



## **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> The FOIA Improvement Act of 2016 established additional 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>3</sup> (For further discussion of the fee-related changes made by the FOIA Improvement Act of 2016, see Fee Restrictions below.) A separate provision of the FOIA also provides for the waiver or reduction of fees if the statutory fee waiver standard is satisfied.<sup>4</sup>

### **Fees**

Congress charged the Office of Management and Budget ("OMB") with the responsibility of providing a "uniform schedule of fees" for agencies to follow when promulgating their FOIA fee regulations.<sup>5</sup> OMB did so in its Uniform Freedom of Information Act Fee Schedule and Guidelines [hereinafter OMB Fee Guidelines] issued

---

<sup>1</sup> [5 U.S.C. § 552\(a\)\(4\)\(A\)\(i\) \(2018\)](#).

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

<sup>3</sup> [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 10/19/2016); see also OIP Guidance: [Decision Tree for Assessing Fees](#) (posted 10/19/2016).

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

<sup>5</sup> [5 U.S.C. § 552\(a\)\(4\)\(A\)\(i\) \(2018\)](#); see [Env'tl. Prot. Info. Ctr. v. U.S. Forest Serv.](#), 432 F.3d 945, 947 (9th Cir. 2005) ("FOIA calls for the Office of Management and Budget to promulgate [fee] guidelines for agencies to follow.") (citation omitted); cf. [Media Access Project v. FCC](#), 883 F.2d 1063, 1069 (D.C. Cir. 1989) (rejecting plaintiff's claim that OMB's authority is limited to establishing "'price list'").

in March 1987.<sup>6</sup> Agency personnel with FOIA fee questions should contact OMB's Office of Information and Regulatory Affairs, Privacy Branch. OMB proposed revisions to sections of its 1987 Fee Guidelines in May 2020.<sup>7</sup>

Under the FOIA, each agency is required to publish regulations "specifying the schedule of fees"<sup>8</sup> applicable to processing requests and must conform its schedule to the guidelines promulgated by OMB.<sup>9</sup> The following discussion summarizes the FOIA's fee provisions.

### **Requester Categories**

The FOIA provides for three categories of requesters: 1) commercial use requesters; 2) educational institution requesters, noncommercial scientific institution requesters, and representatives of the news media; and finally, 3) all requesters who do not fall within either of the preceding two categories.<sup>10</sup>

#### *Commercial Use Requesters*

The first requester category, commercial use requesters, is defined by the Uniform Freedom of Information Act Fee Schedule and Guidelines [hereinafter 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>11</sup> Designation of a requester as a "commercial use requester," therefore, will

---

<sup>6</sup> [52 Fed. Reg. 10,012](#) (Mar. 27, 1987).

<sup>7</sup> 85 Fed. Reg. 26,499 (May 4, 2020).

<sup>8</sup> [5 U.S.C. § 552\(a\)\(4\)\(A\)\(i\)](#).

<sup>9</sup> [Uniform Freedom of Information Act Fee Schedule and Guidelines](#) [hereinafter OMB Fee Guidelines], 52 Fed. Reg. at 10,012; see also OIP Guidance: [Template for Agency FOIA Regulations](#) (posted 09/08/2016) (discussing fee-specific regulations in section X).

<sup>10</sup> See [5 U.S.C. § 552\(a\)\(4\)\(A\)\(ii\)\(I\)-\(III\) \(2018\)](#).

<sup>11</sup> [OMB Fee Guidelines](#), 52 Fed. Reg. 10,012, 10,017-18 (Mar. 27, 1987); see, e.g., [Torres Consulting & Law Grp., LLC v. VA](#), 741 F. App'x 516, 517 (9th Cir. 2018) (finding that requester's intent to "use the information [requested] to materially benefit the unions it represented" was a commercial interest); [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); 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

turn on the use to which the requested information will be put, rather than on the identity of the requester.<sup>12</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>13</sup>

*Educational Institution, Noncommercial Scientific Institution, or  
News Media Requesters*

The second requester category consists of requesters who seek records for a noncommercial use and who qualify as one of three distinct types of requesters within this category (sometimes referred to as preferred fee category or preferred status 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>14</sup>

Educational Institution Requester

---

(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>12</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 Comer v. IRS, No. 97-76329, 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. 96-5972, 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. Torres Consulting & Law Grp., LLC, 741 F. App'x at 517 (stating that "consideration of a requester's identity for the purpose of determining use is not prohibited" where agency analyzed several factors related to requester's commercial use categorization, including requester's identity and mission); Hosp. & Physician Publ'g v. DOD, No. 98-4117, 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).

<sup>13</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 Ecological Seepage Situation, 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), order amended on reconsideration, 457 F. Supp. 2d 30 (D.D.C. 2006), amended on other grounds, 479 F. Supp. 2d 23 (D.D.C. 2007).

<sup>14</sup> See 5 U.S.C. § 552(a)(4)(A)(ii)(II).

The first type of requester in this category is the educational institution requester.<sup>15</sup> The OMB Fee Guidelines "educational institution" definition includes various schools, as well as institutions of higher learning and vocational education, "which operate[] a program or programs of scholarly research."<sup>16</sup> To qualify for inclusion in this fee subcategory, the OMB Fee Guidelines specify that the request must serve a scholarly research goal of the institution, not an individual goal.<sup>17</sup> While historically professors were the most likely individuals to fall into this category,<sup>18</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>19</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>20</sup>

### Noncommercial Scientific Institution Requester

---

<sup>15</sup> See id.

<sup>16</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 requester as "nothing in the FOIA statute or its implementing regulations limits the definition of 'educational institution' to an entity with only one location or funding source").

<sup>17</sup> See OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

<sup>18</sup> See id. at 10,014 (explaining that a "request from a professor of geology at a State university" requesting records "relating to soil erosion, written on letterhead of the Department of Geology" would qualify); see also Long v. DHS, 113 F. Supp. 3d at 104-05 (finding that professors who make request for records "for use in their research 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>19</sup> 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>20</sup> Id. at 693 (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).

The second type of requester in this category is the noncommercial scientific institution requester.<sup>21</sup> For this type of requester, a "noncommercial scientific institution" is defined as a "noncommercial" institution that is "operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry."<sup>22</sup>

### Representative of the News Media

The third type of requester in this category is the representative of the news media.<sup>23</sup> As part of the OPEN Government Act of 2007,<sup>24</sup> Congress borrowed from the Court of Appeals for the District of Columbia Circuit's opinion in National Security Archive v. DOD<sup>25</sup> to statutorily define the term "representative of the news media" for the first time.<sup>26</sup> This type of requester 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 statute also anticipates the potential growth of alternative news media entities, specifically endorsing such alternative media as satisfying the statutory definition.<sup>29</sup> Finally, the statutory definition specifies that freelance journalists shall be

---

<sup>21</sup> See [5 U.S.C. § 552\(a\)\(4\)\(A\)\(ii\)\(II\)](#).

<sup>22</sup> [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,018.

<sup>23</sup> See [5 U.S.C. § 552\(a\)\(4\)\(A\)\(ii\)\(II\)](#).

<sup>24</sup> See [Pub. L. No. 110-175, 121 Stat. 2524](#) § 3 (codified at [5 U.S.C. § 552\(a\)\(4\)\(A\)\(ii\)](#)).

<sup>25</sup> 880 F.2d at 1387 (defining "representative of the news media").

<sup>26</sup> See Cause of Action v. FTC, 799 F.3d 1108, 1120 (D.C. Cir. 2015) (noting that Congress "incorporated 'the definition of media requester that was announced by the DC Circuit in National Security Archive [880 F.2d at 1387]" when it amended the FOIA (quoting 153 CONG. REC. 22,945 (2007) (statement of Sen. Kyl))).

<sup>27</sup> [5 U.S.C. § 552\(a\)\(4\)\(A\)\(ii\)](#); see Nat'l Sec. Archive, 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. Priv. Info. Ctr. v. DOD, 241 F. Supp. 2d 5, 14 (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\(a\)\(4\)\(A\)\(ii\)](#) ("Examples 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

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>

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;

---

or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities”).

<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 this regard); see also [Brown v. U.S. Patent & Trademark Off.](#), 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)), *aff’d per curiam*, 226 F. App’x 866 (11th Cir. 2007).

<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 at 106 (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), *reconsideration denied on other grounds*, No. 11-1534, 2013 WL 1149946 (D. Conn. Mar. 19, 2013), *aff’d*, 570 F. App’x 54 (2d Cir. 2014); [ACLU of Wash. v. DOJ](#), No. 09-0642, 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](#), 799 F.3d at 1120.



(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 the requester, not [the] request" because 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 solely 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 that 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 the news media.<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>

---

<sup>34</sup> *Id.* (citing [5 U.S.C. § 552\(a\)\(4\)\(A\)\(ii\)](#)).

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

<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 1121-22 (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 "'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.

### *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>42</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 or intended use, or both, that determines the requester category for fee purposes.<sup>43</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>44</sup> Similarly, the FOIA expressly provides that an agency is permitted to toll the twenty-day time frame to respond to a request "if necessary to clarify with the requester issues regarding [a] fee assessment."<sup>45</sup> (For a discussion of when it is appropriate to make such an inquiry, see Procedural Requirements, Time Limits.)

An agency need not undertake a "fee category" analysis in any instance in which it has granted a full fee waiver.<sup>46</sup> Finally, an agency is not required to establish at an earlier

---

<sup>42</sup> See [5 U.S.C. § 552\(a\)\(4\)\(A\)\(ii\)\(III\)](#); see also, *Nat'l Sec. Couns. v. CIA*, 931 F. Supp. 2d 77, 85 n.4 (D.D.C. 2013) (noting that "'all other' category consists of all individuals who are not 'commercial' requesters, 'non-commercial educational or scientific institution' requesters, or 'representatives of the news media' requesters"); *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>43</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) (determining that "[a] party's counsel is not the 'requester' for purposes of a fee waiver" request).

<sup>44</sup> See [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,018.

<sup>45</sup> [5 U.S.C. § 552\(a\)\(6\)\(A\)\(ii\)\(II\)](#).

<sup>46</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 per curiam on other grounds*, 277 F. App'x 16 (1st Cir. 2008); *Prison Legal News v. Lappin*, 436 F. Supp. 2d 17, 27 n.5 (D.D.C. 2006) (finding "no need to analyze" entitlement to news media status where plaintiff was entitled to full fee waiver).



date a requester's proper fee category with regard to any future FOIA requests that requester might make,<sup>47</sup> given that a requester's category can change over time.<sup>48</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>49</sup> The fees that may be charged to a particular requester are dependent upon the requester's fee category.

Commercial use requesters are assessed all three types of fees.<sup>50</sup> Requesters determined to be educational institution requesters, noncommercial scientific institution requesters, or representatives of the news media are assessed only duplication fees.<sup>51</sup> Requesters who do not fall within either of the preceding two categories are assessed both search fees and duplication fees.<sup>52</sup> OMB recognized that costs would necessarily vary

---

<sup>47</sup> See, e.g., Long v. DHS, 113 F. Supp. 3d at 108 (declining to issue declaratory judgment as to fee status, indicating that "[a]gencies must make an independent fee status determination for each request"); Long v. DOJ, 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" (quoting Long v. ATF, 964 F. Supp. 494, 498 (D.D.C. 1997))); Long v. ATF, 964 F. Supp. at 498-99 (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>48</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 v. DOJ, 450 F. Supp. 2d at 85 (indicating that "an entity's status can change"); Long v. ATF, 964 F. Supp. at 498 (same).

<sup>49</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(I)-(III) (2018); 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>50</sup> See 5 U.S.C. § 552(a)(4)(A)(ii)(I); see also OMB Fee Guidelines, 52 Fed. Reg. at 10,019.

<sup>51</sup> See 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>52</sup> See id. § 552(a)(4)(A)(ii)(III).

from agency to agency, and directed that each agency promulgate regulations specifying the specific charges for search,<sup>53</sup> review,<sup>54</sup> and duplication<sup>55</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>56</sup> The term "search" means locating records or information either "manually or by automated means."<sup>57</sup> 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>58</sup> The OMB Guidelines direct that searches for responsive records should be done in the "most efficient and least expensive manner."<sup>59</sup>

"Review" fees, which may only be charged to commercial use requesters, consist of the "direct costs incurred during the initial examination of a document for the purposes

---

<sup>53</sup> [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,018 (stating that "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>54</sup> *Id.* at 10,017-18 (explaining that 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>55</sup> *Id.* at 10,018 ("Agencies shall establish an average agency-wide, per-page charge for paper copy reproduction of documents.").

<sup>56</sup> *See id.* at 10,017.

<sup>57</sup> [5 U.S.C. § 552\(a\)\(3\)\(D\)](#); *see also* [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>58</sup> *See* [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,019; *see also* [TPS, Inc. v. Dep't of the Air Force](#), No. 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 exhibit to agency'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); [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 is unproductive).

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

of determining whether [it] must be disclosed [under the FOIA]."<sup>60</sup> Review time thus includes processing records for disclosure, i.e., doing all that is necessary to prepare them for release,<sup>61</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>62</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 applicability of other exemptions not previously considered"<sup>63</sup> and that review fees "for such a subsequent review would be properly assessable."<sup>64</sup>

---

<sup>60</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 use 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>61</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. 10-1735, 2011 WL 710977, at \*5-6 (N.D. Ill. Feb. 22, 2011) (noting that cost of submitter notice required under Exec. Order No. 12,600 is chargeable to commercial use requester).

<sup>62</sup> See [5 U.S.C. § 552\(a\)\(4\)\(A\)\(iv\)](#); see also [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,017, 10,018; *OSHA Data/CIH, Inc.*, 220 F.3d at 162 (noting that agency's regulations state that requesters are "not charged for review at the administrative appeal level" for exemptions "already applied at the initial level" (quoting agency's regulation)); cf. *Hall & Assocs. v. EPA*, 846 F. Supp. 2d 231, 240 (D.D.C. 2012) (supporting the "plain meaning of 'initial review' as contemplated by the FOIA statute and [agency] regulation" in not permitting agency to charge review costs on remand from administrative appeal).

<sup>63</sup> [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,018.

<sup>64</sup> *Id.* at 10,018. But see *Hall & Assocs.*, 846 F. Supp. 2d at 240 (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'").

Under the FOIA, "duplication" fees represent the reasonable "direct costs" of making copies of records.<sup>65</sup> Copies can take various forms, including paper copies or machine-readable documentation.<sup>66</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>67</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>68</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>69</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>70</sup> (For further discussion of the readily

---

<sup>65</sup> [5 U.S.C. § 552\(a\)\(4\)\(A\)\(iv\)](#); see [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,018.

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

<sup>67</sup> See [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,017, 10,018 (detailing elements included in direct costs of duplication).

<sup>68</sup> See [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,018; [FOIA Update, Vol. XI, No. 3](#), at 4 n.25 ("Department of Justice Report on 'Electronic Record' FOIA Issues, Part II"); see also [Nat'l Sec. Couns. v. DOJ](#), No. 18-5171, 2018 WL 6167377, at \*1 (D.C. Cir. Nov. 1, 2018) (per curiam) (finding that district court properly concluded that fee assessed to provide electronic copies of records on CD was not excessive); [Nat'l Sec. Couns. 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 agency's direct costs to prepare CDs).

<sup>69</sup> See [OMB Fee Guidelines](#), 52 Fed. Reg. 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. Couns. v. DOJ](#), 848 F.3d at 471-72 (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>70</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); cf. [Public.Resource.org v. IRS](#), 78 F. Supp. 3d 1262, 1266-68 (N.D. Cal. 2015) (finding that one-time \$6,200 agency expense "to set up a protocol and train staff" in order to accommodate plaintiff's format request would not "significantly burden or interfere with the agency's ability to respond to FOIA requests" thus requiring agency to produce records in plaintiff's chosen format without cost to plaintiff).

reproducible requirement in responding to FOIA requests, see Procedural Requirements, Responding to FOIA Requests.)

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>71</sup>

The OMB Guidelines also 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>72</sup> With regard to any contractor services that agencies may 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 these tasks."<sup>73</sup>

### **Fee Restrictions**

The FOIA includes restrictions both on the assessment of certain fees<sup>74</sup> and on the authority of agencies to ask for an advance payment of a fee.<sup>75</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>76</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>77</sup>

---

<sup>71</sup> [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,018 (explaining that "complying with requests for special services such as [certifying that records are true copies or sending records by special methods] is entirely at the discretion of the agency [, and] neither the FOIA nor its fee structure cover these kinds of services"); *cf. id.* at 10,016 (specifying that charges for ordinary packaging and mailing are to be borne by government).

<sup>72</sup> *See id.* 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.").

<sup>73</sup> *Id.*

<sup>74</sup> *See* [5 U.S.C. § 552\(a\)\(4\)\(A\)\(iv\)\(I\)-\(II\), \(viii\) \(2018\)](#).

<sup>75</sup> *See id.* [§ 552\(a\)\(4\)\(A\)\(v\)](#); *see generally* OIP Guidance: [Guidance for Agency FOIA Regulations](#) (posted 09/08/2016); OIP Guidance: [Template for Agency FOIA Regulations](#) (posted 09/08/2016).

<sup>76</sup> *See* [5 U.S.C. § 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>77</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](#), No. 02-05471, 2005 WL 756573, at \*8 (N.D. Cal. Mar. 31, 2005) (upholding

The FOIA also restricts agencies from assessing certain fees when the FOIA's time limits are not met, unless certain exceptions are satisfied.<sup>78</sup> Specifically, no search fees may be charged to “all other” or “commercial use” requesters and no duplication fees may be charged to requesters in preferred fee categories, i.e., representatives of the news media and educational or noncommercial scientific institution requesters, unless one of three exceptions to the prohibition is met.<sup>79</sup> First, if unusual circumstances apply and the agency provided timely written notice to the requester of those unusual circumstances, the agency has ten additional days to process the request and can assess fees as usual.<sup>80</sup> Second, if the agency determines that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, the agency can charge fees as usual if it: (1) provided timely written notice of unusual circumstances, (2) provided the requester with the opportunity to limit the scope of the request, (3) offered the services of its FOIA Public Liaison and the Office of Government Information Services, and (4) discussed with the requester how they could narrow the scope of their request (or made no less than three good-faith attempts to do so).<sup>81</sup> Third, 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>82</sup>

Agencies 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

---

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); Trupei v. DEA, No. 04-1481, 2005 WL 3276290, at \*3 (D.D.C. Sept. 27, 2005) (upholding agency's refusal to expend additional search time without payment of fees where statutory allowance of two hours was already exceeded), dismissed, No. 06-5083, 2006 WL 2228935 (D.C. Cir. July 8, 2006).

<sup>78</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).

<sup>79</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>80</sup> [5 U.S.C. § 552\(a\)\(4\)\(A\)\(viii\)\(II\)\(aa\)](#).

<sup>81</sup> Id. [§ 552\(a\)\(4\)\(A\)\(viii\)\(II\)\(bb\)](#); see also Rojas v. FAA, 407 F. Supp. 3d 856, 860-61 (D. Ariz. 2019) (finding that agency complied with notice requirements for existence of unusual circumstances thereby allowing it to assess fees, and that agency need only *determine* "that the response would require more than 5,000 pages" rather than *notify* requester of such).

<sup>82</sup> Id. [§ 552\(a\)\(4\)\(A\)\(viii\)\(II\)\(cc\)](#).



a properly assessed fee in a timely manner (i.e., within thirty days of the billing date).<sup>83</sup> The District Court for the District of Columbia has recognized that estimated fees are not intended to be used to discourage requesters from exercising their access rights under the FOIA.<sup>84</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>85</sup> Further, 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

---

<sup>83</sup> See id. [§ 552\(a\)\(4\)\(A\)\(v\)](#); [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,020; see also Otero v. DOJ, No. 18-5080, 2019 WL 4565497, at \*1 (D.C. Cir. Sept. 4, 2019) (per curiam) (upholding agency's refusal to complete processing of request unless requester paid fees assessed for search already conducted in prior requests); O'Meara v. IRS, No. 97-3383, 1998 WL 123984, at \*1 (7th Cir. Mar. 17, 1998) (upholding agency's demand for advance payment when fees exceeded \$800); Morales v. Pension Benefit Guar. Corp., No. 10-1167, 2012 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"); 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), subsequent determination on other grounds, 715 F. Supp. 2d 24 (D.D.C. 2010); 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 [agency] to require" advance payment); Brunsilus v. DOE, 514 F. Supp. 2d 30, 34-36 (D.D.C. 2007) (citing agency's regulation allowing collection of fees before processing when they exceed \$250 and concluding "request is not considered received until the payment is in the agency's possession").

<sup>84</sup> See Hall v. CIA, No. 04-00814, 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>85</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); Taylor v. U.S. Dep't of the Treasury, No. 96-933, 1996 U.S. Dist. LEXIS 19909, at \*4-5 (W.D. Tex. Dec. 16, 1996) (explaining that agency regulation requires payment before records can be released), aff'd in part & remanded in part on other grounds, 127 F.3d 470 (5th Cir. 1997); cf. Lee v. DOJ, 235 F.R.D. 274, 285 (W.D. Pa. 2006) (finding that agency could 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, could repeat that "process until all districts had been searched"); 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").

purpose of avoiding the assessment of fees, the agency may aggregate those requests and charge accordingly.<sup>86</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>87</sup> 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>88</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>89</sup> but it ensures that such fees are properly borne by the requester and not by the general public.<sup>90</sup>

---

<sup>86</sup> See [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,019-20; 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>87</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) [hereinafter [Oglesby I](#)] (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. [Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.](#), 432 F.3d 945, 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>88</sup> See [OMB Fee Guidelines](#), 52 Fed. Reg. at 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" and referencing "statutory-based fee schedule programs . . . such as the NTIS [National Technical Information Service]"); see also [Wade v. Dep't of Com.](#), 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 947-49 (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," did not supersede FOIA 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 I](#)).

<sup>89</sup> See, e.g., [Wade](#), slip op. at 2, 6 (approving assessment of \$1,300 fee pursuant to National Technical Information Service's superseding fee statute and noting cost of \$210 if processed under FOIA).

<sup>90</sup> See [OMB Fee Guidelines](#), 52 Fed. Reg. at 10,017.

The superseding of FOIA fees by the fee provisions of another statute raises a related question, which has not yet been explicitly addressed by an appellate court, 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>91</sup>

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>92</sup> Requesters have been found not to have exhausted their administrative remedies when they fail to satisfy the FOIA's fee requirements,<sup>93</sup> such as failing to file an administrative

---

<sup>91</sup> Compare Oglesby I, 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) [hereinafter Oglesby II] (declining to reach fee waiver issue because plaintiff failed to exhaust administrative remedies), with Env'tl. Prot. Info. Ctr., 432 F.3d at 948 (recognizing FOIA's superseding fee provision as "exception to the fee waiver provision of FOIA").

<sup>92</sup> See 5 U.S.C. § 552(a)(3)(A); 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>93</sup> See, e.g., Oglesby II, 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."); Island Film, S.A. v. Dep't of the 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) (finding no exhaustion where plaintiff failed to specify a maximum fee and had not submitted a fee waiver request); Hines v. United States, 736 F. Supp. 2d 51, 53-54 (D.D.C. 2010) (dismissing requester's complaint due to failure to exhaust administrative remedies by not paying assessed fee, not seeking fee waiver, and not filing administrative appeal); Antonelli, 555 F. Supp. 2d at 23 (stating that "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").

appeal of an adverse fee determination,<sup>94</sup> failing to agree to pay estimated fees,<sup>95</sup> or failing to pay assessed fees.<sup>96</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>97</sup> Additionally, courts have held that a requester's obligation to comply with the agency's

---

<sup>94</sup> See, e.g., Clervrain, 2018 WL 4491224, at \*4 (finding requester did not exhaust his administrative remedies because he did not appeal "the denial of his fee waiver request"); 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. 04-2281, 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 fee waiver denial – precludes judicial review of request); Tinsley v. Comm'r of IRS, No. 96-1769, 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>95</sup> See, e.g., 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"); Dale v. IRS, 238 F. Supp. 2d 99, 107 (D.D.C. 2002) (dismissing case because plaintiff failed to make "'firm commitment' to pay the fees associated with his FOIA search"); 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); Hinojosa, 2006 WL 2927095, at \*4-5 (finding that requesters' commitment to pay up to \$50 per request "appears to satisfy" requirement of "firm promise" to pay).

<sup>96</sup> See, e.g., Trenerry v. IRS, No. 95-5150, 1996 WL 88459, at \*1 (10th Cir. Mar. 1, 1996) (explaining that exhaustion includes payment of FOIA fees); Monaghan v. DOJ, No. 09-2199, 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"), *aff'd sub nom.*, Monaghan v. FBI, 506 F. App'x 596 (9th Cir. 2013); 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"); 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).

<sup>97</sup> See, e.g., Hall & Assocs. 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 as "disingenuous" agency's contention that requester failed to exhaust by paying fees where agency failed to notify requester of fee at administrative level as required by agency fee regulation).

fee requirements does not cease after litigation has been initiated under the FOIA.<sup>98</sup> (For a further discussion of the exhaustion requirement, including exhaustion of "fee" issues, see *Litigation Considerations, Exhaustion of Administrative Remedies*).

Further, the FOIA contains no provision for reimbursement of fees if the requester is dissatisfied with the agency's response,<sup>99</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>100</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 assessed fees were lower than those estimated, to show cause why requester's overpayment should not be reimbursed.<sup>101</sup> In addition, absent specific statutory authority

---

<sup>98</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); *Scaff-Martinez v. DEA*, 770 F. Supp. 2d 17, 23 (D.D.C. 2011) (same) (quoting *Trueblood v. U.S. Dep't of Treasury*, 943 F. Supp. 64, 68 (D.D.C. 1996)); *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*, 943 F. Supp. at 68)); *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); *Goulding v. IRS*, No. 97-5628, 1998 WL 325202, at \*9 (N.D. Ill. June 8, 1998) (finding that plaintiff's constructive exhaustion did not relieve his obligation to pay authorized fees); *Trueblood*, 943 F. Supp. at 68 (stating that even if request for payment not made until after litigation commences, that fact does not relieve requester of obligation to pay reasonably assessed fees (citing *Pollack*, 49 F.3d at 120)); cf. *Pub. Citizen, Inc. v. Dep't of Educ.*, 292 F. Supp. 2d 1, 4-5 (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>99</sup> See *Stabasefski v. United States*, 919 F. Supp. 1570, 1573 (M.D. Ga. 1996) (stating that FOIA does not provide for reimbursement of fees when agency redacts portions of records that are released).

<sup>100</sup> See *Johnson v. EOUSA*, No. 98-729, 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>101</sup> See *Marino v. DOJ*, No 16-5280, 2017 WL 6553398, at \*1 (D.C. Cir. Dec. 6, 2017) (per curiam), cert. denied, 139 S. Ct. 242 (2018); see also *Stein v. DOJ*, 197 F. Supp. 3d 115, 123 (D.D.C. 2016) (finding that agency conceded an issue regarding charging duplication fees, therefore ordering agency to process request free of charge and to return advance payment remitted by requester with interest).

allowing an agency (or a subdivision of it) to do so,<sup>102</sup> all fees collected in the course of providing FOIA services are to be deposited into the Treasury of the United States.<sup>103</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>104</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>105</sup> As for the scope of the review, courts have limited their review to the administrative record before the agency at the time of its decision.<sup>106</sup> Courts have reached

---

<sup>102</sup> See, e.g., 21 U.S.C. § 379f(a)(2) (2018) (authorizing the Food and Drug Administration to "retain all fees charged for [FOIA] requests").

<sup>103</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>104</sup> See [Brown v. U.S. Patent & Trademark Off.](#), 445 F. Supp. 2d 1347, 1356 (M.D. Fla. 2006) (acknowledging some disagreement as to appropriate standard of review for media category), *aff'd per curiam*, 226 F. App'x 866 (11th Cir. 2007); [Hall v. CIA](#), No. 04-00814, 2005 WL 850379, at \*6 n.10 (D.D.C. Apr. 13, 2005) (acknowledging that there is "some dispute" as to review standard for fee limitation based on news media status (citing [Jud. Watch v. DOJ](#), 122 F. Supp. 2d 5 (D.D.C. 2000) (applying arbitrary and capricious standard), and [Jud. Watch, Inc. v. DOJ](#), 133 F. Supp. 2d 52, 53 (D.D.C. 2000) (applying de novo standard))); [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").

<sup>105</sup> See, e.g., [Brown](#), 445 F. Supp. 2d at 1356 (applying de novo standard "because review under the de novo standard or under some more deferential standard lead[s] to the same conclusion" in instant case); [Elec. Priv. Info. Ctr. v. DOD](#), 241 F. Supp. 2d 5, 9 (D.D.C. 2003) (concluding that "[t]he statutory language, judicial authority, and [Freedom of Information 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); [Jud. 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); [Hosp. & Physician Publ'g v. DOD](#), No. 98-4117, 1999 WL 33582100, at \*2 (S.D. Ill. June 22, 1999) (stating in a single sentence that court review of fee category is de novo, yet citing to statutory provision for de novo review of fee *waivers*).

<sup>106</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).



differing results on the extent of judicial deference to be given to agency fee regulations that are based upon the OMB Fee Guidelines.<sup>107</sup>

### **Fee Waivers**

The fee waiver standard of the Freedom of Information Act 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>108</sup>

The statutory fee waiver standard provides a two-prong test that 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 the disclosure.<sup>109</sup> These statutory requirements must be satisfied before properly assessable fees are waived or reduced, with the requester bearing the burden of showing the statutory standard is met.<sup>110</sup> Courts have held that requesters should address the statutory requirements in

---

<sup>107</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, 06-170, 2007 WL 1874190, at \*6 (D. Vt. June 27, 2007) (same) (quoting Media Access Project, 883 F.2d at 1071), aff'd per curiam on other grounds, 568 F.3d 341 (2d Cir. 2009), & aff'd on other grounds, 334 F. App'x 358 (2d Cir. 2009), with Jud. 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 Jud. Watch, Inc., 326 F.3d at 1313)).

<sup>108</sup> [5 U.S.C. § 552\(a\)\(4\)\(A\)\(iii\) \(2018\)](#); 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.'" (quoting [5 U.S.C. § 552\(a\)\(4\)\(A\)\(iii\)](#))).

<sup>109</sup> See [5 U.S.C. § 552\(a\)\(4\)\(A\)\(iii\)](#); see also Nat'l Sec. Couns. 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").

<sup>110</sup> See, e.g., Monaghan v. FBI, 506 F. App'x 596, 597 (9th Cir. 2013) (acknowledging that "burden is on the requester to satisfy FOIA's statutory requirements and the Department of Justice's regulatory standards"); Reynolds v. Att'y Gen. of the U.S., 391 F. App'x 45, 46 (2d Cir. 2010) (declaring that "requester bears the burden of establishing" that he satisfies two-prong test); Clemente v. FBI, 741 F. Supp. 2d 64, 75 (D.D.C. 2010) (noting that "before the

sufficient detail for the agency to make an informed decision as to whether it can appropriately waive or reduce the fees in question.<sup>111</sup> Courts have also held that requests for a waiver or reduction of fees must be considered on a case-by-case basis.<sup>112</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>113</sup>

---

agency and before a reviewing court, the FOIA requester bears the burden of demonstrating" statutory requirements for fee waiver are 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); McQueen v. United States, 264 F. Supp. 2d 502, 524 (S.D. Tex. 2003) (finding that "requester bears the burden of proving entitlement to a fee waiver"), aff'd per curiam in pertinent part, 100 F. App'x 964 (5th Cir. 2004).

<sup>111</sup> See, e.g., Nat'l Sec. Couns., 848 F.3d at 473 (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") (citations omitted); Jud. 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); S.A. Ludsin & Co. v. SBA, No. 97-7884, 1998 WL 642416, at \*1 (2d Cir. Mar. 26, 1998) (unpublished table decision) (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) (determining that conclusory statements insufficient to make public interest showing); McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1285 (9th Cir. 1987) (stating that conclusory statements will not support fee waiver request); Saldana, 715 F. Supp. 2d at 21 (holding that conclusory statements regarding public interest do not satisfy the statutory requirements); In Def. of Animals v. NIH, 543 F. Supp. 2d 83, 109 (D.D.C. 2008) (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, 25-26 (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); 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>112</sup> See Cause of Action, 799 F.3d at 1121 ("Such a case-by-case approach is correct for the public-interest waiver test, which requires that the 'disclosure of the [requested] information' be in the public interest." (quoting 5 U.S.C. § 552(a)(4)(A)(iii))); 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).

<sup>113</sup> See Dale v. IRS, 238 F. Supp. 2d 99, 107 (D.D.C. 2002) (stating that "[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) (noting that agency determined that requester was ineligible for "blanket" fee waiver because request was submitted to agency in plaintiff's counsel's name,

Consistent with the discussion noted above concerning fee categories, when the requester fails to provide sufficient information for the agency to make a fee waiver decision, the agency may ask the requester for necessary supplemental or clarifying information, while tolling the time limits provided in the FOIA.<sup>114</sup> (For a discussion of when it is appropriate to make such an inquiry, see Procedural Requirements, Time Limits.)

Courts have concluded that fee waiver determinations should be evaluated on the face of the request and not on whether the records sought will ultimately be exempt from disclosure.<sup>115</sup> Nevertheless, in the past some courts have been willing to consider whether only a partial fee waiver would be justified in certain situations, such as when the records sought are determined to already be in the public domain.<sup>116</sup>

---

not his own, but declining to address issue because plaintiff failed to exhaust administrative remedies).

<sup>114</sup> See [5 U.S.C. § 552\(a\)\(6\)\(A\)\(ii\)\(II\)](#); see, e.g., [McClellan Ecological Seepage Situation](#), 835 F.2d at 1283, 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 All. v. U.S. Bureau of Indian Affs.](#), 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. [Uniform Freedom of Information Act Fee Schedule and Guidelines](#), 52 Fed. Reg. 10,012, 10,018 (Mar. 27, 1987) (OMB Fee Guidelines specifying same in context of fee issue).

<sup>115</sup> See [Carney v. DOJ](#), 19 F.3d 807, 815 (2d Cir. 1994) (finding that "fee waiver request should be evaluated based on the face of the request and the reasons given by the requester"); [Citizens for Resp. & Ethics in Wash. v. DOJ](#), 602 F. Supp. 2d 121, 125 (D.D.C. 2009) ("Fee-waiver requests are evaluated based on the face of the request, not on the possibility of eventual exemption from disclosure.") (citations omitted); [Schoenman v. FBI](#), 604 F. Supp. 2d 174, 190 (D.D.C. 2009) (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 [Jud. Watch, Inc. v. DOT](#), No. 02-566, 2005 WL 1606915, at \*5 (D.D.C. July 7, 2005))); [Ctr. for Medicare Advoc., Inc. v. HHS](#), 577 F. Supp. 2d at 221, 241 (D.D.C. 2008) (fee waiver decision should not be based on "possibility that the records may ultimately be determined to be exempt from disclosure" (quoting [Jud. Watch, Inc.](#), 2005 WL 1606915, at \*4 (remaining citations and quotations omitted))); [Ctr. for Biological Diversity v. OMB](#), 546 F. Supp. 2d 722, 729 (N.D. Cal. 2008) (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 in which it is proper to decline a fee waiver in light of the likely privileged nature of the material found upon a search").

<sup>116</sup> See, e.g., [McClellan Ecological Seepage Situation](#), 835 F.2d at 1285-87 (holding that twenty-five percent waiver of fees was proper); [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); [Schrecker v. DOJ](#), 970 F. Supp. 49, 50-51 (D.D.C. 1997) (granting full fee waiver rather than partial fee waiver where

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>117</sup> – the Court of Appeals for the District of Columbia Circuit has held that "[d]isclosure 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>118</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>119</sup>

---

agency provided no "strong evidence" that portion of requested information already was in public domain); 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"); Seavey v. DOJ, 253 F. Supp. 3d 269, 274 (D.D.C. 2017) (noting that possible existence of information "that is repetitive to what is already public . . . does not undermine [requester's] entitlement to a fee waiver").

<sup>117</sup> See [5 U.S.C. § 552\(a\)\(4\)\(A\)\(iii\)](#).

<sup>118</sup> Cause of Action, 799 F.3d at 1115; see also [DOJ FOIA Regulations, 28 C.F.R. § 16.10\(k\) \(2019\)](#) (simplifying previous four-factor public interest analysis down to two public interest factors). See generally OIP Guidance: [Template for Agency FOIA Regulations](#) (posted 09/08/2016) (same).

<sup>119</sup> See [5 U.S.C. § 552\(a\)\(4\)\(A\)\(iii\)](#); Cause of Action, 799 F.3d at 1115 (explaining that 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 Off., 226 F. App'x 866, 869 (11th Cir. 2007) (per curiam) (holding that requester failed to adequately explain how requested records were "related to the activities and operations" of agency), reh'g denied, 253 F. App'x 924 (11th Cir. 2007); Monroe-Bey v. FBI, 890 F. Supp. 2d 92, 98 (D.D.C. 2012) (holding that agency regulation requires direct and clear connection to activities and operations of federal government); Brown v. U.S. Patent & Trademark Off., 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); Jud. 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, 96-2146, 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), summary affirmance granted, 162 F.3d 1148 (2d Cir. 1998) (unpublished table decision).

Even records submitted to the government have at times been found to reflect government activity.<sup>120</sup>

Second, courts consider whether information is "likely to contribute significantly to the public understanding" of government activities.<sup>121</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>122</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>123</sup> Courts have

---

<sup>120</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, 604 F. Supp. 2d at 192 (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 Advoc., 577 F. Supp. 2d at 240-41 (finding that although certain documents sought were "submitted by private parties seeking to do business with the federal government[,] they "were reviewed by the agency" as part of its considerations and thus concern activities of the federal 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 "theorize[d]" that such petitions were "likely to contain marginal notes" by agency employees whose "opinions are often ignored or overturned" by agency personnel of higher authority (quotation marks and internal citations omitted)).

<sup>121</sup> 5 U.S.C. § 552(a)(4)(A)(iii); see Cause of Action, 799 F.3d at 1115 (explaining that second fee waiver factor is whether information is "'likely to contribute significantly to public understanding' of those [government] operations or activities" (quoting statute)).

<sup>122</sup> Cause of Action, 799 F.3d at 1116.

<sup>123</sup> See, e.g., Monaghan, 506 F. App'x at 598 (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"); 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 that 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. 07-721, 2008 WL 4326448, at \*4 (S.D. Ohio Sept. 22, 2008) (quoting



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 significantly 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>124</sup> There is no clear consensus among the courts as to what is considered information in the public domain for purposes of a fee waiver determination.<sup>125</sup> Additionally, courts have found that the presence of

---

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, 61-62 (D.D.C. 2002) (rejecting as "rank speculation" [requester's] allegations that agency had "ulterior motive" when it published interpretive rule, thus concluding that requester "failed to establish that the disclosure it seeks has informative value").

<sup>124</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"); Jud. Watch, Inc. v. DOJ, 365 F.3d 1108, 1126-27 (D.C. Cir. 2004) (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, 19 F.3d at 815 (observing that where records "are readily available from other sources . . . further disclosure by the agency will not significantly contribute to the public's understanding"); McClellan Ecological Seepage Situation, 835 F.2d at 1286 (recognizing new information has more potential to contribute to public understanding); Coven v. OPM, No. 07-1831, 2009 WL 3174423, at \*13 (D. Ariz. 2009) (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 (quoting agency regulation)); Sloman, 832 F. Supp. at 68 (stating that public's understanding would not be enhanced to significant extent where material was previously released to other writers and "more important[ly]" was available in agency's public reading room "where the public has access and has used the information extensively").

<sup>125</sup> Compare Jud. Watch, Inc., 2001 WL 1902811, at \*10 (sustaining agency's assessment of fees for duplication of court documents, press clippings, and citizen letters where material was "'easily accessible and available to everyone else for a fee'" (quoting Durham v. DOJ, 829 F. Supp. 428, 434-35 (D.D.C. 1993))), and Durham, 829 F. Supp. at 434-35 (denying fee waiver for 2,340 pages of public court records), appeal dismissed for failure to timely file, No. 93-5354, 1994 WL 704043 (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").



standard, routine administrative material within the requested records does not necessarily militate against a fee waiver.<sup>126</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>127</sup> Relatedly, courts have held that because the proper focus must be on the benefit to be derived by the public, any personal benefit to be derived by the requester, or the requester's particular financial situation, are not considerations entitling him or her to a fee waiver.<sup>128</sup> Indeed, it is well settled that indigence alone, without a showing of a public benefit, is insufficient to warrant a fee waiver.<sup>129</sup> At the same time, the D.C. Circuit has stressed that, "the statutory criterion

---

<sup>126</sup> See Campbell, 164 F.3d at 36 (finding that "the presence of administrative material within files that also contain substantive documents does not justify charging fees for the non-substantive clutter"); Schoenman, 604 F. Supp. 2d at 191 (same); see also Citizens for Resp. & Ethics in Wash. v. HHS, 481 F. Supp. 2d 99, 112-13 (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>127</sup> Cause of Action, 799 F.3d at 1118.

<sup>128</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), cert. denied, 138 S. Ct. 1269 (2018); 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") (citations omitted); Ferrigno v. DHS, No. 09-5878, 2011 WL 1345168, at \*6 (S.D.N.Y. Mar. 29, 2011) (holding that private benefit outweighed public interest where "request for the emails seems to be little more than an attempt to continue the 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. 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. May 24, 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"), aff'd on other grounds, 208 F. App'x 906 (Fed. Cir. 2006).

<sup>129</sup> See, e.g., Otero v. DOJ, No. 18-5080, 2019 WL 4565497, at \*1 (D.C. Cir. Sept. 4, 2019) (per curiam) (observing that "indigent status alone does not entitle an individual to a fee waiver"); Reynolds, 391 F. App'x at 46 (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

focuses only on the likely *effect* of the information disclosure" and "it no longer matters whether the information will also (or even primarily) benefit the requester" or "whether the requester made the request for the *purpose* of benefiting itself."<sup>130</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>131</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>132</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,"<sup>133</sup> "[f]ee-waiver

---

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" (quoting Ely, 753 F.2d at 165)); Bansal v. DEA, No. 06-3946, 2007 WL 551515, at \*6 (E.D. Pa. Feb. 16, 2007) (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.C.A.N. 6285, 6287 (eliminating proposed fee waiver provision for indigents and determining that "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).

<sup>130</sup> Cause of Action, 799 F.3d at 1118; see also Bartko v. DOJ, 898 F.3d 51, 75-76 (D.C. Cir. 2018) (holding that requester qualified for fee waiver for records concerning his criminal case because "[a]ll that matters is whether [the] records are likely to significantly contribute to public understanding" regardless of whether the request was made primarily to benefit the requester) (citing Cause of Action, 799 F.3d at 1118)); Bartko v. DOJ, No. 17-781, 2019 WL 30691695, at \*3 (D.D.C. July 12, 2019) (finding that request for records concerning plaintiff's own criminal case should be granted a fee waiver where plaintiff explained that "the public interest is to educate the public about a larger pattern of prosecutorial misconduct" in the jurisdiction and "Plaintiff's case took place in a district that is fraught with discovery abuses").

<sup>131</sup> Cause of Action, 799 F.3d at 1115-16 (rejecting requirement of agency regulation that requester must show increase in understanding of "public at large"); accord 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").

<sup>132</sup> Cause of Action, 799 F.3d at 1116 (quoting Carney, 19 F.3d at 815).

<sup>133</sup> Id. at 1117.

applicants must support their claims with "reasonable specificity."<sup>134</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>135</sup> For example, specialized knowledge may be required to

---

<sup>134</sup> Id. (quoting Jud. Watch, Inc., 326 F.3d at 1312).

<sup>135</sup> Compare Nat'l Sec. Couns., 848 F.3d at 474 (finding requester's website to be "no more than . . . a clearing house for the records [it] receive[d] through FOIA" (quoting agency denial letter)), Monaghan, 506 F. App'x at 598 (holding that publication on "sub-blog . . . not easily accessible through general searches conducted on common search engines" does not demonstrate ability to effectively disseminate information), Larson v. CIA, 843 F.2d 1481, 1483 & n.5 (D.C. Cir. 1988) (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 professional or personal 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 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 Bartko, 898 F.3d at 75 (granting fee waiver where requester "identified three public service websites with which he had already shared information"), 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), Friends of Oceano Dunes v. Salazar, No. 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)), Cnty. 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 Com., No. 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). Cf.

extract, synthesize, and effectively convey the information to the public, and courts have taken that into account in making fee waiver determinations.<sup>136</sup>

Once an agency determines that the requester has met the "public interest" requirements for a fee waiver, the statute requires that "disclosure of the information" not be "primarily in the commercial interest of the requester."<sup>137</sup>

---

McClain, 13 F.3d at 221 (stating that fee waiver must be assessed in light of identity and objectives of requester).

<sup>136</sup> See Nat'l Sec. Couns., 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 Ecological Seepage Situation, 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 in analyzing requested records, "he fails to indicate that the [s]chool has agreed to assist him"); S. Utah Wilderness All. 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 its expertise in "analyzing and disseminating records" for fee waiver purposes); W. Watersheds Project 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 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 & Co., 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 v. Lappin, 602 F. Supp. 2d 197, 205 (D.D.C. 2009) (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>137</sup> 5 U.S.C. § 552(a)(4)(A)(iii); see Cause of Action, 799 F.3d at 1115 (explaining that third fee waiver factor is requirement that information "not be 'primarily in the commercial interest of the requester'"); cf. Cause of Action, 799 F.3d at 1118 (holding 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"); Rsch. 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); VoteHemp, Inc., 237 F. Supp. 2d at 65

The FOIA does not explicitly reference any time period within which an agency must resolve a fee waiver issue,<sup>138</sup> although agencies are required to include in their Annual FOIA Reports the number of fee waiver requests that were granted and denied and the average and median number of days for adjudicating fee waiver determinations each fiscal year.<sup>139</sup> The statutory twenty-working day time period to respond to a request has been applied to the resolution of fee waiver (and fee) issues by several courts, including the D.C. Circuit.<sup>140</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>141</sup> The Courts of Appeals for the D.C. and Fifth Circuits have held that exhaustion of administrative remedies in connection with fee waiver claims includes filing an administrative appeal.<sup>142</sup> (For a discussion of

---

(concluding that nonprofit organization, as advocate for free market in controlled substance, had commercial interest in requested records).

<sup>138</sup> See [5 U.S.C. § 552\(a\)\(4\)\(A\)](#).

<sup>139</sup> See [id. § 552\(e\)\(1\)\(M\)](#); see also OIP Guidance: [Department of Justice Handbook for Agency Annual Freedom of Information Act Reports](#) (posted 2013, updated 11/04/2019).

<sup>140</sup> See, e.g., [Jud. Watch, Inc.](#), 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); [Law. Comm. for C.R. v. U.S. Dep't of Treasury](#), No. 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"); [Jud. Watch, Inc. v. DOE](#), 310 F. Supp. 2d 271, 293 (D.D.C. 2004) (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), [rev'd in part on other grounds](#), 412 F.3d 125 (D.C. Cir. 2005).

<sup>141</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 (2019) (contemplating administrative appeals of denials of fee waivers and reductions); DOT FOIA Regulations, 49 C.F.R. § 7.32 (2019) (outlining procedures for appealing decisions not to disclose records or waive fees); see also OIP Guidance: [Guidance for Agency FOIA Regulations](#) (posted 09/08/2016); OIP Guidance: [Template for Agency FOIA Regulations](#) (posted 09/08/2016).

<sup>142</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 Com.](#), 907 F.2d 203, 209 (D.C. Cir. 1990) (declining

constructive exhaustion of administrative remedies, see *Litigation Considerations, Exhaustion of Administrative Remedies.*)

As part of the Freedom of Information Reform Act of 1986,<sup>143</sup> a specific judicial review provision for fee waivers was added to the FOIA,<sup>144</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>145</sup> Thus, courts have not permitted either party to supplement the record or offer new argument or rationale for seeking a fee waiver or for denying such a request.<sup>146</sup> To the extent that an agency in its fee waiver analysis does not consider a

---

consideration of fee waiver request when not pursued during agency administrative proceeding).

<sup>143</sup> Pub. L. No. 99-570, 100 Stat. 3207.

<sup>144</sup> See [5 U.S.C. § 552\(a\)\(4\)\(A\)\(vii\)](#).

<sup>145</sup> See *id.*; see also *Reynolds*, 391 F. App'x at 46 (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); *Jud. Watch, Inc.*, 326 F.3d at 1311 (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*, 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).

<sup>146</sup> See, e.g., *Reynolds*, 391 F. App'x at 46 (affirming district court's determination that agency properly denied fee waiver request without consideration of 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*, 110 F.3d at 55 (reiterating that agency's letter "must be reasonably calculated to put the requester on notice" as to reasons for fee waiver denial, and court will only consider such reasons offered in the letter); *Larson*, 843 F.2d at 1483 (determining that information not part of administrative record may not be considered by district court when reviewing agency fee waiver denial); *Bensman v. Nat'l Park Serv.*, 806 F. Supp. 2d 31, 43 (D.D.C. 2011) (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 \*1 (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*, 2008 WL 4326448, at \*3 (concluding that when agency administratively determined that plaintiff's request met factor one, it could not raise "post hoc rationalization . . . to deny plaintiff's request on this first factor" during litigation); *Physicians Comm. for Responsible Med.*, 480 F. Supp. 2d at 121 n.1 (disallowing plaintiff's submission of affidavit that was not part of administrative record); *Citizens for Resp. & Ethics in Wash.*, 481 F. Supp. 2d at 107 n.1 (refusing to take into account material submitted by both parties that were not before agency when administrative appeal considered); *Brown*, 445 F. Supp. 2d at 1354 (observing that "administrative record should consist of those documents



factor or factors addressed by the requester in its request, courts generally have construed such factors as not at issue and thus conceded.<sup>147</sup>

---

which [agency] used to determine whether Plaintiff's fees should be waived"); Pub. Citizen, Inc., v. Dep't of Educ., 292 F. Supp. 2d 1, 5 n.5 (D.D.C. 2003) (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 fee waiver"); see also Ctr. for Pub. Integrity v. HHS, No. 06-1818, 2007 WL 2248071, at \*5 (D.D.C. Aug. 3, 2007) (requester category context) (noting that "mere inclusion" of web address in request insufficient to include all information on website as part of administrative record).

<sup>147</sup> See, e.g., Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Educ., 593 F. Supp. 2d 261, 269-70 (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., 480 F. Supp. 2d at 122 (deciding that because agency did not raise any argument with regard to "commercial interest prong[,]," plaintiff's commercial interest is not at issue).