin v. Stewart](#), 796 F. Supp. 2d 209, 211 (D.D.C. 2011) (citing agency's regulation permitting advance payment when fees exceed \$250); [Saldana v. BOP](#), 715 F. Supp. 2d 10, 21 (D.D.C. 2010) (noting that pursuant to agency's regulations, until requester has paid full amount in arrears, agency may stop processing pending request and may require advance payment for other requests); [Antonelli v. ATF](#), 555 F. Supp. 2d 16, 23 (D.D.C. 2008) (stating that "under DOJ regulations, plaintiff's failure to pay fees to which he had agreed 'within 30 days of the [billing] date' provided an adequate basis for defendant to require" advance payment); [Brunsilius v. DOE](#), 514 F. Supp. 2d 30, 34-36 (D.D.C. 2007) (citing agency's regulation allowing collection of fees before processing when they exceed \$250 and concluding "request is not considered received until the payment is in the agency's possession"). *But cf.* [Ruotolo v. DOJ](#), 53 F.3d 4, 9-10 (2d Cir. 1995) (suggesting that agency should have processed request up to amount offered by requesters rather than state that estimated cost "would greatly

estimated fees are not intended to be used to discourage requesters from exercising their access rights under the FOIA.<sup>89</sup>

The statutory restriction generally prohibiting a demand for advance payments does not prevent agencies from requiring payment before actually releasing records which have been processed.<sup>90</sup> When an agency reasonably believes that a requester or group of requesters 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.<sup>91</sup>

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."<sup>92</sup>

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exceed" \$250 without providing an amount to be paid or offering assistance in reformulating request).

<sup>89</sup> 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).

<sup>90</sup> See Strout v. U.S. Parole Comm'n, 40 F.3d 136, 139 (6th Cir. 1994) (finding that agency regulation requiring payment before release of processed records does not conflict with statutory prohibition against advance payment); Farrugia v. EOUSA, 366 F. Supp. 2d 56, 57 (D.D.C. 2005) (explaining that where requested records are already processed, payment may be required by agency before sending them), subsequent opinion granting summary judgment to agency, No. 04-0294, 2006 WL 33577 (D.D.C. Feb. 14, 2006); Taylor v. U.S. Dep't of the Treasury, No. A-96-CA-933, 1996 U.S. Dist. LEXIS 19909, at \*5 (W.D. Tex. Dec. 17, 1996) (explaining that agency regulation requires payment before records can be released); cf. Lee v. DOJ, 235 F.R.D. 274, 285 (W.D. Pa. 2006) (finding agency's proposal to search large number of district offices designated by requester "three offices at a time" and, after requester's payment was made for searching those three offices, "repeating the process until all districts had been searched," is permissible); Sliney v. BOP, No. 04-1812, 2005 WL 3273567, at \*4 (D.D.C. Sept. 28, 2005) (noting that no authority supported plaintiff's proposal that his suggested "installment plan" for paying fees "constitutes an agreement to pay the total fee"), subsequent opinion granting summary judgment to agency, 2005 WL 3273567, at \*4 (resolving ultimately that requester failed to exhaust with regard to processing fee).

<sup>91</sup> See OMB Fee Guidelines, 52 Fed. Reg. at 10,019; see also Clervrain v. United States, No. 17-3194, 2018 WL 4491224, at \*2 (D. Kan. Sept. 19, 2018) (citing agency's regulations in determining aggregation reasonable where requester submitted three separate requests on same date, seeking same information, but pertaining to different institutions (appeal pending)); Smith v. BOP, 517 F. Supp. 2d 451, 453-54 (D.D.C. 2007) (finding it reasonable to "aggregate plaintiff's separate requests . . . submitted over the course of three weeks" for similar documents).

<sup>92</sup> 5 U.S.C. § 552(a)(4)(A)(vi); see OMB Fee Guidelines, 52 Fed. Reg. at 10,017-18; see also Oglesby v. U.S. Dep't of the Army, 79 F.3d 1172, 1177-78 (D.C. Cir. 1996) (stating that NARA's enabling statute, 44 U.S.C. § 2116 (2006), qualifies "as the genre of fee-setting provision" that supersedes FOIA's fee provisions); cf. Env'tl. Prot. Info. Ctr. v. U.S. Forest Serv., 432 F.3d 945,

Thus, when documents responsive to a FOIA request are maintained for distribution by an agency according to a statutorily based fee schedule, requesters should obtain the documents from that source and pay the applicable fees in accordance with the fee schedule of that other statute.<sup>93</sup> This may at times result in the assessment of fees that are higher than those that would otherwise be chargeable under the FOIA,<sup>94</sup> but it ensures that such fees are properly borne by the requester and not by the general public.<sup>95</sup>

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.<sup>96</sup> Although this question has been raised, it has not yet been explicitly decided by an appellate court.<sup>97</sup>

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947-48 (9th Cir. 2005) (finding FOIA's superseding fee provision to be "ambiguous," relying instead on OMB's Guidelines that discuss that provision, and determining that FOIA's reference to "a statute specifically providing for setting the level of fees" means "any statute that specifically requires a government agency . . . to set the level of fees" and not one that simply allows it to do so (quoting OMB Fee Guidelines) (emphasis added)).

<sup>93</sup> See [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,012-13, 10,017-18 (implementing 5 U.S.C. § 552(a)(4)(A)(vi), and advising agencies to "inform requesters of the steps necessary to obtain records from those sources"); *id.* at 10,017 (contemplating "statutory-based fee schedule programs . . . such as the NTIS [National Technical Information Service]"); see also *Wade v. Dep't of Commerce*, No. 96-0717, slip op. at 5-6 (D.D.C. Mar. 26, 1998) (concluding that fee was "properly charged by NTIS" under its fee schedule). But see *Envtl. Prot. Info. Ctr.*, 432 F.3d at 948-49 (holding that statute permitting agency to sell maps and Geospatial Information System data "at not less than the estimated [reproduction] cost," or allowing agency "to make other disposition of such . . . materials," was not "superseding fee statute" given discretionary nature of agency's authority to charge fees, and recognizing that court's decision "may be at odds" with D.C. Circuit's decision in *Oglesby*, 79 F.3d 1172).

<sup>94</sup> See, e.g., *Wade*, No. 96-0717, slip op. at 2, 6 (D.D.C. Mar. 26, 1998) (approving assessment of \$1300 fee pursuant to National Technical Information Service's superseding fee statute and noting cost of \$210 if processed under FOIA).

<sup>95</sup> See [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,017.

<sup>96</sup> See *Envtl. Prot. Info. Ctr.*, 432 F.3d at 946, 948 (recognizing FOIA's superseding fee provision as "exception to the fee waiver provision of FOIA," but stating that statute in question did not qualify as superseding fee statute).

<sup>97</sup> Compare *Oglesby*, 79 F.3d at 1178 (refusing to rule on plaintiff's argument that a superseding fee statute does not exempt agency from making FOIA fee waiver determination, because plaintiff failed to raise argument in timely manner), and *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 70 n.17 (D.C. Cir. 1990) (declining to reach fee waiver issue because plaintiff failed to exhaust administrative remedies), with *Envtl. Prot. Info. Ctr.*, 432 F.3d at 946, 948 (recognizing FOIA's superseding fee provision as "exception to the fee waiver provision of the FOIA").



The FOIA requires that requesters follow the agency's published rules for making FOIA requests, including those pertaining to the payment of authorized fees.<sup>98</sup> Requesters have been found not to have exhausted their administrative remedies when they fail to satisfy the FOIA's fee requirements,<sup>99</sup> such as failing to file an administrative

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<sup>98</sup> See [5 U.S.C. § 552\(a\)\(3\)\(B\)](#); [Harrington v. DOJ](#), No. 06-0254, 2007 WL 625853, at \*3 (D.D.C. Feb. 27, 2007) (citing agency's regulation that request not deemed received "until the requester agrees in writing to pay the anticipated total fee"); [Hinojosa v. Dep't of Treasury](#), No. 06-0215, 2006 WL 2927095, at \*4 (D.D.C. Oct. 11, 2006) (stating that request must comply with FOIA and with agency's requirements, "including a firm promise to pay applicable processing fees"); [Dinsio v. FBI](#), 445 F. Supp. 2d 305, 311 (W.D.N.Y. 2006) (reiterating that requester is required to follow agency rules "for requesting, reviewing and paying for documents").

<sup>99</sup> See, e.g., [Trenerry v. IRS](#), No. 95-5150, 1996 WL 88459, at \*2 (10th Cir. Mar. 1, 1996) (explaining that exhaustion includes payment of FOIA fees); [Stuler v. IRS](#), No. 10-1342, 2011 WL 2516407, at \*2 (W.D. Pa. June 23, 2011) (declaring that requester has not exhausted administrative remedies when requester "declines to provide a firm agreement to pay for, or request a waiver of, fees and costs" and "the process is properly suspended pending compliance"); [Island Film, S.A. v. Dep't of Treasury](#), 768 F. Supp. 2d 286, 288 (D. D.C. 2011) (holding that "[b]ecause [requester] has not paid, committed to paying or sought a waiver of . . . fees, [requester] has not exhausted its administrative remedies"); [Godaire v. Napolitano](#), No. 10-01266, 2010 WL 6634572, at \*6 (D. Conn. Nov. 18, 2010) (observing no exhaustion where plaintiff failed to specify a maximum fee and had not submitted a fee waiver request); [Hines v. U.S.](#), 736 F. Supp. 2d 51, 54 (D.D.C. 2010) (dismissing requester's complaint due to failure to exhaust administrative remedies by not paying assessed fee, not seeking fee waiver, nor filing administrative appeal); [Skrzypek v. Dep't of Treasury](#), 550 F. Supp. 2d 71, 73-74 (D.D.C. 2008) (concluding that plaintiff had not exhausted administrative remedies when he admitted to not having paid assessed fees); [Antonelli v. ATF](#), 555 F. Supp. 2d 16, 23 (D.D.C. 2008) (stating "payment or waiver of assessed fees or an administrative appeal from the denial of a fee waiver request is a prerequisite to filing a FOIA lawsuit"); [Smith v. BOP](#), 517 F. Supp. 2d 451, 455 (D.D.C. 2007) (finding that because requester's fee waiver was properly denied, exhaustion by paying fees required prior to seeking judicial review of agency action). *But cf.* [Wall v. EOUSA](#), No. 09-344, 2010 WL 4736273, at \*4-5 (D. Conn. Nov. 16, 2010) (determining that plaintiff's initial request for waiver of fees made to appellate authority satisfied requirement to exhaust).

appeal of an adverse fee determination<sup>100</sup> or failing to agree to pay estimated fees.<sup>101</sup> Courts, however, have not required exhaustion where an agency has failed in some way to fully comply with its own regulations or the FOIA statute.<sup>102</sup> Courts have held that a requester's obligation to comply with the agency's fee requirements does not cease after

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<sup>100</sup> See, e.g., Oglesby, 920 F.2d at 66 & n.11, 71 ("Exhaustion does not occur until the required fees are paid or an appeal is taken from the refusal to waive fees."); Smith, 517 F. Supp. 2d at 454 (dismissing plaintiff's aggregation claim "because plaintiff did not exhaust this claim at the administrative level" by appealing agency's determination); Gonzalez v. ATF, No. 04-2201, 2005 WL 3201009, at \*6 (D.D.C. Nov. 9, 2005) (finding that requester's inaction – i.e., that he never paid assessed fee nor appealed agency's refusal of fee waiver denial – precludes judicial review of request); Antonelli v. ATF, No. 04-1108, 2005 WL 3276222, at \*8 (D.D.C. Aug. 16, 2005) (finding requester's unsuccessful administrative appeal challenging amount of fee to be insufficient to satisfy exhaustion requirement); Tinsley v. Comm'r, No. 3:96-1769-P, 1998 WL 59481, at \*4 (N.D. Tex. Feb. 9, 1998) (finding that because plaintiff failed to appeal fee waiver denial, exhaustion was not achieved).

<sup>101</sup> See Monaghan v. DOJ, No. 2:09-CV-2199, 2011 U. S. Dist. LEXIS 28981, at \*5 (D. Nev. Mar. 16, 2011) (holding that "failure to pay the required fees results in a failure to exhaust . . . administrative remedies"); King v. DOJ, 772 F. Supp. 2d 14, 18 (D.D.C. 2010) (emphasizing that plaintiff who did not pay fees associated with search and processing of responsive records had not exhausted administrative remedies); Banks v. DOJ, 605 F. Supp. 2d 131, 139 (D.D.C. 2009) (finding that plaintiff had not exhausted administrative remedies "because he failed to pay duplication fees"); Research Air, Inc. v. Kempthorne, 589 F. Supp. 2d 1, 10 & n.6 (D.D.C. 2008) (concluding that because requester did not commit to pay assessed fee, "agency properly refused to process his FOIA requests"); Brunsilus v. DOE, 514 F. Supp. 2d 30, 34 (D.D.C. 2007) (citing agency regulation allowing agency to treat request as not received once fees are determined or estimated to exceed \$25 until requester agrees to pay fees); Dale v. IRS, 238 F. Supp. 2d 99, 107 (D.D.C. 2002) (dismissing case because plaintiff failed to make "firm commitment" to pay fees); cf. Kemmerly v. U.S. Dep't of Interior, No. 06-2386, 2006 WL 2990122, at \*1 (E.D. La. Oct. 17, 2006) (finding requester's agreement to pay "reasonable fees" to be insufficient under FOIA and agency's implementing regulation); Hall v. CIA, No. 04-0814, 2005 WL 850379, at \*5 n.9 (D.D.C. Apr. 13, 2005) (noting that although plaintiff characterized agency's six-figure fee estimate as "ludicrous," he sought neither accounting nor relief from estimated fees from court). But see Hinojosa v. Dep't of Treasury, No. 06-0215, 2006 WL 2927095, at \*4-5 (D.D.C. Oct. 11, 2006) (finding that requesters' commitment to pay up to \$50 per request "appears to satisfy" requirement of "firm promise" to pay).

<sup>102</sup> See, e.g., Hall & Associates v. EPA, 846 F. Supp. 2d 231, 240 (D.D.C. 2012) (finding that because agency failed to comply with own regulations that require informing requester of adverse determination concerning assessment of fees, agency's argument that requester had failed to exhaust administrative remedies was "baseless"); Bansal v. DEA, No. 06-3946, 2007 WL 551515, at \*6 (E.D. Pa. Feb. 16, 2007) (refusing to grant agency's motion for summary judgment for failure to pay fees as agency had not shown it had complied with its regulation requiring notification when fees are estimated to exceed \$25); Sliney v. BOP, No. 04-1812, 2005 WL 839540, at \*4 (D.D.C. 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).

litigation has been initiated under the FOIA.<sup>103</sup> (For a further discussion of the exhaustion requirement, including exhaustion of "fee" issues, see *Litigation Considerations, Exhaustion of Administrative Remedies*, below).

Further, the FOIA contains no provision for reimbursement of fees if the requester is dissatisfied with the agency's response,<sup>104</sup> nor does it provide for penalties to be assessed against an agency or its administrators for delays in refunding a requester's overpayment.<sup>105</sup> However, in at least one case, the Court of Appeals for the District of Columbia Circuit has directed an agency to confirm that its fee estimate was accurate and if lower than estimated, to show cause why overpayment should not be reimbursed to the requester.<sup>106</sup> In addition, absent specific statutory authority allowing an agency (or a

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<sup>103</sup> See *Pollack v. DOJ*, 49 F.3d 115, 119-20 (4th Cir. 1995) (providing that commencement of FOIA action does not relieve requester of obligation to pay for documents); *Chaplin v. Stewart*, 796 F. Supp. 2d 209, 211 (D.D.C. 2011) (same) (order vacated, appeal dismissed in 2015 WL 9309592 (D.C. Cir. Dec. 9, 2015)); *Scaff-Martinez v. DEA*, 770 F. Supp. 2d 17, 23 (D.D.C. 2011) (same (citing *Trueblood v. U.S. Dep't of Treasury*, 943 F. Supp. 64, 68 (D.D.C. 1996))); *King*, 772 F. Supp. 2d at 18 (same (citing *Pollack*, 49 F.3d at 120)); *Kemmerly*, 2006 WL 2990122, at \*2 (emphasizing that whether request for payment is made by agency pre- or post-litigation, "the plaintiff has an obligation to pay" (quoting *Trueblood v. U.S. Dep't of the Treasury*, 943 F. Supp. 64, 68 (D.D.C. 1996))); *Gavin v. SEC*, No. 04-4522, 2006 WL 2975310, at \*5 (D. Minn. Oct. 16, 2006) (stating that FOIA fees may be assessed post-litigation); *Jeanes v. DOJ*, 357 F. Supp. 2d 119, 123 (D.D.C. 2004) (observing that although plaintiff did not receive notice of fees until after litigation ensued, obligation to pay fees remained); *Maydak v. DOJ*, 254 F. Supp. 2d 23, 50 (D.D.C. 2003) (noting that plaintiff is still obligated to pay fee or seek waiver even if agency's fee assessment is made after plaintiff files suit); *Goulding v. IRS*, No. 97 C 5628, 1998 WL 325202, at \*9 (N.D. Ill. June 8, 1998) (finding plaintiff's constructive exhaustion did not relieve his obligation to pay authorized fees), summary judgment granted, No. 97 C 5628 (N.D. Ill. July 30, 1998) (restating that plaintiff's failure to comply with fee requirements is fatal to claim against government); *Trueblood*, 943 F. Supp. at 68 (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).

<sup>104</sup> See *Stabasefski v. U.S.*, 919 F. Supp. 1570, 1573 (M.D. Ga. 1996) (stating that the FOIA does not provide for reimbursement of fees when agency redacts portions of records that are released).

<sup>105</sup> See *Johnson v. EOUSA*, No. 98-0729, 2000 U.S. Dist. LEXIS 6095, at \*8 (D.D.C. May 2, 2000) (observing that despite delay in refunding overpayment, FOIA does not provide for award of damages to requester, nor does delay rise to level of constitutional violation by agency or its employees), aff'd, 310 F.3d 771 (D.C. Cir. 2002).

<sup>106</sup> See *Marino v. DOJ*, No. 16-5280, 2017 WL 6553398, at \*1 (D.C. Cir. Dec. 6, 2017) (per curiam)); see also *Stein v. DOJ*, No. 13-0571, 2016 WL 3919811, at \*7 (D.D.C. July 18, 2016) (finding that agency conceded an issue regarding charging duplication fees, therefore

subdivision of it) to do so,<sup>107</sup> all fees collected in the course of providing FOIA services are to be deposited into the Treasury of the United States.<sup>108</sup>

The appropriate standard of judicial review for fee issues has yet to be clearly established in the decisions that have considered this issue.<sup>109</sup> 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.<sup>110</sup> As for the scope of the review, courts have limited their review to the

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ordering agency to process request free of charge and to return advance payment remitted by requester with interest).

<sup>107</sup> See, e.g., Food and Drug Administration Revitalization Act, Pub. L. No. 101-635, § 201, 104 Stat. 4584 (1990) (codified as amended at 21 U.S.C. § 379f(a)(2) (2006)) (authorizing FDA to "retain all fees charged for [FOIA] requests").

<sup>108</sup> See [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,012, 10,017 (directing that funds collected for providing FOIA services must be deposited into general revenues of United States and not into agency accounts).

<sup>109</sup> Compare Hall v. CIA, No. 04-00814, 2005 WL 850379, at \*6 n.10 (D.D.C. 2005) (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 5, 11-12 (applying arbitrary and capricious standard), and Judicial Watch, Inc. v. DOJ, 133 F. Supp. 2d 52, 53 (D.D.C. 2000) (applying de novo standard))), Judicial Watch, Inc. v. DOJ, 185 F. Supp. 2d 54, 59 (D.D.C. 2002) (conceding that there is "some disagreement as to the correct standard" for review of agency's denial of media status), and Rozet v. HUD, 59 F. Supp. 2d 55, 56 (D.D.C. 1999) (emphasizing that although denials of fee waiver requests are reviewed de novo, "the appropriate standard of review for an agency determination of fee status under FOIA . . . has not been decided in this Circuit"), with Brown v. U.S. Patent & Trademark Office, 445 F. Supp. 2d 1347, 1356 (M.D. Fla. 2006) (acknowledging some disagreement as to appropriate standard of review for media category but applying de novo standard "because review under the de novo standard or under some more deferential standard leads to the same conclusion" in instant case) (aff'd per curiam, 226 F. App'x 866 (11th Cir. 2007)), Elec. Privacy Info. Ctr. v. DOD, 241 F. Supp. 2d 5, 9 (D.D.C. 2003) (concluding that "[t]he statutory language, judicial authority, and [FOIA Reform Act's] legislative history . . . support the view that determinations regarding preferred fee status are reviewed de novo" while acknowledging that at least one recent court has applied "arbitrary and capricious" standard), and Hosp. & Physician Publ'g v. DOD, No. 98-CV-4117, 1999 WL 33582100, at \*2 (S.D. Ill. June 22, 1999) (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).

<sup>110</sup> See, e.g., Judicial Watch, Inc. v. DOJ, No. 99-2315, 2000 WL 33724693, at \*3-4 (D.D.C. Aug. 17, 2000) (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).

administrative record before the agency at the time of its decision.<sup>111</sup> Courts have reached differing results on the extent of judicial deference to be given to agency fee regulations that are based upon the OMB Fee Guidelines.<sup>112</sup>

### **Fee Waivers**

The fee waiver standard of the Freedom of Information Act<sup>113</sup> provides that fees should be waived or reduced "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."<sup>114</sup>

The statutory fee waiver standard focuses on both public interest requirements and a requirement that the requester's commercial interest in the disclosure, if any, must be less than the public interest in disclosure.<sup>115</sup> These statutory requirements must be

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<sup>111</sup> See Stewart v. Dep't. of the Interior, 554 F.3d 1236, 1243 (10th Cir. 2009) (declining, as did district court, to rely on affidavit submitted by agency because it "was not contained in the administrative record"); Ctr. for Pub. Integrity v. HHS, No. 06-1818, 2007 WL 2248071, at \*5 & n.3 (D.D.C. Aug. 3, 2007) (limiting administrative record to website pages actually viewed by agency instead of incorporating requester's entire website as suggested by plaintiff), appeal dismissed, No. 07-5332, 2007 WL 4197584, at \*1 (D.C. Cir. 2007).

<sup>112</sup> 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"), and Pietrangelo v. U.S. Dep't of the Army, 2007 WL 1874190, at \*6 (D. Vt. June 27, 2007) (same) (quoting Media Access Project, 883 F.2d at 1071), with Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1313 (D.C. Cir. 2003) (emphasizing that court owes "no particular deference to the [agency's] interpretation of FOIA") (fee waiver case), Physicians Comm. for Responsible Med. v. HHS, 480 F. Supp. 2d 119, 122 n.3 (D.D.C. 2007) (noting that while no deference was owed agency's interpretation of FOIA, court would apply agency's regulation because it was not in controversy and plaintiff had relied upon it in its request) (fee waiver context), and Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv., 290 F. Supp. 2d 1226, 1230 (D. Or. 2003) (stating that court owes no particular deference to agency's interpretation of FOIA (citing Judicial Watch, 326 F.3d at 1313)).

<sup>113</sup> [5 U.S.C. § 552\(a\)\(4\)\(A\)\(iii\) \(2012 & Supp. V 2017\)](#).

<sup>114</sup> Id.; see also Cause of Action v. FTC, 799 F.3d 1108, 1115 (D.C. Cir. 2015) (relating that, in order to qualify for fee waiver, "[d]isclosure of the requested information must: (1) shed light on 'the operations or activities of the government'; (2) be 'likely to contribute significantly to public understanding' of those operations or activities; and (3) not be 'primarily in the commercial interest of the requester.'").

<sup>115</sup> See [5 U.S.C. § 552\(a\)\(4\)\(A\)\(iii\)](#); see also Nat'l Sec. Counselors v. DOJ, 848 F. 3d 467, 473 (D.C. Cir. 2017) (stating that "waiver or reduction of fees under [the fee waiver] provision rests on satisfaction of two requirements"); Larson v. CIA, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (per curiam) (recognizing that "fee waiver test provides a two-pronged analysis"); Brown v. U.S. Patent & Trademark Office, 445 F. Supp. 2d 1347, 1358 (M.D. Fla. 2006)

satisfied before properly assessable fees are waived or reduced, with the requester bearing the burden of showing the statutory standard is met.<sup>116</sup> Courts have held that requests for a waiver or reduction of fees must be considered on a case-by-case basis<sup>117</sup> inasmuch as

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(referencing two-part test used for fee waiver determinations), aff'd per curiam, 226 F. App'x 866 (11th Cir. 2007); Perkins v. VA, 754 F. Supp. 2d 1, 5 (D.D.C. 2010) (acknowledging two-prong test); Monaghan v. DOJ, No. 2:09-CV-2199, 2010 WL 2540110, at \*1 (D. Nev. June 17, 2010) (stating "requester may obtain a waiver of fees if he can satisfy a two prong test"); FedCURE v. Lappin, 602 F. Supp. 2d 197, 201 (D.D.C. 2009) (stating that statute "prescribes a two-pronged test the requester must satisfy"); Brown, 445 F. Supp. 2d at 1358 (referencing two-part test used for fee waiver determinations); Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv., 290 F. Supp. 2d 1226, 1228 (D. Or. 2003) (observing that statute establishes two-part test for fee waiver); Sloman v. DOJ, 832 F. Supp. 63, 68 (S.D.N.Y. 1993) (acknowledging statutory "two-pronged test" to be used for fee waiver determinations).

<sup>116</sup> See, e.g., Monaghan v. FBI, 506 F. App'x 596, 597 (9th Cir. Jan 28, 2013) (acknowledging that "burden is on the requester to satisfy FOIA's statutory requirements and the Department of Justice's regulatory requirements"); Reynolds v. Attorney Gen. of the U.S., 391 F. App'x 45, 46 (2d Cir. Aug. 26, 2010) (declaring that "requester bears the burden of establishing" that he satisfies two-prong test); Friends of the Coast Fork v. U.S. Dep't of the Interior, 110 F.3d 53, 55 (9th Cir. 1997) (reiterating that "requesters bear the initial burden of satisfying the statutory and regulatory standards for a fee waiver" (citing McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284-85 (9th Cir. 1987)); Wall v. EOUSA, No. 09-344, 2010 WL 4736273, at \*6 (D. Conn. Nov 16, 2010) (stating that "burden is on the requester to establish that a fee waiver is warranted"); Clemente v. FBI, 741 F. Supp. 2d 64, 75 (D.D.C. 2010) (noting that "before the agency and before a reviewing court, the FOIA requester bears the burden of demonstrating" statutory standard is satisfied); Saldana v. BOP, 715 F. Supp. 2d 10, 20 (D.D.C. 2010) (articulating that "requester bears the burden of demonstrating that he and his request qualify" for waiver of fees); Perkins, 754 F. Supp. 2d at 5 (noting that requester "retains the burden of satisfying both prongs" of the statutory standard); Ctr. for Medicare Advocacy, Inc. v. HHS, 577 F. Supp. 2d 221, 239 (D.D.C. 2008) (noting that "[c]ourts employ a two part test to determine whether the requester has satisfied [its] burden"); In Def. of Animals v. NIH, 543 F. Supp. 2d 83, 97 (D.D.C. 2008) (noting that "requester bears the initial burden" of meeting two-prong statutory test); McQueen v. United States, 264 F. Supp. 2d 502, 524 (S.D. Tex. 2003) (finding that "requester bears the burden of demonstrating that he and his request qualify" for waiver of fees), aff'd per curiam in pertinent part, 100 F. App'x 964 (5th Cir. 2004); Citizens Progressive Alliance v. U.S. Bureau of Indian Affairs, 241 F. Supp. 2d 1342, 1366 (D.N.M. 2002) (same); S.A. Ludsin & Co. v. SBA, No. 96 Civ. 2146, 1997 WL 337469, at \*4 (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); see also FOIA Update, Vol. VIII, No. 1, at 4 ("New Fee Waiver Policy Guidance").

<sup>117</sup> See 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. DOD, 880 F.2d 1381, 1383 (D.C. Cir. 1989) (dictum) (noting that statute provides for fee waivers on "case-by-case" basis), cert. denied, 494 U.S. 1029 (1990).

the information sought varies from request to request.<sup>118</sup> Further, the Court of Appeals for the District of Columbia Circuit has held that requesters should address 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.<sup>119</sup> If a requester is represented by an attorney, the fee waiver showing must be made as to the requester, and not the requester's counsel.<sup>120</sup> To the extent that an agency in its fee waiver analysis does not consider a factor or factors addressed by the requester in its request, courts generally have construed that factor as not at issue and thus conceded.<sup>121</sup>

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

<sup>119</sup> See, e.g., Nat'l Sec. Counselors v. DOJ, 848 F.3d 467, 473 (D.C. Cir. 2017) (finding that "[w]hile fee-waiver applications are to be 'liberally construed' in favor of finding that requesters meet FOIA's two-prong test, requesters still must justify their entitlement to a waiver of fees in 'reasonably specific' and 'non-conclusory' terms"); Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (reiterating that requests for fee waivers "must be made with reasonable specificity . . . and based on more than conclusory allegations") (quotation marks and internal citations omitted); McClellan, 835 F.2d at 1285 (stating that conclusory statements will not support fee waiver request); Clervrain v. United States, No. 17-3194, 2018 WL 4491224, at \*3 (D. Kan. Sept. 19, 2018) (finding fee waiver denial proper as because "requester must do more than recite the regulatory factors") (appeal pending); Saldana, 715 F. Supp. 2d at 21 (holding that conclusory statements regarding public interest do not satisfy the statutory requirements); In Def. of Animals, 543 F. Supp. 2d at 109 (observing that fee waiver requests must be reasonably specific and not based on conclusory allegations); Jarvik v. CIA, 495 F. Supp. 2d 67, 73 (D.D.C. 2007) (stating that requester "must pinpoint the type of government activity he is investigating"); Prison Legal News v. Lappin, 436 F. Supp. 2d 17, 26 (D.D.C. 2006) (finding that requester had provided reasonable specificity as to how records about events within agency's facilities would benefit public); McQueen, 264 F. Supp. 2d at 525 (emphasizing that "[c]onclusory statements on their face are insufficient" to prove entitlement to fee waiver).

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

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

When a requester fails to provide sufficient information for the agency to make a fee waiver decision, the agency may defer consideration of the fee waiver request in order to ask the requester for necessary supplemental or clarifying information.<sup>122</sup> As amended by the OPEN Government Act of 2007,<sup>123</sup> the FOIA expressly provides that an agency may request additional information from the requester "if necessary to clarify with the requester issues regarding fee assessment."<sup>124</sup> (For a discussion of when it is appropriate to make such an inquiry, see Procedural Requirements, Time Limits, above.) As an additional threshold matter, courts have held that agencies analyzing fee waiver requests are not strictly bound by previous administrative decisions.<sup>125</sup>

In order to determine whether the first fee waiver requirements have 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,<sup>126</sup> the Court of Appeals for the District of Columbia Circuit has held that

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<sup>122</sup> See, e.g., McClellan, 835 F.2d at 1287 (noting that "[t]he fee waiver statute nowhere suggests that an agency may not ask for more information if the requester fails to provide enough"; finding twenty-three questions posed by agency not burdensome); Citizens Progressive Alliance v. U.S. Bureau of Indian Affairs, 241 F. Supp. 2d 1342, 1366 (D.N.M. 2002) (recognizing that agency "is entitled to ask for more information with regards to a fee waiver request, where the information provided is not sufficient"); cf. OMB Fee Guidelines, 52 Fed. Reg. at 10,018 (specifying same in context of fee issue). But see Judicial Watch, 326 F.3d at 1315 (concluding that initial request demonstrated with reasonable specificity requester's eligibility for fee waiver, thus rejecting propriety of agency's request for additional information).

<sup>123</sup> [Pub. L. No. 110-175, 121 Stat. 2524 § 6.](#)

<sup>124</sup> [5 U.S.C. § 552\(a\)\(6\)\(A\)\(ii\)\(II\).](#)

<sup>125</sup> See, e.g., Judicial Watch, Inc., 2000 WL 33724693, at \*5 (noting that requester's "past record in uncovering information [through use of FOIA] is simply irrelevant"); cf. Judicial Watch, Inc. v. GSA, No. 98-2223, slip op. at 14 (D.D.C. Sept. 25, 2000) (reiterating that although prior judicial recognition of requester's "ability to disseminate FOIA-disclosed information is not binding," agency should consider requester's "track record" and reputation for disseminating information).

<sup>126</sup> See, e.g., Judicial Watch, 326 F.3d at 1312 (stating that case turns on whether public interest requirement is met, and noting that agency's implementing regulation included "non-exclusive list of factors the agency 'shall consider'" (quoting agency's regulation)); S.A. Ludsin & Co. v. SBA, No. 97-7884, 1998 WL 642416, at \*1 (2d Cir. Mar. 26, 1998) (reiterating that first requirement not met when requester "merely paraphrased" fee waiver provision); Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 66 n.11 (D.C. Cir. 1990) (conclusory statements insufficient to make public interest showing); Ctr. for Biological Diversity v. OMB, 546 F. Supp. 2d 722, 727 (N.D. Cal. 2008) (finding request was in "the public interest" and thus qualified for fee waiver where requester established why records were sought, what it intended to do with them, to whom it would give records, and "the [subject matter] expertise of [its] membership"); Judicial Watch, Inc. v. DOJ, 122 F. Supp. 2d 5, 9 (D.D.C. 2000) (finding that nonprofit group's "general description of [its] organizational mission" failed to



"disclosure of the requested information must: (1) shed light on 'the operations or activities of the government'; [and] (2) be 'likely to contribute significantly to public understanding' of those operations or activities."<sup>127</sup>

First, courts examine whether the subject matter of the requested records, in the context of the request, concern identifiable "operations or activities of the government."<sup>128</sup> Even, records submitted to the government have at times been found to reflect government activity.<sup>129</sup>

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identify public interest to be served by release of specific information requested); Sloman v. DOJ, 832 F. Supp. 63, 68 (S.D.N.Y. 1993) (finding that public interest requirement is not met merely by quoting statutory standard).

<sup>127</sup> Cause of Action v. FTC, 799 F.3d 1108, 1115 (D.C. Cir. 2015); see also [DOJ FOIA Regulations, 28 C.F.R. § 16.10\(k\)](#) (simplifying previous four-factor public interest analysis down to two public interest factors). See generally OIP Guidance: [Template for Agency FOIA Regulations](#) (posted 2016, updated 2/22/2017) (same).

<sup>128</sup> See [5 U.S.C. § 552\(a\)\(4\)\(A\)\(iii\)](#); Cause of Action, 799 F.3d at 1115 (first fee waiver factor is whether information would "shed light on 'the operations or activities of the government'"); see also, e.g., Brown v. U.S. Patent & Trademark Office, 226 F. App'x 866, 869 (11th Cir. 2007) (holding that requester failed to adequately explain how requested records were "related to the activities and operations" of agency); Monroe-Bey v. FBI, No. 11-1915 (RMC), 2012 WL 4017729, at \*4 (holding that agency regulation requires direct and clear connection to activities and operations of federal government); Brown v. U.S. Patent & Trademark Office, 445 F. Supp. 2d 1347, 1358-59 (M.D. Fla. 2006) (finding that the allegations made in lawsuits brought against agency did not concern operations or activities of agency); Judicial Watch, Inc. v. Reno, No. 00-0723, 2001 WL 1902811, at \*10 (D.D.C. Mar. 30, 2001) (upholding agency's assessment of fees, reasoning that while agency's response to citizen letters regarding Cuban emigré Elian Gonzales would likely contribute to understanding of agency actions, incoming citizen letters to agency on that topic do not), summary judgment granted on other grounds, (D.D.C. Sept. 25, 2001); S.A. Ludsin & Co. v. SBA, No. 96 Civ. 2146, 1997 WL 337469, at \*5 (S.D.N.Y. June 19, 1997) (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).

<sup>129</sup> See Forest Guardians v. U.S. Dep't of Interior, 416 F.3d 1173, 1178 (10th Cir. 2005) (finding that lienholder agreements that derived from private transactions have connection to activities of government where government maintains copies of those records and notifies submitters of agency actions that "might affect" their value); Schoenman v. FBI, 604 F. Supp. 2d 174, 192 (D.D.C. 2009) (finding that records that originated outside government are not "categorically ineligible" for fee waiver when they are "targeted and collected" by agency); Ctr. for Medicare Advocacy, Inc. v. HHS, 577 F. Supp. 2d 221, 240-41 (D.D.C. 2008) (finding that although certain documents sought were "submitted by private parties seeking to do business with the federal government" they "were reviewed by the agency" as part of its considerations and thus concern activities of government); Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv., 290 F. Supp. 2d 1226, 1231 (D. Or. 2003) (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

Second, courts consider whether information is "likely to contribute significantly to the public understanding" of government activities.<sup>130</sup> The D.C. Circuit has "recognize[d] that the requirement that disclosure of the requested information be 'likely to contribute *significantly* to public understanding' defies easy explication[,] but has found that "[a]pplication of this criterion may well require assessment along two dimensions: the degree to which 'understanding' of government activities will be advanced by seeing the information; and the extent of the 'public' that the information is likely to reach."<sup>131</sup>

In order for the disclosure to advance understanding of government operations or activities, courts have examined whether disclosure of the requested information is meaningfully informative in relation to the subject matter of the request.<sup>132</sup> Courts have found that requests for information that is already in the public domain, either in a duplicative or a substantially identical form, may not warrant a full fee waiver because the disclosure would not be likely to contribute to an understanding of government operations or activities when nothing new or substantive about the agency's activities would be added to the public's understanding.<sup>133</sup> There is no clear consensus among the

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"likely to contain marginal notes" by agency employees whose "opinions are often ignored or overturned" by agency personnel of higher authority).

<sup>130</sup> [5 U.S.C. § 552\(a\)\(4\)\(A\)\(iii\)](#); see *Cause of Action*, 799 F.3d at 1115 (second fee waiver factor is whether information is "'likely to contribute significantly to public understanding' of those [government] operations or activities").

<sup>131</sup> *Cause of Action*, 799 F.3d at 1116.

<sup>132</sup> See, e.g., *Monaghan v. FBI*, 506 F. App'x 596, 598 (9th Cir. Jan 28, 2013) (finding requester did not demonstrate "how documents that address 'broad public skepticism' and 'public doubts' regarding" the terrorist attacks of September 11, 2001 "are 'meaningfully informative' on governmental operations or activities"); *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (noting that character of information is proper factor to consider); *Perkins v. VA*, 754 F. Supp. 2d 1, 6 (D.D.C. 2010) (noting that where stated goal of FOIA request is to evaluate racial disparities among federal employees, but requested records do not reveal this information release cannot contribute to public understanding); *Wall v. EOUSA*, No. 09-344, 2010 WL 4736273, at \*6 (D. Conn. Nov 16, 2010) (determining plaintiff failed to demonstrate how request for records concerning himself would be informative regarding his unsubstantiated allegations of government corruption); *Manley v. Dep't of the Navy*, No. 1:07-cv-721, 2008 WL 4326448, at \*4 (S.D. Ohio Sept. 22, 2008) (quoting with approval agency's regulation requiring "assessment of the 'the substantive content of the record . . . to determine whether disclosure is meaningful'"); *VoteHemp, Inc. v. DEA*, 237 F. Supp. 2d 55, 61 (D.D.C. 2002) (rejecting as "rank speculation" plaintiff's allegations that agency had "ulterior motive" when it published interpretive rule, thus concluding that plaintiff "failed to establish that the disclosure it seeks has informative value").

<sup>133</sup> See *Monaghan*, 506 F. App'x at 598 (affirming district court's dismissal of requester's challenge to fee waiver denial and observing that requester did not challenge that "portions of the responsive documents have previously been released to the public" and finding that their "prior availability makes them unlikely to contribute to public understanding"); *Judicial*

courts as to what is considered information in the public domain for purposes of a fee waiver determination.<sup>134</sup> Additionally, courts have found that the presence of standard, routine administrative material within the requested records does not necessarily militate against a fee waiver.<sup>135</sup>

The D.C. Circuit has held that "a requester is ineligible for a waiver if the requested information will be to its benefit alone."<sup>136</sup> Relatedly, courts have held that because the

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Watch, Inc. v. DOJ, 365 F.3d 1108, 1127 (D.D.C. 2013) (upholding denial of "blanket fee waiver," emphasizing that plaintiff failed to counter government's representations that requested information "was already in the public domain"); Carney v. DOJ, 19 F.3d 807, 815 (2d Cir. 1994) (observing that where records "are readily available from other sources . . . further disclosure by the agency will not significantly contribute to the public's understanding"); McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1286 (9th Cir. 1987) (recognizing new information has more potential to contribute to public understanding); Coven v. OPM, No. 07-1831, 2009 WL 3174423 (D. Ariz. 2009), at \*13 (agreeing with agency's fee waiver denial and puzzling over how request for job vacancy data already provided by agency on own website could contribute to public understanding); Brown, 445 F. Supp. 2d at 1359-60 (applying agency regulation that specified that "'disclosure of information that already is in the public domain,'" such as that found "in open records and available to the public in court documents "would not be likely to contribute" to public understanding); Sloman v. DOJ, 832 F. Supp. 63, 68 (S.D.N.Y. 1993) (stating that public's understanding would not be enhanced to significant extent where material was previously released to other writers and "more important[ly]" was available in agency's public reading room "where the public has access and has used the information extensively").

<sup>134</sup> Compare Judicial Watch, Inc. v. Reno, No. 00-0723, 2001 WL 1902811, at \*10 (D.D.C. Mar. 30, 2001) (sustaining agency's assessment of fees for duplication of court documents, press clippings, and citizen letters where material was "'easily accessible and available to everyone else for a fee'" (quoting Durham v. DOJ, 829 F. Supp. 428, 434-35 (D.D.C. 1993))), and Durham, 829 F. Supp. at 434-35 (denying fee waiver for 2340 pages of public court records), appeal dismissed for failure to timely file, No. 93-5354 (D.C. Cir. Nov. 29, 1994), with Friends of the Coast Fork 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), and In Def. of Animals, 543 F. Supp. 2d at 111 (commenting that courts "have been reluctant to treat information that is technically available, through a reading room or upon a FOIA request, as part of the public domain").

<sup>135</sup> See Schoenman v. FBI, 604 F. Supp. 2d 174, 191 (D.D.C. 2009) (finding persuasive observation of D.C. Circuit that "'the presence of administrative material within files that also contain substantive documents does not justify charging fees for the non-substantive clutter'" (quoting Campbell v. DOJ, 164 F.3d 20, 36 (D.C. Cir. 1998))); see also Citizens for Responsibility & Ethics in Wash. v. HHS, 481 F. Supp. 2d 99, 112 (D.D.C. 2006) (finding agency's "view that there is nothing to be gained from information about 'standard, routine operations' . . . irrelevant" and "without merit").

<sup>136</sup> Cause of Action, 799 F.3d at 1118.

proper focus must be on the benefit to be derived by the public, any personal benefit to be derived by the requester, or the requester's particular financial situation, are not considerations entitling him or her to a fee waiver.<sup>137</sup> Indeed, it is well settled that indigence alone, without a showing of a public benefit, is insufficient to warrant a fee waiver.<sup>138</sup> At the same time, the D.C. Circuit has stressed that, "since the 1986 amendments, it no longer matters whether the information will also (or even primarily) benefit the requester[;] [n]or does it matter whether the requester made the request for the *purpose* of

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<sup>137</sup> See, e.g., Conley v. FBI, 714 F. App'x. 191, 194 (3d Cir. 2017) (agreeing that requester did not qualify for fee waiver where documents sought only concerned development of criminal case defense and requester failed to establish that he was authorized representative of several public interest organizations); Passmore v. DOJ, No. 17-5083, 2017 WL 4231167, at \*1 (D.C. Cir. Sept. 13, 2017) (affirming determination that requester was ineligible for fee waiver where records sought consisted of emails serving requester's personal interest of proving his innocence); Carney, 19 F.3d at 816 (finding fee waiver inappropriate for portion of responsive records that concerned processing of plaintiff's own FOIA requests); McClain v. DOJ, 13 F.3d 220, 220-21 (7th Cir. 1993) (stating that fee waiver not merited when requester sought to serve private interest rather than "public understanding of operations or activities of the government"); Ferrigno v. DHS, No. 09 civ. 5878, 2011 WL 1345168, at \*6 (S.D.N.Y. Mar. 29, 2011) (holding that private benefit outweighed public interest where "request for . . . emails seems to be . . . an attempt to continue [an] investigation and settle old scores"); Banks v. DOJ, 605 F. Supp. 2d 131, 139 (D.D.C. 2009) (finding that individual's "attack on a criminal conviction is a private interest"); Cotton v. Stine, No. 6:07-98, 2008 WL 4963200, at \*1 (E.D. Ky. Nov. 14, 2008) (finding no indication of public benefit where prisoner sought fee waiver for papers lost during his transfer to another facility); Klein v. Toupin, No. 05-647, 2006 WL 1442611, at \*4 (D.D.C. 2006) (finding that plaintiff presented no evidence to show how records related to his suspension from practice before agency "would benefit anyone other than himself").

<sup>138</sup> See, e.g., Reynolds v. Attorney Gen. of the U.S., 391 F. App'x 45, 46 (2d Cir. Aug. 26, 2010) (upholding district court's denial of fee waiver request, noting that requester "argued only that he should be granted the waiver because he could not afford the fees"); Brunsilus v. DOE, No. 07-5362, 2008 U.S. App. LEXIS 15314, at \*2 (D.C. Cir. July 16, 2008) (per curiam) (emphasizing that "[a]ppellant's indigence and his private litigation interest are not valid bases for waiving fees under FOIA"); Ely v. USPS, 753 F.2d 163, 165 (D.C. Cir. 1985) ("Congress rejected a fee waiver provision for indigents."); Cotton, 2008 WL 4963200, at \*1 (reiterating that Congress has "rejected a fee waiver provision for indigents" and that fee waiver denials for records on self "will be upheld despite requester's indigence"); Bansal v. DEA, No. 06-3946, 2007 WL 551515, at \*6 (finding "no special provision" in statute for "reduced fees based on indigence or incarcerated status"); see also S. Conf. Rep. No. 93-1200, at 8 (1974), reprinted in 1974 U.S.C.A.N. 6285, 6287 (proposed fee waiver provision for indigents eliminated; "such matters are properly the subject for individual agency determination in regulations"); cf. Banks, 605 F. Supp. 2d at 137 (distinguishing between in forma pauperis status for civil filings and obligation to pay fees for FOIA requests); Emory v. HUD, No. 05-00671, 2007 WL 641406, at \*4 (D. Haw. Feb. 23, 2007) (stating that order granting in forma pauperis status is not waiver of FOIA fee requirement in agency regulation).

benefiting itself[;] [t]he statutory criterion focuses only on the likely *effect* of the information disclosure."<sup>139</sup>

The D.C. Circuit has held that the fee waiver standard does not "require [a] requester to show an ability to convey the information to a 'broad segment' of the public or to a 'wide audience.'"<sup>140</sup> Rather, "the relevant inquiry . . . is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject."<sup>141</sup>

Additionally, the D.C. Circuit held that while there is "nothing in the statute that specifies the number of [media] outlets a requester must have," "[f]ee-waiver applicants must support their claims with "reasonable specificity.""<sup>142</sup> Courts have typically evaluated the identity and qualifications of the requester – e.g., his or her expertise in the subject area of the request and ability and intention to disseminate the information to the public – in order to determine whether the public would benefit from disclosure to that requester.<sup>143</sup>

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<sup>139</sup> Cause of Action, 799 F.3d at 1118 (noting that statutory standard changed with 1986 amendments, which eliminated requirement that disclosure must primarily benefit public, and so "it no longer matters whether the information will also (or even primarily) benefit the requester," so long as disclosure meets current statutory standard that it be "likely to contribute significantly to public understanding").

<sup>140</sup> Id. at 1115 (dismissing requirement of agency regulation that requester show increase in understanding of "public at large").

<sup>141</sup> Id. (quoting Carney v. U.S. Dep't of Justice, 19 F.3d 807, 814–15 (2d Cir.1994) and finding that FOIA does not "require a requester to show an ability to convey the information to a 'broad segment' of the public or to a 'wide audience'").

<sup>142</sup> Cause of Action, 799 F.3d at 1117 (quoting Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (quoting Larson v. CIA, 843 F.2d 1481, 1483 (D.C. Cir. 1988))).

<sup>143</sup> Compare Nat'l Sec. Counselors v. DOJ, 848 F.3d 467, 474 (D.C. Cir. 2017) (finding requester's website to be "no more tha[n] ... a clearing house for the records [it] receive[d]' through FOIA"); Monaghan v. FBI, 506 F. App'x 596, 598 (9th Cir. Jan 28, 2013) (holding that publication on "sub blog . . . not easily accessible through a general searches conducted on common search engines" does not demonstrate ability to effectively disseminate information); McClain v. DOJ, 13 F.3d 220, 221 (7th Cir. 1993) (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 newspaper company to which he intended to release the requested information, his purpose for seeking the requested material, or his . . . contacts with any major newspaper companies"), Ferrigno, 2011 WL 1345168, at \*6 (finding that requester "has not even argued that he has an intention of disseminating the [requested] emails to the public, much less demonstrated his ability to do so"), Perkins, 754 F. Supp. 2d at 8 (concluding that lack of "professional or personal contacts" at newspaper and no "history of publishing in it" does not "lend credence to [requester's] statement of intention"), and Hall v. CIA, No. 04-0814, 2005 WL 850379, at \*7 (D.D.C. Apr. 13, 2005) (viewing requester's

Specialized knowledge may be required to extract, synthesize, and effectively convey the information to the public, and courts have taken that into account in making fee waiver determinations.<sup>144</sup>

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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), with Forest Guardians, 416 F.3d at 1180 (finding requester's publication of online newsletter and its intent to create interactive website using requested records, "[a]mong other things," to be sufficient for dissemination purposes), Judicial Watch, 326 F.3d at 1314 (granting fee waiver where requester did not specifically state its intent to disseminate requested information but had presented multiple ways in which it could convey information to public), Carney, 19 F.3d at 814-15 (characterizing dissemination requirement as ability to reach "a reasonably broad audience of persons interested in the subject" and not need to "reach a broad cross-section of the public"), Friends of Oceano Dunes v. Salazar, No. C-11-1476, 2011 WL 6748575, at \*3 (N.D. Cal. Dec. 22, 2011) (finding that non-profit organization satisfied dissemination requirement by highlighting its "insight, guidance and [provision of] information on issues of import" and emphasizing how disclosure "may impact recreational opportunities for its 28,000 members"), Clemente, 741 F. Supp. 2d at 76-77 (lauding plaintiff's ability to initiate "article about her FOIA request in a very prominent national newspaper" as clear evidence of her ability to disseminate), Consumers' Checkbook v. HHS, 502 F. Supp. 2d 79, 87-88 (D.D.C. 2007) (determining requester's dissemination plan adequate where requester had broad base of subscribers for its publication, coverage of its press releases by "numerous major media outlets," and ongoing relationship with local television station) (rev'd on other grounds, 554 F.3d 1046, D.C. Cir. Jan. 30, 2009); Cmt'y. Legal Servs. v. HUD, 405 F. Supp. 2d 553, 557 n.3 (E.D. Pa. 2005) (noting that agency's demand for "detailed numbers" with regard to requester's dissemination plan is not required by at least three other courts), and Eagle v. U.S. Dep't of Commerce, No. C-01-20591, 2003 WL 21402534, at \*3, \*5 (N.D. Cal. Apr. 28, 2003) (finding that educator-requester made adequate showing of his ability to disseminate through his proposed distribution of newsletter to Congress, through publication in academic journals, and through publication on website).

<sup>144</sup> See Nat'l Sec. Counselors, 848 F.3d at 474 (finding requester did not "demonstrate[] its possession of the requisite scientific or technical sophistication to analyze and convey the data in a more broadly digestible form"); McClellan, 835 F.2d at 1286 (affirming fee waiver denial and observing that fee waiver request gave no indication of requesters' ability to understand and process information nor whether they intended to actually disseminate it); Friends of Oceano Dunes, 2011 WL 6748575, at \*5 (granting fee waiver and observing that requester hired an attorney with "experience dealing with . . . critical habitat designations" and board members have experience analyzing conservation programs); Perkins, 754 F. Supp. 2d, at 8 (denying fee waiver and noting that although plaintiff had contacted university for assistance "he fails to indicate that the [s]chool has agreed to assist him"); S. Utah Wilderness Alliance v. U.S. Bureau of Land Mgmt., 402 F. Supp. 2d 82, 87 (D.D.C. 2005) (granting fee waiver and 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 v. Brown, 318 F. Supp. 2d 1036, 1038, 1040 (D. Idaho 2004) (granting fee waiver and accepting requester's statement that it could put requested ecological information – characterized by requester as "tedious to read

Once an agency determines that the "public interest" requirements for a fee waiver have been met, the statute requires that the agency must determine that "disclosure of the information . . . is not primarily in the commercial interest of the requester."<sup>145</sup> The D.C. Circuit has held that a requester's "interest in information regarding the [agency's] treatment of fee-waiver applications (including [requester's] own) is not rendered 'commercial' merely because the information could help it obtain a fee waiver."<sup>146</sup>

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and difficult to understand" – into more user-friendly format given its past analysis of similar information, and noting there was no evidence in record demonstrating that "the information requested was highly technical"); Eagle, 2003 WL 21402534, at \*5 (granting fee waiver and emphasizing that agency ignored educational institution requester's intent to review, evaluate, synthesize, and present "the otherwise raw information into a more usable form"); S.A. Ludsin, 1997 WL 337469, at \*5 (denying fee waiver and finding requester's intention to make raw appraisal data available on computer network, without analysis, to be insufficient to meet public interest requirement). But see FedCURE, 602 F. Supp. 2d at 205 (granting fee waiver and explaining that any dissemination of "highly technical" information where none is currently available, "regardless of [requester's] plan for interpreting the information," will enhance public's understanding of it).

<sup>145</sup> [5 U.S.C. § 552\(a\)\(4\)\(A\)\(iii\)](#); see Cause of Action, 799 F.3d at 1115 (third fee waiver factor is requirement that information "not be 'primarily in the commercial interest of the requester'").

<sup>146</sup> See Cause of Action, 799 F.3d at 1117 (citing McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1285 (9th Cir.1987) (holding that FOIA "[i]nformation helpful to a tort claim furthers a requester's interest in compensation or retribution, but not an interest in commerce, trade, or profit") and McClain v. U.S. Dep't of Justice, 13 F.3d 220, 220 (7th Cir.1993) ("[requester] sought the documents primarily to facilitate a challenge to his conviction; this is not a 'commercial' interest")).

Of note overall, when only some of the requested records satisfy the statutory test, some courts have upheld waiver for just those records,<sup>147</sup> while other courts have found that a full waiver is appropriate.<sup>148</sup>

Courts have concluded that fee waiver determinations should not take into consideration the fact that records may ultimately be found to be exempt from disclosure.<sup>149</sup> Additionally, the majority of these opinions specify that a fee waiver request should be evaluated "on the face of the request."<sup>150</sup>

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<sup>147</sup> See Samuel Gruber Educ. Project v. DOJ, 24 F. Supp. 2d 1, 2 (D.D.C. 1998) (upholding, in case involving in excess of 80,000 pages of responsive records, seventy-percent fee waiver granted by agency); cf. Campbell v. DOJ, 164 F.3d 20, 35-37 (D.C. Cir. 1998) (finding, where agency awarded partial fee waiver, that it had not carried its burden in denying waiver for public domain, repetitious, and administrative information in files, remanding for agency to "recalculate its fee waiver ratio" but specifically "declin[ing] to hold" that FBI cannot charge any copying fee").

<sup>148</sup> See Schoenman v. FBI, 604 F. Supp. 2d 174, 191 (D.D.C. 2009) (finding that "the presence of administrative material within files that also contain substantive documents does not justify charging fees for . . . the non-substantive clutter" (quoting Campbell, 164 F.3d at 36)); Schrecker, 970 F. Supp. at 50-51 (granting full fee waiver where agency provided no "strong evidence" that portion of requested information already was in public domain).

<sup>149</sup> See Carney, 19 F.3d at 815 (finding that agency's denial of fee waiver was not proper when made simply on basis that requested records "may [be] exempt from disclosure . . . , [because a] fee waiver request should be evaluated based on the face of the request and the reasons given by the requester" (citing Project on Military Procurement, 710 F. Supp. at 367)); Citizens for Responsibility & Ethics in Wash. v. DOJ, 602 F. Supp. 2d 121, 125 (D.D.C. 2009) ("Fee-waiver requests are [not] evaluated . . . on the possibility of eventual exemption from disclosure.") (citations omitted); Ctr. for Medicare Advocacy, 577 F. Supp. 2d at 241 (fee waiver decision should not be based on "possibility that the records may ultimately be determined to be exempt from disclosure" (quoting Judicial Watch, Inc. v. DOT, No. 02-566, 2005 WL 1606915, at \*4 (D.D.C. July 5, 2005))) (remaining citations and quotations omitted); Ctr. for Biological Diversity, 546 F. Supp. 2d at 729 (rejecting agency's rationale for fee waiver denial based on its argument that "its unique role as a deliberative agency that advises the President about proposed regulations makes this the rare case" when responsive documents were "patently exempt" from disclosure); S. Utah, 402 F. Supp. 2d at 90 (deciding that agency cannot base fee waiver decision on anticipated redactions to responsive records); Judicial Watch, 2005 WL 1606915, at \*4 (stating that fee waiver decision should not be made on basis of agency's "determination that most of the information was exempt from disclosure"); Judicial Watch, Inc. v. DOE, 310 F. Supp. 2d 271, 295 (D.D.C. 2004) (same); cf. Schoenman, 604 F. Supp. 2d at 190-91 (finding that agency improperly concluded that "certain records are not qualified for a fee waiver because they contain exempt material," rejecting defendants' distinction between asserted exemptions for records already processed as in instant case and "anticipated" exemptions, stating that "this distinction is not one that courts have necessarily relied on").

<sup>150</sup> See, e.g., Carney, 19 F.3d at 815 (finding that "fee waiver request should be evaluated based on the face of the request and the reasons given by the requester" (citing Project on Military



The FOIA does not explicitly reference any time period within which an agency must resolve a fee waiver issue,<sup>151</sup> although agencies are required to include in their Annual FOIA Reports each year the number of fee waiver requests that were granted and denied and the average and median number of days for adjudicating fee waiver determinations.<sup>152</sup> The statutory twenty-working day time period to respond to a request has been applied to resolution of fee waiver (and fee) issues by several courts, including the D.C. Circuit.<sup>153</sup>

The FOIA also does not explicitly provide for administrative appeals of denials of requests for fee waivers. Nevertheless, many agencies, either by regulation or by practice, have considered appeals of such actions.<sup>154</sup> The Courts of Appeals for the D.C. and Fifth Circuits have held that exhaustion of administrative remedies in connection with fee

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Procurement, 710 F. Supp. at 367)); Coven, 2009 WL 3174423, at \*12 (same); Schoenman, 604 F. Supp. 2d at 190 (asserting that request "should be evaluated based on the face of the request and the reasons given by [requester] in support of the waiver" (quoting Judicial Watch, 2005 WL 1606915, at \*5)); Citizens for Responsibility & Ethics in Wash., 602 F. Supp. 2d at 125 (emphasizing that "[f]ee-waiver requests are evaluated based on the face of the request") (citations omitted); Ctr. for Medicare Advocacy, 577 F. Supp. 2d at 241 (same) (quoting Judicial Watch, 2005 WL 1606915, at \*4); Ctr. for Biological Diversity, 546 F. Supp. 2d at 730 (finding that fee waiver "should be evaluated based on the face of the request and the reasons given by the requester" (quoting Carney, 19 F.3d at 815)).

<sup>151</sup> See [5 U.S.C. § 552\(a\)\(4\)\(A\)](#).

<sup>152</sup> See [5 U.S.C. § 552\(e\)\(1\)\(M\)](#); see also OIP Guidance: "[Department of Justice Handbook for Agency Annual Freedom of Information Act Reports](#)" (posted October 4, 2018).

<sup>153</sup> 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); Lawyers Comm. for Civil Rights v. U.S. Dep't of Treasury, No. C 07-2590, 2009 WL 2905963, at \*1 (N.D. Cal. Sept. 8, 2009) (holding that agency "was required to act upon LCCR's fee waiver request within [twenty] days"); 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).

<sup>154</sup> See, e.g., [DOJ FOIA Regulations, 28 C.F.R. § 16.6\(d\)](#) (including in its listing of adverse determinations "denials involving fees or fee waiver matters"); [Dep't of State FOIA Regulations, 22 C.F.R. § 171.16 \(2016\)](#) (appeals of denials of fee waivers and reductions); [DOT FOIA Regulations, 49 C.F.R. § 7.32 \(2017\)](#) (procedures for appealing decisions not to disclose records or waive fees); see also OIP Guidance: [Guidance for Agency FOIA Regulations](#) (posted 2016, updated 2/22/2017); OIP Guidance: [Template for Agency FOIA Regulations](#) (posted 2016, updated 2./22/2017).

waiver claims includes filing an administrative appeal.<sup>155</sup> (For a discussion of constructive exhaustion of administrative remedies, see *Litigation Considerations, Exhaustion of Administrative Remedies*, below.)

As part of the Freedom of Information Reform Act of 1986,<sup>156</sup> a specific judicial review provision for fee waivers was added to the FOIA,<sup>157</sup> which provides for the review of agency fee waiver denials according to a de novo standard, yet explicitly provides that the scope of judicial review remains limited to the administrative record established before the agency.<sup>158</sup> Thus, courts have not permitted either party to supplement the

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<sup>155</sup> See *Pruitt v. EOUSA*, No. 01-5453, 2002 WL 1364365, at \*1 (D.C. Cir. Apr. 19, 2002) (reiterating that judicial review is not appropriate until requester either appeals fee waiver denial or pays assessed fee); *Voinche v. U.S. Dep't of the Air Force*, 983 F.2d 667, 669 (5th Cir. 1993) (emphasizing that requester seeking fee waiver under FOIA must exhaust administrative remedies before seeking judicial review); *Oglesby*, 920 F.2d at 66 & n.11, 71 ("Exhaustion does not occur until . . . fees are paid or an appeal is taken from the refusal to waive fees."); see also *AFGE v. Dep't of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990) (declining consideration of fee waiver request when not pursued during agency administrative proceeding); *In Def. of Animals*, 543 F. Supp. 2d at 97 (noting that nonpayment of fees did not preclude judicial review where plaintiff had timely appealed its fee waiver denial).

<sup>156</sup> Pub. L. No. 99-570, 100 Stat. 3207.

<sup>157</sup> See 5 U.S.C. § 552(a)(4)(A)(vii).

<sup>158</sup> See *id.*; see also *Reynolds v. Attorney Gen. of the U.S.*, 391 F. App'x 45, 46 (2d Cir. Aug. 26, 2010) (reiterating that standard of review is de novo and is limited to the administrative record); *Stewart v. Dep't. of the Interior*, 554 F.3d 1236, 1241 (10th Cir. 2009) (same); *Judicial Watch*, 326 F.3d at 1311 (same); *Carney*, 19 F.3d at 814 (same); *Bensman v. Nat'l Park Serv.*, 806 F. Supp. 2d 31, 37 (D.D.C. 2011) (same); *Perkins*, 754 F. Supp. 2d at 5 (same); *Clemente*, 741 F. Supp. 2d at 75 (same); *Saldana*, 715 F. Supp. 2d at 20 (same); *Schoenman v. FBI*, 604 F. Supp. 2d 174, 188 (D.D.C. 2009) (same); *Brown v. U.S. Patent & Trademark Office*, 445 F. Supp. 2d 1347, 1353 (M.D. Fla. 2006) (same); *Cmty. Legal Servs. v. HUD*, 405 F. Supp. 2d 553, 555 (E.D. Pa. 2005) (same); *W. Watersheds v. Brown*, 318 F. Supp. 2d 1036, 1039 (D. Idaho 2004) (same); *Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv.*, 290 F. Supp. 2d 1226, 1228 (D. Or. 2003) (same); *McQueen v. United States*, 264 F. Supp. 2d 502, 524 (S.D. Tex. 2003) (same); cf. *Physicians Comm. for Responsible Med. v. HHS*, 480 F. Supp. 2d 119, 121 n.2 (D.D.C. 2007) (dismissing separate challenge to fee waiver denial brought under APA's arbitrary and capricious standard, emphasizing that FOIA provides adequate remedy); *Eagle v. U.S. Dep't of Commerce*, No. C0120591, 2003 WL 21402534, at \*2, \*4 (stating that Court reviews fee waiver decisions de novo; acknowledging that agency ordinarily is not permitted "to rely on justifications for its decision that were not articulated during the administrative proceedings" but finding that here agency was "simply clarifying and explaining" its earlier position).

record or offer new argument or rationale for seeking a fee waiver or for denying such a request.<sup>159</sup>

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<sup>159</sup> See, e.g., Reynolds, 391 F. App'x at 46 (upholding district court's refusal to consider requester's "academic status or interest in publishing a scholarly article" because neither was made known to agency during administrative proceedings); Friends of the Coast Fork v. U.S. Dep't of the Interior, 110 F.3d 53, 55 (9th Cir. 1997) (reiterating that agency's letter "must be reasonably calculated to put the requester on notice" as to reasons for fee waiver denial); Larson v. CIA, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (information not part of administrative record may not be considered by district court when reviewing agency fee waiver denial); Bensman, 806 F. Supp. 2d at 43 (declaring that court "may not entertain litigation positions newly adopted by Defendant after Plaintiff filed suit"); Monaghan v. DOJ, No. 09-2199, 2010 WL 2540110, at \*2 (D. Nev. June 17, 2010) (denying plaintiff's motion to supplement record with "materials that were not submitted with the Plaintiff's FOIA request or request for a fee waiver"); Manley v. Dep't of the Navy, No. 07-721, 2008 WL 4326448, at \*3 (S.D. Ohio Sept. 22, 2008) (concluding that when agency administratively determined that plaintiff's request met factor one, it could not raise "post hoc rationalization . . . to deny plaintiff's request on this first factor" during litigation); Physicians Comm. for Responsible Med., 480 F. Supp. 2d at 121 n.1 (disallowing plaintiff's submission of affidavit that was not part of administrative record); Citizens for Responsibility & Ethics in Wash. v. HHS, 481 F. Supp. 2d 99, 107 n.1 (D.D.C. 2006) (refusing to take into account material submitted by both parties that were not before agency when administrative appeal considered); Brown, 445 F. Supp. 2d at 1354 (observing that "administrative record should consist of those documents which [agency] used to determine whether Plaintiff's fees should be waived"); Pub. Citizen, 292 F. Supp. 2d at 5 n. 5 (criticizing agency for its failure to adjudicate fee waiver by emphasizing that "this Court has no record upon which to evaluate plaintiff's claims that it is entitled to a waiver"); see also Ctr. for Pub. Integrity v. HHS, No. 06-1818, 2007 WL 2248071, at \*5 (D.D.C. Aug. 3, 2007) (noting that "mere inclusion" of web address in request insufficient to include all information on website as part of administrative record) (requester category context), appeal dismissed, No. 07-5332, 2007 WL 4197584, at \*1 (D.C. Cir. 2007).