ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13 – 5335

Cause of Action,
Plaintiff-Appellant,

v.

Federal Trade Commission,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia
Civil Action No. 12-cv-00850 (Hon. Emmet G. Sullivan)

Opening Brief of Plaintiff-Appellant Cause of Action

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Appellant states as follows:

A. Parties and Amici

Cause of Action was the Plaintiff below and is the Appellant. The Federal Trade Commission was the Defendant below and is the Appellee.

There were no amici in the district court. Reporters Committee for Freedom of the Press, *et al*., intend to participate as amici supporting Appellant..

There are no intervenors.

B. Ruling Under Review

The ruling under review is *Cause of Action v. Federal Trade Commission*, 12-cv-0850-EGS (D.D.C. Aug. 19, 2013) (ECF No. 20), made appealable by the final consent judgment issued September 11, 2013 (ECF No. 26). The decision is in the Appendix at A374, and is published as *Cause of Action v. Federal Trade Commission*, 961 F. Supp. 2d 142 (D.D.C. 2013).

C. Related Case

This case has never been before this Court. There are no other related cases pending.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Appellant Cause of Action is a nonprofit corporation. It has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

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GLOSSARY

COA	Cause of Action
FOIA	Freedom of Information Act
FTC	Federal Trade Commission
FIRA	Freedom of Information Reform Act of 1986

JURISDICTIONAL STATEMENT

Cause of Action properly exhausted its administrative remedies before filing suit in district court. *Oglesby v. Dep't of Army*, 920 F.2d 57, 61 (D.C. Cir. 1990). The district court had subject matter jurisdiction under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201, *et seq.* (declaratory judgment), and 5 U.S.C. § 552(a)(4)(B) (Freedom of Information Act). Judge Emmet G. Sullivan granted Appellee's motion for summary judgment. *Cause of Action v. Fed. Trade Comm'n*, 12-cv-00850-EGS (ECF No. 19 (Aug. 19, 2013 memorandum opinion), ECF No. 20 (Aug. 19, 2013 order), and ECF No. 26 (Sept. 12, 2013 final consent judgment and appealable order)). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the district court erroneously find that Cause of Action did not qualify for news media requestor status with respect to its Freedom of Information Act requests designated by FTC as FOIA-2011-01431 and FOIA-2012-00227?

2. Did the district court erroneously find that Cause of Action's requests for news media requestor status and a public interest fee waiver were moot with respect to its Freedom of Information Act Request designated by FTC as FOIA-2012-00687 and dated January 27, 2012?

3. Did the district court erroneously find that Cause of Action did not qualify for a public interest fee waiver with respect to its Freedom of Information Act Requests designated by FTC as FOIA-2011-01431 and FOIA-2012-00227?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the Statutory and Regulatory Addendum.

STATEMENT OF THE CASE

I. A Case of First Impression: "Representative Of The News Media" Status After The OPEN Government Act of 2007.

In 1986, Congress enacted the Freedom of Information Reform Act of 1986 (FIRA), Pub. L. No. 99-570, §§ 1801-04, 100 Stat. 3207, 3207-08 (1986), providing that executive branch agencies should grant Freedom of Information Act (FOIA) fee waivers if the information sought is in the public interest or if the requestor is a representative of the news media. *Id.* § 1803 (amending ¶ (4)(A) of 5 U.S.C. § 552(a)).

In 1989, this Court decided *National Security Archive v. Dep't of Defense*, 880 F.2d 1381 (D.C. Cir. 1989). Guided by FIRA's legislative history, the Court broadly construed the term "representative of the news media" as "any person or organization which regularly publishes or disseminates information to the public." *Id.* at 1385-86 (citing 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986)).

In 2003, the United States District Court for the District of Columbia decided that the Electronic Privacy Information Center (EPIC) qualified as a "representative of the news media." *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 6-15 (D.D.C. 2003) [hereinafter *EPIC*]. The court's decision in

EPIC was based, in large part, on the fact that EPIC, an organization founded in 1994, published a periodic electronic newsletter. *Id.* at 13-14. The court in *EPIC* adopted the reasoning in *National Security Archive*, as well as FIRA's legislative history, in concluding EPIC indeed qualified as a representative of the news media:

> The fact that EPIC's newsletter is disseminated via the Internet to subscriber's e-mail addresses does not change [their status as a representative of the news media]. . . . More importantly, the regulation anticipates technological advancements, recognizing that 'as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in [the news media] category.'" *Id.* at 14.

On December 17, 2007, Congress enacted the "Openness Promotes Effectiveness in our National Government Act of 2007" or the "OPEN Government Act of 2007," Pub. L. No. 110-175, 121 Stat. 2524 (2007) (OPEN Government Act). The OPEN Government Act defined "representative of the news media" to include "any person or entity delivering news to a segment of the public via methods of electronic dissemination." *Id.* § 3, Protection Of Fee Status For News Media. It mandated that agencies recognize "alternative media" were entitled to news media fee status: "alternative media *shall* be considered to be news-media entities." *Id.* (emphasis supplied).

The District of Columbia Circuit has not had occasion to apply or clarify the definition of "representative of the news media" to nonprofit entities that rely in

the main on alternative media since the OPEN Government Act was enacted in 2007. Accordingly, this case presents issues of first impression.

II. Prelude To Avoidable Litigation: FTC Targets Cause Of Action.

This case presents a cautionary tale about the harm done when agencies use fee waiver categorizations to chill the government accountability activities of nascent nonprofit organizations in the age of new media, especially when those nonprofits, like Cause of Action (COA) here, criticize agency actions. A020; A026; A181; A184.[1] Though this case has many facets, it can be distilled into two basic questions. First, should the court below have applied a 1956 media standard to a 2012 world to determine if a nonprofit is a representative of the news media, and/or qualifies for a public interest fee waiver, under FOIA? And, second, should the FTC have been allowed to use FOIA's news media status and/or fee waiver provisions against COA because the agency knew COA would be critical of its actions?

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[1] In its April 4, 2012 appeal to FTC regarding its January 27, 2012 FOIA request, COA expressly indicated its intent to use the information gleaned from its FOIA request as raw material for an article titled, "**How the FTC Denies Fee Waivers to Organizations That Seek Information About FTC Operations**." A181 (emphasis in bold supplied). COA also explicitly stated it intended to file another report titled, "The FTC and the Guides Concerning Endorsements: Why the Change?". *Id.* Both the FTC and the district court refused to consider this information in light of COA's third FOIA request, but instead found the issue of fee waivers "moot." A397.

COA is a nonprofit, nonpartisan 501(c)(3) government accountability organization that advocates for economic freedom and opportunity by educating the public about the threat posed by improvident federal regulations, spending, and cronyism. A008; A020-21; A030. To carry out its educational mission, COA investigates federal agency over-reach and then publicly disseminates its findings through two periodical-newsletters, *Cause of Action News* and *Agency Check*, a high traffic website, and through social media networks including Facebook and Twitter. A027; A030; A048–50; A155–56; A159; A181–83.

COA began operating on August 15, 2011 and soon thereafter, its work and findings began being featured in "traditional" high-profile media publications. *See* A331-36; *see also* A031, n.11; A047, n.8; A155, n.7; A183, n. 25.

FTC's unreasonable refusal to grant COA news media requestor status and a public interest fee waiver resulted in the submission of three successive, distinct FOIA requests regarding the Guides as well as the operative issue of fee waivers. A009–018. COA lodged a series of discrete appeals and requests for reconsideration.[2] However, at every turn, FTC played a game of administrative hide-and-seek by failing to provide a fee agreement under 16 C.F.R. § 4.8(d)(3)

[2] COA's third FOIA request was filed at the express suggestion of an Office of Government Information Services (OGIS) representative when FTC refused to engage in mediation of this dispute. A016.

(2012), thereby violating its own regulations.[3] FTC denied COA news media requestor status and a public interest fee waiver for FOIA requests one and two, and unilaterally declared the fee waiver and media requestor status moot for request three.[4] *Id.*

At all times, COA acted in good faith to secure the requested information, as the circumstances of Request Three demonstrate. *See supra* notes 2 & 3. If only FTC had followed FIRA and the OPEN Government Act, this case would not have been necessary.

III. FTC's Tripartite Denial: COA's FOIA Fee Waivers And Requests For News Media Requestor Status.

A. FOIA Request One (FOIA–2011–01431): August 30, 2011.

On November 28, 2008, FTC proposed to regulate on-line testimonials and consumer product endorsements by social media authors and bloggers. *See* Guides Concerning the Use of Endorsements and Testimonials in Advertising, 73 Fed. Reg. 72,374, *adopted in* 74 Fed. Reg. 53,124 [hereinafter the Guides]; *see also* A009 ¶ 10. This rule was finalized on October 15, 2009. 74 Fed. Reg. 53,124

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[3] "If the [fee agreement] required by this section is absent, and if the estimated fees exceed $25.00, *the requester will be advised of the estimated fees* and the request will not be processed until the requester agrees to pay such fees." 16 C.F.R. § 4.8(d)(3) (emphasis supplied).

[4] Cause of Action will refer to its August 30, 2011 FOIA (FOIA–2011–01431) as Request One, to its October 28, 2011 FOIA (FOIA–2012–00227) as Request Two, and to its January 27, 2012 FOIA (FOIA–2012–00687) as Request Three. A375–78.

(codified at 16 C.F.R. §§ 255.0–255.5) (2009). Among other things, the Guides required social media authors and bloggers to disclose their relationships "with a seller of the product or service that they have endorsed." A009 ¶ 9.

In or about August 2011, COA received reliable information[5] that FTC was unfairly and inequitably enforcing the Guides based on requestors' political views, and infringing free speech rights. A009 ¶ 10; A342 ¶ 3 (Epstein Decl.). Therefore, on August 30, 2011, COA submitted Request One for documents relating to FTC's drafting, formulation, and revision of the Guides. A009 ¶¶ 10-11; A020; A342 ¶ 4.

In a phone call with FTC on September 14, 2011, COA narrowed its request to the drafting, formulation, and revision of the Guides generated between January 1, 2009 and September 6, 2011, and *concerning social media authors.*[6] A204 (emphasis added); *see also* A223 ¶ 7. COA requested a public interest fee waiver and news media requestor status. A021.

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[5] As of August 2011, FTC was on notice that Request One would elicit documents and information critical of FTC's actions in unfairly and inequitably enforcing the Guides. "It has come to our attention [that FTC] has begun to initiate investigations and enforcement actions against businesses or individual bloggers who may have violated [FTC's Guides]. *Because disclosure requirements put restrictions on the commercial speech of bloggers and other marketers, the FTC's actions in this area justify close scrutiny*." A020 (emphasis supplied).

On September 22, 2011, FTC denied the public interest fee waiver. A025. COA appealed FTC's denial of the public interest fee waiver request on September 26, 2011. A026-27. On October 7, 2011, FTC denied COA's appeal. A028.

FTC also denied COA's request for news media requestor status; instead FTC classified COA as an "Other (General Public)" requestor and provided 100 pages of records pursuant to its FOIA regulations. *Id.* Nathaniel Fairbanks Gray[7] indicated in his Declaration that he had located more than 100 pages of records by stating he had "*selected and reviewed 100 pages*" of responsive records. A243 ¶ 14 (Gray Decl.) (emphasis supplied). However, FTC never disclosed the *total* number of pages it located, nor did it advise COA of the estimated fees associated with this request as required by 16 C.F.R. § 4.8(d)(3).[8]

On December 20, 2011, FTC denied COA's appeals regarding Request One. A040.[9]

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[7] Paralegal Specialist in FTC's Office of General Counsel who performed the initial FOIA search at issue, and who directed the second, including the search terms used.

[8] While FTC also acknowledged that COA sought records about how the Guides affected "social media authors," neither Mr. Gray nor Ms. Modell (an attorney in FTC's Bureau for Consumer Protection) used this search term when searching for responsive records. *See* A241 ¶ 6; A242 ¶ 10.

[9] COA filed successive appeals for Request One on October 28, 2011 and December 12, 2011. A029-31; A037–39. COA again requested reconsideration of its public interest fee waiver and news media requestor status requests for Request One on January 27, 2012, A152-60, which FTC again denied on February 27, 2012. A161-64.

B. FOIA Request Two (FOIA–2012–00227): October 28, 2011.

On October 28, 2011, COA submitted Request Two. A041-43.[10] On January 6, 2012, FTC denied COA's requests for a public interest fee waiver and news media requestor status. A050–51.

On January 27, 2012, COA appealed these denials. A152–60. FTC upheld the denials on February 27, 2012. A161–64.

C. FOIA Request Three (FOIA 2012-00687): January 27, 2012.

COA filed Request Three on January 27, 2012.[11] This request was substantively distinct on its face from Request One. *Compare* A024 *with* A172-73. Specifically, COA added **"***bloggers*,**"** which was another new media group affected by adverse FTC action, in addition to "social media authors" and two more categories of "fee waiver documents." *Id.* (emphasis supplied).

COA again requested a public interest fee waiver and news media requestor status, A180–84; *see also* A168–72, explaining that it would use its combined 20 years of experience in investigative reporting, government oversight, and federal

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[10] This request sought all FOIA requests where FTC granted public interest fee waivers from January 1, 2009 to October 28, 2011, and also all documents referring to the process by which FTC determined such requests qualified for the fee waiver.

[11] COA filed Request Three at the direction of OGIS because this would indeed clarify and expand Request One to FTC in order to serve FOIA's scope and purpose. A308, A343 ¶ 14. COA acted on OGIS's measured suggestion, but FTC further obstructed OGIS's purpose (having refused to participate in mediation) by declaring COA's January 27, 2012 request moot.

public interest litigation to turn FTC's raw data into distinct works that COA would disseminate through social media outlets, its website, newsletters, memoranda, press releases, and two published reports with specific titles. *Id*.; *see also* A168–72; A181; A184. COA also explained that it would rely on a vast network of connections with other news media organizations to further disseminate stories that it would generate from the information collected from FTC. A167–68.

Despite COA's detailed plans to disseminate its work to the public, FTC denied COA news media requestor status and again categorized it as an "Other (General Public)" requestor without explanation. A174. FTC also limited its response to items two and three of Request Three, because it claimed that item one was "a duplicate" of the August 30, 2011 request—a claim that wholly disregarded the fact that item one actually *expanded* the scope of the August 30, 2011 request and could not be "a duplicate." *Id.* at n.1. FTC ostensibly reached this conclusion because it located fewer than 100 pages, which would have triggered a mandatory fee waiver analysis. *See* A174 n.1.[12]

On May 25, 2012, COA filed a complaint against FTC for violation of FOIA requesting declaratory and injunctive relief. A007–19. On September 28, 2012,

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[12] As with Request One, FTC did not disclose how many pages it located in response to item one of this FOIA request, nor did FTC inform COA of the estimated fees associated with this request. *Id.* COA also appealed FTC's denial of news media requestor status. A181–84.

FTC filed a motion for summary judgment, which was opposed by COA on November 28, 2012. A260–343. FTC filed its reply on January 25, 2013. A344–72.

The district court granted FTC's motion for summary judgment with respect to the denials of public interest fee waivers and news media requestor status for Requests One and Two. A373–418. As to Request Three, the court affirmed FTC's denial of COA's fee waiver as moot, presuming FTC's mootness analysis equally applied to COA's request for news media requestor status and COA's public interest fee waiver request. *Compare* A382–83 *and* A397–99 *with* A400.

The district court entered a Consent Judgment and final appealable Order on September 11, 2013. A419. On November 12, 2013, COA filed a timely Civil Notice of Appeal. A420.

SUMMARY OF THE ARGUMENT

The district court erroneously denied COA news media requestor status for Requests One, Two, and Three because the court failed to recognize COA as a representative of the news media under the OPEN Government Act. COA, a textbook alternative media entity, demonstrated its capacity to gather information of potential interest to a segment of the public and expressed its intent to utilize its editorial skill to turn raw materials into distinct works. It also demonstrated its intent and capacity to distribute its work to a reasonably broad audience interested

in how FTC interpreted and applied the Guides, particularly as to social media authors and bloggers. To this end, COA identified numerous examples where it actively distributed information obtained through FOIA requests in the 2011-2012 timeframe.

The district court also erroneously determined that COA's Request Three was moot. FTC cannot refuse to process a request merely because it is similar to an earlier request. Moreover, the number of pages implicated by COA's Request Three was sufficient to trigger an analysis of COA's fee requests.

The district court also erroneously ignored FTC's failure to meet its burden to conduct an adequate search for records responsive to Request Three.

Finally, the district court erroneously determined that COA did not qualify for a public interest fee waiver although COA demonstrated that the information sought was (1) likely to contribute significantly to public understanding of the operations and activities of the government, and (2) was not primarily in COA's commercial interest.

FTC denied COA's requests for public interest fee waivers and news media requestor status knowing COA intended to criticize the agency for using the Guides to limit speech. Groups with the "correct" political ideology, however, were give fee waivers. Nonprofits, especially new nonprofits, are especially harmed by fee waiver and media status gamesmanship because they rely so heavily

on FOIA's fee waiver provisions in obtaining the information needed for government accountability and transparency.

The district court's opinion improperly rewrote the FOIA, narrowing the scope of the news requestor and public interest fee waiver provisions. This opinion, if allowed to stand, likely will devastate the community of organizations, scholars and individuals, many very thinly funded, that work to ensure government transparency and accountability. For these reasons, the district court should be reversed and judgment granted COA.

STANDARD OF REVIEW

FOIA cases receive the same de novo standard of appellate review applicable generally to summary judgments. *Petroleum Info. Corp. v. Dep't. of Interior*, 976 F.2d 1429, 1433 (D.C. Cir. 1992); *Pub. Citizen v. U.S. Dist. Ct.*, 486 F.3d 1342, 1345 (D.C. Cir. 2007); *see also* 5 U.S.C. § 552(a)(4)(B). On summary judgment, this Court must view the evidence in the light most favorable to the nonmoving party, and the Court may grant summary judgment only if there is no genuine issue of material fact and judgment is required as a matter of law. Fed. R. Civ. P. 56; *Ctr. for Auto Safety & Pub. Citizen, Inc. v. Nat'l Highway Traffic Admin.*, 452 F.3d 798, 805 (D.C. Cir. 2006).

FTC must prove it performed an adequate search and responded appropriately to COA's FOIA requests. 5 U.S.C. § 552(a)(4)(B); *Weisberg v.*

Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983) (the agency must demonstrate "that it has conducted a search reasonably calculated to uncover all relevant documents") (citation omitted); *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989) ("The burden is on the agency to demonstrate, not the requestor to disprove, that the materials sought are not agency records or have not been improperly withheld.") (internal quotes and citation omitted).

This Court reviews *de novo* FOIA fee waiver requests and requests for news media status, and is limited to the record before the agency at the time of its decision. 5 U.S.C. § 552(a)(4)(B); *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1311 (D.C. Cir. 2003). The requestor bears the burden of proving that it is entitled to a fee waiver. *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004). However, "Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters." *Rossotti*, 326 F.3d at 1312 (citation omitted).

ARGUMENT

I. COA Is A "Representative Of The News Media."

Generally, FOIA requestors are responsible for paying the costs of search, review, and duplication. 5 U.S.C. § 552(a)(4); *Larson v. Cent. Intelligence Agency*, 843 F.2d 1481, 1482 (D.C. Cir. 1988). However, a core purpose of the FOIA is public understanding of the operations or activities of the government.

Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 774-75 (1988). Therefore, Congress provided that "a representative of the news media" does not have to pay FOIA search or review costs. 5 U.S.C. § 552(a)(4)(A)(ii)(II).[13]

The OPEN Government Act defines "a representative of the news media" as follows:

> [T]he term "a representative of the news media" means 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. In this clause, the term "news" means information that is about current events or that would be of current interest to the public. 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 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

[13] This Court has long embraced the philosophy that the "representative of the news media" fee category must be "broadly interpreted if [FOIA] is to work as expected." *Nat'l Sec. Archive*, 880 F.2d 1381, 1386 (D.C. Cir. 1989). In fact, when promulgating model fee guidelines after the passage of FIRA, the Office of Management and Budget (OMB) referenced Senator Leahy's statements in the legislative history that explained the term should be "broadly" interpreted. *See* Uniform FOIA Fee Schedule & Guidelines, 52 Fed. Reg. 10,012, 10,014 (Mar. 27, 1987). Congress reinforced this view when it codified this Court's language from *National Security Archive* in the OPEN Government Act.

> shall be considered to be news-media entities.

5 U.S.C. § 552(a)(4)(A)(ii).

The district court wrongly failed to apply the OPEN Government Act. A382-410. It also ignored the Record demonstrating that COA was "alternative media" with both the editorial skill and capacity to distribute information. A020–22; A026–27; A029–34; A037–39; A041–43; A045–49; A152–60; A165–73; A176–84. Therefore, it erroneously determined that COA was not a "representative of the news media." A400-06.

A. FTC's Denial Of COA's Requests Was Erroneous And FTC's Regulation Was *Ultra Vires*.

At the time of COA's three FOIA requests, FTC regulations incorrectly defined a "representative of the news media" as "any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public." 16 C.F.R. § 4.8(b)(2). However, FTC's regulation was *ultra vires*, and the agency's denials of COA's Requests thereunder were unlawful, because the regulation contradicted the OPEN Government Act's mandate that "alternative media shall be considered" a news media requestor. *See Orion Reserves Ltd. P'ship v. Salazar*, 553 F.3d 697, 703 (D.C. Cir. 2009) ("a regulation contrary to a statute is void").

On March 21, 2014, FTC updated its regulations to comply with the OPEN Government Act. *See* FTC FOIA, Miscellaneous Rules, 79 Fed. Reg. 15,680 (Mar.

21, 2014); *see also* A158-59 (COA's Jan. 27, 2012 letter to FTC calling the agency's regulatory deficiency to its attention.). But this action does not cure FTC's wrongful denial of COA's three Requests and, on *ultra vires* grounds alone, judgment for COA is proper. "[C]ourts will 'ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command.'" *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (citing *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 (1986)). Regarding "'the review of *ultra vires* actions . . . [w]hen an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority.'" *Id.*[14]

B. COA Meets The Statutory Test.

The FOIA's plain language should lead to the conclusion that COA is a "representative of the news media." The ordinary meaning, context, statutory

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[14] *Reich* also cited *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988), which in turn cited and analyzed *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108, 110 (1902) ("[A]cts of all [a government department's] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief. . . . Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual.").

structure, and legislative history all counsel a broad interpretation of the term "alternative media." Among other things, the legislative history shows that Congress understood technological advancements and the changing face of news media required "alternative media" to be treated as news media requestors.

Statutory language is the starting point for statutory construction and legislative purpose is expressed in the ordinary meaning of the words used. *Am. Mining Cong. v. Envtl. Prot. Agency*, 824 F.2d 1177, 1183 (D.C. Cir. 1987). It is often necessary to understand statutory terms in context by examining the surrounding terms and overall statutory scheme.[15] *See United Distrib. Cos. v. Fed. Energy Reg. Comm'n*, 88 F.3d 1105, 1165 (D.C. Cir. 1996) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory

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[15] This case does not present a deference question because FTC has neither interpreted nor applied the statutory term "alternative media" during the time period relevant to this case. In some instances, courts defer to agency interpretation of statutory terms. For example, courts will defer to an agency's interpretation if a statutory term is ambiguous, the agency has provided an interpretation with the force of law, and the interpretation is a permissible construction of the statute. *See Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc*. 467 U.S. 837, 843 (1984). If, however, an agency's interpretation is not contained in an authoritative document that carries the force of law, the interpretation may help guide the court to the extent it has the "power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). No deference is warranted here because the FTC has neither interpreted nor applied the statutory term "alternative media" in this case.

scheme."). In addition to context, courts are often guided to a term's ordinary meaning by examining legislative history. *See Nat'l Sec. Archive*, 880 F.2d at 1383-85.

The FOIA defines the term "representative of the news media" to mean "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." 5 U.S.C. § 552(a)(4)(A)(ii). This language tracks this Court's holding in *National Security Archive*. 880 F.2d at 1387 ("A representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.").

Adoption of the *National Security Archive* test and the addition of the term "alternative media" to the FOIA demonstrate that Congress understood technology was changing the way news media requestors disseminated information obtained under FOIA. *See also EPIC*, 241 F. Supp. 2d 14 (recognizing Dep't of Defense's regulatory language—which Congress adopted—"anticipates technological advancements").

1. Neither FTC nor the district court interpreted or applied the term "alternative media," therefore it is appropriate that this Court do so.

The term "alternative media" is not defined in the Merriam-Webster or Oxford Dictionaries. However, "alternative" is defined as "relating to behavior that is considered unconventional and is often seen as a challenge to traditional norms." *See* "Alternative", Oxford Dictionaries, http://goo.gl/PYBvRv (last visited May 5, 2014). Reading the full statutory definition, it is apparent Congress was comparing "alternative media," and their methods of news distribution, to traditional media such as television and radio stations. *See* 5 U.S.C. § 552(a)(4)(A)(ii). The sentence structure indicates that "such alternative media" also qualify for news media status, with "such" referring back to organizations that are using evolving methods of news delivery. *Id*. Further, the parenthetical interposed in the definition provides media is "alternative" if it "disseminat[es] . . . [information] through telecommunications services." *Id*. The Record demonstrates that COA was "alternative media" for purposes of the FOIA. For example, COA repeatedly stated that it "routinely and systematically disseminate[d] information to the public in several ways," namely, an e-mail newsletter, website, Twitter, and Facebook. A048; A157-60; A181-84.

Moreover, the touchstone for COA's qualification as a member of "alternative media" was the OPEN Government Act, which COA undeniably argued both to FTC and the district court. A171-73; A181-84; A294-96.[16]

2. The legislative history of the OPEN Government Act demonstrates Congress intended organizations like COA to be representatives of the news media.

The legislative history confirms COA should be considered "alternative media" and a "representative of the news media." 153 Cong. Rec. S10,986 (2007); *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 669 (D.C. Cir. 1994). OPEN Government Act co-sponsor Sen. Patrick Leahy stated the amendments would "ensur[e] that anyone who gathers information to inform the public, including freelance journalist and bloggers, may seek a fee waiver when they request information under FOIA." 153 Cong. Rec. S10,986, S10,987 (2007). He also stated the new definition of "a representative of the news media" covered "Internet blogs and other Web-based forms of media. . . free newspapers and individuals performing a media function who do not necessarily have a prior history of publication." *Id.* Co-sponsor Sen. John Cornyn affirmed Senator Leahy's view that the new definition "grants the same privileged FOIA fee status

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[16] The notion that COA's Third Request was "moot" is entirely irrelevant when considering the district court's failure to evaluate COA's news media requestor status by virtue of the OPEN Government Act. This is so because COA's January 27, 2012 letter, in addition to advancing COA's Third Request, also contained an appeal of FOIA Requests One and Two. A165-73.

currently enjoyed by traditional media outlets to bloggers and others who publish reports on the Internet." *Id*. at S10,990.

C. Grounds For Reversing The District Court.

1. The district court erroneously ignored the OPEN Government Act.

In its January 27, 2011, appeal of Request Two, COA informed FTC that it violated the OPEN Government Act. A171. Yet FTC paid no heed. COA called FTC's deviation from the statute to the district court's attention, A294-95, but the district court failed to apply the OPEN Government Act test. Instead, it erroneously applied the *National Security Archive* test without accounting for the Congressional directive that "alternative media shall [also] be considered to be news-media entities." 5 U.S.C. § 552(a)(4)(A)(ii).

2. The district court erroneously held that COA did not possess "editorial skills to turn raw materials into a distinct work."

A news media requestor must use "editorial skills to turn raw materials into a distinct work." 5 U.S.C. § 552(a)(4)(A)(ii). "Editorial skill" is the ability to research and synthesize information, including connecting disparate information sources, to communicate a coherent story to an audience and to distinguish valuable from irrelevant information. *See EPIC*, 241 F. Supp. 2d at 11, 13 (finding editorial skill includes "evaluat[ing] the newsworthiness of materials," putting "facts and issues in context," and determining "what is newsworthy for [an]

audience"); *Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 202 (D.D.C. 2009); *Carney v. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994).

A news media requestor must also use raw materials to create a distinct work. 5 U.S.C. § 552(a)(4)(A)(ii). That work may include materials "from a variety of sources, including material obtained under FOIA." *EPIC*, 241 F. Supp. 2d at 13. However, the statute does not require a requestor to use a variety of sources. 5 U.S.C. § 552(a)(4)(A)(ii). And neither does this Court. *See Nat'l Sec. Archive*, 880 F.2d at 1387.

The district court held that to "satisfy the second element, [COA] *must* demonstrate that it would use information from a range of sources to independently produce a unique product." A402 (emphasis added). The district court then compared COA to the requestor in *National Security Archive*, who satisfied this element by "gathering raw materials from a wide variety of sources in addition to the FOIA requests." *Id*. The district court then erroneously found "COA did not indicate . . . that it would use any information beyond that obtained in the FOIA requests . . . ." and wrongly held COA did not qualify for news media requestor status. A403.

The district court erred for at least two reasons. First, the court misread *National Security Archive*'s multiple-source requirement. Second, COA did in fact indicate that it gathers information from a wide range of sources.

First, a representative of the news media may demonstrate its editorial skill through a range of factors. Courts in this Circuit have examined the analytic capacity, staff experience level, ability to synthesize information, ability to cull relevant from irrelevant documents, and gathering information from multiple sources as factors that together comprise an organization's editorial skill. *See EPIC*, 241 F. Supp. 2d at 11, 13; *Fed. CURE*, 602 F. Supp. 2d at 202. However, none of these "activities is either necessary or sufficient" to demonstrate editorial skill. *Nat'l Sec. Archive*, 880 F.2d at 1387.

The types of sources courts find beneficial to a requestor's claim for news media status include: "FOIA requests, state and federal courts, government agencies, universities, international groups, law reviews, interest groups, and even other news stories." *EPIC*, 241 F. Supp. 2d at 11. Yet this Circuit has never required an organization to use multiple sources in publications following each and every FOIA request, and it should not do so here.

Second, COA demonstrated that consistent with common-sense investigative journalistic practices it gathers information from a "wide variety of sources." A171. For example, in just its fourth month of existence, COA obtained a previously unavailable audit showing "NeighborWorks America, a taxpayer-funded federal nonprofit . . . funneled more than $26.5 million in federal foreclosure-avoidance money to ACORN . . . 'evidence [of] extensive relationships

between both organizations that may undermine claims of an 'arm's length relationship' between them.'" Matthew Vadum, *Obama Uses Taxpayers Cash to Back ACORN Name Changes Used to Dodge the Law*, Wash. Times, Nov. 28, 2011. A167 n.7; SA-114–15.

COA's January 27, 2012 appeal of FTC's denial of Request Two also detailed how COA "analyzes relevant data [and] evaluates the newsworthiness of the material" it receives through FOIA. A171. For example, COA synthesized information it obtained under FOIA with the then-ongoing debate over the National Labor Relations Board's (NLRB) lawsuit against Boeing. *See EPIC*, 241 F. Supp. 2d at 11 (stating with approval the synthesis of FOIA information with "other news sources").

FTC's summary judgment motion did not allege that COA lacked editorial skill. A199-200 (arguing COA's fee status denial was based on lack of ability to disseminate). Even so, in COA's opposition to that motion, COA again established its "experienced professionals would use their then combined fifteen . . . years of experience in investigative reporting, government oversight and public interest litigation to apply their analytical and editorial skills to 'turn raw materials'—the FTC data—'into distinct work.'" A270. Instead of considering these arguments, the district court inappropriately elevated the "various sources" factor to a dispositive test and incorrectly held COA did not meet that test.

3. The district court erroneously discounted COA's publication history and demanded unreasonable specificity as to future publications.

The district court erroneously determined COA would not produce a "distinct work." 5 U.S.C. § 552(a)(4)(A)(ii). First, it wrongly discounted COA's past publication history. Second, it unreasonably demanded COA to prove with oracular specificity what it would publish in the future.

The district court wrongly held COA did not "independently produce a unique product." A402. To support this determination, it summarized COA's past publication history as "unspecified information it posts on its website, social media sites such as Facebook and Twitter, and through an email newsletter it began publishing to subscribers beginning in September 2011, *after* it made its first FOIA request and just one month before it filed its second request." *Id*. (emphasis original). The district court then compared COA—an organization then a few months old—to EPIC, an organization that had published seven books. *Id*. The district court then held "COA did not indicate any distinct work it planned to create based on the requested information . . ." A403.

As a threshold matter, the district court mischaracterized the frequency and nature of COA's newsletter and thus came to an incorrect conclusion about COA's history of producing a unique product. COA began operating on August 15, 2011, merely two weeks before it sent its first FOIA request to FTC on August 30, 2011.

A029-31. Cause of Action published nine editions of its newsletter between filing its FOIA request on August 30, 2011 and filing its request for reconsideration on December 12, 2011. SA-116 (publication history of CoA's newsletter August – December 2011); A048 (Dec. 12, 2011 letter informing FTC of COA's regularly published newsletter).

This history should have been sufficient. In *EPIC*, the Court stated that at "a minimum, newsletters must be published regularly, over a period of time." 241 F. Supp. 2d at 14 n.6 (D.D.C. 2003). In keeping with the FOIA's core purpose of promoting disclosure and government transparency, "regular" publication has been broadly construed. For example, a fee waiver was granted by the court to an organization with only nine distributed newsletters in four years. *Fed. CURE*, 602 F. Supp. 2d at 204 n.3. And, even if COA had failed to demonstrate a prior publication history, the co-sponsors of the OPEN Government Act foresaw that alternative media, like COA, may not have the same publication history as previous generations of media. *See* Statement of Sen. Leahy, 153 Cong. Rec. at S10,987 (amendments meant to cover "individuals performing a media function who do not necessarily have a prior history of publication.").

Second, the district court unreasonably demanded COA prove that it would publish information from the Requests in the future. It held "COA did not indicate any distinct work it planned to create based on the requested information . . ."

A403. In this the court erred, for it is manifestly unreasonable to require a FOIA requestor to precisely outline what the requestor will produce before the requestor knows what information the request will uncover.

In *Judicial Watch, Inc. v. Rossotti*, this Court ruled a requestor must show "in detailed and non-conclusory terms—again, all that FOIA requires—exactly how and to whom it will disseminate the information it receives." 326 F.3d at 1314. However, that plan need not contain "pointless specificity." *Id*.

In *Center for Public Integrity v. Dep't of Health & Human Services*, the district court found "no indication . . . that [this Court] intended in all circumstances to require a detailed game plan for the publication of information requested through FOIA." 2007 U.S. Dist. LEXIS 56172 at *19-20 (D.D.C. Aug. 3, 2007). In *Carney*, the United States Court of Appeals for Second Circuit rejected the government's contention "that Carney was *required to prove* that his articles and book would be published," 19 F.3d at 816 (2d Cir. 1994) (emphasis added).[17]

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[17] Of course, it is impossible for any requestor to provide an agency with an absolute assurance the requestor will publish the information it receives from a FOIA request. This is especially true in the context of government oversight, because the requestor does not know what they will uncover. Indeed, an organization would undermine its editorial skill claim if it *promised* an agency that it would publish information obtained through FOIA regardless of what the documents received were found to contain. Therefore, the relevant question should be whether the requestor publishes distinct works in general, not whether the

In any event, COA's September 26, 2011 appeal of FTC's initial denial specified that COA planned "to publicize the results of [the] inquiry into the [FTC's treatment of social media authors] by using editorial skill to create a new, distinct work." A026. COA did not assure FTC it would publish the information, but it did say the "disclosable portions of the requested information will be meaningfully informative" to the subject of the request. A027. Also, in its December 12, 2011 letter, COA informed FTC it would share "the resulting analysis [from documents produced in response to the request] with the public, either through memoranda, reports, or press releases." A046. Just this should have been sufficient. *Ctr. for Pub. Integrity*, 2007 U.S. Dist. LEXIS 56172, at *19-20.

4. The district court erroneously held COA did not have the intent and capacity to distribute information.

In addition to gathering information of public interest and transforming that information into a distinct work with editorial skill, a news media requestor must "distribute" that work to an audience, 5 U.S.C. § 552(a)(4)(A)(ii)(III),[18] and

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requestor will absolutely create a distinct work with the materials received in a given FOIA request.

[18] The district court also included an outdated requirement that COA "must demonstrate that its operational activities are especially organized around" distribution. A403, citing *EPIC*, 241 F. Supp. 2d at 12-13. OMB first created the "organized and operated" requirement in its model guidelines for the 1986 FOIA Amendments. *See* OMB FOIA Guidelines, 52 Fed. Reg. 10,012, 10,015 (Mar. 27, 1987). FTC's outdated regulations also contain the phrase. *See* 16 C.F.R. § 4.8(b)(2) (2012). However, Congress chose not to adopt the phrase when it

demonstrate both the intent and capacity to distribute information. *Nat'l Sec. Archive*, 880 F.2d at 1386-87.

The requestor must actively distribute its work; "merely making information available to the public" is not sufficient.[19] *Judicial Watch v. Dep't of Justice*, 122 F. Supp. 2d 13, 20 (D.D.C. 2000). To determine intent and distribution capacity, courts must examine the totality of a requestor's history, its stated intent, and its ability to distribute information. *Id.*

Neither the FTC nor the district court disputed COA's intent to distribute. At issue here was whether COA had the capacity to actively do so. A403-06. Courts examine many factors when considering a requestor's capacity to actively distribute information. *Judicial Watch*, 122 F.Supp.2d at 21; *but see* Statement of Senator Leahy, 153 Cong. Rec. at S10,987 (2007 FOIA Amendments cover those "who do not necessarily have a prior history of publication."). Active distributors display "a firm intent to disseminate" information. *Id*. They "get[] the documents for [their] own purpose, which is to assemble them . . . [and] then offer [them] to the public. *Nat'l Sec. Archive*, 880 F.2d at 1387. "Passive" distributors merely make FOIA requests as an agent for others" and "purport to act on behalf of

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codified the new definition of "a representative of the news media" in the 2007 FOIA Amendments.

[19] *But see EPIC*, 241 F. Supp. 2d at 14, where the court looked favorably on EPIC because it "makes its newsletter, as well as its archive of past newsletters, easily accessible . . ."

specific parties . . . [who] themselves are either unaware that they could get records directly from the Government, or simply find it more efficient to employ a service." *Id.*[20]

Neither the FTC nor the district court questioned COA's intent to distribute information obtained through the Requests. But the district court erroneously held that COA was akin to "a middleman for dissemination to the media," not an active distributor, and thus not a representative of the news media. A406. COA was an active distributor of information that demonstrated a firm intention to "disseminate any documents it acquires from these requests to the public." A167. COA maintained its own channels of distribution and does not rely solely on other entities to disseminate its information. The district court recognized and recounted COA's channels of distribution, including COA's "periodical newsletter, website, social media sites, and media contacts . . ." A404. However, as it did throughout its decision, the district count discounted these new avenues of dissemination and failed to account for the OPEN Government Act's command that "as methods of

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[20] One example of passive distribution is a repository "such as a library which stores information and makes it available on demand." *Ctr. for Pub. Integrity*, 2007 U.S. Dist. LEXIS 56172, at *11-12 ; *see also* OMB FOIA Guidelines, 52 Fed. Reg. at 10015 (distinguishing active and passive distributors). The "active" / "passive" distinction does not work well in the on-line world. *See* Michael Russo, *Are Bloggers Representatives of the News Media Under the Freedom of Information Act?*, 40 Colum. J.L. & Soc. Probs. 225, 250-51 (2006) (discussing the difficulty of applying the active-versus-passive test to online news media organizations).

news delivery evolve . . . [including] electronic dissemination . . . through telecommunications services, such alternative media shall be considered to be news-media entities." 5 U.S.C. § 552(a)(4)(A)(ii).

The district court also erroneously held that disseminating information through media contacts is not evidence of active distribution. A404-05 (citing *Hall v. Cent. Intelligence Agency*, 2005 U.S. Dist. LEXIS 6638, at *22 n.11 (D.D.C. Apr. 13, 2005) (quotation marks and brackets omitted)). The district court takes the *Hall* footnote out of context. In that case, the district court found that plaintiff Accuracy in Media misstated the burden of proof, offered no specific publishing activities, and tried to claim its chairman of board's personal credentials to news media status. See *Id.* at *22.

The relevant question is not whether COA "borrowed" its media contacts' credentials wholesale, but whether media contacts may be considered alongside other avenues of dissemination when demonstrating active distribution. In other cases, courts have held that they may. *See EPIC*, 241 F. Supp. 2d at 13-14.

In *Carney*, the Second Circuit looked favorably on the requestor's assertion that although he was a student, he had written two newspaper articles on the subject in question. 19 F.3d at 810. It also found the "relevant inquiry . . . is whether the requestor will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject." *Id*. at 815. Certainly other members

of the media may constitute "persons interested in the subject" of the government oversight COA conducts.

COA cannot plausibly be considered a passive information source. It is neither a library nor a repository. It does not act as an agent for others and make FOIA requests on their behalf. COA actively distributes information through its multiple channels of electronic dissemination and media contacts, just as Congress envisioned in the OPEN Government Act.

The district court failed to recognize that, despite having only been in existence for less than a year, COA's past and future activities, distribution mechanisms, frequency of publication, and range of recipients are analogous to many of the requestors that have been granted news media status in this Circuit.

A requestor's publication history may be indicative of its future capacity to publish information. However, "general statements about . . . past activities are not specific enough" to satisfy this inquiry. *Judicial Watch*, 122 F. Supp. 2d at 21. Instead, courts are looking for groups that have "taken, and will continue to take, an active role in disseminating information of current interest to the public." *Ctr. for Pub. Integrity*, 2007 U.S. Dist. LEXIS 56172, at *15. Thus, there is a nexus between past activities and future intent to publish.

In *Rossotti*, this Court ruled a requestor must show "in detailed and non-conclusory terms—again, all that FOIA requires—exactly how and to whom it will

disseminate the information it receives." 326 F.3d at 1314. However, that plan need not contain "pointless specificity." *Id*. The D.C. District Court applied the *Rossotti* decision by finding "no indication . . . that [this Court] intended in all circumstances to require a detailed game plan for the publication of information requested through FOIA." *Ctr. for Pub. Integrity*, 2007 U.S. Dist. LEXIS 56172, at *19-20. In *Carney*, the Second Circuit Court of Appeals "reject[ed] the [Department of Justice's] contention that Carney was *required to prove* that his articles and book would be published," 19 F.3d at 816 (emphasis added).

COA demonstrated a past history of distribution and a future likelihood to do so again. COA informed FTC of its general capacity to distribute information "through its website . . . which also includes links to thousands of pages of documents" from FOIA and its other substantive work. A167. COA informed FTC that—just as in *EPIC*—it maintains "contacts with news media organizations that regularly feature our work." *Id*. COA detailed to the court below the list of "extensive[] high profile media publications" showing interest in COA's work in 2011-2012. A262. COA listed eighteen examples of other members of the news media also showing interest in its work. A167 n.7. COA also distributed information through the social media platforms Twitter and Facebook. *Id*. When broadly interpreting this fee category, COA's showing of general capacity meets the standard from *Rossotti* and *Center for Public Integrity*.

Furthermore, a requestor may use a wide range of methods to demonstrate capacity to distribute information. Publishing newsletters is one valid method. OMB FOIA Guidelines explain "publishers of newsletters are included within OMB's definition" of news media.[21] *EPIC*, 241 F. Supp. 2d at 13 (citing OMB FOIA Guidelines, 52 Fed. Reg. at 10,014). In *EPIC*, the court reasoned the "fact that [a] newsletter is disseminated via the Internet to subscribers e-mail addresses does not change the analysis." *Id.* at 14. In *National Security Archive*, this Court granted news media status even though the organization "previously published only one book." 880 F.2d at 1386. In *EPIC*, the organization had "publication to date of seven books" and was granted news media status. 241 F. Supp. 2d at 11. The *EPIC* court wrote that at "a minimum, newsletters must be published regularly, over a period of time." *Id*. at 14 n.6. In *Fed. CURE*, the organization published only nine newsletters in four years. 602 F. Supp. 2d at 204 n.3.

Here, the district court inappropriately dismissed many of the mechanisms used by COA (and others) to distribute information. The court minimized COA's "periodical newsletter, website, social media sites, and media contacts. . . ." A404. However, Senator Leahy made clear that "Internet blogs and other Web-based

[21] FTC's FOIA regulations did not explicitly include or exclude newsletters. *See* 16 C.F.R. § 4.8(b)(2).

forms of media" are relevant under the OPEN Government Act test. 153 Cong. Rec. at S10,987.[22]

In addition to methods and frequency, courts also examine the range of recipients to which an organization distributes information. In *Tax Analysts v. Dep't of Justice*, this Court ruled the "fact that [Tax Analysts'] readership is relatively small and largely composed of tax attorneys, accountants and economists is irrelevant to the point" that it is a news media organization. 965 F.2d at 1095. COA's readership includes individuals that are interested in monitoring government and assuring transparency and accountability. A158, A171-72. This segment of the public interested in the subject of Cause of Action's work is sufficiently broad to satisfy this Court's standards and the district court was wrong to hold otherwise.

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[22] News media status should be broadly construed to accomplish FOIA's goals. The changing face of news media requires that new organizations be given the jurisprudential latitude to gain access to the information necessary to grow the organization. This is especially true for nonprofit news organizations "who depend on FOIA to supply their lifeblood -- information." *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 94 (D.C. Cir. 1986). Just as "a newly established newspaper would be able to [qualify for news media status] by demonstrating that it had held itself out for subscription and had in fact enrolled subscribers," so too should a newly established publisher of an online newsletter qualify for news media status. OMB FOIA Guidelines, 52 Fed. Reg. at 10,015.

II. Weaponized FOIA Fee Waivers: FTC Wages War Against Nonprofits Critical Of FTC In The Age Of New Media

A. FTC Denied Cause Of Action Fee Waivers Because The Agency Knew Cause Of Action Intended To Publish Articles Critical Of FTC.

Both Congress and this Court have recognized the vital role nonprofits such as Cause of Action play in monitoring government activities, and challenging those activities when appropriate. Prior to FIRA, Congress was concerned that executive agencies were utilizing search and copying fees to prevent oversight of their activities:

> Indeed, experience suggests that agencies are most resistant to granting fee waivers when they suspect that the information sought may cast them in a less than flattering light or may lead to proposals to reform their practices. Yet that is precisely the type of information which the FOIA is supposed to disclose, and agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information. . . .

132 Cong. Rec. S14298 (Sept. 30, 1986) (remarks of Sen. Leahy); Pub. L. 99-570. FIRA specifically stated "that regulations to implement such amendments *shall be implemented* by [April 25, 1987]." *Id.* § 1804(b)(1) (emphasis supplied). This applied to all federal branch executive agencies, without exception.

FTC ignored Congress and refused to amend its regulations to comply with FIRA regarding public interest fee waivers or news media requestor status.

Congress enacted the OPEN Government Act, in large part, to define the term "representative of the news media" to include "alternative media." OPEN Government Act at § 3 ("Protection Of Fee Status For News Media"). COA clearly demonstrated that it qualified as a representative of the news media under the 2007 standard.[23] *Id.*; *Nat'l Sec. Archive*, 880 F.2d 1381, 1386; *EPIC*, 241 F.Supp.2d 5, 12-15.

COA paid a steep price for its stated dedication to government transparency and accountability and its promise to strictly scrutinize FTC's potential violations of the First Amendment under the Guides: an inability to obtain information essential to the commercial speech rights of social media authors and bloggers. FTC's denial allowed it to keep secret its documents regarding "the drafting, formulation, and revision of the Guides," A172, and to impair the rights of social media authors and bloggers nationwide.

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[23] FTC flouted the OPEN Government Act by refusing to amend its regulations to bring the agency into compliance with the law and ignoring the critical definition of the term "representative of the news media" to include "alternative media" such as websites, e-mail, electronic newsletters, Facebook, Twitter, and other methods of information dissemination by electronic means. Government Act of 2007, at § 3 (amending 5 U.S.C. § 552(a)(4)(A)(ii)). The fact of the matter is FTC did not substantively amend *any* of its FOIA regulations during the time period relevant to this case. FTC chose instead to ignore the law.

The Record demonstrates that FTC brandished FOIA's fee waiver provisions as both sword and shield against COA's FOIA requests to protect the FTC from criticism for restricting the speech rights of social media authors and bloggers. A020–21; A045–49; A152–60; A176-84.

FTC weaponized FOIA fee waivers in this case against COA as an offensive tactic because COA's use of the information would cast a suspicious eye upon the agency's actions and restrictions visited upon social media authors and bloggers based on the Internet Advertising Guides. FTC did not deny COA fee waivers because the standard was not met. In a rather insidious manner,[24] FTC denied fee waivers to COA because the agency knew that disclosure of the information would "cast them in a less than flattering light" and may have led "to proposals to reform their practices." 132 Cong. Rec. S14,298 (daily ed. Sept. 30, 1986).

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[24] The Record here is replete with examples of FTC granting fee waivers to entities with little or no information supporting public interest fee waivers or news media requestor status. A060–62, A130 (American Federation of Government Employees, AFL-CIO); A065–67, A131 (Public.Resource.Org); A081–82, A136 (Marin Institute); A099, A143 (Consumer Watchdog); A111–12, A146–47 (Environmental Working Group). These entities provided terse, conclusory statements at best regarding respective qualifications for fee waivers, yet the waivers were granted by FTC. COA was denied fee waivers and new media requestor status with far more detail and information. A020–22; A026–27; A029–34; A037–39; A041–43; A045–49; A152–60; A165–73; A176–84. Again the district court ignored these vital comparisons which demonstrated that COA was being singled out for disparate treatment by FTC.

FTC, then, preferred darkness to transparency, excuses to accountability. FTC is the agency Senator Leahy warned of in 1986. FTC is the agency training its fire on nonprofits like COA and others in the FOIA community shining the light on FTC's policies, practices, and procedures.

FTC has repeatedly ignored Congress's amendments to FOIA since 1986, particularly the OPEN Government Act. FTC has contemptuously disregarded the law and gotten away with it.

This Court should hold FTC accountable.

B. FTC's Fee Waiver Denials Chill Free Speech For Nonprofits And Acts As An Impediment To Agency Oversight.

This Court has made clear that selectively denying fee waivers to start-up nonprofits such as COA is unacceptable, precisely because such organizations make "FOIA requests that potentially would not be made absent a fee waiver provision." *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 93 (D.C. Cir. 1986). Like the nonprofit organizations in *Better Government Association*,[25] COA relies "heavily and frequently on FOIA and its fee waiver provisions to conduct the investigations that are essential to the performance of certain of [its] primary

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[25] "BGA is a nonprofit organization that conducts investigations designed to expose waste, fraud and abuse in the functioning of government programs. . . . NWF is a nonprofit organization 'dedicated to the promotion of conservation principles on behalf of a large national . . . constituency.'" *Better Gov't Ass'n*, 780 F.2d at 90 (note omitted).

institutional activities – publicizing governmental choices and highlighting abuses that otherwise might go undisputed and thus unchallenged." *Id.*

The district court's decision prevents the functionality and mission of start-up nonprofit entities which are critical members of the FOIA community whose mission is government accountability and transparency.[26]

Furthermore, the decision to deny COA's fee waiver requests impedes critical "access to information for precisely those groups Congress intended to aid by the fee waiver provision," and continues to inflict "hardship on the non-profit public interest groups who depend on FOIA to supply their lifeblood—information." *Id.* at 94.[27] Congress has made clear "its intent that fees should not be utilized . . . as 'toll gates' on the public access road to information." *Id.* (note omitted).[28] FTC's pattern here of denying fee waivers to organizations such as COA " 'chill' the ability and willingness of [such] organizations to engage in activity that is not only voluntary, but that Congress *explicitly wished to*

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[26] "A requester is likely to contribute significantly to public understanding if the information disclosed is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government." 132 Cong. Rec. H9464 (Oct. 8, 1986) (Reps. English and Kindness).
[27] *See* S. Comm. on the Judiciary (Amending the FOIA), S. Rep. No. 854, 93rd Cong., 2d Sess. 11-12 (1974) (cited in *Better Gov't Ass'n*, 780 F.2d at 89, 94).
[28] *See* Subcomm. Rep. on Admin. on Practice & Procedure of the S. Judiciary Comm. (Agency Implementation of the 1974 Amendments to [FOIA]: Rep. on Oversight Hearings), 95th Cong., 2d Sess. 90-96 (1980) (cited in *Better Gov't Ass'n*, 780 F.2d at 89, 94).

encourage." *Id.* (emphasis supplied); *see* A337-41 (FTC denial rate for fee waivers was *89.38 %*, compared with a mean denial rate of *43.61%* for *all other agencies* reporting fee waiver data).

As a 501(c)(3) nonprofit, COA must be permitted to rely on FOIA's fee waiver provisions to educate the public and conduct the investigations essential to fulfilling its mission. Finally, the district court's ruling prevents COA, and other similarly situated nonprofits, from realizing the true scope and purpose of FOIA: active oversight of the policies and actions of executive branch agencies such as FTC. Fee waiver provisions should not be countenanced as roadblocks to information vital in assessing government transparency and accountability. Only in this way can COA and similarly situated organizations educate the American people regarding "know what their government is up to." *Reporters Comm. for Freedom of the Press*, 489 U.S. at 773 (1989) (citation omitted).

III. The District Court Erred In Finding That Fee Issues Were Moot For Cause Of Action's January 27, 2012 FOIA Request.

Fee category and fee waiver requests in FOIA matters become moot when there are no fees associated with the request and the requestor "has obtained everything that [it] could recover." *Hall v. Cent. Intelligence Agency*, 437 F.3d 94, 99 (D.C. Cir. 2006) (holding that agency's release of documents without seeking payment mooted plaintiff's "arguments that the district court's denial of a fee waiver was substantively incorrect"); *see also Hall v. Cent. Intelligence Agency*,

668 F. Supp. 2d 172, 195 (D.D.C. 2009) (finding that plaintiff's fee status was moot where agency decided, as a matter of administrative discretion, to give plaintiff same treatment as representative of the news media). These circumstances are not present in this case.

In affirming FTC's determination that fees were moot for COA's Third Request, the district court relied upon FTC's assertion that the agency had found fewer than 100 responsive pages—the threshold for triggering duplication fees for non-commercial requestors[29]—and that it had released seventy-nine pages free of charge. A397, A400. This was reversible error because the FTC in fact possesses *more than* 100 pages responsive to COA's request. The page count reported by FTC was based solely upon items two and three of the request; FTC ignored altogether item one of the request because it deemed it to be "a duplicate" of Request One. A174 n.1. These requests are not facially duplicative.[30] But even if they were, it was plain error for FTC to ignore item one of Request Three, as discussed below, because COA added new information to the administrative record.

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[29] *See* 5 U.S.C. § 552(a)(4)(A)(iv)(II). FTC designated COA as an "Other" requestor (i.e., non-commercial). A174.

[30] The first item of Request Three added the term "bloggers." *Compare* A020-22, 024, *with* A159.

A. FTC Cannot Refuse To Process A Request Merely Because It Is Substantially Identical To An Earlier Request.

This Court and courts within this Circuit have recognized that requestors may file new, duplicative requests. *See, e.g.*, *Spannaus v. Dep't of Justice*, 824 F.2d 52, 61 (D.C. Cir. 1987) ("Nothing prevents [a requestor] from requesting the same withheld documents decade after decade without ever bringing a timely suit to compel disclosure."); *see also Nat'l Sec. Counselors v. Cent. Intelligence Agency*, 931 F. Supp. 2d 77 (D.D.C. Mar. 20, 2013) (rejecting agency's contention that it "'is not obligated to produce redundant records to the same requester'").

In this case, COA made a substantially identical request for the Guides at the suggestion of the OGIS "in order to clear up any confusion as to [COA's] purpose and intent to disseminate the requested information."[31] A153, A270 & n.7. This was necessary, in large part, because COA was established on August 15, 2011, A342 ¶¶ 7-8, only two weeks before it filed its first request with the FTC on August 30, 2011. Thus, COA's publishing practices and methods of dissemination were nascent and developing.

Requiring FTC to re-adjudicate COA's fee request with respect to the Guides would not "disserve the purposes of FOIA" by compelling the agency to

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[31] OGIS is a FOIA resource for the public and the government. Its mission includes "resolving FOIA disputes between Federal agencies and requesters." *The Federal FOIA Ombudsman*, Office of Gov't Info. Servs., https://ogis.archives.gov/ (lasted visited Apr. 8, 2014).

expend "scarce agency resource" in order to reconsider "static records." *Toensing v. Dep't of Justice*, 890 F. Supp. 2d 121, 140 (D.D.C. 2012). In *Toensing*, the court concluded that when a requestor failed to exhaust his administrative remedies with regard to certain withheld records, and then filed a duplicative FOIA request for the same records in order to revive the previously unexhausted issues for litigation, the agency was not required to re-review the exact same records to indulge the requestor. *Id.*

This case is clearly distinguishable from *Toensing*. Aside from the fact that exhaustion of administrative remedies is not an issue here, FTC would not be required "to plow the same ground all over again." *Id.* In connection with Request Three, COA submitted updated information regarding its publishing practices in order to justify a public interest fee waiver and news media status. A176-84. As the district court acknowledged, COA's subsequent request presented new information for the administrative record. A403 n.6. Therefore, FTC should not be permitted to ignore item one of Request Three, even if it did seek the same records as Request One. A requestor's ability to disseminate information can change over time, as well as its fee category. *See, e.g.*, *Nat'l Sec. Archive*, 880 F.2d at 1388 (stating that court's determination of requestor's news media status is "not chiseled in granite"); *Long v. Dep't of Justice*, 450 F. Supp. 2d 42, 85 (D.D.C. 2006) (noting that "an entity's status can change").

B. The Number Of Pages Implicated By COA's January 27, 2012 Request Is Sufficient To Trigger An Analysis Of Cause Of Action's Fee Requests.

FTC has yet to disclose how many pages it found in response to Request One—and, by extension, to Request Three. *See*, *e.g.*, A025, A028, A035-36. Instead, the agency has stated only that it "selected and reviewed" 100 pages and released them in full to COA without cost. A243 ¶¶ 14-15 (Gray Decl.). Despite FTC's opaqueness, the record nonetheless establishes that FTC located more than 100 responsive pages. First, the fact that FTC "selected" 100 pages indicates, by definition, that those pages derive from a larger set of responsive records. *See "Select"*, Merriam-Webster.com, http://goo.gl/H98gtL (last visited May 5, 2014) ("select, v." is "to choose . . . from a group"). Second, FTC would not have denied COA's fee requests and solicited a fee agreement unless fees were at stake. *See* A025. FTC "selected and reviewed" 100 pages not because it found precisely 100 pages, but because it was required to release "the first 100 pages of duplication" to an "Other" requestor. 16 C.F.R. § 4.8(b)(3).

Although only FTC knows exactly how many responsive pages exist, one can readily deduce from its regulations that the volume exceeds 200 pages. When COA submitted its first FOIA request to FTC in 2011, the agency was required to waive all fees if the total "chargeable fees" were $14.00 or less. 16 C.F.R. § 4.8(b)(4) ("Waiver of small charges"). Duplication costs at that time were

fourteen cents per page. *Id.* § 4.8(b)(6). If FTC had found 200 or fewer releasable pages, it would have been required to disclose all of them to COA without cost and without a fee agreement.[32] But FTC released only 100 pages *and* asked for a fee agreement. A025, 027. Accordingly, FTC must have found at least 201 releasable pages, or $14.14 worth of records, which is beyond the threshold for the "[w]aiver of small charges." 16 C.F.R. § 4.8(b)(4).

C. The District Court Erred In Not Finding That The FTC Failed To Meet Its Burden To Conduct An Adequate Search For Records Pursuant To Cause Of Action's January 27, 2012 FOIA Request.

FTC failed to satisfy its burden to conduct a search "reasonably calculated to uncover all relevant documents." *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). FTC ignored the first item of Request Three, and prematurely concluded that this request yielded too few pages to trigger a fee waiver analysis. FTC's intentional omission denied COA the opportunity to "obtain[] everything that [COA] could recover." *Hall*, 437 F.3d at 99.

As set forth at Section III.B *supra*, had FTC considered the entire FOIA request, including item one, it would have identified more than 100 pages, and this would have triggered a mandatory fee waiver and fee category analysis. COA's

[32] Non-commercial requestors, like COA, receive the first 100 pages free of charge. 16 C.F.R. § 4.8(b)(3). If the remaining pages consist of 100 or fewer pages, all fees would be waived under 16 C.F.R. § 4.8(b)(4).

fee waiver and fee category requests cannot be moot before FTC first discloses how many records it located in response to Request One, wherein COA sought information only regarding "social media authors." FTC's Paralegal Specialist Nathaniel Fairbanks Gray's Declaration stated he "selected and reviewed 100 pages" of responsive records, which clearly indicated FTC located more than 100 records in response to Request One. A243. It then follows that FTC must identify how many records are responsive to the terms "social media authors" and "bloggers" in Request Three.

Moreover, COA raised specific concerns regarding the adequacy of FTC's search. A176–79. COA also specifically explained the problematic nature of FTC's opaque representations concerning Request Three by stating that FTC's handling of the request made administrative appeal highly difficult. A179. An effective appeal is impossible if a requestor does not know "whether a document exists and [does] not know the contents of a specific document." *Id.*

Therefore, FTC *failed to properly search* item one of Cause of Action's FOIA request. A240-243, ¶¶ 5-15; *see Inturralde v. Comptroller of the Currency*, 315 F.3d 311, 313–14 (D.C. Cir. 2003) (explaining requirements for adequate search). The district court then committed reversible error when it found that COA had not challenged the adequacy of FTC's search for responsive documents in this litigation. A293; A399–400; A176-79.

In retrospect, it is more than likely that FTC's refusal to conduct a search of item one was an artful act of chicanery. Having intentionally omitted key search terms[33] for the first request in September 2011, FTC compounded its duplicity in May 2012 by declaring item one of the January 27, 2012 request moot because it allegedly "duplicated" the first request.[34] While FTC's motives in effecting this scheme remain unknown, it is incontrovertible upon the facts in the Record that FTC ***never*** conducted an *adequate search* for these records because the first search was incomplete and the second never occurred. A176–79. Legerdemain as métier is no way for a federal executive agency to behave, especially when faced with its responsibilities under FOIA.[35]

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[33] In a letter to COA dated September 22, 2011, FTC's Associate General Counsel Sarah Mathis agreed the search would focus on "social media authors." A024. Yet neither FTC's Nathaniel Fairbanks Gray nor Shira Modell, an attorney in the Bureau of Consumer Protection–Division of Advertising Practices, ever used "social media authors" or its variants, as a search term for the August 30, 2011 FOIA request. A242-43.

[34] Mr. Gray's actions in this instance are mysterious indeed. His Declaration states "[i]n consultation with my supervisor, [I] concluded that section (i) of [the January 27, 2012 request] was a duplicate of [the August 30, 2011 request]." A245. The supervisor remains unknown. More to the point, Mr. Gray knew, or should have known, that Cause of Action's first and third requests were substantively different as regards the terms "social media authors" *and* "bloggers." After all, he personally negotiated the narrowing of the first request to focus on "social media authors" as an essential search term. A023-24.

[35] COA qualified for news media status for Request Three as well. First, COA gathers information of potential interest to a segment of the public. The subject of the Request Three is similar to Requests One and Two: the social media "guides" and FTC fee waiver documents. A172-73. Second, COA demonstrated that it

The Record affirms that four other federal agencies had granted COA news media request status as of April 2012: the Departments of Education, Energy, and Commerce; and the Federal Emergency Management Agency. A181 n.21. The FTC should have considered these determinations. See *EPIC*, 241 F. Supp. 2d at 14-15 (admonishing the agency for not explaining or distinguishing why it denied the requestor when other federal agencies gave the requestor news media status).

In sum, the number of pages that FTC found in response to COA's request(s) for the Guides (201 or more pages), together with the seventy-nine pages released in response to items two and three of Request Three, are sufficient to trigger an analysis of COA's fee requests. Additionally, the district court erred in not finding FTC's search for documents inadequate. Therefore, the district court's decision that fees were moot should be reversed.

IV. COA Qualified For A Public Interest Fee Waiver For FOIA Requests One, Two, And Three.

A. Overview Of The Public Interest Fee Waiver Analysis.

COA established its right to a fee waiver under FOIA's public

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would use editorial skill to turn raw materials into a distinct work. Third, COA demonstrated that it would distribute these reports through the various mechanisms it regularly uses to distribute information, including "through [COA's] regular periodicals . . . 'Agency Check' and 'Cause of Action News.'" COA also detailed it would use its website and social media platforms to disseminate the information. A181.

interest provision because it satisfied the two-part statutory test. That is, COA demonstrated "that the information sought [was] (1) in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government and (2) is not primarily in the commercial interest[36] of the requestor." *Judicial Watch, Inc. v. Gen'l Servs. Admin.*, No. 98-2223, 2000 U.S. Dist. LEXIS 22872, at *10 (D.D.C. Sept. 25, 2000) (citations omitted); *see also Carney*, 19 F.3d at 814 (2d Cir. 1994) (citing *Nat'l Treasury Emps. Union v. Griffin*, 811 F.2d 644, 648 (D.C. Cir. 1987)).

B. COA Satisfied The Third Element Of The Public Interest Test.

The district court erroneously held that COA did not satisfy its burden regarding the third element of the public interest test because the court misconstrued the proper legal standard and failed to account for what Judge Robertson called the technology of the "Information Age." *D.C. Technical Assistance Org. v. Dep't of Hous. & Urban Dev.*, 85 F. Supp. 2d 46, 49 (D.D.C. 2000). Moreover, the district court improperly analyzed the requirement that the

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[36] FTC decided this factor in COA's favor with respect to Request One. *See* A385 & n.2. FTC also admits COA was not a commercial requestor when it classified COA as an "Other (General Public)" requestor. A174. Further, as a 501(c) educational nonprofit, COA's purpose is to "provide the information to the public," and it therefore had no commercial interest in the request which was seeking information about how the FTC enforced its Guides. A042; *see also* A021; A027. The district also agreed that Request One was not primarily in COA's commercial interest. A385 & n.2.

information "would increase the understanding of the *public at large*." A389 (citing 16 C.F.R. § 4.8(e)(2)(i)(c)) (emphasis in original). These errors are fatal to the district court's opinion.

As courts in this Circuit have concluded, "the information *need not reach a broad cross-section of the population to benefit the 'public at large' for this purpose.*" *Judicial Watch, Inc.*, 2000 U.S. Dist. LEXIS 22872, at *25-26 (citing *Better Gov't Ass'n*, 780 F.2d at 89 (emphasis added) (other citations omitted). The district court imposed an unreasonably high standard on Cause of Action which is contrary to FOIA. The OPEN Government Act amendments were intended to benefit organizations in the same or similar position as COA by "forbidding the use of fees as 'toll gates' on the public access road to information." *Better Gov't Ass'n*, 780 F.2d at 94 (note omitted).

Additionally, the district court's main finding on the third element of the public interest test centered almost exclusively on the stilted notion that COA did not possess the means to disseminate the information to the public because "it only identified two methods of dissemination," namely, a website and articles published by other news media outlets. A389-92.

As a purely factual matter, the district court too narrowly constrained the methods by which COA intended to distribute the requested information because those methods were not limited to its website and articles. For example, in its

April 4, 2012 appeal letter, COA stated that it "uses technology—including but not limited to the Internet, Twitter, and Facebook—to publish and distribute news." A182. At that time, COA also published an e-mail newsletter, another newsletter titled "Agency Check," and yet another periodical titled "Cause of Action News." *Id.*; *see supra* Section I.

To this end, the district court's statements in its memorandum opinion are inaccurate and incomplete. After acknowledging a myriad of dissemination methods which embodied the functionality of COA's mission as a months-old start-up nonprofit, the district court erroneously concluded that this was not enough. But that decision was based in large part upon the court's finding that COA "did not provide most of this evidence during the lengthy administrative process." A392. The Record indicates otherwise. A020–22; A026–27; A029–34; A037–39; A041–43; A045–49; A152–60; A165–73; A176–84.

The district court compounded its error by failing to understand the significance of COA's presence as an alternative media entity with a reasonably broad audience with interest in the subject matter of FTC's enforcement of the Guides. *Judicial Watch, Inc.*, 2000 U.S. Dist. LEXIS 22872, at *25-26 (citing *Better Gov't Ass'n*, 780 F.2d at 89 (other citations omitted)); *Carney*, 19 F.3d at 815.

The court's dismissive conclusion that COA's website was insufficient because it was merely a passive repository is erroneous, and contrary to common knowledge of the nature of the internet.

"In this Information Age, technology has made it possible for almost anyone to fulfill this requirement." *D.C. Technical Assistance Org.*, 85 F. Supp. 2d at 49 (cited by *Judicial Watch*, 2000 U.S. Dist. LEXIS 22872, at *31). Possible indeed in the usual case, and certain in this case based upon COA's express documentation of its intent and ability to disseminate the information to a reasonably broad audience with interest in the subject matter.

COA fully satisfied the third element of the public interest fee waiver test, and this Court should so find.

CONCLUSION

For the foregoing reasons, Appellant Cause of Action respectfully requests this Court to reverse the decision of the district court granting FTC's motion for summary judgment.

May 5, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B). Prepared in Microsoft Word 2010, the foregoing brief used proportionally spaced type in 14-point Times New Roman font. The brief, excluding the parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), contains 13,169 words except for (1) corporate disclosure statement, (2) table of contents, (3) table of authorities, (4) statement with respect to oral argument, (5) any addendum containing statutes, (6) rules or regulations, and (7) any certificates of counsel as counted by Microsoft Word 2010.

Dated: May 5, 2014

/s/ Patrick J. Massari
Counsel for Cause of Action

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I also hereby certify that I will have eight copies hand-delivered or sent via Federal Express overnight delivery to the Court within two business days, pursuant to Circuit Rule 31(b).

/s/ Patrick J. Massari
Counsel for Cause of Action

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Freedom of Information Act
5 U.S.C. § 552(a)(4)(A)-(B)

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

* * *

(a)(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, the term "a representative of the news media" means 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. In this clause, the term "news" means information that is about current events or that would be of current interest to the public. 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 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. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) 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.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section--

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $ 250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(viii) An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.

(a)(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986)

SEC. 1801. SHORT TITLE.
This subtitle may be cited as the "Freedom of Information Reform Act of 1986".

SEC. 1802. LAW ENFORCEMENT.

(a) EXEMPTION.—Section 552(b)(7) of title 5, United States Code, is amended to read as follows:

> "(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;".

(b) EXCLUSIONS.—Section 552 of title 5, United States Code, is amended by redesignating subsections (c), (d), and (e) as subsections (d), (e), and (f) respectively, and by inserting after subsection (b) the following new subsection:

"(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

> "(A) the investigation or proceeding involves a possible violation of criminal law; and

"(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

"(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

"(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.".

SEC. 1803. FEES AND FEE WAIVERS.

Paragraph (4)(A) of section 552(a) of title 5, United States Code, is amended to read as follows:

"(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies,

"(ii) Such agency regulations shall provide that—

"(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

> "(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and
> "(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication,

"(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) 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.

"(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

> "(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or
>
> "(II) for any request described in clause (ii) (II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

"(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

"(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

"(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo:

Provided, That the court's review of the matter shall be limited to the record before the agency.".

SEC. 1804. EFFECTIVE DATES.
(a) The amendments made by section 1802 shall be effective on the date of enactment of this Act, and shall apply with respect to any requests for records, whether or not the request was made prior to such date, and shall apply to any civil action pending on such date.

(b)(1) The amendments made by section 1803 shall be effective 180 days after the date of enactment of this Act, except that regulations to implement such amendments shall be promulgated by such 180th day.

(2) The amendments made by section 1803 shall apply with respect to any requests for records, whether or not the request was made prior to such date, and shall apply to any civil action pending on such date, except that review charges applicable to records requested for commercial use shall not be applied by an agency to requests made before the effective date specified in paragraph (1) of this subsection or before the agency has finally issued its regulations.

OPEN Government Act of 2007,
Pub. L. No. 110-175, 121 Stat. 2524 (2007)

*** * ***

§ 3. PROTECTION OF FEE STATUS FOR NEWS MEDIA.

Section 552(a)(4)(A)(ii) of title 5, United States Code, is amended by adding at the end the following:

"In this clause, the term a representative of the news media means 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. In this clause, the term news means information that is about current events or that would be of current interest to the public. 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 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. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination."

16 C.F.R. § 4.8 (2012)
Costs for obtaining [Federal Trade] Commission records

(a) *Definitions.* For the purpose of this section:

(1) The term *search* includes all time spent looking, manually or by automated means, for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents.

(2) The term *duplication* refers to the process of making a copy of a document in order to respond to a request for Commission records.

(3) The term *review* refers to the examination of documents located in response to a request to determine whether any portion of such documents may be withheld, and the reduction or other processing of documents for disclosure. Review does not include time spent resolving general legal or policy issues regarding the release of the document.

(4) The term *direct costs* means expenditures that the Commission actually incurs in processing requests. Not included in direct costs are overhead expenses such as costs of document review facilities or the costs of heating or lighting such a facility or other facilities in which records are stored. The direct costs of specific services are set forth in § 4.8(b)(6).

(b) *Fees.* User fees pursuant to 31 U.S.C. 483(a) and 5 U.S.C. 552(a) shall be charged according to this paragraph.

(1) *Commercial use requesters.* Commercial use requesters will be charged for the direct costs to search for, review, and duplicate documents. A commercial use requester is a requester who seeks information 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 made.

(2) *Educational requesters, non-commercial scientific institution requesters, and representative of the news media.* Requesters in these categories will be charged for the direct costs to duplicate documents, excluding charges for the first 100 pages. An *educational institution* is a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which

operates a program or programs of scholarly research. A *non-commercial scientific institution* is an institution that is not operated on a *commercial* basis as that term is referenced in paragraph (b)(1) of this section, and that is operated solely to conduct scientific research the results of which are not intended to promote any particular product or industry. A *representative of the news media* is any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. *News* means information that is about current events or that would be of current interest to the public.

(3) *Other requesters.* Other requesters will be charged for the direct costs to search for and duplicate documents, except that the first 100 pages of duplication and the first two hours of search time shall be furnished without charge.

(4) *Waiver of small charges.* Notwithstanding the provisions of paragraphs (b)(1), (2), and (3) of this section, charges will be waived if the total chargeable fees for a request do not exceed $14.00.

(5) *Materials available without charge.* These provisions do not apply to recent Commission decisions and other materials that may be made available to all requesters without charge while supplies last.

(6) *Schedule of direct costs.* The following uniform schedule of fees applies to records held by all constituent units of the Commission:

Paper Fees:	
Paper copy (up to 8.5" x 14")	
Reproduced by Commission	$ 0.14 per page.
Reproduced by Requester	0.05 per page.
Microfiche Fees:	
Film Copy -- Paper to 16mm film	0.04 per frame.
Fiche Copy -- Paper to 105mm fiche	0.08 per frame.
Film Copy -- Duplication of existing 100 ft. roll of 16mm film	9.50 per roll.
Fiche Copy -- Duplication of existing 105mm fiche	0.26 per fiche.
Paper Copy -- Converting existing 16mm film to paper (Conversion by Commission Staff)	0.26 per page.

Paper Copy -- Converting existing 105mm fiche to paper (Conversion by Commission Staff)	0.23 per page.
Film Cassettes	2.00 per cassette.
Electronic Services:	
Converting paper into electronic format (scanning)	2.50 per page.
Computer programming	8.00 per qtr. hour.
Other Fees:	
Computer Tape	18.50 each.
Certification	10.35 each.
Express Mail	3.50 for first pound and 3.67 for each additional pound (up to $ 15.00).

Search and Review Fees

Agency staff is divided into three categories: clerical, attorney/economist, and other professional. Fees for search and review are assessed on a quarter-hourly basis, and are determined by identifying the category into which the staff member(s) conducting the search or review belong(s), determining the average quarter-hourly wages of all staff members within that category, and adding 16 percent to reflect the cost of additional benefits accorded to government employees. The exact fees are calculated and announced periodically and are available from the Consumer Response Center, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580; (202) 326–2222.

(c) *Information to determine fees.* Each request for records shall set forth whether the request is made for other than commercial purposes and whether the requester is an educational institution, a noncommercial scientific institution, or a representative of the news media. The deciding official (as designated by the General Counsel) initially, or the General Counsel on appeal, will use this information, any additional information provided by the requester, and any other relevant information to determine the appropriate fee category in which to place the requester.

(d) *Agreement to pay fees.*

(1) Each request that does not contain an application for a fee waiver shall specifically indicate the requester’s willingness either:

(i) To pay, in accordance with § 4.8(b) of these rules, whatever fees may be charged for processing the request; or

(ii) A willingness to pay such fees up to a specified amount.

(2) Each request that contains an application for a fee waiver must specifically indicate:

(i) The requester's willingness to pay, in accordance with § 4.8(b) of the rules, whatever fees may be charged for processing the request;

(ii) The requester's willingness to pay fees up to a specified amount; or

(iii) That the requester is not willing to pay fees if the waiver is not granted.

(3) If the agreement required by this section is absent, and if the estimated fees exceed $25.00, the requester will be advised of the estimated fees and the request will not be processed until the requester agrees to pay such fees.

(e) *Public interest fee waivers—*

(1) *Procedures.* A requester may apply for a waiver of fees. The requester shall explain why a waiver is appropriate under the standards set forth in this paragraph. The application shall also include a statement, as provided by paragraph (d) of this section, of whether the requester agrees to pay costs if the waiver is denied. The deciding official (as designated by the General Counsel) initially, or the General Counsel on appeal, will rule on applications for fee waivers.

(2) *Standards.*

(i) The first requirement for a fee waiver is that disclosure will likely contribute significantly to public understanding of the operations or activities of the government. This requirement shall be met if:

(A) The subject matter of the requested information concerns the operations or activities of the Federal government;

(B) The disclosure is likely to contribute to an understanding of these operations or activities;

(C) The understanding to which disclosure is likely to contribute is the understanding of the public at large, as opposed to the understanding of the individual requester or a narrow segment of interested persons; and

(D) The likely contribution to public understanding will be significant.

(ii) The second requirement for a fee waiver is that the request not be primarily in the commercial interest of the requester. Satisfaction of this requirement shall be determined by considering:

(A) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and

(B) If so, whether the public interest in disclosure is outweighed by the identified commercial interest of the requester so as to render the disclosure primarily in the requester's commercial interest.

(f) *Unsuccessful searches.* Charges may be assessed for search time even if the agency fails to locate any responsive records or if it locates only records that are determined to be exempt from disclosure.

(g) *Aggregating requests.* If the deciding official (as designated by the General Counsel) initially, or the General Counsel on appeal, reasonably believes that a requester, or a group of requesters acting in concert, is attempting to evade an assessment of fees by dividing a single request into a series of smaller requests, the requests may be aggregated and fees charged accordingly.

(h) *Advance payment.* If the deciding official (as designated by the General Counsel) initially, or the General Counsel on appeal, estimates or determines that allowable charges that a requester may be required to pay are likely to exceed $250.00, or if the requester has previously failed to pay a fee within 30 days of the date of billing, the requester may be required to pay some or all of the total

estimated charge in advance. Further, the requester may be required to pay all unpaid bills, including accrued interest, prior to processing the request.

(i) *Means of payment.* Payment shall be made by check or money order payable to the Treasury of the United States.

(j) *Interest charges.* The Commission will begin assessing interest charges on an unpaid bill starting on the 31st day following the day on which the bill was sent. Interest will accrue from the date of the billing, and will be calculated at the rate prescribed in 31 U.S.C. 3717.

(k) *Effect of the Debt Collection Act of 1982 (Pub. L. 97–365)* The Commission may pursue repayment, where appropriate, by employing the provisions of the Debt Collection Act, Public Law 97–365), including disclosure to consumer reporting agencies and use of collection agencies.

Freedom of Information Act; Miscellaneous Rules; FTC
79 Fed. Reg. 15680, March 21, 2014

SUPPLEMENTARY INFORMATION: In a document previously published in the **Federal Register**, 78 FR 13570 (Feb. 28, 2013), the Federal Trade Commission (FTC or Commission), as required by the Freedom of Information Act (FOIA), sought comments on proposed revisions to its fee regulation. *See* 5 U.S.C. 552(a)(4)(A)(i). The FTC proposed to change its fee schedule to implement the 2007 FOIA Amendments as appropriate[1] and to revise the agency's fee schedule to account for new and discontinued services and the current costs of providing services. The Commission stated that the proposed changes would also be useful in providing additional notice to the public and to the FTC's professional and administrative staff about the procedures governing how the agency responds to FOIA requests. The Commission is adopting the proposed rules with some further revisions in response to public comments.

A. Public Comments

The FTC received six comments in response to the proposed rulemaking changes; one each from Troy Abraham, William A. Cross, Ann Fennell, the Electronic Privacy Information Center (EPIC), Michael Ravnitzky, and Neal Seaman.[2] The comments from EPIC and Mr. Ravnitzky generally supported the proposed rule amendments, with certain recommended changes, as discussed below. One comment did not address the proposed amendments at all, while the remaining comments took issue with FOIA fees generally, suggesting that they be kept at current levels, lowered, waived, or eliminated.[3]

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[1] The FOIA was amended in late 2007 by the Openness Promotes Effectiveness in our National Government Act of 2007, Public Law 110-175, 121 Stat. 2524.

[2] *See http://ftc.gov/os/comments/FOIAfeeschedule/index.shtm* for links to each comment.

[3] Mr. Abraham stated that, while he supports "this bill" (presumably the FOIA) because "people have the right to have full access to information," the FTC should lower or waive FOIA fees, since "hidden information in the government should be provided free of charge." Mr. Cross opposed a fee increase, stating that it "amounts to another tax." He added his view that public identity theft would increase if fees are increased. Ms. Fennell stated that "fee increases should not be allowed unless they are balanced by all of the proposed pro-public changes." Mr. Seaman's

As set out in the Notice of Proposed Rulemaking, the rule changes are consistent with statutory and Office of Management and Budget (OMB) mandates. The FOIA provides for the charging of fees "applicable to the processing of requests,"[4] and sets limitations and restrictions on the assessment of certain fees.[5] A separate provision provides for the waiver or reduction of fees if certain standards are satisfied.[6] The Freedom of Information Reform Act of 1986 (FOIA Reform Act) directed the OMB to establish guidelines containing a uniform schedule of fees for individual agencies to follow when promulgating their own FOIA fee regulations. 5 U.S.C. 552(a)(4)(A)(i). On March 27, 1987, the OMB issued its Uniform FOIA Fee Schedule and Guidelines (OMB Fee Guidelines) but also concluded that creation of a government-wide fee schedule was precluded by language of the FOIA Reform Act that required "each agency's fees to be based upon its direct reasonable operating costs of providing FOIA services." *See* 52 FR at 10015. The FOIA Reform Act mandated that agencies conform their fee schedules to these guidelines. The guidelines specifically direct that "[a]gencies should charge fees that recoup the full allowable direct costs they incur . . . and shall use the most efficient and least costly methods to comply with requests for documents made under the FOIA." Id. at 10018.

EPIC Comment

EPIC states that it largely supports the Commission's proposals because the rule changes benefit FOIA requesters. For example, EPIC concurs with the Commission proposal to increase the threshold for small-charge fee waivers "from those that do not exceed $ 14 to those under $ 25," and with the proposed change that complies with the 2007 FOIA amendment provision precluding agencies from assessing search fees for untimely responses.
Additionally, EPIC specifically urges the FTC to: (1) Revise its definition of a news media representative; (2) clarify which documents are public information and ensure that hyperlinks to those records work properly; (3) disclose private sector contract rates for FOIA processing; (4) refrain from prematurely closing FOIA requests; and (5) adopt alternative dispute resolution or arbitration to resolve delinquent FOIA fees.

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comment offers his view of the overall effectiveness of the FTC without addressing the proposed rule amendments.
[4] 5 U.S.C. 552(a)(4)(A)(i).
[5] 5 U.S.C. 552(a)(4)(A)(ii), (iv)-(vi), (viii).
[6] *Id.* § 552(a)(4)(A)(iii).

First, EPIC claims that the Commission's proposed definition of " *representative of the news media* "[7] --specifically the phrases "electronic dissemination of newspapers through telecommunications services" and the definition of a "freelance" journalist--are dated. EPIC recommends that the FTC revise this provision to read as follows:
The term "representative of the news media" refers to any person actively gathering information to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include print, broadcast and webcast news services available for purchase or subscription by the general public, or available to the general public by means of an online search.

The Commission declines to accept this proposal, and has determined to retain and adopt as final its proposed definition for a *representative of the news media*, which more closely conforms to the statutory definition set forth in the 2007 FOIA Amendments.[8]

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[7] For Rule 4.8(b)(2)(iii), the Commission proposed this revised definition: "A *representative of the news media* is 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 the public. The term news' means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances where they can qualify as disseminators of news) who make their products available for purchase by or subscription by the general public or free distribution to the general public. These examples are not intended to be all-inclusive. As traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would provide a solid basis for such an expectation, but the past publication record of a requester may also be considered in making such a determination."

[8] *Cf.* 5 U.S.C. 552(a)(4)(A)(ii).

Second, EPIC asks that the Commission clarify the proposed revision to Rule 4.8(b)(5),[9] claiming that in the digital reading room context, making public information available while supplies last' is inapposite." EPIC recommends that the Commission revise the rule language to read as follows:

(5) *Materials available without charge.* These provisions do not apply to public records, including but not limited to Commission decisions, orders, and other public materials that may be made available to all requesters without charge.
The Commission agrees and is incorporating EPIC's recommended language for the final amended version of Rule 4.8(b)(5).

Third, EPIC asks that the Commission disclose private sector contract rates for FOIA processing. The Commission agrees and intends to make available on the Public Record the appropriate sections of each of the two contracts to the extent permitted by, and in accordance with any notice required under, sections 6(f) and 21 of the FTC Act, or other applicable law. As discussed in the Notice of Proposed Rulemaking, the agency maintains microfiche storage and management contracts with Iron Mountain Archival Services (Iron Mountain) and the National Archive and Records Administration's Washington National Records Center (WNRC).[10] The contract with Iron Mountain was awarded after full and open competitive bidding. Since WNRC is part of the National Archives and Records Administration (NARA), the FTC's contract with WNRC is technically an interagency agreement. The OMB Fee Guidelines encourage agencies "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. When doing so . . . agencies should ensure that the ultimate cost to the requester is no greater than it would be if the agency itself had performed these tasks." *See* 52 FR at 10018. The Commission has determined that the fees incurred by the requesters are no greater for the services that Iron Mountain and WNRC perform than they would be if the Commission staff itself performed these tasks.

[9] Proposed Rule 4.8(b)(5) would read as follows: " *Materials available without charge.* These provisions do not apply to recent Commission decisions and other public materials that may be made available to all requesters without charge while supplies last."

[10] Iron Mountain Contract # FTC-10-H0233 and Washington National Records Center (WNRC) Contract # FTC-12-I-0009.

Fourth, EPIC also asks that the Commission revise its proposed procedures for closing FOIA requests where the requester has not agreed that it will pay the fee after the request has been processed. The Commission proposed that—

If the agreement required by this section is absent, and if the estimated fees exceed $ 25.00, the requester will be advised of the estimated fees and the request will not be processed until the requester agrees to pay such fees. If the requester does not respond to the notification that the estimated fees exceed $ 25.00 within 10 calendar days from the date of the notification, the request will be closed.[11]

EPIC states that Commission should grant requesters additional time to assess their financial ability to pay fees associated with processing their FOIA requests. The Commission agrees that extra time would be beneficial to FOIA requesters and is extending the timeframe to 20 calendar days. The Department of Justice's Office of Information Policy, which oversees compliance by federal government agencies with FOIA, concurs with this time frame.

Finally, EPIC asks that when resolving delinquent FOIA fees the Commission first pursue alternative dispute resolution and arbitration before employing other legally authorized means such as disclosure to consumer reporting agencies and use of collection agencies.[12] EPIC describes the FTC as the "nation's consumer protection agency," charged with enforcing the Fair Debt Collection Practices Act (FDCPA) and notes that in this role, the FTC sometimes observes abusive debt collection practices. The FTC agrees that there are situations where alternative dispute resolution methods are appropriate and has revised the language to clarify the Commission may use these methods when appropriate.

Michael Ravnitzky's Comment

Mr. Ravnitzky stated that some of the Commission's recommended changes to the fee regulation seem reasonable but he sought clarification regarding a few proposals. For example, he considered the proposal to define the term "duplication" in proposed Rule 4.8(a)(2), which includes the process of converting paper to electronic format, as reasonable but requested that the rule clarify that duplication costs for converting paper to electronic format should not apply when the Commission already maintains the record in electronic format. Mr. Ravnitzky adds that, when proposed Rule 4.8(a)(2) is read in conjunction with proposed Rule

[11] *See* Proposed Rule 4.8(d)(3).
[12] *See* proposed Rule 4.8(k) in the Notice of Proposed Rulemaking.

4.8(b)(6), the text does not make clear that electronic scanning applies the quarterly hour rate of the operator but not the per page duplication fee. We understand Mr. Ravnitzky's concern. The definition for "duplication" in proposed Rule 4.8(a)(2) states as follows:

The term *duplication* refers to the process of making a copy of a document for the purpose of releasing that document in response to a request for Commission records. Such copies can take the form of paper copy, microform, audio-visual materials, or machine readable documentation such as magnetic tape or computer disc. For copies prepared by computer and then saved to a computer disc, the Commission charges the direct costs, including operator time, of production of the disc or printout if applicable. Where paper documents must be scanned in order to comply with a requester's preference to receive the records in an electronic format, the requester shall pay the direct costs associated with scanning those materials.

Therefore, if the requester seeks a response in electronic format and a paper record must be converted to comply with that request, it is clear that the agency can charge both operator time for the conversion and the output format (if it is computer disc, the fee for the disc). If the requester seeks responsive information in electronic format which already exists in electronic format, the Commission can charge for the operator time to copy/convert from one electronic format to the specific electronic format desired by the requester (for example, the time for copying/converting information directly from the computer to a computer disc and the fee for the computer disc). Thus, although the Commission agrees that operator time for converting paper to electronic format should not be charged when the information already exists in electronic format, there may be duplication charges associated with converting from one electronic format to another electronic format that serves as the output given to the requester. In the final rule, the Commission clarifies that duplication costs include direct costs associated with copies saved to computer disc and other output formats. The final rule also adds an additional line to Rule 4.8(b)(6)'s schedule of direct costs to clarify allowable duplication costs for a non-paper format of reproduction. If the output format is paper, then the Commission will continue to charge per page as allowable per the requester's fee category.

Regarding the introductory table of fee categories set out in proposed Rule 4.8(b), Mr. Ravnitzky claims that the proposed fee category of "Other (General Public)" is inaccurate and that the FOIA expressly sets out "all other requesters" for this default category. The Commission agrees and has adjusted this category to "All other requesters (including members of the general public)."

Regarding proposed Rule 4.8(b)(7) on allowable fee charges for untimely responses and exceptions for unusual or exceptional circumstances, Mr. Ravnitzky argues the provision for exceptions is ambiguous and not clearly defined. The revised rule language incorporates by reference the FOIA statutory standard and factors provided in the legislative history. *See* 5 U.S.C. 552(a)(6), *see also* H.R. Rep. No. 104-795, at 24-25, 1996 U.S.C.C.A.N. 3448, 3468 (1996) (specifying factors that may be considered in determining whether "exceptional circumstances" exist). The Commission is therefore adopting as final proposed Rule 4.8(b)(7).

For proposed Rule 4.8(c) on information needed to make fee category determinations, Mr. Ravnitzky claims that the description lacks a presumption of the requester's good faith statement in a request. The Commission's determination of the appropriate category for an individual requester depends upon the intended use of the information sought, and also, for some categories, on the identity of the requester.[13] The OMB FOIA Fee Guidelines also specify that where "use is not clear from the request . . . agencies should seek additional clarification before assigning the request to a specific category."[14] The FTC solicits the amount of information sufficient to ensure that requesters meet the statutory standards. The Commission is adopting as final proposed Rule 4.8(c) which includes an additional clarifying instruction that asks requesters whether the request is for commercial or noncommercial purposes.

Finally, for proposed Rule 4.8(e)(2) setting out fee waiver standards, Mr. Ravnitzky claims the provision is cumbersome and should incorporate a presumption of good faith. The statutory fee waiver standard contains two basic requirements: the public interest requirement (corresponding to/incorporated by fee waiver factors (i)(A)-(D) in Rule 4.8(e)(2)); and the requirement that the requester's commercial interest in the disclosure, if any, must be less than the public interest in it (corresponding to/incorporated by fee waiver factors (ii)(A)-(B) in the Rule).[15] Both of these requirements must be satisfied by the requester before properly assessable fees are waived or reduced under the statutory standard. Further, requesters should address both of the statutory requirements in sufficient

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[13] *See* 5 U.S.C. 552(a)(4)(A)(ii).

[14] *See* OMB FOIA Fee Guidelines, 52 Fed. Reg. at 10018; *see also* McClellan v. Carlucci, 835 F.2d 1282, 1287 (9th Cir. 1987) ("Legislative history and agency regulations imply that an agency may seek additional information when establishing a requester's category for fee assessment.").

[15] *See* 5 U.S.C. 552(a)(4)(A)(iii).

detail for the agency to make an informed decision as to whether it can appropriately waive or reduce the fees in question.[16] Thus, the Commission is simply following the statutory standard on fee waiver determinations to ensure that the public gets the benefit of the information that is released to the requester without charge. The Commission is making one clarification to Rule 4.8(e)(1) to ask for sufficient detail in fee waiver requests and is otherwise adopting the remainder of proposed Rule 4.8(e)(2) as final.

Certain proposed rule changes did not garner any comment. Accordingly, the Commission adopts as final the proposed rule changes to Rule 4.8(a)(3)-(4), 4.8(b)(2)(i)-(ii), 4.8(b)(4), and 4.8(f). Rule 4.8(b)(3) is adopted as final with an additional formatting change to be consistent with other sections.

Regulatory Flexibility Act and Paperwork Reduction Act

The Commission certifies that the Rule amendments set forth in this document do not require initial or final regulatory analyses under the Regulatory Flexibility Act. *See* 5 U.S.C. 603(a) and604(a). Those requirements do not apply to agency rules of practice and procedure that are legally exempt from the notice-and-comment requirements of the Administrative Procedure Act.*See* 5 U.S.C. 553(b)(3)(A). In any event, the Commission does not believe the amendments will have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. *See* 5 U.S.C. 605(b). The Commission anticipates that the economic impact of the amendments will be minimal, if any, and most requests for access to FTC records are filed by individuals who are not "small entities" within the meaning of that Act. *Id.* at 601(6). The Rule amendments also do not contain information collection requirements within the meaning of the Paperwork Reduction Act, 44 U.S.C. 3501-3520.

List of Subjects in 16 CFR Part 4
Administrative practice and procedure, Freedom of Information Act.

[16] *See, e.g.*, Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (reiterating that requests for fee waivers "must be made with reasonable specificity . . . and based on more than conclusory allegations") (quotation marks and internal citations omitted); McClellan, 835 F.2d at 1285 (stating that conclusory statements will not support fee waiver request).

For the reasons set forth in the preamble, the Federal Trade Commission is amending Title 16, Chapter I, Subchapter A of the Code of Federal Regulations as follows:

PART 4-- MISCELLANEOUS RULES

1. The authority citation for Part 4 continues to read as follows:

- Authority:
  15 U.S.C. 46, unless otherwise noted.

2. Amend § 4.8 by revising paragraphs (a)(2), (a)(3) and (a)(4), the introductory text of paragraph (b), (b)(2), (b)(3), (b)(4), (b)(5), and (b)(6), by adding a new (b)(7), and by revising paragraphs (c), (d), (e), (f) and (k), to read as follows:

§ 4.8. Costs for obtaining Commission records.

(a) * * *

(2) The term *duplication* refers to the process of making a copy of a document for the purpose of releasing that document in response to a request for Commission records. Such copies can take the form of paper copy, microform, audio-visual materials, or machine readable documentation such as magnetic tape or computer disc. For copies prepared by computer and then saved to a computer disc, the Commission charges the direct costs, including operator time, of production of the disc or other output format. Where paper documents must be scanned in order to comply with a requester's preference to receive the records in an electronic format, the requester shall pay the direct costs associated with scanning those materials. As set out in § 4.8(b), certain requesters do not pay for direct costs associated with duplicating the first 100 pages.

(3) The term *review* refers to the examination of documents located in response to a request to determine whether any portion of such documents may be withheld, and the redaction or other processing of documents for disclosure. Review costs are recoverable from commercial use requesters even if a record ultimately is not disclosed. Review time includes time spent considering formal objections to disclosure made by a business submitter but does not include time spent resolving general legal or policy issues regarding the release of the document.

(4) The term *direct costs* means expenditures that the Commission actually incurs in processing requests. Direct costs include the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover

benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of document review facilities or the costs of heating or lighting such a facility or other facilities in which records are stored. The direct costs of specific services are set forth in § 4.8(b)(6).

(b) ***Fees.*** User fees pursuant to 31 U.S.C. 9701 and 5 U.S.C. 552(a) shall be charged according to this paragraph, unless the requester establishes the applicability of a public interest fee waiver pursuant to § 4.8(e). The chart summarizes the types of charges that apply to requester categories set out in paragraphs (b)(1)-(b)(3).

Requester categories	Fee charged for all search time	Fee charged for all review time	Duplication charges
Commercial	Fee	Fee	Fee charged for all duplication
Educational, Non-commercial Scientific Institution, or News Media	No charge	No charge	No charge for first 100 pages
All other requesters (including members of the general public)	Fee after two hours	No charge	No charge for first 100 pages

* * * * *

(2) ***Educational requesters, non-commercial scientific institution requesters, and representative of the news media.*** Requesters in these categories will be charged for the direct costs to duplicate documents, excluding charges for the first 100 pages.

(i) An *educational institution* is a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further the scholarly research of the institution and are not sought for a commercial or an individual use or goal.

(ii) A *non-commercial scientific institution* is an institution that is not operated on a *commercial* basis as that term is referenced in paragraph (b)(1) of this section, and that is operated solely to conduct scientific research the results of which are not intended to promote any particular product or industry.

(iii) A *representative of the news media* is 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 the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances where they can qualify as disseminators of news) who make their products available for purchase by or subscription by the general public or free distribution to the general public. These examples are not intended to be all-inclusive. As traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would provide a solid basis for such an expectation, but the past publication record of a requester may also be considered in making such a determination.

(3) ***Other requesters.*** Other requesters not described in paragraphs (b)(1) or (2) will be charged for the direct costs to search for and duplicate documents, except that the first 100 pages of duplication and the first two hours of search time shall be furnished without charge.

(4) ***Waiver of small charges.*** Notwithstanding the provisions of paragraphs (b)(1), (2), and (3) of this section, charges will be waived if the total chargeable fees for a request are under $ 25.00.

(5) ***Materials available without charge.*** These provisions do not apply to public records, including but not limited to Commission decisions, orders, and other public materials that may be made available to all requesters without charge.

(6)

(i) ***Schedule of direct costs.*** The following uniform schedule of fees applies to records held by all constituent units of the Commission:

Duplication:	
Paper to paper copy (up to 8.5' x 14)	$ 0.14 per page.
Converting paper into electronic format (scanning)	Quarter hour rate of operator (Clerical, Other Professional, Attorney/Economist)
Other reproduction (e.g., computer disk or printout, microfilm, microfiche, or microform)	Actual direct cost, including operator time.
Electronic Services:	
Preparing electronic records and media	$ 10.00 per qtr. hour.
Compact disc (CD)	$ 3.00 per disc.
DVD	$ 3.00 per disc.
Videotape cassette	$ 2.00 per cassette.
Microfilm Services:	
Conversion of existing fiche/film to paper	$ 0.14 per page.
Other Fees:	
Certification	$ 25.00 each.
Express Mail	U.S. Postal Service Market Rates.
Records maintained at Iron Mountain or Washington National Records Center facilities (records retrieval, re-filing, et cetera)	Contract Rates.
Other Services as they arise	Market Rates.

(ii) ***Search, review and duplication fees.*** Agency staff is divided into three categories: Clerical, attorney/economist, and other professional. Fees for search and review purposes, as well the costs of operating duplication machinery such as converting paper to electronic format (scanning), are assessed on a quarter-hourly basis, and are determined by identifying the category into which the staff member(s) conducting the search or review or duplication procedure belong(s), determining the average quarter-hourly wages of all staff members within that category, and adding 16 percent to reflect the cost of additional benefits accorded to government employees. The exact fees are calculated and announced periodically and are available from the Consumer Response Center, Federal Trade Commission, 600 Pennsylvania Avenue NW., Washington, DC 20580; (202) 326-2222. (7) *Untimely responses.* Search fees will not be assessed for responses that fail to comply with the time limits in which to respond to a Freedom of

Information Act request, provided at 5 U.S.C. 552(a)(4)(A)(viii) and § 4.11(a)(1)(ii), if there are no unusual or exceptional circumstances, as those terms are defined by 5 U.S.C. 552(a)(6) and § 4.11(a)(1)(ii). Duplication fees will not be assessed for an untimely response, where there are no unusual or exceptional circumstances, made to a requester qualifying for one of the fee categories set forth in § 4.8(b)(2).

(c) ***Information to determine fees.*** Each request for records shall set forth whether the request is made for either commercial or non-commercial purposes or whether the requester is an educational institution, a noncommercial scientific institution, or a representative of the news media. The deciding official (as designated by the General Counsel) will use this information, any additional information provided by the requester, and any other relevant information to determine the appropriate fee category in which to place the requester. *See* § 4.11(a)(3)(i)(A)(3) for procedures on appealing fee category and fee waiver determinations.

(d) ***Agreement to pay fees.***

(1) Each request that does not contain an application for a fee waiver as set forth in § 4.8(e) shall specifically indicate that the requester will either:

(i) Pay, in accordance with § 4.8(b), whatever fees may be charged for processing the request; or

(ii) Pay such fees up to a specified amount, whereby the processing of the request would cease once the specified amount has been reached.

(2) Each request that contains an application for a fee waiver shall specifically indicate whether the requester, in the case that the fee waiver is not granted, will:

(i) Pay, in accordance with § 4.8(b), whatever fees may be charged for processing the request;

(ii) Pay fees up to a specified amount, whereby the processing of the request would cease once the specified amount has been reached; or

(iii) Not pay fees, whereby the processing of the request will cease at the point fees are to be incurred in accordance with § 4.8(b).

(3) If the agreement required by this section is absent, and if the estimated fees exceed $ 25.00, the requester will be advised of the estimated fees and the request will not be processed until the requester agrees to pay such fees. If the requester does not respond to the notification that the estimated fees exceed $ 25.00 within 20 calendar days from the date of the notification, the request will be closed.

(e) ***Public interest fee waivers*** **--**

(1) ***Procedures.*** A requester may apply for a waiver of fees. The requester shall explain in sufficient detail why a waiver is appropriate under the standards set forth in this paragraph. The application shall also include a statement, as provided by paragraph (d) of this section, of whether the requester agrees to pay costs if the waiver is denied. The deciding official (as designated by the General Counsel) will rule on applications for fee waivers. To appeal the deciding official's determination of the fee waiver, a requester must follow the procedures set forth in § 4.11(a)(3).

(2) ***Standards.***

(i) The first requirement for a fee waiver is that disclosure will likely contribute significantly to public understanding of the operations or activities of the government. This requirement shall be met if the requester establishes that:

(A) The subject matter of the requested information concerns the operations or activities of the Federal government;

(B) The disclosure is likely to contribute to an understanding of these operations or activities;

(C) The understanding to which disclosure is likely to contribute is the understanding of the public at large, as opposed to the understanding of the individual requester or a narrow segment of interested persons; (e.g., by providing specific information about the requester's expertise in the subject area of the request and about the ability and intention to disseminate the information to the public); and

(D) The likely contribution to public understanding will be significant.

(ii) The second requirement for a fee waiver is that the request not be primarily in the commercial interest of the requester. This requirement shall be met if the requester shows either:

(A) That the requester does not have a commercial interest that would be furthered by the requested disclosure; or

(B) If the requester does have a commercial interest that would be furthered by the requested disclosure, that the public interest in disclosure outweighs the identified commercial interest of the requester so that the disclosure is not primarily in the requester's commercial interest.

(f) ***Searches that do not yield responsive records.*** Charges may be assessed for search time even if the agency fails to locate any responsive records or if it locates only records that are determined to be exempt from disclosure.

(k) ***Effect of the Debt Collection Act of 1982 (*** *Pub. L. 97-365), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104-134).*

The Commission will pursue repayment, where appropriate, by employing the provisions of the Debt Collection Act of 1982, as amended by the Debt Collection Improvement Act of 1996, the Federal Claims Collection Standards (FCSS), 31 CFR 900-904, and any other applicable authorities in collecting unpaid fees assessed under this section, including disclosure to consumer reporting agencies and use of collection agencies. The FTC also reserves the legal right to employ other lawful debt collection methods such as alternative dispute resolution and arbitration when appropriate.

By direction of the Commission.

Donald S. Clark,

Secretary.

The Freedom of Information Reform Act of 1986;
Uniform Freedom of Information Act Fee Schedule and Guidelines
52 FR 10,012 March 27, 1987

SUPPLEMENTARY INFORMATION: The Freedom of Information Reform Act of 1986 (Pub. L. 99-570) amended the Freedom of Information Act (5 U.S.C. 552) by modifying the terms of exemption 7 and by supplying new provisions relating to the charging and waiving of fees. The Reform Act specifically required the Office of Management and Budget to develop and issue a schedule of fees and guidelines, pursuant to notice and comment.

On January 16, 1987, OMB published a proposed fee schedule and guidelines explaining how to implement the schedule. The notice invited public comment especially on the definitions of "commercial," "representative of the news media," "educational institution," "non-commercial scientific institution," "search," and "review."

At the end of the comment period, February 17, 1987, OMB had received 80 comments from 6 identifiable categories of commentator:

-- The Congress (1)

-- The Federal Agencies (11)

-- Publishers of Newsletters (41)

-- Public interest groups affiliated with the news media (11)

-- Other public interest groups (12)

-- Individual members of the public (4)

Although many of the commentators focused exclusively on OMB's proposed definition of "representative of the news media," a significant number provided substantive comments on other aspects of the guidelines and schedule. These comments are discussed in the sectional analysis that follows.

Several commentators urged OMB to publish a revised schedule and guidance for a second round of public comment, while acknowledging the problems presented by the statutory deadline requiring agencies to promulgate their own fee

regulations by April 25, 1987. OMB has carefully considered this suggestion, but declines to adopt it. Since agencies' regulations must be published not only pursuant to (and thus following) OMB's issuance and also for notice and comment, a second round of comment would make it impossible for agencies to meet the statutory deadline. It should be noted, however, that OMB intends to follow agencies' implementation of the schedule and guidelines closely and will issue clarifications when needed.

Section-by-Section Analysis

Section 1. Purpose.

Many commentators suggested that OMB's emphasis on collecting FOIA fees was contrary to the intent of the FOIA amendment which they insisted was to make information more widely and cheaply available, and they urged that we emphasize this intention. While it is true that many of the provisions of the FOIA amendments will have this effect, OMB's role in this process is limited to that of providing guidance on charging fees under the FOIA. Moreover, given OMB's budgetary responsibilities, it is quite appropriate for it to require agencies to develop and diligently carry out programs that charge, collect and deposit fees for FOIA services where such activities are clearly permitted by statute. Accordingly, no changes were made to this section.

Section 5. Authorities.

One commentator objected to the citation of statutory authorities other than the Freedom of Information Reform Act: specifically, the Paperwork Reduction Act of 1980 and the Budget and Accounting Act and Budget and Accounting Procedures Act. It was not OMB's intention to enlarge the scope of its authority or responsibilities in developing FOIA fee guidance by citing these Acts. Nevertheless, these Acts do provide a framework for the development and issuance of OMB policies relating to information access and dissemination policies and the collecting and disposition of fees. The Paperwork Reduction Act, for example, makes the Director of OMB responsible for developing and implementing "Federal information policies, principles, standards, and guidelines" (44 U.S.C. 3504(a)). Among these responsibilities are those for issuing guidance on the Privacy Act of 1974. These FOIA fee guidelines rely on that authority to remind agencies that the fee schedule provided herein does not apply to individuals seeking access to their own records which are filed in Privacy Act systems of records. Similarly, the budgetary authorities cited mandate that funds agencies receive for providing

FOIA services are to be deposited in the general revenues of the United States rather than individual agency accounts. OMB has made one change to this section and that is to add a reference to the Privacy Act of 1974.

Section 6. Definitions:

Section 6b. "Statute Specifically Providing for Setting the level of fees for particular types of records."

A few commentators addressed this definition and suggested that it was too broad and general and could permit agencies, on a discretionary basis, to "circumvent the general FOIA policy of minimal fees for statutory access to agency records." The commentators urged that we include in the definition that a qualifying statute would have to specifically establish a level of fees and specifically identify a particular type of records for which the fees could be charged.

It was not OMB's intention to have this provision read broadly, since the legislative history relating to this provision is unambiguous in stating that it is not intended to change existing law. We have therefore revised the section to meet the concerns of the commentators. We would note only, however, that a number of commentators misquoted the plain wording of the provision by insisting that a qualifying statute must set a specific level of fees rather than specifically providing for the setting of fees by an agency. Our guidance makes it clear that a qualifying statute must require, not merely permit, an agency to establish fees for particular documents.

The commentators also objected to the first subparagraph in the definition which refers to statutes that "serve both the general public and private sector organizations by conveniently making available government information . . . ," and urged its elimination on the basis that it is "so vague and meaningless that it could probably be applied to any statute allowing disclosure of information." The objectionable paragraph is taken from the legislation establishing the National Technical Information Service (albeit somewhat condensed) and we have left it unchanged, but note that it is to be read in conjunction with the other subparagraphs in providing a generic description of such fee statutes.

Section 6c. "Direct Costs."

Two categories of commentators addressed the issue of charging a percentage of an employee's salary to cover benefits. Non-federal commentators thought that

such charges were improper because they represented agency overhead costs rather than direct costs. Federal agency commentators, on the other hand, pointed out that the 16 percent rate the guidance attributed to benefits was inconsistent with OMB's own guidance in Circular No. A-76 which uses a much higher percentage.

As to the first point, the Freedom of Information Act permits agencies to charge only for allowable reasonable direct costs of providing certain FOIA services. Employee salaries are clearly a direct cost of providing FOIA services. The cost to the agency of conducting, for example, a search for a document is the salary that must be paid to the employee performing the search multiplied by the time he or she spends searching.

The elements used to calculate an employee's total salary are the pay grade of the employee and any fringe benefits. Because the agency is permitted to charge only "reasonable" direct costs, the inclusion of some kinds of fringe benefits would be clearly unreasonable. For example, an agency that maintains recreational facilities for employees and their families could not count the cost of operating the facility as a reasonable direct cost for FOIA fee purposes. But, an employer's contribution to a retirement system and to health and life insurance programs are concrete identifiable costs directly associated with the salary of the employee and should be counted as part of the direct costs of providing FOIA services.

As to the second point, the figure cited in OMB Circular No. A-76 was developed for a different purpose and on a different basis. The circular uses a figure, for example, of 27.9 percent as a cost factor in determining agency costs for employee retirement. The figure includes not only the direct 7 percent agency contribution, but other governmental sources of funds for the Civil Service Retirement System. While 27.9 percent may be an appropriate figure for purposes of Circular No. A-76, the "direct reasonable cost" restriction of the Freedom of Information Act precludes using more than the 7 percent agency contribution. OMB arrived at the 16 percent figure in consultation with the Office of Personnel Management, and it is retained in the final version of our guidance.

Some readers noted that the 16 percent figure was rendered 16.1 in Section 7a of the guidelines. That was a typographical error.

Section 6d. "Search."

Several commentators objected to the inclusion of line-by-line searches as an example of search. It is not often that an agency would need to read a document

line-by-line to locate records responsive to a request, and agencies should not artificially raise search costs by unnecessarily spending time reading a document for responsive records when it would be cheaper and faster simply to reproduce the entire document. Our intention was to provide guidance on the *scope* of what constitutes FOIA search and we were careful to distinguish line-by-line search from review. We have accordingly modified the section to make it clear that agencies should not conduct line-by-line searches when whole document reproduction would be cheaper and faster.

Section 6f. "Review."

Several Federal agency commentators suggested that we provide greater detail on what constitutes review of documents for which agencies may charge commercial use requesters. We have therefore expanded the explanation.

Section 6g. "Commercial Use Request."

Although the legislative history is in conflict on the precise meaning of this provision, it seems clear that the Congress intended to distinguish between requesters whose use of the information was for a use that furthered their business interests, as opposed to a use that in some way benefited the public. The amendment shifts some of the burden of paying for the FOIA to the former group and lessens it for the latter.

As opposed to the other fee categories created by the amendment, inclusion in this one is determined not by the identity of the requester, but the use to which he or she will put the information obtained. Because "use" is the exclusive determining criterion, it is possible to envision a commercial enterprise making a request that is not for a commercial use. It is also possible that a non-profit organization could make a request that is for a commercial use. Moreover, because "use," not identity, controls, agencies will have to spend more time than they do now in determining what the requester intends to do with the records sought.

Both the legislative history and the comments on OMB's proposed fee guidance contain suggestions that agencies can look to the identities of requesters and automatically assign them to or exclude them from this category. Indeed, the original OMB proposal instructed agencies that a request, without further explanation, submitted on corporate letterhead could be presumed to be for a commercial use. Commentators urged that we also include a presumption that requests submitted on the letterhead of a non-profit organization be for a non-

commercial purpose. We no longer think either presumption should be made automatically since both would be based upon the identity of the requester as opposed to the use to which he or she intended to put the records sought. We have therefore revised the definition to eliminate the example.
Many commentators were troubled by the breadth of OMB's proposed definition of "commercial use," arguing that by defining such a use as one which is "related to" commerce, OMB was providing too tenuous a connection to be meaningful. OMB has revised the definition to attempt to provide a more meaningful linkage. "Commercial use" is therefore defined as a use that "furthers the commercial, trade or profit interests of the requester or person on whose behalf the request is made."

Section 6h. "Educational Institution."

Many commentators were concerned about our definition of "educational institution." One Federal agency, for example, pointed out that it would exclude high schools from this category of FOIA requesters. The legislative history is unhelpful on this point, nowhere defining the term. One commentator recommended the definition found in Webster's *New Twentieth Century Dictionary of the English Language* (2nd. ed. 1968) in which the word "education" means providing instruction or information; an "educational institutional" is an entity organized to provide instruction or information. The problem with this suggestion is that it is not sufficiently discriminating. There are very few organizations that do not in some way "provide information" and who would not qualify as "an entity organized to provide information."

Other commentators recommended the definition of educational institution used by the Internal Revenue Service in its regulations implementing Section 501(c)(3) of the Tax Code. Institutions meeting this definition qualify for tax exempt treatment. The commentators pointed out that since the task the FOIA Reform Act set OMB was to develop a uniform fee schedule, looking to an existing definition would be consistent with the statutory intent. After some consideration, OMB agrees that while it would be appropriate to incorporate an existing and well understood definition, neither the Tax Code nor the IRS regulations implementing the Code serve that purpose well. The statute merely provides that "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for . . . educational purposes . . .," qualify for exemption from taxation. The IRS regulations interpreting this somewhat vague statutory provision are themselves too general to be useful to the agencies in determining an institution's eligibility under the FOIA fee schedule. Moreover, OMB does not think it is appropriate to

tie eligibility for inclusion in the "educational institution" fee category to an IRS interpretation of the institution's eligibility for tax exempt status.

Rather than using the IRS definition, OMB thinks it more appropriate to look to the Department of Education definition found in 20 U.S.C. 1681(c). Accordingly, the terms of that statutory definition have been adapted for use in a revised definition, but it is intended that they be given their plain meaning in the FOIA context. Moreover, these terms must be applied in conjunction with the FOIA's "scholarly research" requirement. Thus, the definition has been revised to read " 'educational institution' refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education and an institution of vocational education, which operates a program or programs of scholarly research."

As a practical matter, it is unlikely that a preschool or elementary or secondary school would be able to qualify for treatment as an "educational" institution since few preschools, for example, could be said to conduct programs of scholarly research. But, agencies should be prepared to evaluate requests on an individual basis when requesters can demonstrate that the request is from an institution that is within the category, that the institution has a program of scholarly research, and that the documents sought are in furtherance of the institution's program of scholarly research and not for a commercial use.

Agencies should ensure that it is apparent from the nature of the request that it serves a scholarly research goal of the institution, rather than an individual goal. Thus, for example, a request from a professor of geology at a State university for records relating to soil erosion, written on letterhead of the Department of Geology, could be presumed to be from an educational institution. A request from the same person for drug information from the Food and Drug Administration in furtherance of a murder mystery he is writing would not be presumed to be an institutional request, regardless of whether it was written on institutional stationary. Indeed, such a request could reasonably be construed to be a request that is for a commercial use.

The institutional versus individual test would apply to student requests as well. A student who makes a request in furtherance of the completion of a course of instruction is carrying out an individual research goal and the request would not qualify, although the student in this case would certainly have the opportunity to apply to the agency for a reduction or waiver of fees.

One commentator suggested that OMB should read the phrase "scholarly or scientific research" conjunctively in association with the term "educational institution" so that a request from an educational institution in furtherance of either scholarly or scientific research would qualify. OMB rejected this suggestion; the statute and the legislative history recite the formula "educational or scientific institution/scholarly or scientific research," and it seems clear that the phrase was meant to be read disjunctively so that scholarly applies to educational institution and scientific applies to non-commercial scientific institution.

Section 6i. "Non-Commercial Scientific Institution."

A number of Federal agencies commented on this definition. Several suggested that qualifying institutions be limited to those conducting research in the natural sciences. OMB rejected this suggestion; there is no support in either the statute, the legislative history, or the plain meaning of the term to permit such a narrow reading.

Other agency commentators suggested that the word "non-commercial" be more fully defined so that an institution whose purpose was to further a specific product or industry would be excluded from this category. OMB has accepted this suggestion and modified the definition accordingly.

OMB has also revised the definition to ensure consistency with the definition of "commercial" in Section 6g.

Section 6j. "Representative of the News Media."

This definition drew the most comments of any section. Commentators generally fell into two classes. The first consisted of newsletter publishers and their representatives who were concerned that the guidelines could be read to exclude them from qualifying as "representatives of the news media." The second class had broader concerns about the definition, and were especially concerned about its perceived narrowness.

Many of the newsletter commentators pointed to their accreditation to the House and Senate press galleries as evidence of their membership in the new media category. It was not OMB's intention to exclude the publishers of newsletters from this category. The examples provided in the definition were not intended to be all-inclusive. Certainly newsletters, if they meet all of the other criteria, would qualify as "representatives of the news media" for purposes of this definition. To avoid

implying any such limitation, OMB has replaced the references to "newspaper" and "magazine" in the definition with the word "periodical."

The other class of commentators criticized the narrowness of OMB's proposed definition, pointing to the words of Senator Leahy in the legislative history that "[i]t is critical that the phrase 'representative of the news media' be broadly interpreted if the Act is to work as expected." Cong. Rec. S.14298 (daily ed. September 30, 1986). They asserted that including the words "established," "general circulation," "working for," and "regularly," all served to unnecessarily limit what they perceived to be the breadth of the definition's coverage.

OMB has carefully considered these comments. Our intention in this section was to provide the agencies and the public with a workable definition. We used the word "established" not to limit eligibility only to those organizations in being at the time of the issuance of the guidance, but simply to indicate that a qualifying organization must be able to show some evidence of its identity beyond the mere assertion that it is a member of the news media. Press accreditation, guild membership, a history of continuing publication, business registration, Federal Communications Commission licensing, for example, would suffice. The word "regularly" which the legislative history shows Senator Leahy using in precisely this context, was meant to indicate that a qualifying organization would have to show that it was a continuing venture that was publishing or broadcasting news to the public. Thus, a newly established newspaper would be able to do so by demonstrating that it had held itself out for subscription and had in fact enrolled subscribers.

The phrase "general circulation" was misinterpreted by many commentators: members of the public and Federal agencies as well. OMB intended the phrase to refer to a newsworthy product that was broadcast or published in a manner that made it *available* to the general public, not that it had to have an exclusively general content or that it had to be circulated exclusively to a general audience.

In any case, OMB has sought to address these concerns by redrafting the section so that "news media" is defined generically as "an entity that is organized and operated to publish or broadcast news to the public." *The American Heritage Dictionary* (Second College Edition, 1982) defines the word "news" as ". . . Recent events and happenings, esp. those that are unusual or notable. . . . Information about recent events of general interest, esp. as reported by newspapers, periodicals, radio or television . . . A presentation or broadcast of such information: newscast. . . . Newsworthy material."

Thus, "news media" is further limited to purveyors of information that is current or would be of current interest. The Congress could easily have drafted the section to read "representative of the media" rather than "news media," but it did not; therefore, OMB thinks it is reasonable to give some weight to the term "news" when constructing a definition. The examples given cite the traditional models -- radio and television stations as well as publishers of peridicals that disseminate "news," -- but also look to evolving non-traditional distributors, such as videotext. While these examples are not meant to be all-inclusive, they *are* meant to be limiting, and to give meaning to the phrase "publish or broadcast news" so that it implies something more than merely "make information available." The news media perform an active rather than passive role in dissemination. Thus, they can be distinguished, for example, from an entity such as a library which stores information and makes it available on demand.

The provision for freelancer eligibility, especially the term "solid basis for expecting publication" also drew comments. OMB's aim was to incorporate legitimate freelance representatives of the news media into the categorical definition without opening the door to anyone merely calling himself or herself a freelance journalist. Many commentators noted that while it was quite reasonable to require freelancers to show some evidence that they could expect their work to be published before granting them acess to this category of requester, they were troubled by the use of the phrase "solid basis." OMB has attempted to address these concerns by adding to this section examples amplifying what solid basis means, e.g., a publication contract would be the clearest basis, but freelancer's past publication history could also be considered. In any case, freelancers who do not qualify for inclusion in the "representatives of the news media" category because they cannot demonstrate a solid basis for expecting publication could be eligible to seek a reduction or waiver of fees if they meet the statutory waiver criteria.

Section 7. "Fees to be Charged."

A number of commentators expressed frustration that OMB was not issuing a unitary schedule of fees which would establish one government-wide charge for each FOIA service performed. OMB is sympathetic to this position, but does not believe that the FOIA Reform Act gives it the authority to do so. Because the FOIA Reform Act requires each agency's fees to be based upon its direct reasonable operating costs of providing FOIA services, OMB is precluded from establishing a government-wide fee schedule.

Commentators urged OMB to emphasize in this section that the effect of the FOIA amendment was to minimize costs by creating categorical limitations on what fees could be charged. They asserted that OMB's direction to the agencies to "charge fees that recoup the full direct costs they incur . . .," was at the least misleading, given the statutory limitations. OMB agrees and has revised the sentence to read "full allowable direct costs" to make it clear that agencies must look to the categorical limitations in the statute and charge fees accordingly.

Commentators pointed out that OMB's encouragement of agencies to use private sector services to locate, reproduce and disseminate records in response to FOIA requests, while consistent with the policy articulated in OMB Circular No. A-130, needed some limitations. Commentator specifically wanted OMB to make it clear that the ultimate costs for requesters serviced by private sector contractors should be no different than if serviced by an agency. They also suggested that OMB clarify that there are some services taht agencies may not contract out: e.g., records for the application of an exemption or the waiving of a fee. OMB has accordingly redrafted the section to accommodate these concerns.

Section 7b. "Computer Searches for Records."

At the suggestion of a Federal agency commentator, OMB has added a provision permitting agencies to establish agency-wide average computer processing unit operating costs and operator/programmer salaries for purposes of determining fees for computer searches where they can reasonably do so because these costs are relatively uniform across the agency. This provision is meant to encourage agencies to minimize FOIA costs by reducing the administrative steps necessary to establish a fee for a particular search. It is not meant to allow agencies to raise the prices of such searches by including in the average expensive but seldom-used equipment.

OMB has also revised this section to make it clear that agencies may only charge search costs for that portion of the operation of the central processing unit (CPU) and operator salary that is directly attributable to the FOIA search.

Section 7c. "Review of Records."

Several Federal agency commentators requested additional clarification of when review costs could be charged, i.e., at what point in the processing of a request were review charges permitted and could charges be made for subsequent review of materials. OMB has revised this section to address these concerns and clarify

that charges may only be assessed the first time an agency reviews a record for the application of an exemption and not at the administrative appeal level of an exemption already applied.

At the suggestion of a Federal agency commentator, OMB has added a provision permitting agencies to establish an agency-wide average cost for review when review is performed by a single class of employee. The intent is to minimize agency administrative costs.

Section 7d. "Duplication of Records."

One commentator objected to the salary of the employee operating the duplicating machinery being included as a reasonable direct cost of duplication. Since the operation of a duplicating machine is necessary to produce a copy of a document, OMB considers this a reasonable direct cost and has not changed the section.

Section 7e. "Other Charges."

Several commentators objected to the inclusion of fees for normal packaging and mailing of records in this section, arguing that mailing records was a reasonable interpretation of the FOIA requirement that agencies "make . . . records promptly available . . ." They argued that an agency requiring a requester to come from Alaska to Washington, D.C. to obtain records responsible to his request could hardly be said to be making records available. Upon reflection, OMB concurs and has deleted charges for ordinary packaging and mailing as examples of allowable other charges.

Section 7f. "Restrictions on Assessing Fees."

OMB has revised this section to provide greater detail on how agencies should develop costs relating to the 100 free pages of reproduction and two hours of free search time the FOIA Reform Act permits certain classes of requesters. The revision also reminds agencies of the consequences of these restrictions for the use of contractors to perform search and duplication services: specifically, that contracts must incorporate free search and reproduction services when appropriate.

OMB also added an explanation of how agencies should determine what constitutes two hours of free computer search time. Since most computer searches are accomplished in seconds and fractions of seconds, it would be unreasonable to interpret the statutory free search time to mean that an individual would be entitled

to require an agency to operate a computer for two hours. The cost and the disruption of an agency's normal ADP activities would be prohibitively expensive. OMB has therefore developed a formula based upon the concept of manual search, i.e., search done by an agency employee who examines records to find those that are responsive to a request. The employee performing the computer search who is most nearly like the clerical searcher is the operator. The guidance, therefore, tells agencies that a requester is entitled to two hours of operator salary translated into computer search costs (computer search consists of operator salary plus CPU operating time cost for the duration of the search).

Section 7g. "Waiving or Reducing Fees."

OMB has dropped this section. A number of commentators pointed out that OMB's role is limited by the plain wording of the statute to developing guidelines and a fee schedule. In looking carefully at this requirement, OMB has determined that developing a schedule providing for the charging of fees and issuing guidance on when fees should be reduced or waived are separate issues and that OMB's role does not involve the latter consideration. In developing a fee schedule and guidance on its implementation that the statute clearly contemplates, it was necessary for OMB to carefully define the categories or classes of requester and explain to the agencies what fees to charge them. Thus, for example, OMB discussed the exclusion of search fees for educational/scientific institutional requesters and representatives of the news media. This discussion was about the establishment and limitation of fees for a particular category of requester. It was not about waiving search fees since the statute gives agencies no discretion about what search fees to charge this class of requester. OMB considers the development of such definitions as required by the statute and thus squarely within its proper responsibilities.

Section 8. "Fees to be Charged."

OMB has added the phrase "requesters must reasonably describe the records sought" to all categories of requesters to accommodate some commentators' concerns that OMB was creating a new requirement for a particular class of requester by applying this requirement to educational/scientific institutional requesters and representatives of the news media alone.

Section 8d. "All Other Requesters."

OMB has revised this section to explain that the requests of record subjects asking for copies of records about themselves filed in agencies' systems of records must be processed under the Privacy Act's fee schedule.

Section 8a. "Commercial Use Requesters."

OMB has removed the reference to fee waivers, based upon the discussion in Section 7g. above.

Section 9a. "Charging Interest."

OMB has revised this section to specify that interest will accrue from the date the bill was mailed if fees are not paid by the 30th day following the billing date. To ensure that agencies do not bill interest because of defects in their own administrative procedures, the section has been revised to provide that agencies should ensure their accounting procedures are adequate to properly credit a requester who has remitted the fee within the time period. To guard against inadequate processing procedures, the guidelines require that receipt of a fee by the agency, whether processed or not, will stay the accrual of interest.

Section 9b. "Charges for Unsuccessful Search."

Many requesters urged OMB to delete this section. Some argued that it could be used by an agency to surprise and unwary requester with an unexpected and potentially ruinous bill. OMB thinks that an agency should be entitled to charge for unsuccessful search, but agrees that it should be done with the knowledge and consent of the requester. Thus the section has been revised to require agencies to notify requesters who have not agreed to pay fees as high as those anticipated when charges are likely to exceed $25.

Section 9c. "Aggregating Requests."

Requesters generally agreed that agencies should not permit a requester to make multiple requests merely to avoid paying fees. There was disagreement about what standard to use in such cases and many requesters urged that OMB adopt a 30-day limit.

The 30-day limit, while providing certainty for both the requester and the agency, does not achieve the goal of allowing an agency to identify requesters who are attempting to circumvent the fee provisions of the statute and charge accordingly.

Therefore, OMB has declined to change its original proposal, a "reasonable belief" standard, but has provided examples to help agencies understand what "reasonable" means in this context. Thus, agencies could presume that multiple requests for documents that could reasonably have been the subject of a single request and which occur within a 30-day period are made to avoid paying fees. Agencies may make that presumption for requests occurring over a longer period, but should have a solid basis for doing so.

Commentators also suggested that agencies should not be able to aggregate requests from a single requester for records on unrelated subjects nor from different requesters for records about the same subject. As to the first, OMB agrees and has revised this section to reflect this concern. As to the second, OMB does not agree that agencies should in no circumstances be able to aggregate requests from multiple users. However, such aggregation should occur rarely and only when the agency has solid evidence that multiple requesters are colluding to avoid paying FOIA fees. OMB has included cautions to this effect in the section.

Section 9d. "Advance Payments."

The Amendments clearly permit agencies to charge and collect advance payments in two specific circumstances: (1) When fees will exceed $250; or when a requester has previously failed to pay fees in a timely fashion. Non-federal commentators generally argued that this provision should be read as a limitation rather than an authorization: i.e., "agencies may only charge advance fees when. . . ." OMB has accordingly revised this section to incorporate the fee limitation concept and also to ensure that agencies use this provision fairly. Thus, when agencies determine the estimated fee is likely to exceed $250, they should seek satisfactory assurances of payment if the requester has a record of prompt payment. If the requester has no history of payment, they may ask for an advance payment of an amount up to the estimated cost. For requesters who have failed to pay in a timely fashion in the past, however, or who are currently delinquent, agencies are encouraged to require full prepayment of the estimated amount.

Uniform Freedom of Information Act Fee Schedule and Guidelines

To the Heads of Executive Departments and Establishments

1. *Purpose* -- This Fee Schedule and Guidelines implement certain provisions of the Freedom of Information Reform Act of 1986 (P.L. 99-570) which require the

Office of Management and Budget to promulgate guidelines containing a uniform schedule of FOIA fees applicable to all agencies that are subject to the FOIA.

Data from agencies' annual FOIA reports to the Congress as well as studies by the General Accounting Office and others indicate that inconsistent application of the Act's fee provisions has sometimes resulted in inequitable treatment of users of the Act as well as substantial loss of revenues to the Treasury. While the legislative history of the 1974 amendments to the Freedom of Information Act shows that the Congress did not intend that fees be erected as barriers to citizen access, it is quite clear that the Congress did intend that agencies recover of their costs. The 1986 Amendments to the Act clarify that congressional intention further by creating specific categories of requesters and prescribing fees for each category. Therefore, these Guidelines provide a schedule of fees and related administrative procedures in order to establish a consistent government-wide framework for assessing and collecting FOIA fees.

2. *Scope* -- This Fee Schedule and Guidelines apply to all agencies subject to the Freedom of Information Act (see 5 U.S.C. 552(f)).

3. *Effective Date* -- This Fee Schedule and Guidelines are effective upon issuance -- April 27, 1987.

4. *Inquires* -- Inquiries should be directed to Robert N. Veeder at the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503. Telephone: (202) 395-4814.

5. *Authorities* -- The Freedom of Information Act (5 U.S.C. 552), as amended; the Paperwork Reduction Act (44 U.S.C. 35); the Privacy Act of 1974 (5 U.S.C. 552a); the Budget and Accounting Act of 1921 (31 U.S.C. 1 et. seq.); the Budget and Accounting Procedures Act (31 U.S.C. 67 et seq.).

6. *Definitions* -- For the purpose of these Guidelines:

a. All the terms defined in the Freedom of Information Act apply.

b. A "statute specifically providing for setting the level of fees for particular types of records" (5 U.S.C. 552(a)(4)(A)(vi)) means any statute that specifically requires a government agency, such as the Government Printing Office (GPO) or the National Technical Information Service (NTIS), to set the level of fees for particular types of records, in order to:

(1) Serve both the general public and private sector organizations by conveniently making available government information;

(2) Ensure that groups and individuals pay the cost of publications and other services which are for their special use so that these costs are not borne by the general taxpaying public;

(3) Operate an information dissemination activity on a self-sustaining basis to the maximum extent possible; or

(4) Return revenue to the Treasury for defraying, wholly or in part, appropriated funds used to pay the cost of disseminating government information.

Statutes, such as the User Fee Statute, which only provide a general discussion of fees without explicitly requiring that an agency set and collect fees for particular documents do not supersede the Freedom of Information Act under section (a)(4)(A)(vi) of that statute.

c. The term “direct costs” means those expenditures which an agency actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

d. The term “search” includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. Agencies should ensure that searching for material is done in the most efficient and least expensive manner so as to minimize costs for both the agency and the requester. For example, agencies should not engage in line-by-line search when merely duplicating an entire document would prove the less expensive and quicker method of complying with a request. “Search” should be distinguished, moreover, from “review” of material in order to determine whether the material is exempt from disclosure (see subparagraph 6f below). Searches may be done manually or by computer using existing programming.

e. The term “duplication” refers to the process of making a copy of a document necessary to respond to an FOIA request. Such copies can take the form of paper copy, microform, audio-visual materials, or machine readable documentation (e.g.,

magnetic tape or disk), among others. The copy provided must be in a form that is reasonably usable by requesters.

f. The term “review” refers to the process of examining documents located in response to a request that is for a commercial use (see subparagraph 6g below) to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, e.g., doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

g. The term “ ‘commercial use’ request” refers to a request from or on behalf of one who seeks information 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 made. In determining whether a requester properly belongs in this category, agencies must determine the use to which a requester will put the documents requested. Moreover, where an agency has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, agencies should seek additional clarification before assigning the request to a specific category.

h. The term “educational institution” refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

i. The term “non-commercial scientific institution” refers to an institution that is not operated on a “commercial” basis as that term is referenced in 6g above, and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.

j. The term “representative of the news media” refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term “news” means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of “news”) who make their products available for purchase or subscription by the general public. These examples are not intended to be all-

inclusive. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of "freelance" journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but agencies may also look to the past publication record of a requester in making this determination.

7. *Fees To Be Charged -- General.* Agencies should charge fees that recoup the full allowable direct costs they incur. Moreover, they shall use the most efficient and least costly methods to comply with requests for documents made under the FOIA.

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. When doing so, however, agencies should ensure that the ultimate cost to the requester is no greater than it would be if the agency itself had performed these tasks. In no case may an agency contract out responsibilities which the FOIA provides that it alone may discharge, such as determining the applicability of an exemption, or determining whether to waive or reduce fees.

In addition, agencies should ensure that when documents that would be responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs (see definition in paragraph 6b above), such as the NTIS, they inform requesters of the steps necessary to obtain records from those sources.

a. Manual Searches for Records -- Whenever feasible, agencies should charge at the salary rate(s) (i.e. basic pay plus 16 percent) of the employee(s) making the search. However, where a homogeneous class of personnel is used exclusively (e.g., all administrative/clerical, or all professional/executive), agencies may establish an average rate for the range of grades typically involved.

b. Computer Searches for Records -- Agencies should charge at the actual direct cost of providing the service. This will include the cost of operating the central processing unit (CPU) for that portion of operating time that is directly attributable to searching for records responsive to a FOIA request and operator/programmer salary apportionable to the search. When agencies can establish a reasonable

agency-wide average rate for CPU operating costs and operator/programmer salaries involved in FOIA searches, they may do so and charge accordingly.

c. Review of Records -- Only requesters who are seeking documents for commercial use may be charged for time agencies spend reviewing records to determine whether they are exempt from mandatory disclosure. It should be noted that charges may be assessed only for the *initial*review; i.e., the review undertaken the first time an agency analyzes the applicability of a specific exemption to a particular record or portion of a record. Agencies may not charge for review at the administrative appeal level of an exemption already applied. However, records or portions of records withheld in full under an exemption which is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review would be properly assessable. Where a single class of reviewers is typically involved in the review process, agencies may establish a reasonable agency-wide average and charge accordingly.

d. Duplication of Records -- Agencies shall establish an average agency-wide, per-page charge for paper copy reproduction of documents. This charge shall represent the reasonable direct costs of making such copies, taking into account the salary of the operators as well the cost of the reproduction machinery. For copies prepared by computer, such as tapes or printouts, agencies shall charge the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction or duplication, agencies should charge the actual direct costs of producing the document(s). In practice, if the agency estimates that duplication charges are likely to exceed $25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with agency personnel with the object of reformulating the request to meet his or her needs at a lower cost.

e. Other Charges -- It should be noted that complying with requests for special services such as those listed below is entirely at the discretion of the agency. Neither the FOIA nor its fee structure cover these kinds of services. Agencies should recover the full costs of providing services such as those enumerated below to the extent that they elect to provide them:

(1) Certifying that records are true copies;

(2) Sending records by special methods such as express mail, etc.

f. Restrictions on Assessing Fees -- With the exception of requesters seeking documents for a commercial use, Section (4)(A)(iv) of the Freedom of Information Act, as amended, requires agencies to provide the first 100 pages of duplication and the first two hours of search time without charge. Moreover, this section prohibits agencies from charging fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself. These provisions work together, so that except for commercial use requesters, agencies would not begin to assess fees until after they had provided the free search and reproduction. For example, for a request that involved two hours and ten minutes of search time and resulted in 105 pages of documents, an agency would determine the cost of only 10 minutes of search time and only five pages of reproduction. If this cost was equal to or less than the cost to the agency of billing the requester and processing the fee collected, no charges would result.

The elements to be considered in determining the "cost of collecting a fee," are the administrative costs to the agency of receiving and recording a requester's remittance, and processing the fee for deposit in the Treasury Department's special account (or the agency's account if the agency is permitted to retain the fee). The per-transaction cost to the Treasury to handle such remittances is negligible and should not be considered in the agency's determination.

For purposes of these restrictions on assessment of fees, the word "pages" refers to paper copies of a standard agency size which will normally be "8 1/2 x 11" or "11 by 14." Thus, requesters would not be entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or 100 pages of computer printout, however, might meet the terms of the restriction.

Similarly, the term "search time" in this context has as its basis, *manual search.* To apply this term to searches made by computer, agencies should determine the hourly cost of operating the central processing unit and the operator's hourly salary plus 16 percent. When the cost of the search (including the operator time and the cost of operating the computer to process a request) equals the equivalent dollar amount of two hours of the salary of the person performing the search, i.e., the operator, agencies should begin assessing charges for computer search.

8. *Fees to be Charged -- Categories of Requesters.* There are four categories of FOIA requesters: commercial use requesters; educational and non-commercial scientific institutions; representatives of the news media; and all other requesters. The Act prescribes specific levels of fees for each of these categories:

a. Commercial use requesters -- When agencies receive a request for documents for commercial use, they should assess charges which recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Requesters must reasonably describe the records sought. Commercial use requesters are not entitled to two hours of free search time nor 100 free pages of reproduction of documents. Agencies are reminded that they may recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records (see section 9b below).

b. Educational and Non-commercial Scientific Institution Requesters -- Agencies shall provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that the request is being made as authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research. Requesters must reasonably describe the records sought.

c. Requesters who are Representatives of the News Media -- Agencies shall provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in Section 6j above, and his or her request must not be made for a commercial use. In reference to this class of requester, a request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use. Thus, for example, a document request to the Department of Justice by a newspaper for records relating to the investigation of a defendant in a current criminal trial of public interest could be presumed to be request from an entity eligible for inclusion in this category and entitled to records for the cost of reproduction alone. Requesters must reasonably describe the records sought.

d. All Other Requesters -- Agencies shall charge requesters who do not fit into any of the categories above fees which recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished without charge. Moreover, requests from record subjects for records about themselves filed in agencies' systems of records will continue to be treated under the fee provisions of the Privacy Act of 1974 which permit fees only for reproduction. Requesters must reasonably describe the records sought.

9. *Administrative Actions to Improve Assessment and Collection of Fees* -- Agencies shall ensure that procedures for assessing and collecting fees are applied consistently and uniformly by all components. To do so, agencies should amend their agency-wide FOIA regulations to conform to the provisions of this Fee Schedule and Guidelines, especially including the following elements:

a. *Charging Interest -- Notice and Rate.* Agencies may begin assessing interest charges on an unpaid bill starting on the 31st day following the day on which the billing was sent. Agencies should ensure that their accounting procedures are adequate to properly credit a requester who has remitted the full amount within the time period. The fact that the fee has been received by the agency, even if not processed, will suffice to stay the accrual of interest. Interest will be at the rate prescribed in Section 3717 of Title 31 U.S.C. and will accrue from the date of the billing.

b. *Charges for Unsuccessful Search.* Agencies should give notice in their regulations that they may assess charges for time spent searching, even if the agency fails to locate the records or if records located are determined to be exempt from disclosure. In practice, if the agency estimates that search charges are likely to exceed $25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer the requester the opportunity to confer with agency personnel with the object of reformulating the request to meet his or her needs at a lower cost.

c. *Aggregating Requests.* Except for requests that are for a commercial use, an agency may not charge for the first two hours of search time or for the first 100 pages of reproduction. However, a requester may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When an agency reasonably believes that a requester or, on rare occasions, a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the agency may aggregate any such requests and charge accordingly. One element to be considered in determining whether a belief would be reasonable is the time period in which the requests have occurred. For example, it would be reasonable to presume that multiple requests of this type made within a 30-day period had been made to avoid fees. For requests made over a longer period, however, such a presumption becomes harder to sustain and agencies should have a solid basis for determining that aggregation is warranted in such cases. Agencies

are cautioned that before aggregating requests from more than one requester, they must have a concrete basis on which to conclude that the requesters are acting in concert and are acting specifically to avoid payment of fees. In no case may agencies aggregate multiple requests on unrelated subjects from one requester.

d. *Advance Payments.* Agencies may not require a requester to make an advance payment, i.e., payment before work is commenced or continued on a request, unless:

(1) The agency estimates or determines that allowable charges that a requester may be required to pay are likely to exceed $250. Then, the agency should notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees, or require an advance payment of an amount up the full estimated charges in the case of requesters with no history of payment; or

(2) A requester has previously failed to pay a fee charged in a timely fashion (i.e., within 30 days of the date of the billing), the agency may require the requester to pay the full amount owed plus any applicable interest as provided above or demonstrate that he has, in fact, paid the fee, and to make an advance payment of the full amount of the estimated fee before the agency begins to process a new request or a pending request from that requester.

When an agency acts under subparagraphs (1) or (2) above, the administrative time limits prescribed in subsection (a)(6) of the FOIA (i.e., 10 working days from receipt of initial requests and 20 working days from receipt of appeals from initial denial, plus permissible extensions of these time limits) will begin only after the agency has received fee payments described above.

e. *Effect of the Debt Collection Act of 1982* (Pub. L. 97-365). Agencies' FOIA regulations should contain procedures for using the authorities of the Debt Collection Act, including disclosure to consumer reporting agencies and use of collection agencies, where appropriate, to encourage repayment.

10. *Agencies' Required Implementing Actions* -- Section 1804(b)(1) of the Freedom of Information Reform Act requires agencies to promulgate final regulations in conformance with OMB's schedule and guidelines no later than the 180th day following enactment: April 25, 1987.

James C. Miller III, Director.

CONGRESSIONAL RECORD -- SENATE
110th Congress, 1st Session
153 Cong Rec S 10986
OPEN GOVERNMENT ACT OF 2007
August 3, 2007

Mr. REID. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of Calendar No. 127, *S. 849*.

The PRESIDING OFFICER. The clerk will report the bill by title.

The legislative clerk read as follows:

A bill (*S. 849*) to promote accessibility, accountability, and openness in Government by strengthening section 552 of title V, United States Code (commonly referred to as the Freedom of Information Act), and for other purposes.

There being no objection, the Senate proceeded to consider the bill.

Mr. LEAHY. Mr. President, I am pleased that the Senate has passed the Leahy-Cornyn Openness Promotes Effectiveness in our National Government Act" (the "OPEN Government Act"), *S. 849*, before adjourning for the August recess. This important Freedom of Information Act legislation will strengthen and reinvigorate FOIA for all Americans.

For more than four decades, FOIA has translated the great American values of openness and accountability into practice by guaranteeing access to government information. The OPEN Government Act will help ensure that these important values remain a cornerstone of our American democracy.

I commend the bill's chief Republican cosponsor, Senator John Cornyn, for his commitment and dedication to passing FOIA reform legislation this year. Since he joined the Senate 5 years ago, Senator Cornyn and I have worked closely together on the Judiciary Committee to ensure that FOIA and other open government laws are preserved for future generations. The passage of the OPEN Government Act is a fitting tribute to our bipartisan partnership and to openness, transparency and accountability in our government.

I also thank the many cosponsors of this legislation for their dedication to open government and I thank the Majority Leader for his strong support of this

legislation. I am also appreciative of the efforts of Senator Kyl and Senator Bennett in helping us to reach a compromise on this legislation, so that the Senate could consider and pass meaningful FOIA reform this legislation before the August recess.

But, most importantly, I especially want to thank the many concerned citizens who, knowing the importance of this measure to the American people's right to know, have demanded action on this bill. This bill is endorsed by more than 115 business, public interest, and news organizations from across the political and ideological spectrum, including the American Library Association, the U.S. Chamber of Commerce, OpenTheGovernment.org, Public Citizen, the Republican Liberty Caucus, the Sunshine in Government Initiative and the Vermont Press Association. The invaluable support of these and many other organizations is what led the opponents of this bill to come around and support this legislation.

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As the first major reform to FOIA in more than a decade, the OPEN Government Act will help to reverse the troubling trends of excessive delays and lax FOIA compliance in our government and help to restore the public's trust in their government. This bill will also improve transparency in the Federal Government's FOIA process by:

Restoring meaningful deadlines for agency action under FOIA;

Imposing real consequences on federal agencies for missing FOIA's 20-day statutory deadline;

Clarifying that FOIA applies to government records held by outside private contractors;

Establishing a FOIA hotline service for all federal agencies; and

Creating a FOIA Ombudsman to provide FOIA requestors and federal agencies with a meaningful alternative to costly litigation.

Specifically, the OPEN Government Act will protect the public's right to know, by ensuring that anyone who gathers information to inform the public, including freelance journalist and bloggers, may seek a fee waiver when they request information under FOIA. The bill ensures that federal agencies will not

automatically exclude Internet blogs and other Web-based forms of media when deciding whether to waive FOIA fees. In addition, the bill also clarifies that the definition of news media, for purposes of FOIA fee waivers, includes free newspapers and individuals performing a media function who do not necessarily have a prior history of publication.

The bill also restores meaningful deadlines for agency action, by ensuring that the 20-day statutory clock under FOIA starts when a request is received by the appropriate component of the agency and requiring that agency FOIA offices get FOIA requests to the appropriate agency component within 10 days of the receipt of such requests. The bill allows federal agencies to toll the 20-day clock while they are awaiting a response to a reasonable request for information from a FOIA requester on one occasion, or while the agency is awaiting clarification regarding a FOIA fee assessment. In addition, to encourage agencies to meet the 20-day time limit, the bill prohibits an agency from collecting search fees if it fails to meet the 20-day deadline, except in the case of exceptional circumstances as defined by the FOIA statute.

The bill also addresses a relatively new concern that, under current law, federal agencies have an incentive to delay compliance with FOIA requests until just before a court decision that is favorable to a FOIA requestor. The Supreme Court's decision in Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources, 532 U.*S. 598* (2001), eliminated the "catalyst theory" for attorneys' fees recovery under certain federal civil rights laws. When applied to FOIA cases, Buckhannon precludes FOIA requesters from ever being eligible to recover attorneys fees under circumstances where an agency provides the records requested in the litigation just prior to a court decision that would have been favorable to the FOIA requestor. The bill clarifies that Buckhannon does not apply to FOIA cases. Under the bill, a FOIA requester can obtain attorneys' fees when he or she files a lawsuit to obtain records from the government and the government releases those records before the court orders them to do so. But, this provision would not allow the requester to recover attorneys' fees if the requester's claim is wholly insubstantial.

To address concerns about the growing costs of FOIA litigation, the bill also creates an Office of Government Information Services in the National Archives and creates an ombudsman to mediate agency-level FOIA disputes. In addition the bill ensures that each federal agency will appoint a Chief FOIA Officer, who will monitor the agency's compliance with FOIA requests, and a FOIA Public Liaison who will be available to FOIA to resolve FOIA related disputes.

Finally, the bill does several things to enhance the agency reporting and tracking requirements under FOIA. Tracking numbers are not required for FOIA requests that are anticipated to take ten days or less to process. The bill creates a tracking system for FOIA requests to assist members of the public and the media. The bill also establishes a FOIA hotline service for all federal agencies, either by telephone or on the Internet, to enable requestors to track the status of their FOIA requests.

In addition, the bill also clarifies that FOIA applies to agency records that are held by outside private contractors, no matter where these records are located. And to create more transparency about the use of statutory exemptions under FOIA, the bill ensures that FOIA statutory exemptions that are included in legislation enacted after the passage of this bill clearly cite the FOIA statute and clearly state the intent to be exempt from FOIA.

The Freedom of Information Act is critical to ensuring that all American citizens can access information about the workings of their government. But, after four decades this open government law needs to be strengthened. I am pleased that the reforms contained in the OPEN Government Act will ensure that FOIA is reinvigorated so that it works more effectively for the American people.

I am also pleased that, by passing this important reform legislation today, the Senate has reaffirmed the principle that open government is not a Democratic issue or a Republican issue. But, rather, it is an American issue and an American value. I commend all of my Senate colleagues, on both sides of the aisle, for unanimously passing this historic FOIA reform measure. I hope that the House of Representatives, which overwhelmingly passed a similar measure earlier this year, will promptly take up and pass this bill and that the President will then promptly sign it into law.

Mr. KYL. Mr. President, I rise today to comment on *S. 849*, the OPEN Government Act. As a result of negotiations between Senators Cornyn, Leahy, and me, we have reached an agreement on an amendment to this bill that addresses my concerns about the legislation while keeping true to the bill's intended purposes. When this bill was marked up in the Senate Judiciary Committee several months ago, I filed a number of amendments intended to address problems with the bill. Senator Leahy asked me at the mark up to withhold offering my amendments in favor of addressing my concerns through negotiations with him and with Senator Cornyn. I agreed to do so, and later submitted a statement of additional views to

the committee report for this bill that described the nature of some of my concerns, and that included as an attachment the Justice Department's lengthy Views Letter on this bill. After follow-up meetings with the Justice Department and Office of Management and Budget to elucidate the nature of some of those agencies' concerns and to try to come up with compromise language, negotiations among members of the Senate began. I am pleased to report that those negotiations have proved fruitful. Our negotiations have benefited from extensive assistance from the Justice Department and other parts of the executive branch, as well as from the input of various journalists' organizations. While none of these parties has gotten exactly what it wants, I do believe that we now have a bill that strikes the right balance with regard to FOIA-a bill that will make FOIA work more smoothly and efficiently.

Allow me to describe some of the changes that my amendment will make to the underlying bill. Section three of the original bill broadened the definition of media requesters to include anyone who "intends" to broadly disseminate information. My concern, which was also expressed by the Justice Department, was that in the age of the internet, anyone can plausibly state that he "intends" to broadly disseminate the information that he obtains through FOIA. The media-requester category is important because requesters who receive this status are exempt from search fees. Search fees are one of the principal tools that agencies use to encourage requesters to clarify and sharpen their requests. When someone makes a broad and vague request, the agency will come back with an estimate of the cost of conducting such a search. Often, the individual will then sharpen that request. This saves the agency time and the requester money. According to some FOIA administrators, legitimate media requesters rarely make vague

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requests. These requesters usually know what they want and they want to get it quickly. But if virtually any requester could be exempted from search fees by claiming that he intends to widely disseminate the information, search fees would no longer serve as a tool for encouraging requesters to focus their requests. Overall, this would waste FOIA resources and slow down processing of all requests. Such a result would not be in anyone's interest.

The compromise language included in my amendment clarifies the definition of media requester in a way that protects internet publications and freelance journalists but that still preserves commonsense limits on who can claim to be a journalist. At the suggestion of some media representatives, we have incorporated

into the amendment the definition of media requester that was announced by the DC Circuit in National Security Archive v. U.S. Department of Defense. 880 F.2d 1381 (D.C. Cir. 1989). That definition focuses on public interest in the collected information, the use of editorial skill to process that information into news, and the distribution of that news to an audience. It would appear in my view to protect publishers of newsletters and other smaller news sources, as well as, obviously, the types of organizations described in that opinion. On the other hand, given that this construction of the term news media as used in FOIA has been in effect for 17 years, I do not think that anyone can reasonably fear that codifying it will turn the world upside down. I was amused to see that Judge Ginsburg's analysis of the statute's definition of news media relied in part on conflicting legislative statements made by Senators Hatch and Leahy, two members with whom I currently serve on the Senate Judiciary Committee, regarding the meaning of the 1986 amendments to FOIA. By incorporating a judicially crafted definition of news media, I believe that my amendment spares the courts the indignity of being compelled to parse conflicting Senate floor statements in order to divine the meaning of that term.

The remainder of my amendment's changes to section 3 codify language that has been adopted by some administrative agencies to clarify who is a media requester. Other than stylistic edits, that agency language has been modified in my amendment only to make express that news-media entities include periodicals that are distributed for free to the public. This will protect the fee status of the numerous free newspapers that have become common in American cities in recent years. The agency language codified here also extends express protection to freelance journalists.

Overall, this language should guarantee news-media status for new electronic formats and for anyone who would logically be considered a journalist, even when that journalist's method of news distribution takes on new means and forms. But the language should also prevent gamesmanship by individuals who cannot logically be considered journalists but who are willing to assert that they are journalists in order to avoid paying search fees.

The modified bill also makes important changes to section 6 of the bill. The original version of this section eliminated certain important FOIA exemptions as a penalty for an agency's failure to comply with FOIA's 20-day response deadline. I commented at length on this provision of the bill at the beginning of my additional views to the committee report for the bill. This provision was far and away the most problematic provision of the original bill and I am relieved that Senators Leahy and Cornyn have agreed to abandon this approach to deadline enforcement.

My amendment adopts a modified version of an approach to deadline enforcement that was suggested by Senators Cornyn and Leahy. Their approach denies search fees to agencies that do not meet FOIA deadlines. I have modified my colleagues' proposal by including an exception allowing an agency to still collect search fees if a delay in processing the request was the result of unusual or exceptional circumstances. These exceptions have been part of FOIA for many years now and have a reasonably well-known meaning. I expect that these exceptions will account for virtually all of the cases where an agency cannot reasonably be expected to process a particular FOIA request within the paragraph (6) time limits.

Preserving this type of flexibility is important. A penalty that seriously punishes an agency, which I believe that denying search fees would do, would likely backfire if the penalty did not account for complex or broad requests that cannot reasonably be processed within the FOIA deadlines. If the penalties for not processing a request within the deadlines are harsh and include no exceptions, the agency will process every request within 20 or 30 days. It will simply do a sloppy job. That would not improve the operation of the FOIA and would not be in anyone's interest.

The original bill also made FOIA's 20-day clock run from the time when any part of a government agency or department received a FOIA request. Again, the modified bill exempts FOIA requesters from search fees if the 20-day deadline is not met and no unusual or exceptional circumstances are present. These provisions in combination would have created a perverse incentive for a FOIA requester to ignore the addressing instructions on an agency's website and send his request to some distant outpost of an agency or department, in the hope that doing so would prevent the agency from meeting the 20-day deadline and the requester would be exempted from search fees. I would not expect more than a very small portion of FOIA requesters to engage in such gamesmanship. But given the large number of individuals and institutions that make FOIA requests, it is inevitable that some bad apples would abuse the rules if Congress were to create an incentive to do so.

My amendment makes the FOIA deadline run only from the time when the appropriate component of an agency receives the request. To address concerns that an agency might unreasonably delay in routing a request to the appropriate component, I have added language providing that the deadline shall begin to run from no later than ten days after some designated FOIA component receives the request. I think that it is reasonable to expect that requesters send their requests to

some designated FOIA-receiving component of an agency, and I think that it is reasonable to expect that once a FOIA component of the agency gets the request, it will expeditiously route that request to the appropriate FOIA component.

My amendment also changes the bill's standard for awarding attorney's fees to FOIA requesters when litigation is ended short of a judgement or court-approved settlement. The original bill would have entitled a requester to fees whenever an agency voluntarily or unilaterally changed its position and handed over the requested information after litigation had commenced. As I noted in my statement of additional views to the committee report, I am concerned that such a standard would discourage agencies from releasing documents in situations where the agency is fully within its rights to withhold a record-for example, because some clear exception applies-but senior personnel at the agency decide to produce the documents anyway. To impose fees in such a situation would be to adopt a rule of no good deed goes unpunished. It would also likely discourage some disclosures. If an exemption clearly applied to the records in question, the only way that the agency could avoid being assessed fees would be to continue litigating. Also, in my view attorney's fee shifting should only reward litigation that was meritorious. A baseless lawsuit should not be rewarded with attorney's fees. There is enough bad lawyering around already. The government should not be paying litigants for bringing claims that lack legal merit.

On the other hand, Senator Cornyn has presented compelling arguments that since the time when the Buckhannon standard was extended to FOIA, some agencies have begun denying clearly meritorious requests and then unilaterally settling the case on the eve of trial to avoid paying attorney's fees. Obviously, such behavior should not be encouraged. Or at the very least, the requester should be compensated for the legal expense of forcing agency compliance with a meritorious request. Senator Cornyn has

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made a strong case that the current standard denies the public access to important information about the operations of the Federal Government.

In the spirit of compromise, and out of deference to Senator Cornyn's arguments and persistence, I have agreed to incorporate language into my amendment that does not fully address my concerns about this part of the bill and that is very generous to FOIA requesters. The language of the amendment entitles a requester to fees unless the court finds that the requester's claims were not

substantial. This is a pretty low standard. It would allow the requester to be deemed a prevailing party for fee-assessment purposes even if the government's litigating position was entirely reasonable-or even if the government's arguments were meritorious and the government would have won had the case been litigated to a judgment.

Substantiality is a test that is employed in the Federal courts to determine whether a federal claim is adequate to justify retaining jurisdiction over supplemental or other State law claims. It is generally understood to require only that the plaintiff's complaint not be clearly nonmeritorious on its face and not be clearly precluded by controlling precedent. The classic and most-quoted statement of the substantiality standard appears to be that in the Supreme Court's decision in Levering & Garrigues Co. v. Morrin, 289 U.*S. 103*, 105 (1933), in which Justice Sutherland explained that a claim may be "plainly unsubstantial either because obviously without merit, or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." The same principle is expressed through different words in Oneida Indian Nation v. County of Oneida, 414 U.*S. 661*, 666 (1974), as whether the claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a Federal controversy," and in Kaz Manufacturing v. Chesebrough-Pond's, Inc., 211 F.Supp. 815, 822 (S.D.N.Y. 1962), as whether "it cannot be said that the claim is obviously without merit or that its invalidity clearly results from the previous decisions of this court or, where the claim is pretty clearly unfounded."

One aspect of this test that makes it well-suited to evaluating attorney's fee requests is that the "insubstantiality" of a claim is a quality "which is apparent at the outset." Rosado v. Wyman, 397 U.*S. 397*, 404 (1970). It is a standard that courts should be able to apply without further factual inquiry into the nature of a complaint. It thus addresses one of the Supreme Court's major concerns in the Buckhannon case, that "a request for attorney's fees should not result in a second major litigation."

Part of the very definition of the substantiality test is that courts can evaluate the complaint on its pleadings or without resolving factual disputes. A claim is substantial so long as "it cannot be said that [it] is obviously without merit, or clearly foreclosed by prior Supreme Court decisions, or a matter that should be dismissed on the pleadings alone without the presentation of some evidence." Rumbaugh v. Winifrede Railroad Company, 331 F.2d 530, 539-40 (4th Cir. 1964).

"The substantiality of the Federal claim is ordinarily determined on the basis of the pleadings"-on whether "it appears that the Federal claim is subject to dismissal under F.R.Civ.P. 12(b)(6) or could be disposed of on a motion for summary judgment under F.R.Civ.P. 56." Tully v. Mott Supermarkets, Inc., 540 F.2d 187, 196 (3d Cir. 1976). Other cases articulating these principles are Kavit v. A.L. Stam & Co., 491 F.2d 1176, 1179-80 (2d Cir. 1974) (Friendly, J.); Scholz Homes, Inc. v. Maddox, 379 F.2d 84, 87 (6th Cir. 1967); Smith v. Metropolitan Development Housing Agency, 857 F.Supp. 597, 601 (M.D. Tenn. 1994); In the Matter of Union National Bank & Trust Company of Souderton, Pennsylvania, 298 F.Supp. 422, 424 (E.D. Pa. 1969).

I hope that these comments on my understanding of the law in this area are of assistance to courts and litigants who will now be forced to adapt to the application of the substantiality test to FOIA fee shifting. Obviously this transition would be easier had we adopted a test more familiar to this area of the law, but the exigencies of legislative compromise have precluded such an outcome. For some recent and very thorough examples of how a substantiality analysis is actually conducted, courts and litigants should also look to Judge Williams's panel opinion in Decatur Liquors, Inc. v. District of Columbia, 478 F.3d 360, 363-63 (D.C. Cir. 2007), and to the Sixth Circuit's opinion in Wal-Juice Bar, Inc. v. Elliott, 899 F.2d 1502, 1505-07 (6th Cir. 1990).

Again, I would have preferred that the Senate select some standard that protects from fee assessments an agency that releases information when the law clearly applied an exemption to the requested information. Agencies will still be protected by the discretionary factors considered in the fee-shifting system, but the lacks-a-reasonable-legal-basis factor is not always controlling and does not create a guaranteed safe harbor. I fear that the standard that we adopt today will lead some agency employees to withhold information that they would otherwise be inclined to release out of concern that unilaterally releasing the information would make the agencies subject to fee assessments.

I would also note that the substantiality test would have been unacceptable were this a fee-shifting statute that assessed fees against private parties. If a private party adopts a meritorious position in litigation but then unilaterally settles, the Federal Government could not rightfully force that party to pay attorney's fees. The occasional unfairness of this provision-the fact that it will sometimes require the payment of fees to a party whose litigation position lacked merit-is tolerable only because the only party that will be forced to pay fees under this provision even when that party was in the right is the government.

I would also like to emphasize for the legislative record that I had originally proposed formulating this standard as "provided that the complainant's claim is substantial"-and I would have been equally content with language along the lines of "unless the complainant's claim is insubstantial." The double negative in the amendment was not my proposal and I accept no responsibility for that grammatical infraction. It is only because others have insisted on that formulation and I can perceive no substantive difference between "not insubstantial" and "substantial" that the double negative appears in my amendment.

My amendment also makes one other important change to section 4 of the bill. The original bill allowed a requester to be deemed a prevailing party if the requester obtained relief through "an administrative action." Agency administrative appeals of FOIA decisions do not require lawyers, and FOIA requesters should not be compensated for or encouraged to bring lawyers into these proceedings. An agency appeal simply means that the plaintiff asks the agency to reconsider its denial of a request. Every agency has an appeal procedure in which it assigns the case to another agency employee trained in FOIA who then reevaluates the request. These appeals are most often successful when the plaintiff provides more information about his request. Legal arguments are not appropriate to these appeals. There is no reason to bring attorneys-fee shifting into this stage of FOIA. Thus my amendment eliminates the fee-shifting section's reference to relief obtained through an administrative action.

Mr. CORNYN. Mr. President, since coming to the U.S. Senate in 2002, I have made it my mission to bring a little "Texas sunshine" to Washington.

The State of Texas has one of the strongest laws expanding the right of every citizen to access records documenting what the government is up to. As attorney general of Texas, I was responsible for enforcing Texas's open government laws. I have always been proud that Texas is known for having one of the strongest and most robust freedom of information laws in the country.

Unfortunately, the Sun doesn't shine as brightly in Washington. The Federal Freedom of Information Act, or FOIA, which was signed into law 41 years ago, was designed to guarantee public access to records that explain what the Government is doing.

Some Federal agencies are taking years to even start working on requests. Far too often when citizens

seek records from our Government, they are met with long delays, denials and difficulties. Federal agencies can routinely and repeatedly deny requests for information with near impunity. Making the situation worse, requestors have few alternatives to lawsuits for appealing an agency's decision.

And when requestors do sue agencies, the deck is stacked in the Government's favor.

Courts have ruled that requestors cannot recover legal fees from agencies who improperly withhold information until a judge rules for the requestor. That means an agency can withhold documents without any consequences until the day before a judge's ruling. Then the agency can suddenly send a box full of documents, render the lawsuit moot and leave the requestor with a hefty legal bill. And the agency gets away scot-free.

In the meantime, the delay can keep mismanagement and wasteful practices hidden and unfixed. Documents obtained through FOIA helped reporters for Knight Ridder-now part of McClatchy Company-show the public that veterans who fought bravely for our country have trouble obtaining the medical benefits they deserve upon returning home. Thousands died waiting for their benefits, many more received wrong information. Legal fees alone topped $100,000 along with the time and effort. Few citizens have such time and budgets.

To address problems of long delays and strengthen the ability of every citizen to know what its government is up to, Senator Patrick Leahy and I introduced bipartisan legislation to reform FOIA.

There are, unfortunately, many issues in the Senate Judiciary Committee that have become partisan and divisive. So it is especially gratifying to be able to have worked so closely with Chairman Leahy on an issue as important and as fundamental to our Nation as openness in government.

Today we are making history by passing the Openness Promotes Effectiveness in our National Government Act of 2007, also known as the OPEN Government Act.

I am grateful to Senator Leahy and to his staff for all their hard work on these issues of mutual interest and national interest. A special thanks to Lydia Griggsby,

Senator Leahy's counsel, for her diligence and hard work. And I would like to thank and to commend Senator Leahy for his decades-long commitment to freedom of information.

I also want to especially thank Senators Kyl and Bennett and their respective staff members, Joe Matal and Shawn Gunnarson for their good faith efforts to resolve differences and move this bill out of the Senate. We couldn't have done it without their cooperation and fair-mindedness.

Open-government reforms should be embraced by conservatives, liberals, and anyone who believes in the freedom and the dignity of the individual.

Passage of this important legislation is a victory for the American people. From my vantage point here in Washington, DC, it is about holding accountable the politicians who continue to grow the size and scope of the Federal Government. And it is about holding accountable the bureaucrats who populate the Federal Government's ever-expanding reach over individual liberty.

This legislation contains important congressional findings to reiterate and reinforce our belief that FOIA establishes a presumption of openness, and that our government is based not on the need to know, but upon the fundamental right to know. In addition, the act contains over a dozen substantive provisions, designed to achieve four important objectives: (1) to strengthen FOIA and close loopholes, (2) to help FOIA requestors obtain timely responses to their requests, (3) to ensure that agencies have strong incentives to act on FOIA requests in a timely fashion, and (4) to provide FOIA officials with all of the tools they need to ensure that our government remains open and accessible.

The OPEN Government Act is not just pro-openness, pro-accountability, and pro-accessibility-it is also pro-Internet. It requires government agencies to establish a hotline to enable citizens to track their FOIA requests, including Internet tracking, and it grants the same privileged FOIA fee status currently enjoyed by traditional media outlets to bloggers and others who publish reports on the Internet.

The act has the support of business groups, such as the U.S. Chamber of Commerce and National Association of Manufacturers, media groups and more than 100 advocacy organizations from across the political spectrum. Without their help, this legislation would have been impossible.

We owe it to all Americans to help them know what their government is up to and to make our great democracy even stronger and more accountable to its citizens

Mr. REID. Mr. President, I wish the record to reflect how much I appreciate the work of Senator Leahy on this very important matter. The Freedom of Information Act is something that has needed amending for some time, and I am happy we are able to do it tonight.

I ask unanimous consent that the amendment at the desk be considered and agreed to, the bill, as amended, be read three times, passed, and the motion to reconsider be laid upon the table; that any statements be printed in the Record, with no intervening action or debate.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment (No. 2655) was agreed to, as follows:

The bill is amended as follows:

(a) News-Media Status.-At page 4, strike lines 4 though 15 and insert:

"The term "a representative of the news media" means 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. The term "news" means information that is about current events or that would be of current interest to the public. 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 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. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.".

(b) Attorneys' Fees.-At page 5, strike lines 1 through 7 and insert:

"(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, provided that the complainant's claim is not insubstantial.".

(c) Commencement of 20-Day Period and Tolling.-At page 6, lines 1 through 7 and insert:

"(1) In General.-*Section 552(a)(6)(A)(i) of title 5, United States Code*, is amended by striking "determination;" and inserting:

"determination. The 20-day period shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event no later than ten days after the request is first received by any component of the agency that is designated in the agency's FOIA regulations to receive FOIA requests. The 20-day period shall not be tolled by the agency except (I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the FOIA requester or (II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period;".

(d) Compliance With Time Limits.-At page 6, strike line II and all that follows through page 7, line 4, and insert:

"(b) Compliance With Time Limits.-

(1)(A) *Section 552(a)(4)(A) of title 5, United States Code*, is amended by adding at the end the following:

"(viii) An agency shall not assess search fees under this subparagraph if the agency fails to comply with any time limit under paragraph (6), provided that no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.".

(B) *Section 552(a)(6)(B)(ii) of title 5, United States Code*, is amended by inserting between the first and second sentences the following:

"To aid the requester, each agency shall make available its FOlA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency."

(e) Status of Requests.-At page 7:

(1) strike lines 17 through 22 and insert:

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"(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and" .

(2) at line 23, strike "(C)" and insert "(B)".

(f) Clear Statement for Exemptions.-At page 8, strike line 19 and all that follows through the end of the section and insert:

"(A) if enacted prior to the date of enactment of the OPEN Government Act of 2007, requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or establishes particular criteria for withholding or refers to particular types of matters to be withheld; or

"(B) if enacted after the date of enactment of the OPEN Government Act of 2007, specifically cites to the Freedom of Information Act.".

(g) Private Records Management.-At page 13, lines 14 through 15, strike "a contract between the agency and the entity." and insert "Government contract, for the purposes of records management.".

(h) Policy Reviews, Audits, and Chief FOIA Officers and Public Liaisons.-Strike section 11 and insert the following:

"SEC. 11. OFFICE OF GOVERNMENT INFORMATION SERVICES.

"(a) In General.-*Section 552 of title 5, United States Code*, is amended by adding at the end the following:

"(h) There is established the Office of Government Information Services within the National Archives and Records Administration. The Office of Government

Information Services shall review policies and procedures of administrative agencies under section 552, shall review compliance with section 552 by administrative agencies, and shall recommend policy changes to Congress and the President to improve the administration of section 552. The Office of Government lnfonnation Services shall offer mediation services to resolve disputes between persons making requests under section 552 and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.

"(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of section 552 and issue reports detailing the results of such audits.

"(j) Each agency shall-

"(1) Designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

General Duties.-The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency-

"(A) have agency-wide responsibility for efficient and appropriate compliance with the FOIA;

"(B) monitor FOIA implementation throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing the FOIA;

"(C) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of the FOIA;

"(D) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing the FOIA; and

"(E) facilitate public understanding of the purposes of the FOIA's statutory exemptions by including concise descriptions of the exemptions in both the agency's FOIA handbook issued under *section 552(g) of title 5, United States Code*, and the agency's annual FOIA report, and by providing an overview, where

appropriate, of certain general categories of agency records to which those exemptions apply."

"(2) Designate one or more FOIA Public Liaisons who shall be appointed by the Chief FOIA Officer.

General Duties-FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a FOIA requester can raise concerns about the service the FOIA requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes."

"(b) Effective Date.-The amendments made by this section shall take effect on the date of enactment of this Act.".

(i) Critical infrastructure information.-Strike section 12 of the bill.

The bill (*S. 849*) was ordered to be engrossed for a third reading, was read the third time, and passed.

(The bill will be printed in a future edition of the Record.)

Are Bloggers Representatives of the News Media Under the Freedom of Information Act?

MICHAEL RUSSO*

Courts currently apply a functional test to determine whether a person making a request under the federal Freedom of Information Act (FOIA) is a "representative of the news media" and therefore qualifies for a statutory waiver of fees associated with the request. The applicability of this caselaw to bloggers and other Internet journalists has yet to be resolved in a definitive fashion. This Note considers the policy implications of extending or withholding favorable fee status and argues that either extreme has negative consequences. The Note proposes that the current functional test be supplemented by an inquiry into the content of the requested material. This approach will efficiently and effectively ensure that the waiver serves FOIA's purpose of promoting public understanding of government activities.

I. INTRODUCTION

In 2006, blogs — the most distinctive and original form of Internet journalism — have arrived. Pundits highlight the role of blogs in Ned Lamont's successful primary challenge to Senator Joseph Lieberman,[1] and report on politicians' attempts to woo

* The author thanks Professor Michael Dorf for his advice and comments in the formative stages of this Note. The author is grateful as well to the members of the *Journal* staff who have assisted in its preparation, particularly Oladipo Ashiru and Philip Kopczynski for their help in the editing process.

1. *See* Jason Horowitz, *Can Joe Stand if Contender Gets a T.K.O.?*, N.Y. OBSERVER, July 17, 2006, at 1. Lamont was eventually defeated by Lieberman, who ran as an independent, in the general election. Mark Leibovich, *Enter, Pariah: Now It's Hugs for Lieberman*, N.Y. TIMES, Nov. 14, 2006, at A1.

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bloggers to their side.[2] Where once bloggers were discussed in almost anthropological terms, presented as a curious sort of novelty,[3] the prevailing public discourse now recognizes that bloggers occupy an important place in the media landscape. Still, precisely what journalistic function blogs serve — or should serve — remains a subject of considerable debate.[4] Their role in the legal order is even more unsettled. Scholars continue to debate how traditional press protections should apply to bloggers and other Internet journalists,[5] and some courts have even been required to determine which rights and protections bloggers may claim.[6] These two strands of debate — the question of the legal status of bloggers on the one hand, and their role in the greater media landscape on the other — intersect in an unlikely place: the Freedom of Information Act (FOIA).[7]

For forty years, FOIA has served an important role in allowing members of the public to gain access to government information. The Act authorizes a member of the public to request any document or set of documents gathered or produced by the Federal government or its agencies, subject to only a few specified restrictions.[8] Many different requesters have used FOIA for a variety of

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2. *See* Ryan Lizza, *Wag the Blog*, NEW REPUBLIC, June 26, 2006, at 16.

3. *See, e.g.*, Chris Seper, *Stream of Consciousness*, PLAIN DEALER (Cleveland), May 13, 2002, at E1.

4. *See, e.g.*, Richard A. Posner, *Bad News*, N.Y. TIMES BOOK REVIEW, July 31, 2005, at 1; Jeffrey Rosen, *Your Blog or Mine?*, N.Y. TIMES MAG., Dec. 19, 2004, at 24; Daily Dish, http://time.blogs.com/daily_dish/2006/06/bloglash.html (June 19, 2006, 14:53); Political Animal, http://www.washingtonmonthly.com/archives/individual/2004_05/003890.php (May 11, 2004, 13:56).

5. *See, e.g.*, Linda L. Berger, *Shielding the UnMedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371 (2003); Laura Durity, *Shielding Journalist-"Bloggers": The Need to Protect Newsgathering Despite the Distribution Medium*, 2006 DUKE L. & TECH. REV. 11 (2006); Stephanie J. Frazee, *Bloggers as Reporters: An Effect-Based Approach to First Amendment Protections in a New Age of Information Dissemination*, 3 VAND. J. ENT. & TECH. L. 609 (2006); Christopher P. Zubowicz, *The New Press Corps: Applying the Federal Election Campaign Act's Press Exemption to Online Political Speech*, 9 VA. J.L. & TECH. 6 (2004).

6. Rita K. Farrell, *Delaware Supreme Court Declines to Unmask a Blogger*, N.Y. TIMES, Oct. 6, 2005, at C3 (Delaware court refusing to reveal the identity of anonymous blogger who allegedly defamed public figure); Jonathan Glater, *At a Suit's Core: Are Bloggers Reporters Too?*, N.Y. TIMES, Mar. 7, 2005, at C1 (California state court determining whether bloggers are journalists for purposes of state press shield law).

7. 5 U.S.C. § 552 (2000).

8. FOIA is paralleled by numerous state-level open government laws. *See* Open Government Guide, http://www.rcfp.org/ogg/index.php (2006) (containing links to information about the "open records and open meetings laws" of each state).

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different purposes, from environmental groups hoping to gain access to government research to litigants attempting to gather information related to their suits. FOIA's most prominent users, however, are journalists, whose efforts to inform the public about government activities are bolstered by the direct access the Act provides.

Several high-profile articles have been deeply indebted to the statute. For example, the *New York Daily News* recently cited EPA records gathered through FOIA to rebut the EPA's statements that the air at Ground Zero in New York posed no health risks in the immediate aftermath of September 11th;[9] two reporters won the 1998 Pulitzer Prize for a series of articles on the U.S. military's health care system that drew heavily on information obtained through FOIA requests;[10] and the *Plain Dealer* used FOIA documents to reveal that the FAA knew of safety problems at the airline ValuJet prior to a fatal crash.[11]

Amendments to the statute in 1986[12] explicitly privilege "representative[s] of the news media," allowing them to pay reduced processing fees for their requests[13] and, in exceptional circumstances, permitting them to receive expedited handling of their requests.[14] FOIA therefore can be a more effective and efficient tool in the hands of journalists than in those of the ordinary members of the public. The logic of these privileges is incontrovertible — the central purpose of the statute is to promote public

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9. *See* Thomas Zambito, *Judge Hot Over 9/11 Air*, DAILY NEWS (New York), Feb. 3, 2006, at 6.

10. *See* Jim DeBrosse, *Series Wins Pulitzer Prize*, DAYTON DAILY NEWS, Apr. 15, 1998, at 1A.

11. *See* Elizabeth A. Marchek, *ValuJet Trouble with Parts Noted*, PLAIN DEALER (Cleveland), July 29, 1996, at A1.

12. Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

13. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II) (2000) ("[F]ees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by . . . a representative of the news media."). Ordinary commercial requesters must pay fees related to document search and review in addition to copying costs. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(I) (2000).

14. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II) (2000) (mandating expedited processing when there is "urgency to inform the public concerning . . . Federal Government activity" and the request is made by "a person primarily engaged in disseminating information"). Discussion of the expedited processing provision is outside the scope of this Note, though in the author's opinion the case law in this area is worthy of scholarly attention. *See infra* Part III.B for details of the costs and time frames associated with FOIA requests.

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understanding of the government,[15] and by favoring journalists, with their professional skills and broad distribution networks, FOIA subsidizes those requests most likely to inform the public.

Yet the statute's text does not establish who exactly counts as a "representative of the news media," leaving elaboration to the agencies and the courts. Under the current tests, nearly all newspapers, newsmagazines, radio broadcasts, and television programs qualify for favored treatment under FOIA.[16] Despite the statute's category-focused language, the courts have espoused a functional test that hinges on the activities of the requester, rather than its formal status.[17] The remaining unsettled interpretive issues mostly concern the proper treatment of nonprofit and lobbying groups that engage in the incidental dissemination of information as a means to further their mission of advocacy.[18] This question is surely of great importance to such organizations, but hardly shakes the underpinnings of the fee waiver doctrine. Perhaps because of this perceived stability, the legal academy has paid little attention to the "representative of the news media" fee waiver.[19]

The rise of the Internet as an important source for news and information raises a simple question for this interpretive order: are bloggers, and other Internet journalists, "representative[s] of

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15. U.S. DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 775 (1989) ("The core purpose of the FOIA [is] contribut[ing] significantly to public understanding *of the operations or activities of the government*." (internal quotation marks omitted) (emphasis added)).

16. *See, e.g.*, Department of Defense Freedom of Information Program, 32 C.F.R. § 286.28(e)(7)(i) (1998) (The term "refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. . . . [This includes] television or radio stations broadcasting to the public at large, and publishers of periodicals . . . .").

17. *See* Nat'l Sec. Archive v. U.S. Dep't of Def., 880 F.2d 1381 (D.C. Cir. 1989) (holding that requester public interest organization qualified as "a representative of the news media by reason of its publication *activities*") (emphasis added).

18. For a discussion of the fusillade of FOIA lawsuits filed by Judicial Watch, see *infra* Part IV.A.

19. *National Security Archive* is the leading case on interpretation of the "representative of the news media" fee waiver, but is discussed in only a handful of law review articles. *See* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 445–46 (2002) (briefly discussing *National Security Archive* in questioning the legal protections accorded to the press); Zrinka Rukavina, *Re-Pressing the Internet: Journalists Battle for Equal Access*, 13 DEPAUL-LCA J. ART & ENT. L. & POL'Y 351 (2003) (applying *National Security Archive* test to Internet journalist to determine whether First Amendment protections apply).

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the news media" who may take advantage of FOIA's fee waiver? The activities carried out by many bloggers appear journalistic in character. Bloggers publish content to the Internet, sometimes posting material that is novel and has not been previously reported, sometimes building on reportage from the mainstream media and providing their opinion or expert analysis. Still, to a large degree, blogs remain dependent upon the mainstream media for their existence and vitality, rather than clearly standing on their own as a fully independent source of news and information.

Further, there are a number of important practical differences between a blog and a more conventional news source. For instance, in contrast to producing a newspaper or making a TV or radio news broadcast, setting up and running a blog is simple. The assumption that journalists have professional skills and an audience breaks down when applied to bloggers, complicating the rationale for the fee waiver. Also, while traditional journalists are often regulated, either by government agencies such as the FCC or self-regulated according to codes of professional ethics,[20] bloggers have yet to establish such uniform standards. While FOIA case law has dealt with both media organizations and freelance journalists, these paradigms are less useful when applied to bloggers, who are often individual citizen-journalists who have made only minor investments in their abilities to present news to their audience.

Beyond the analytic difficulties, FOIA's treatment of blogs raises vexing policy questions. Because of the low cost of entry into the medium, if the fee waiver were extended to bloggers, nearly any person interested in making a FOIA request could begin blogging in order to secure the statutory discount for members of the news media. This would lead to the news media exception swallowing the statute and all requesters being forced to pay the same rate, in spite of the congressional intent to privilege those who will share the information with the public.

Yet a denial of such treatment risks frustrating FOIA's primary goal of allowing concerned members of the public to keep themselves informed about important government activities.

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20. *See, e.g.*, SOCIETY OF PROFESSIONAL JOURNALISTS, CODE OF ETHICS (1996), *available at* http://spj.org/pdf/ethicscode.pdf.

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Some middle path between the extremes seems best, but issues of administrability, efficiency, and fairness, as always, complicate the choice of compromise. As blogs and other Internet media gain importance, the question of how to categorize these media becomes more salient by dint of volume, if nothing else.

This Note considers the eligibility of bloggers for the "representative of the news media" fee waiver under FOIA. After finding the current judicial tests indeterminate and exploring the policy consequences of granting or denying access to the waiver, this Note proposes a new approach that examines the subject matter of individual requests alongside the characteristics of particular blogs. Part II traces the history of blogs and outlines their relevant characteristics. Part III discusses the origin and interpretation of FOIA, from its text, amendments, and accompanying legislative history, with a focus on the provisions having to do with the "representative of the news media" category. It then looks to how these provisions have been implemented by agency regulations. Part IV examines the case law interpreting the "representative of the news media" fee waiver and finds that its application to the fact pattern presented by blogs to be indeterminate and inadequate. Finally, Part V examines the policy consequences of a determination that blogs do or do not fall within the statutory "member of the news media" category, and outlines an efficient, administrable alternative to the current judicial framework that will ensure that the publicly-subsidized fee waiver furthers the public interest.

II. BLOGS

The Internet offers a variety of options for those seeking news and news analysis. Many online media sources are simply the Internet footprint of traditional media entities, such as newspapers, radio, and television stations. Others are structured along analogous lines, despite having an online-only presence. *Salon*, for example, is a longstanding Internet publication that looks very much like a conventional magazine, running a combination

of features and recurring columns and supporting itself through a mixture of subscription revenue and advertising.[21]

Blogs are different.[22] The word refers most broadly to a website that posts information on the Internet. Together, all blogs in existence comprise the "blogosphere."[23] While similar sites have existed since the earliest days of the Internet, they only rose to prominence after the turn of the millennium.[24] A blog may be the work of a single individual[25] or a "group blog"[26] in which a number of commentators each contribute to the discussion. A single

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21. Salon, http://www.salon.com (last visited Oct. 22, 2006). The content is available to those who pay a subscription fee, while those who do not pay to subscribe may gain access to its content by volunteering to watch advertisements. *See* Salon Registration, https://sub.salon.com/registration/ (describing the benefits of a paid membership/subscription) (last visited Oct. 22, 2006); Salon Site Pass, http://www.salon.com/premium/daypass/ (describing the free ad-based method for gaining access to the site) (last visited Oct. 22, 2006).

22. This Note usually employs the word "blog" — an infelicitous neologism drawn from the shortening of the phrase "web log," *see* WIKIPEDIA, BLOG, http://en.wikipedia.org/wiki/Blog (last visited Oct. 22, 2006) — in a restricted sense. Blogs exist on nearly every subject imaginable — from literary theory (*see, e.g.*, The Valve, http://www.thevalve.org (last visited Oct. 22, 2006)), to pop music (*see, e.g.*, Brooklyn-Vegan, http://www.brooklynvegan.com (last visited Oct. 22, 2006)), to broader, autobiographical ruminations (*see, e.g.*, John and Belle Have a Blog, http://examinedlife.typepad.com/johnbelle (last visited Oct. 22, 2006)). When discussing FOIA and its primary purpose of keeping the public informed of the actions of the government, it is most convenient to consider only those blogs that focus at least in part on some aspect of the news and politics. Presumably there would be few circumstances under which FOIA would be relevant to blogs not included in this category.

Also, the blog format has been taken up by many conventional media outlets. Dan Froomkin's White House Briefing, http://www.washingtonpost.com/wp-dyn/politics/administration/whbriefing (last visited Oct. 22, 2006), for example, is a political blog written and published under the auspices of the *Washington Post*. Blogs affiliated with established media outlets do not raise the question of FOIA eligibility as sharply as do those which lack such affiliation. Therefore, the paradigmatic "blog," for purposes of this Note, is an independent web log that takes politics or government in some form as its primary subject matter.

23. The term reportedly originated as a joke in 1999, before coming into wider currency in 2002. *See* WIKIPEDIA, BLOGOSPHERE, http://en.wikipedia.org/wiki/Blogosphere (last visited Oct. 22, 2006).

24. *See id.* The first major news story driven by blog coverage — Senator Trent Lott's resignation of his post as Senate Majority Leader — occurred in late 2002. *See* Mark Jurkowitz, *The Descent of Trent Lott Brings the Rise of 'Bloggers'*, BOSTON GLOBE, Dec. 26, 2002, at D1.

25. *See, e.g.*, Atrios, http://atrios.blogspot.com (last visited Oct. 22, 2006); InstaPundit, http://instapundit.com (last visited Oct. 22, 2006); Talking Points Memo, http://www.talkingpointsmemo.com (last visited Oct. 22, 2006).

26. *See, e.g.*, Crooked Timber, http://www.crookedtimber.org (last visited Oct. 22, 2006) (academics in the humanities); Volokh Conspiracy, http://volokh.com (last visited Oct. 22, 2006) (law and economics professors).

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post usually has its own headline and deals with one specific topic, and is often prompted by some other article or discussion, such as a news report or a post on another blog. Blog posts usually contain one or more hyperlinks to whatever prompted the post, to previous posts dealing with the same issue, and so on. The frequency of posting varies greatly, depending on the blog. Many, such as the *Washington Monthly*'s Political Animal blog,[27] have new posts multiple times per day, while others (e.g., Philosoraptor[28] and Slacktivist[29]) upload new content relatively rarely, sometimes only a few times a week. Current and past (termed "archived") blog posts are almost always freely available to the public.

In addition to the contributions of the blog writers (or "bloggers") themselves, many blogs also play host to extensive communities of readers. Readers often e-mail bloggers with tips and analysis — some of which the blogger may post — and most blogs open a "comment thread" alongside each post. Readers may post contributions of their own, which will be published on the blog.[30] Some sites — most notably Daily Kos[31] — have become focused more around community contributions than the "primary" blogger's posts.

Those who operate blogs more often resemble pundits or opinion-writers than beat reporters. The dominant mode of blog discourse has been commentary upon the news, perhaps bringing to bear some particular expertise of the blogger or drawing connections between previously reported stories. Original reporting — the introduction of new, independently researched facts — has been comparatively rare in the first years of the blogosphere's existence.

If bloggers were only parasitic upon the conventional news media, the question of their status under FOIA would be easier to evaluate. However, there has been a marked, albeit gradual, trend towards more original journalism by prominent bloggers.

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27. Political Animal, http://www.washingtonmonthly.com (last visited Oct. 22, 2006).
28. Philosoraptor, http://philosoraptor.blogspot.com (last visited Oct. 22, 2006).
29. Slacktivist, http://slacktivist.typepad.com (last visited Oct. 22, 2006).
30. Most major sites host comment threads, with varying degrees of moderation. While a few high-profile blogs do not have comments, such as Talking Points Memo and Andrew Sullivan's Daily Dish, these sites in particular often post reader correspondence on the main blog.
31. Daily Kos, http://www.dailykos.com (last visited Oct. 22, 2006).

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Immediately after the midterm elections of 2002, a number of liberal blogs stoked outrage over comments made by then–Senate Majority Leader Trent Lott that were perceived to be racist, ultimately resulting in Senator Lott stepping down from his post.[32] In the fall of 2004, the blog Power Line responded to a CBS report on certain memos alleged to have been written by a Texas Air National Guard officer and containing information damaging to President Bush. Power Line investigated the possibility that the memos were forged, examining the typography of the documents and comparing them to the product of contemporaneously-available word-processors.[33] Ultimately, their conjecture proved correct, sparking significant news coverage and, some speculate, CBS anchor Dan Rather's eventual resignation.[34]

More recently, the blog Talking Points Memo solicited funds to hire two full-time bloggers to cover congressional corruption scandal.[35] The resulting blog contains both analysis and original reporting.[36] Further, journalists who work in conventional media are increasingly turning to the blogosphere as an alternative venue for publication. Reporter Murray Waas, for example, has covered the investigation of the origin of the leak that "outed" undercover CIA operative Valerie Plame for a number of conventional news outlets,[37] but broke several newsworthy pieces of information through his personal blog.[38] David Neiwert, a journalist and author, reports on hate groups both through his blog and his books.[39]

The conventional media is also taking more notice of goings-on in the blogosphere. In addition to these relatively exceptional episodes, in which blog discussion and reporting effectively drove

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32. Oliver Burkeman, *Bloggers Catch What* Washington Post *Missed*, GUARDIAN (London), Dec. 21, 2002, at Foreign Pages 13.

33. *See* Posting of Scott W. Johnson to Power Line, http://www.powerlineblog.com/archives/007760.php (Sept. 9, 2004, 07:51).

34. Peter Johnson, Mark Memmott & Gary Levin, *It's Time to Move On*, USA TODAY, Nov. 24, 2004, at 1A.

35. *See* Talking Points Memo, http://www.talkingpointsmemo.com/archives/week_2005_11_13.php#006995 (Nov. 14, 2005, 11:26 EDT).

36. *See* TPM Muckraker, http://www.tpmmuckraker.com/ (last visited Oct. 22, 2006).

37. *See, e.g.*, Murray Waas, *What Now, Karl?*, VILLAGE VOICE, Aug. 13, 2005, http://www.villagevoice.com/news/0533,waasweb1,66861,2.html.

38. Whatever Already!, http://www.whateveralready.blogspot.com (last visited Oct. 22, 2006).

39. *See* Orcinus, http://dneiwert.blogspot.com (last visited Oct. 22, 2006).

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news coverage, the everyday happenings among the blogs are themselves increasingly a subject of reportage. Stories running on the *Washington Post*'s website, for example, now contain a sidebar linking to blogs that discuss that particular story.[40] CNN launched a daily blog-roundup segment in February of 2005.[41]

Further, several of the higher-profile bloggers have been brought under the auspices of one of the conventional news organizations. Kevin Drum, who wrote the popular Calpundit blog, became the official blogger for the *Washington Monthly* in 2004.[42] In November of 2005, Andrew Sullivan, an early practitioner of the format who had been blogging independently since 2001, signed on with *Time* to write a blog for that venerable institution.[43]

While some blogs are drawing closer and closer to conventional news outlets in terms of their activities and coverage, the commercial side of the blogging enterprise remains widely variable. A blog's technical requirements are modest, and a number of services offer users the relevant software and disk space after a free account-registration process.[44] Start-up costs are usually very low as a result. As a blog gains in popularity and sophistication, a blogger might wish to host the site on his or her own server rather than relying on one of the services, some of which charge users more as traffic to their site increases. If a blogger does manage to win a substantial readership, however, a number of options exist for him or her to at least break even — usually through a combination of advertising revenue and donations.[45]

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40. *See, e.g.*, Evelyn Nieves, *S.D. Abortion Bill Takes Aim at 'Roe'*, WASH. POST, Feb. 23, 2006, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/02/22/AR2006022202424.html.

41. *See* Bryan Keefer, *Further Crimes Against Humanity*, CJR DAILY, Mar. 9, 2005, http://www.cjrdaily.org/behind_the_news/further_crimes_against_humanit.php (discussing the shortcomings of the CNN segment).

42. *See* Calpundit, http://www.calpundit.com (Mar. 17, 2004, 07:00).

43. *See* Daily Dish, http://www.andrewsullivan.com (Nov. 14, 2005, 12:12).

44. *See, e.g.*, Blogger, http://www.blogger.com/home/ (last visited Oct. 22, 2006); Movable Type, http://www.sixapart.com/movabletype/ (last visited Oct. 22, 2006). Strictly speaking, any person with web space can set up a blog, but these services also provide tools to streamline the process of posting and allow readers to comment.

45. *See, e.g.*, Andrew Sullivan, Tipping Point, http://time-blog.com/daily_dish/tipping_point.php (last visited Oct. 22, 2006) (soliciting reader contributions before transfer to blogging for *Time* magazine); Talking Points Memo, http://www.talkingpointsmemo.com/archives/001172.php (June 13, 2003, 09:46 EDT). There are several forms of advertising prevalent in the blogosphere. Google Ads act as a

There are a few full-time bloggers who are able to support themselves through their site or sites, but many more engage in blogging as a pastime or supplement to their ordinary employment.[46]

On first glance at the blogosphere, there might be reason to think that bloggers are unlikely to make much use of FOIA. Blogs are very much creatures of the 24-hour news cycle. One of the first blogs to reach real prominence was Instapundit;[47] as the name indicates, its novel contribution was seen as its ability to comment on the developments of the day more or less in real time. Bloggers on the whole tend to focus on breaking news, and the often months-long time cycle of a FOIA request may be ill-suited to a frequent posting schedule. Similarly, as the first crop of blogs emphasized broad punditry rather than technocratic expertise, FOIA requests may not have been on early bloggers' mental horizons. For all its virtues, the Act is a slow mechanism that often results in the disclosure of large quantities of rather technical documents, whose meaning might not be immediately clear to a nonspecialist

These objections, however, fail to account for the current state of the field. First, bloggers are in fact filing FOIA requests, asking for everything from information about complaints submitted to the FCC[48] to notes taken by Defense Department staff on September 11, 2001.[49] Indeed, one blogger and activist recently filed a request with the Pentagon asking for documents relating to all

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sidebar, displaying advertisements that might appeal to the readers of a blog by choosing which ads are displayed based on the content of the blog's posts. *See* Google AdSense, https://www.google.com/adsense/ (2006). Some sites contain sponsored links to other Internet services, like Amazon.com, such that when a blog's visitors click through the sponsored link and purchase something from the service, the originating blog receives a portion of the proceeds. *See, e.g.*, Brad DeLong's Semi-Daily Journal, http://delong.typepad.com/ (last visited Oct. 22, 2006). Donations are often solicited through the familiar public-broadcasting "telethon" model. *See, e.g.*, Talking Points Memo, http://www.talkingpointsmemo.com/archives/007258.php (Dec. 15, 2005, 12:46 EDT).

46. *See, e.g.*, InstaPundit, http://www.instapundit.com (last visited Oct. 22, 2006) (law professor); The Decembrist, http://markschmitt.typepad.com/decembrist/ (last visited Oct. 22, 2006) (think tank fellow).

47. *See* WIKIPEDIA, INSTAPUNDIT, http://en.wikipedia.org/wiki/Instapundit (last visited Oct 22, 2006); Catherine Seipp, *Online Uprising*, AM. JOURNALISM REV., June 2002, at 42.

48. *See* BuzzMachine, http://www.buzzmachine.com/archives/2004_11_15.html (Nov. 15, 2004).

49. *See* Outraged Moderates, http://www.outragedmoderates.org/2006/02/dod-staffers-notes-from-911-obtained.html (Feb. 16, 2006, 20:12).

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the FOIA requests it had processed since 2000, in order to audit the statute's use by the *New York Times* and other news organizations.[50] While there is no precise data on the number of FOIA requests filed by bloggers, as the number of blogs continues to grow, presumably so too will the number of such requests.[51]

As the blogosphere becomes more and more professionalized, there are an increasing number of specialist and full-time bloggers who could make profitable use of FOIA information. These bloggers are more concerned with following particular stories or issues, rather than simply reacting to the political news on an hour by hour basis.[52] The dispersed nature of the blogosphere also suits it particularly well to certain FOIA-related tasks. The Daily Kos community, for example, has initiated a project to analyze and process the tens of thousands of pages of FOIA documents pertaining to detainee abuse, released by the government to the ACLU and other requesters. The results of this project are posted to an encyclopedia of sorts on the Internet.[53] Taking advantage of the communications capabilities offered by the web and splitting up such a task allows laypersons to complete a task that could take a specialist researcher hundreds of hours or more to complete.

Finally, because bloggers are by and large not part of the news media establishment, FOIA might well be their only direct means of learning about government activities. Reporters from large newspapers or broadcast organizations often have the ability to gain access to government documents through non-FOIA means, for example by requesting information from sources or whistleblowers with whom the journalist has cultivated an ongoing relationship, or by using their influence to convince agency officials to release information rather than face an embarrassing story

50. *See* Posting of John Byrne to Raw Story, http://www.rawstory.com/ (Nov. 23, 2005).

51. The blog tracking site Technorati has found that since 2003, the total number of blogs has doubled roughly every six months. *See* State of the Blogosphere, http://technorati.com/weblog/2006/04/96.html (Apr. 17, 2006). As of August 2006, it listed 15,375 blogs under its "News" category. Technorati Blog Finder: News, http://technorati.com/blogs/news (last visited Aug. 20, 2006).

52. *See* Political Animal, *supra* note 4; Posting of Steve to iAOCblog, http://www.iaocblog.com/blog/_archives/2005/5/9/664519.html (May 9, 2005, 07:39 PDT).

53. *See* ACLU FOIA Releases, http://www.dkosopedia.com/index.php/ACLU_FOIA_Releases (July 11, 2006).

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documenting their stonewalling.[54] While some individual bloggers may have such contacts, for the most part, their power to gather government information through unofficial channels pales next to that of the established Washington press corps.

As blogging grows out of its infancy and takes its place as one medium among many, the rationale for excluding blogs from FOIA's favored "representative of the news media" category becomes weaker and weaker. Blogs' dynamism and democratic features make them an ideal avenue for opening the government's activities to public oversight and promoting public understanding of the government's programs.[55] Senator John Cornyn has argued that blogs "contribute to the health of our political democracy" and has introduced a bill to amend FOIA to explicitly recognize the eligibility of Internet journalists for the fee waiver.[56] As their readership grows,[57] their impact can only increase.

III. THE FOIA FRAMEWORK

A. THE "REPRESENTATIVE OF THE NEWS MEDIA" FEE WAIVER

Congress passed FOIA in 1966 with the aim of allowing the general public easier access to information about government activities.[58] The statute has been amended numerous times since

54. *See, e.g.*, Gail Sheehy, *The Kean Mutiny*, MOTHER JONES, Sept./Oct. 2004, *available at* http://www.motherjones.com/commentary/notebook/2004/09/09_200.html (noting that the Bush administration released a briefing warning of terrorist threats after public pressure to do so); Adrian Walker, *An Open Review*, BOSTON GLOBE, Aug. 14, 2006, at B1 (taking Boston's mayor to task for refusing to release a report on police misconduct to the newspaper).

55. *See supra* note 15 and accompanying text.

56. 151 CONG. REC. S1, 520–22 (daily ed. Feb. 16, 2005). Cornyn's bill, S. 394, 109th Cong. (2005), was reported out of committee on September 21, 2006. Thomas (Library of Congress), Search Results for S. 394, http://thomas.loc.gov/cgi-bin/bdquery/z?d109:s.00394: (last visited Oct. 22, 2006).

57. In a study looking at all blogs, not merely those devoted to political subjects, the Pew Internet and American Life Project found that 57 million Americans were blog readers in 2006, more than double the figure from 2004. *See* PEW INTERNET & AMERICAN LIFE PROJECT, BLOGGERS 25 (July 19, 2006), http://www.pewinternet.org/pdfs/PIP%20Bloggers%20Report%20July%2019%202006.pdf.

58. In signing FOIA into law, President Lyndon B. Johnson declared, "This legislation springs from one of our most essential principles: [a] democracy works best when the people have all the information that the security of the Nation permits." H.R. Doc No. 104–795, at 8 (1966) (Conf. Rep).

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then — most notably in 1986[59] and 1996[60] — in order to deal with a changing policy environment.[61] FOIA sets out a comprehensive program through which any person may gather information about the activities of the federal government. A requester may ask for any records in the custody of an agency so long as they are adequately described.[62] As a default rule, disclosure is presumed to be required, subject to nine specific exceptions.[63] Indeed, even if portions of a requested document fall under one of these exceptions, the agency is required to release "[a]ny reasonably segregable portion."[64]

In addition to the substantive disclosure rules, FOIA also contains a number of procedural provisions to improve access for certain kinds of requests and requesters, added in the 1986 amendments to the statute.[65] Ordinarily, a requester is charged for the "document search, duplication, and review" required to process the request.[66] However, for certain categories of requesters — "educational or noncommercial scientific institution[s]" and "representative[s] of the news media" — the statute requires search and review fees to be waived, so long as the request is made for a noncommercial use.[67] Further, the statute requires fees to be

59. *See supra* note 12.

60. Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048.

61. HOUSE OF REPRESENTATIVES COMMITTEE ON GOVERNMENT REFORM, A CITIZEN'S GUIDE ON USING THE FREEDOM OF INFORMATION ACT & THE PRIVACY ACT OF 1974 TO REQUEST GOVERNMENT RECORDS (2005), *available at* http://www.fas.org/sgp/foia/citizen.pdf. The 1986 amendments added the fee waiver provisions discussed in this Note and clarified exemptions for law-enforcement information, while the 1996 amendments obligated agencies to post FOIA-related information on the Internet and created a system for expedited processing of certain requests. *See supra* notes 12 and 60; Kristen Elizabeth Uhl, *The Freedom of Information Act Post-9/11*, 53 AM. U.L. REV. 261, 267–68 (2003).

62. 5 U.S.C. § 552(a)(3)(A) (2000).

63. *Id.* § 552(b), (d). The exceptions, briefly, are for (1) classified information, (2) information on personnel rules and practices, (3) information exempted from FOIA by statute, (4) "trade secrets" or commercial information, (5) information related to an agency's deliberative process, (6) medical and personal information whose disclosure "would constitute a clearly unwarranted invasion of personal privacy," (7) law enforcement records, (8) reports of agencies overseeing financial institutions, and (9) geological information. *Id.* § 552(b).

64. *Id.*

65. *See supra* note 12.

66. 5 U.S.C. § 552(a)(4)(A)(ii)(I) (2000). These fees are determined according to schedules set by each individual agency. *See id.* § 552(a)(4)(A)(i).

67. *Id.* § 552(a)(4)(A)(ii)(II). The statute's sponsors and the courts have consistently been of the opinion that the fee waiver applies to news organizations requesting information that will be included in a publication sold for a profit. *See, e.g.*, 132 CONG. REC.

waived or reduced, regardless of the identity of the requester, 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."[68]

Courts have looked to the legislative history of the fee waivers to plumb Congress' intent.[69] The four congressional sponsors of the 1986 amendments — Representatives English and Kindness and Senators Leahy and Hatch — each made statements regarding the applicability of the "representative of the news media" exception, but their views were not always in lockstep. Representatives English and Kindness and Senator Leahy all made broad pronouncements about the appropriate applicability of the fee waiver provisions, even going so far as to explicitly recognize "media other than traditional print or broadcast media."[70] Senator Hatch, in contrast, held a more restrictive view, arguing that FOIA was "not intended to permit a fee waiver to any requester simply on the basis of his status as a disseminator of public information . . . . Of course, a true 'media' requester, in the traditional and common sense meaning of that term, should be treated otherwise."[71] The Court of Appeals for the District of Columbia Circuit has held, however, that Senator Hatch's statement was aimed at private libraries and information middlemen acting on behalf of other requesters.[72] Thus, it found that the legislative history is of one voice in requiring the fee waiver to be broadly construed as to those who regularly provide information to the *public*.[73]

S14298 (daily ed. Sept. 30, 1986) ("The fact that a newspaper or a publisher seeks to make a profit through publication does not affect the public interest nature of the information dissemination.") (statement of Senator Leahy).

68. 5 U.S.C. § 552(a)(4)(A)(iii) (2000).

69. *See, e.g.*, Nat'l Sec. Archive v. Dep't of Def., 880 F.2d 1381, 1385–86 (D.C. Cir. 1989).

70. 132 CONG. REC. S14298 (daily ed. Sept. 30, 1986) ("It is critical that the phrase 'representative of the news media' be broadly interpreted if the act is to work as expected . . . . In fact, any person or organization which regularly publishes or disseminates information to the public, whether in print or electronically, should qualify for waivers as a 'representative of the news media.'") (statement of Senator Leahy).

71. 132 CONG. REC. S16504 (daily ed. Oct. 14, 1986).

72. *Nat'l Sec. Archive*, 880 F.2d at 1387.

73. *Id.* at 1385–86.

B. AGENCY IMPLEMENTATION OF THE FEE WAIVER

There are broad areas of overlap and some differences between the definitions of "representative of the news media" espoused by various agencies. FOIA orders federal agencies to write and promulgate their own regulations implementing the statute's provisions, including those having to do with fee schedules and fee waivers.[74] The agencies also have statutory discretion to expand provisions — for example by providing additional bases for granting expedited processing.[75]

According to the Department of Defense regulations, for example, "[a]ny person actively gathering news for an entity that is organized . . . to publish . . . news to the public" qualifies for the fee waiver.[76] "News" is defined as "information that is about current events or that would be of current interest to the public."[77] The guidelines provide a number of examples of qualifying organizations, but emphasize that the list is not "all-inclusive."[78] Moreover, the guidelines specifically state that "alternative media" should be included in the definition of news media, noting the "electronic dissemination of newspapers" as one instance of evolving "methods of news delivery."[79]

The Department of State's definition, in contrast, omits all reference to alternative media.[80] The Department of Justice regulation likewise contains no language explicitly recognizing nontraditional or electronic media.[81] As such, a fee waiver request made by a person whose publication activities are primarily Internet-focused may therefore receive more favorable treatment at the Department of Defense than at the Departments of State or Justice.

74. 5 U.S.C. § 552(a)(4)(A)(i) (2000) ("[E]ach agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced.").

75. *Id.* § 552(a)(E)(ii)(II).

76. Department of Defense Freedom of Information Program, *supra* note 16.

77. *Id.*

78. *Id.*

79. *Id.*

80. Department of State, Availability of Information to the Public, 22 C.F.R. § 171.11(o) (2004).

81. Department of Justice, Production or Disclosure of Material or Information, 28 C.F.R § 16.11(b)(6) (2006).

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The fees charged to requesters are also set out according to the regulations of the individual agencies.[82] The Department of Defense, for example, charges up to 25 cents per page requested and from $20 to $75 per hour of search and review time, depending on the administrative rank of the personnel required.[83] Department of State duplication fees are likewise 25 cents per page, but hourly search and review charges range from $8 to $30, again based on the position of the reviewer.[84] In the absence of any fee waiver relief, the fee charged for a relatively small request, requiring only a few hours of low-level agency personnel time and a few hundred pages of requested material, can therefore still be relatively burdensome, especially to a private individual with few monetary resources to commit.[85] Nevertheless, agencies recoup only a small percentage of the costs of complying with FOIA requests through the fees they charge.[86]

The processing of FOIA requests is also relatively slow. According to a 2002 report by the General Accounting Office, in 2001 the median number of days required to process a "complex"

82. 5 U.S.C. § 552(a)(4)(A)(i) (2000).

83. 32 C.F.R. § 286.29 (2006). Fees relating to the costs of agency computers are included when the search requires the use of electronic resources, but as specific costs are not easily available, these are excluded from the above discussion.

84. *See* Department of State Fee Structure for Requests, http://foia.state.gov/fees2.asp (last visited Oct. 22, 2006). The State Department's provisions in the Code of Federal Regulations, 22 C.F.R. § 171.14 (2006), are different and less specific.

85. Using the figures above, a request to the Department of Defense resulting in the disclosure of 300 pages of material after six hours of search/review time by a mid-level functionary (i.e., a "Professional" or "Contractor" under 32 C.F.R. § 286.29(b)(1) (2006)) would cost nearly $350. Without fee waivers, some large-scale requests — for example, the ACLU request for information having to do with detainees of the U.S. military, which has generated over 90,000 pages of responsive material, *see* Torture Documents Released Under FOIA, http://www.aclu.org/torturefoia (last visited Oct. 22, 2006) — are prohibitively expensive.

86. For example, in fiscal year 2004: the Department of Defense spent $47.2 million to process FOIA requests, and collected $537,000 in fees (1.1% of expenditures), *see* OFFICE OF FREEDOM OF INFO. & SEC. REVIEW, FREEDOM OF INFORMATION ACT PROGRAM REPORT FOR FISCAL YEAR 2004, at 12 (2004), *available at* http://www.defenselink.mil/pubs/foi/FY2004report.pdf; the State Department spent $12.8 million and collected $30,800 in fees (.24% of expenditures), *see* Dep't of State FOIA Annual Report, Fiscal Year 2004, http://foia.state.gov/anrept04.asp (last visited Oct. 22, 2006); and the Department of Homeland Security spent $21.1 million and collected $320 thousand in fees (1.5% of expenditures), *see* DEP'T OF HOMELAND SEC., 2004 FOIA REPORT 9 (2004), *available at* http://www.dhs.gov/interweb/assetlibrary/privacy_rpt_foia_2004.pdf.

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FOIA request was 86 for the CIA, 84 for the Department of Defense, and 742 for the State Department.[87]

IV. THE "REPRESENTATIVE OF THE NEWS MEDIA" FEE WAIVER IN THE COURTS

A. EXISTING FEE WAIVER JURISPRUDENCE

Cases that have interpreted the "representative of the news media" fee waiver do not resolve definitively the question of whether blogs qualify for the exemption. While some have addressed the weight that should be assigned to Internet publishing,[88] the courts have most often been called upon to adjudicate the status of public interest organizations who engage in communications activities as part of their advocacy.[89] Further, it is impossible to synthesize a clear doctrine from the precedent. Indeed, in deciding whether the public interest organization Judicial Watch qualifies for the "representative of the news media" fee waiver, district court judges in the District of Columbia Circuit have contemporaneously reached opposite conclusions.[90] The case law articulates a functional approach to applying the fee waiver, rather than a categorical one. This suggests that courts should look at what bloggers actually do rather than simply ruling that their nontraditional position disqualifies them from preferential treatment. A court asked to rule on the fee status of bloggers will find precedent of equivocal use, as there are cases to support both positions. Their application is not transparent, and simple recourse to precedent leaves unaddressed the policy question of whether bloggers *should* qualify.

At the outset, it is important to note that FOIA sets out a de novo standard for judicial review "in any action regarding the

87. U.S. GAO, INFORMATION MANAGEMENT: UPDATE ON IMPLEMENTATION OF THE 1996 FOIA AMENDMENTS 13 (2002), *available at* http://www.gao.gov/new.items/d02493.pdf.

88. *See, e.g.*, Elec. Privacy Info. Ctr. v. Dep't of Def., 241 F. Supp. 2d 5 (D.D.C. 2003).

89. *See, e.g.*, *id.*; cases cited *infra* note 90.

90. *Compare* Judicial Watch, Inc. v. Dep't of Justice, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (holding Judicial Watch qualified for the media fee waiver), *with* Judicial Watch, Inc. v. U.S. DOJ (*Judicial Watch I*), 122 F. Supp. 2d 5, 11–13 (D.D.C. 2000) (holding Judicial Watch not qualified for the media fee waiver).

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waiver of fees."[91] Thus, contrary to the ordinary post-*Chevron* administrative law situation,[92] the agency decision is not owed any deference.[93] As a result, while internal agency regulations perform a gatekeeper function for those unwilling or unable to litigate, the case law trumps such regulations.

Although the FOIA statute's use of the term "representative of the news media" suggests a category-based determination,[94] the courts have for the most part adopted a more functional approach. The leading case is *National Security Archive v. Department of Defense*, in which the District of Columbia Circuit ruled that a public interest organization could benefit from the news media fee waiver.[95] The National Security Archive had filed a

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91. 5 U.S.C. § 552(a)(4)(A)(vii) (2000). Some courts have interpreted this provision to apply only to the grant or denial of a full waiver of fees, and therefore adopted a deferential standard of review of agency determinations of "representative of the news media" status, which technically affords the requester a reduction in fees. *See, e.g.*, *Judicial Watch I*, 122 F. Supp. 2d 5. Others have declined to address the question. *See, e.g.*, Nat't Sec. Archive v. Dep't of Def., 880 F.2d 1381 (D.C. Cir. 1989); Rozet v. HUD, 59 F. Supp. 2d 55 (D.D.C. 1999). The text of the statute is not dispositive, but certain features suggest that a deferential standard of review is not appropriate: representatives of the news media are exempted from paying any charges relating to document search and review, 5 U.S.C. § 552(a)(4)(A)(ii)(II) (2000), so the discount is perhaps better characterized as a partial waiver than a simple reduction in fees. Further, FOIA nowhere provides for a mandatory full waiver of fees — the statute provides that a request in the public interest "shall be furnished without any charge or at a charge reduced below" the ordinary schedule of fees, but the choice of full waiver or partial reduction is left to the agency. As such, under the restricted reading of the de novo review provision, courts would exercise deferential review in all cases except the small number where an agency had decided to fully waive fees for a public-interest requester, and an agency could insulate itself from review by requiring the payment of a token fee. The broad language of the review provision — which speaks of any action "under this section," as opposed to simply a subset of actions under § 552(a)(4)(A)(iii) — argues against this interpretation.

92. *See* Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, 467 U.S. 837, 843 (1984) (where statute is silent on a particular question, "the question for the court is whether the agency's answer is based on a permissible construction of the statute").

93. The Court of Appeals for the District of Columbia Circuit has extended this standard of review beyond the fee waiver context, holding that "because FOIA's terms apply government-wide, we generally decline to accord deference to agency interpretations of the statute, as we would otherwise do under *Chevron*." Al-Fayed v. CIA, 254 F.3d 300, 307 (D.C. Cir. 2001). The pronouncements of the Court of Appeals carry great weight in FOIA matters, as most litigation under the statute occurs in the District of Columbia Circuit for jurisdictional reasons. FOIA provides that jurisdiction over FOIA complaints lies in the district court of the requester's residence, in the district where the requested records reside, and the District of Columbia. 5 U.S.C. § 552(a)(4)(B) (2000). A recent Lexis search in the "Federal Court Cases Combined" database for "FOIA AND fee waiver" returned 210 results; an identical search in the District of Columbia Circuit database returned 144 hits.

94. 5 U.S.C. § 552(a)(4)(A)(ii)(II) (2000).

95. 880 F.2d 1381 (D.C. Cir. 1989).

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number of FOIA requests with the Department of Defense and asserted its entitlement to a waiver of fees as a representative of the news media.[96] It planned to compile the requested documents, along with other materials, into indexed "document sets" that would be published and offered for sale in microform format.[97] The Department of Defense denied the fee waiver request, and the Archive sought judicial review.[98]

The court disagreed with the agency and held that the Archive did qualify for a fee waiver as a representative of the news media.[99] In the course of its analysis applying the fee waiver provision, the court framed the critical question as "whether [the requesters'] activities qualify as those of a representative of the news media."[100] These activities consist of "gather[ing] information of potential interest to a segment of the public, us[ing] its editorial skills to turn the raw materials into a distinct work, and distribut[ing] that work to an audience."[101] Indeed, according to the District of Columbia Circuit's analysis of the legislative history, even public interest organizations were "unambiguously envisioned" as possible beneficiaries of the news media fee exception.[102] This test thus holds the potential of expanding "representative of the news media" treatment quite elastically to include many different kinds of requesters, as long as they engage in the paradigmatic activities of gathering, processing, and publishing information.

Unsurprisingly, courts have adopted a number of more stringent requirements in order to limit the reach of the functional analysis. Most have seized on language in the *National Security*

96. *Id.* at 1383. The National Security Archive also attempted to establish its eligibility for the "educational institution" fee waiver under § 552(a)(4)(A)(ii)(II), but the court was unconvinced by this claim. *Id.* at 1385.

97. *Id.* at 1386.

98. *Id.* at 1381.

99. *Id.* at 1388.

100. *Id.* at 1385.

101. *Id.* at 1387.

102. *Id.* at 1385. The court found that all of the bill's sponsors, including Representative Hatch, agreed on this point. *Id.* at 1387. Despite this clear holding, district courts have continued to cite the self-identification of public interest organizations as a rationale for denying "representative of the news media" fee waivers. *See, e.g.*, Judicial Watch v. Rossotti, 89 A.F.T.R. 2d (RIA) 1627, at *17 n.7 (D.D.C. 2002) ("plaintiff remains an ethical and legal watchdog over our government, legal, and judicial systems [and a] non-partisan, non-profit foundation — not a representative of the news media" (quotation marks omitted)), *rev'd on other grounds*, 326 F.3d 1309 (D.C. Cir. 2003).

Archive decision indicating that a requester must have a "firm intention" to publish the requested information in an identified work.[103] But the implementation of this standard has been non-uniform in practice: some courts have established it as a relatively heavy burden, requiring the requester to disclose specific plans to publish the information.[104] Others have disagreed, as in *Electronic Privacy Information Center v. Department of Defense*, where the court held that a general certified statement that requested information would be publicized through certain identified publications "and others" was enough to establish that the plaintiff was a representative of the news media.[105]

Another attempt to limit requesters' access to the news media fee waiver emphasizes the difference between active dissemination and passively making information available — a distinction arguably implicit in the *National Security Archive* holding.[106] "[M]erely mak[ing] information available to the public," according to the court, will not entitle the requester to a fee waiver.[107] The actual content of this distinction is difficult to glean, as cases that have employed this distinction often fail to make non-conclusory arguments explaining the criteria that separate active from passive dissemination. For example, in one case the public interest organization Judicial Watch was denied a fee waiver because the court held that posting documents to the organization's website did not qualify as active publication.[108]

Other courts have taken a more solicitous stance toward the role Internet publication plays in news media activities. In *Electronic Privacy*, a district court held that an organization that

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103. Nat'l Sec. Archive v. Dep't of Def., 880 F.2d 1381, 1386 (D.C. Cir. 1989).

104. *See* Judicial Watch, Inc. v. U.S. DOJ (*Judicial Watch II*), 122 F. Supp. 2d 13, 21 (D.D.C. 2000).

105. Elec. Privacy Info. Ctr. v. Dep't of Def., 241 F. Supp. 2d 5, 11–12 (D.D.C. 2003).

106. 880 F.2d at 1386 ("Unlike merely . . . 'mak[ing] information available' . . . the Archive's intended distribution of document sets entails the kind of initiative we associate with 'publishing or otherwise disseminating' that information.") (citing H.R. 6414, 98th Cong. § 4 at 9 (1984) and 132 CONG. REC. H9463 (daily ed. Oct. 8, 1986)). A plausible reading of this passage is that the court wished to distinguish between actual publication and simply keeping the information on file and making it available to those who might request it, as might a research institution or a library. *See id.* at 1384.

107. *E.g.*, *Judicial Watch I*, 122 F. Supp. 2d 5, 12–13 (D.D.C. 2000).

108. *See id.* The entirety of the discussion is contained the following extract: "most of Judicial Watch's methods of 'disseminating' information merely make information available to the public; these methods do not establish that Judicial Watch is a representative of the news media." *Id.*

published a biweekly e-mail newsletter on privacy issues qualified for a waiver of fees as a member of the news media, citing its "large circulation" of 15,000 readers and the fact that "journalists and writers" were among its recipients.[109] The court qualified its holding, warning that "newsletters must be published regularly, over a period of time, and must disseminate actual 'news' to the public, rather than solely self-promoting articles about that organization."[110] One federal court has noted with trepidation that nearly any entity with a website may in fact qualify as a member of the news media under the current FOIA language.[111]

B. DO BLOGGERS QUALIFY AS "REPRESENTATIVE[S] OF THE NEWS MEDIA" UNDER CURRENT FOIA CASE LAW?

As the text of FOIA contains no definition of the phrase, the statute by itself does not determine whether blogs and other Internet media are properly included in the "representative of the news media" category.[112] Similarly, while some agency regulations are more congenial to fee waiver claims by bloggers than others,[113] these regulations are themselves subject to meaningful judicial review and oversight.[114] In the absence of further congressional action, the treatment bloggers receive will ultimately be up to the courts.

Yet the existing case law is inadequate to the task. Applying *National Security Archive*'s functional framework — requiring that requesters gather, process, and publish the information — is for the most part straightforward, but the analysis becomes more complex on the last requirement that the requester publish the materials gained through FOIA. There are two competing doctrines on the interpretation of this requirement. One emphasizes the formal difference between "active dissemination" and "passive making-available"; the other takes a more pragmatic and solicitous approach to new forms of communication. While the former is ultimately irrational as applied to Internet journalism, the lat-

109. *Electronic Privacy*, 241 F. Supp. 2d at 13–14.
110. *Id.* at 14 n.6.
111. Judicial Watch, Inc. v. Dep't of Justice, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000).
112. *See* 5 U.S.C. § 552 (2000).
113. *See supra* Part III.B.
114. *See supra* Part IV.A.

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ter poses its own problems. By focusing only on the activities performed by the requester, this approach leads to a very broad determination that all but the very rare blogger will qualify for the fee waiver, which raises difficult policy questions.

The test announced in *National Security Archive* is activity-based, and requires that the requester gather information, exercise some editorial function, and have a firm intention to "publish" the resulting product, in order to qualify for a fee waiver.[115] The first requirement is usually fairly simple to meet,[116] but it might prove an obstacle for some bloggers. As the usual modus operandi of the blogger involves commenting upon publicly available news stories, it could be argued that most do not "gather" information; rather they are merely helping themselves to pre-processed stories. Yet more and more bloggers are exercising truly journalistic functions — adducing commentary and applying expertise to the material they publish.[117] Indeed, in *National Security Archive*, the organization had not previously published books, but the court found that the novelty of its publication activities was no obstacle.[118]

If courts take the second prong seriously, it would segregate out different kinds of bloggers. On its face, the editorial intervention requirement could be satisfied merely by posting the FOIA documents received by the blogger. A more stringent reading of the requirement is possible, however, such that a layperson's comments, reflecting no expertise beyond simply reading the document and reporting what it says, would not qualify as sufficient processing. Yet even this strict reading is unlikely to disqualify many blog-related requests. The blogs most likely to request government documents through FOIA are likely to be the "expert" blogs alluded to above, which feature writers who have a particular knowledge of the subject area. Further, even a lay blogger can provide a valuable public service by going through a

115. Nat'l Sec. Archive v. Dep't of Def., 880 F.2d 1381, 1386 (D.C. Cir. 1989); *see supra* Part IV.A.

116. Indeed, there do not appear to be any reported cases in which a requester has failed to satisfy this prong of the analysis.

117. *See supra* Part II.

118. *Nat'l Sec. Archive*, 880 F.2d at 1387. The court did, however, find that the organization had a firm intention going forward to publish a book based on the material requested. *Id.*

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large pile of documents and highlighting the most important sections.[119]

In contrast to the first two prongs, the requirement that the requester evidence a "firm intention" to distribute the requested information to the public, has often been used to deny a waiver of fees, generally because the intention is held to be too vague.[120] In the blogging context, however, this third prong will fail to exclude any blogger who makes a careful request. As discussed above, the major bloggers usually make a dozen or more posts per day, and it is a rare blog that fails to update at least weekly. The effort required to make a post when the information arrives is trivial, given the ease with which a blogger can make a post and the flexibility of the post format. Such a post could range from a few short sentences reporting the gist of the requested material to an exact scan of the disclosed documents. Unlike the freelance journalist or author writing on spec, whose ability to publish requested information is contingent on securing a contract with a publisher, the blogger already has the capacity to make public what he or she requests. Thus, where other requesters might have to identify particular modes of dissemination or a specific, planned publication in order to establish that their intention to publicize the information is sufficiently firm,[121] the blogging format allows a blogger to simply and convincingly state that the requested information will wind up in a globally-available post.

The final component of the *National Security Archive* test, requiring that the requester "publish" the material is likely to present the strongest obstacle for bloggers wishing to obtain "representative of the news media" status. The judicial gloss given to this requirement sometimes hinges on a distinction between "active publication" and "passive making-available."[122] From the language used, the distinction the courts have in mind is apparently not simply a matter of the size of the audience; rather, the active/passive distinction hinges on the nature of the dissemination activity itself.

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119. *See* discussion of the DailyKos project to process the ACLU FOIA documents relating to abuse of U.S. military detainees *supra* note 53 and accompanying text.

120. *See, e.g.*, Judicial Watch, Inc. v. U.S. DOJ (*Judicial Watch III*), No. 99-2315, slip op. at 10–12 (D.D.C. Aug. 17, 2000).

121. *See id.*

122. *See supra* Part IV.A.

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The argument that posting information on a website falls on the passive side of the scales is facially persuasive — while the information is available for anyone who wishes to search it out, the site operator is not necessarily taking any affirmative steps to distribute it. The availability of various alternative models of distribution renders this analysis problematic, however. A court following the above framework could hold that a blog that receives tens of thousands of unique visitors per day is passive and therefore deny it a fee waiver, while an e-mail newsletter sent out to a few dozen recipients would qualify for favored status, because sending out content in a subscription model is deemed more "active." Indeed, mechanically speaking, the process of posting a web-only article to the *New York Times* website is identical to that of a blogger uploading a new post. Only those who choose to visit the site will see the information.[123] Technologies that allow readers to "subscribe" to a blog, receiving notice when the site updates with new content further complicate the inquiry.[124] The active/passive distinction is indeterminate at best, even when applied to conventional media, and when used as a framework for electronic publication, it leads to results that are essentially accidental and provides no real guidance for determining whether disclosure is in the public interest. As such, the outcome of decisions that rely on this standard will be very hard to predict, and courts should disfavor its use in these contexts.[125]

The approach taken in *Electronic Privacy* provides a more pragmatic framework for analyzing the significance of dissemination activities.[126] In that case, while the court found that the Electronic Privacy Information Center's role as a publisher of books qualified it as a member of the news media, it also found the organization's electronic newsletter qualified it as a publisher of periodicals, creating independent grounds for the FOIA fee

123. The active/passive distinction makes little sense even when applied to more familiar forms of news publication. After all, access to all conventional media requires some affirmative act by the consumer. It is difficult to formulate a difference in kind between, for example, typing in a URL and tuning a radio to a particular station.

124. *See* Mark Pilgrim, *What is RSS*, Dec. 18, 2002, http://www.xml.com/pub/a/2002/12/18/dive-into-xml.html.

125. The result of the active/passive analysis will also likely depend on the sophistication of judicial understanding of the technologies involved.

126. Elec. Privacy Info. Ctr. v. Dep't of Def., 241 F. Supp. 2d 5 (D.D.C. 2003).

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waiver.[127] The court noted that under the Department of Defense's comparatively broad definition of "representative of the news media," publishers of news periodicals qualify for the waiver, even though in this case the periodical was entirely electronic.[128] In holding that the e-mail newsletter was a periodical under the DOD regulation, the court noted that it was sent to over fifteen thousand recipients via e-mail; the court also examined the content of the publication to ensure that it qualified as "news."[129]

Of course, an e-mail newsletter is not the same thing as a blog. But in a cautionary footnote, the *Electronic Privacy* court appeared to recognize that its analysis could reach websites as well as content distributed via e-mail, though it was careful to voice its doubt that "a website is, by itself, sufficient to qualify a FOIA requester" for a fee waiver.[130] Specifically, the court warned that the websites of "businesses, law firms, [and] trade associations" would not make them representatives of the news media.[131] In light of this caveat, it is clear that the court's approach is a functionalist one, setting apart websites that might post the occasional (possibly "self-promoting")[132] news article, which should not be considered members of the media. When considering blogs that are wholly devoted to providing information and commentary, rather than promoting some completely unrelated commercial enterprise, *Electronic Privacy*'s disclaimer does not appear particularly applicable.

In sum, whether FOIA requests from bloggers qualify for fee waivers is likely to depend on the approach taken by the courts. A formalist approach placing undue emphasis on the artificial distinction between active and passive dissemination may lead to the conclusion that the paradigmatic blog format does not qualify as "publication," regardless of the journalistic bona fides of the requester. This conclusion is logically insupportable, and will lead to incoherent policy results, as news media status will de-

127. *Id.* at 11–15.
128. *Id.* at 14 ("The fact that EPIC's newsletter is disseminated via the Internet . . . does not change the analysis.").
129. *Id.* at 13–14.
130. *Id.* at 14 n.7.
131. *Id.*
132. *Id.* at 14 n.6.

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pend on technical details having little to do with the concerns animating FOIA.

If, on the other hand, the more pragmatic *Electronic Privacy* approach is taken, the analysis will be more fact-specific and dependent on the actual content and distribution of the blog. Still, this test poses its own problems. By focusing only on what the blogger *does*, without considering questions of audience, it risks opening FOIA offices to a floodgate of requests for low-cost processing.

V. POLICY CONSIDERATIONS

A. WHAT IF BLOGS QUALIFY?

The primary purpose of FOIA is to inform the public about the activities of the government.[133] The fee waiver promotes that end by making requests less expensive for those who are more likely to make a significant contribution to public understanding — journalists — by virtue of their skills and readership. Allowing bloggers access to this privileged category will have a number of positive and negative policy effects for the goals of FOIA. Opening up the waiver to an idiosyncratic cadre of citizen-journalists will promote the flow of information that might not be of interest to the traditional media and could allow such information to reach an audience less likely to follow traditional news sources. But this opening carries the risk of drastically undermining the efficiency and administrability of the fee waiver program; the number of potential applicants will increase and bloggers might not actually be in a position to contribute meaningfully to public understanding.

The advantages of allowing bloggers to qualify for FOIA fee waivers are fairly clear: bloggers currently play a vital role as adjuncts to the conventional media and allowing them fee waivers serves much the same purpose as providing those waivers to newspapers. To the extent that a blogger has an audience interested in the subject matter of the request, the public interest is served regardless of the precise form of the medium. Also, because bloggers tend to have smaller budgets for their activities

133. *See supra* note 15 and accompanying text.

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than do professional media outlets, the fee waiver will be disproportionately beneficial to them and therefore to the public. While the *New York Times* presumably has a large research budget to which its reporters may have recourse if denied the waiver, the prospect of several hundred dollars in processing fees may be prohibitive to an amateur blogger, such that requested material is unlikely to be published if the waiver is not granted.[134]

Further, on a normative level, treating blogging as one media activity among others will help reify the blogosphere as one part of the larger news media project. This could have a number of positive repercussions. First, it could act to undermine a prevalent conception in the blogosphere that bloggers are somehow in opposition to the mainstream media.[135] Additionally, by being treated as "members of the club," certain standards of journalistic probity — adequate sourcing, a clear demarcation between fact and viewpoint, and a feeling of civic responsibility for keeping the public informed — might be inculcated among bloggers, increasing the professionalism and value of the blogosphere.[136]

Opening up FOIA to bloggers is likely to have its disadvantages as well. Blogging has a very low cost of entry, which greatly expands the number of requesters who could take advantage of the fee waiver if it extended to bloggers. More requests for fee waivers could lead to overworked or underfunded FOIA offices, making the process slower and more expensive for requesters who are not fortunate or sophisticated enough to take advantage of the fee waiver. Similarly, there could be second-order effects. For example, if an agency's FOIA budget is shrinking due to excessive blogger requests, the agency might correspondingly make it harder to qualify under the public interest fee waiver provision. This concern is not limited to harming the ex-

134. Of course, the increased costs incurred by a news organization will be passed along to its subscribers and advertisers, but the cost to the public of these marginal increases is wholly different from the possibility that the material requested by a blogger will simply not reach the public.

135. There have been some indications that bloggers are becoming more normalized members of the media. For example, in addition to the convergences discussed *supra* Part II, bloggers were given press passes to cover both 2004 political conventions. *See* Charles Passy, *Attack of the Blogs!*, PALM BEACH POST, Nov. 19, 2004, at 33. However, cleavages certainly remain, as the title of the just-cited article suggests.

136. The immediate rejoinder is that the blogosphere derives much of its vitality from its informality and comparative democracy of institutions. Informality, however, is not necessarily in conflict with an appreciation for journalistic ethics.

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ecutive agencies or other requesters. If Congress considers the question of bloggers' eligibility for fee waivers at a time when requests by bloggers are bleeding the agencies dry, Congress is unlikely to be particularly solicitous.

In addition to this raw numeric increase, an expansion would also alter the characteristics of the "representative of the news media" pool, as it would now include amateur bloggers who might not have made significant monetary or professional investments in their journalistic activities. Professional journalists are more likely to have access to expert contacts, and their coverage presumably will benefit from editorial guidance. Further, as the financial success of the traditional media organizations that employ professional journalists depends in large part on the size of the audience for their reporting — either through subscription charges or because higher circulation allows them to sell advertisements at a higher rate — they have an incentive to reach as many members of the public as possible. Therefore, traditional media organizations generally have several structural advantages over their blogger colleagues when it comes to their ability to inform the public.

If bloggers are systematically less efficient than traditional journalists at meeting FOIA's core purpose of promoting public understanding of government activities, extending the fee waiver to support their activities is questionable.[137] The fee waiver provisions essentially impose the FOIA costs on non-privileged requesters and taxpayers instead of on the requesting entity. Including all bloggers qua bloggers in the fee waiver's coverage could undercut the logic of this public subsidy, as it would be funding requests that are of limited public benefit.

These concerns are not trivial. A recent study suggests that approximately ninety percent of FOIA requests are made by businesses or individuals, with media and non-profit requests making up less than nine percent of the total.[138] While many of those making commercial requests would presumably have an interest in not making the requested information available, certainly some of them — and most individual requesters — would

137. *See supra* note 15 and accompanying text.

138. COAL. OF JOURNALISTS FOR OPEN GOV'T, FREQUENT FILERS: BUSINESSES MAKE FOIA THEIR BUSINESS 8 (2006), *available at* http://www.cjog.net/documents/Who_Uses_FOIA2.pdf.

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have an incentive to set up a blog in order to obtain the fee waiver, especially if they make repeat requests. Even outside such "gaming" of the system, it seems reasonable to conclude that many individual requesters, who are passionate enough about a particular topic to file a FOIA request in the first place, will want to publicize the resulting material.[139] While it is difficult to predict the likely consequences of expanding the reach of the fee waiver to bloggers, it could lead to a flood of new requests entitled to reduced fees.

The above discussion suggests the importance of articulating a standard for determining that some bloggers qualify for the waiver and others do not. Notably, the functional *National Security Archive* framework does not easily lend itself to segregating requesters according to the size of their audiences. Courts could attempt to apply common-law reasoning to determine whether a particular blog should qualify or not, but judicial institutions often lack the technical and policy-based expertise that would be helpful to this kind of analysis.[140] The FOIA statute is silent on what criteria should be evaluated in granting a waiver to a particular blog. Thus, individual courts would be left to develop a decision rubric more or less out of whole cloth, without a strong textual anchor. If such a standard existed instead at the agency level, administering it would require resources, as FOIA officers would need to inquire into the blog's time of operation, the size of its audience, and perhaps other data as well. Plus, the sufficiency of the standard would itself be subject to judicial review if any blogger denied a fee waiver chose to litigate, likely without a presumption of deference.[141]

On a more fundamental level, no matter where such a standard is implemented, it is likely to be in peril of quickly becoming out of date. The blogosphere today is a radically different place

139. This result will vary widely by agency, of course. Some agencies, such as the Department of Veterans Affairs, receive FOIA requests almost exclusively seeking the personal records of the requester, which the requester is unlikely to want to publicize. *See id.* at 2.

140. *See, e.g.*, Frank Partnoy, *Synthetic Common Law*, 53 KAN. L. REV. 281, 312 (2005) (noting difficulties presented by cases "in areas of rapidly evolving technology where judges lack expertise"); *see also* Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, 467 U.S. 837, 865 (1984).

141. Al-Fayed v. CIA, 254 F.3d 300, 307 (D.C. Cir. 2001); *see supra* discussion accompanying note 93.

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than it was just three years ago, much less five. Even agency regulations, which can generally be revised far more quickly than statutes or judicial rules, will be hard-pressed to keep pace with the changes the immediate future will bring, from the traffic numbers that qualify a blog as "high-traffic" to the methods used for monitoring this traffic.

The mere fact that most blogs are run by a single individual or a small group of individuals on an informal basis presents policy issues.[142] A would-be requester easily could ask an ideologically or personally sympathetic blogger to submit a request on his or her behalf. The existing news media waiver permits this abuse too, but since blogs tend to be more informal and involve more direct participation with their audience, the concern is greater here. Indeed, in addition to business and law firms, the *Electronic Privacy* court listed "individuals" among the entities whose websites might not provide prima facie evidence for membership in the news media, perhaps for these reasons.[143] Further, requesters with an axe to grind could intentionally clog an agency's FOIA office with excessive requests. The ACLU request for documents related to detainee treatment, for example, has been a major cause of a nine month processing backlog at the Army Crime Records Center.[144] It would not be too difficult for an irresponsible requester to manipulate the system to cause a disliked agency's FOIA office to grind to a halt. Large organizations with a public profile, reliant on advertisers and donors for their continued survival, have a strong incentive to avoid such irresponsible behavior, but individual bloggers are not subject to the same constraints.

142. Some group blogs are, however, formally incorporated. One example is The Huffington Post, http://www.huffingtonpost.com/theblog/ (last visited Oct. 22, 2006). *See* James Nash, *Arianna's Post Not Hitching Ads Despite Rising Interest in Blogs*, L.A. BUS. J., May 23, 2005, http://www.looksmartstocks.com/p/articles/mi_m5072/is_21_27/ai_n13806592. Another is Pajamas Media, http://pajamasmedia.com/ (last visited Oct. 22, 2006). *See* Gregory M. Lamb, *A One-Stop Shop for the 'Best' Blogs*, CHRISTIAN SCIENCE MONITOR, Nov. 30, 2005, at 14.

143. Elec. Privacy Info. Ctr. v. Dep't of Def., 241 F. Supp. 2d 5, 14 n.7 (D.D.C. 2003).

144. Telephone Interview with Crime Records Center FOIA Officer (Aug. 5, 2005).

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B. UNWORKABLE ALTERNATIVES

The existing body of law defining who qualifies as a representative of the news media under FOIA does not give a single, definitive answer to the question of how to treat bloggers. Further, because the case law has developed without considering the unique difficulties blogs pose, the straightforward application of existing precedent is likely to have unintended policy consequences. Alternative approaches are therefore worth exploring, in order to best effectuate FOIA's "primary purpose" of promoting public understanding of the operations and activities of the government.[145]

The application of the active/passive standard should be rethought. As currently applied, the results it reaches — whether a particular Internet media source would qualify for a fee waiver — will primarily turn on more or less incidental choices of technological delivery mechanisms, distinctions that have no particular bearing on whether FOIA's core purpose of promoting public understanding is being served.[146] Courts therefore should prefer a more pragmatic approach that keeps the policy goals of FOIA firmly in mind.

The alternative tests below do not delve into details as to which branch of government should implement such policies — the courts, the agencies, or Congress. To the extent that specific standards are contemplated, the agencies would be the more logical locus for development, but some of the proposals would require congressional action to amend FOIA, and judicial oversight would be necessary regardless of which possible solution is chosen.

The simplest alternative to the two currently existing legal approaches would require the blogger to show that her audience is large enough to justify treatment as a representative of the news media. Judicial precedent supports this approach; in *Electronic Privacy*, the court quoted with approbation the number of recipients of the e-mail newsletter in question,[147] but the analogous quantity in the blog context is not immediately obvious. The

145. *See supra* note 15 and accompanying text.
146. *See* discussion *supra* Part IV.B.
147. *Electronic Privacy*, 241 F. Supp. 2d at 13–14.

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aggregate number of "hits" the website records appears to be an easy marker for which blogs have the capacity to inform the public and which do not, but hits simply record the number of times the website is loaded, so if a person reloads a site continually throughout the day, each new visit would be a hit. A more sophisticated approach would consider the "unique visitors" registered by the blog, which tracks the IP address of each visitor. But, again, for technical reasons, this number might be an overstatement of a blog's actual readers.[148] There is also the issue of whether to look at monthly, weekly, or daily unique visitors, which might bias the results of the inquiry depending on relatively inconsequential details of the blogger's update schedule.[149]

Further, it is possible to contest the baseline against which these traffic numbers should be compared. When evaluating whether a radio station in a particular town has an appreciable audience, for example, it makes sense to look at the proportion of those within the station's broadcast radius who listen to its programs. But a blog's audience is potentially global, complicating the effort to understand what a particular number of readers actually means. For example, a particular blog might have a preponderance of non-U.S. visitors, whose interests FOIA was not primarily intended to serve.[150] A blog that focuses primarily on county-level political issues could be of great value to the community it serves, a value disproportionate to its comparatively tiny audience. Also, some specialist blogs might not have very large built-in audiences by the nature of their subjects. Even once these problems are addressed, the standards could quickly

148. Registering "unique visitors" requires taking note of the IP of the computer loading the page, but a single reader might use many different IP addresses over the course of a week or even a day. For example, a single reader might check a blog on his or her home connection, then read the blog again on a connection at work, then take a laptop to lunch and check the blog via a coffee shop's wireless network (indeed, because of the way wireless networks assign IP addresses, each day that the putative reader goes to the coffee shop, he or she would probably be registered as a different IP).

149. A blogger who mostly updates on the weekends, for example, will register smaller daily traffic than does one who updates continuously, even if they post identical quantities of content.

150. Though even here categorical statements are difficult, since the traffic statistics a blog collects would likely only indicate the country of origin of the visitor's Internet service; expatriate Americans would be indistinguishable from foreigners in this case.

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become out of date; the traffic numbers of a high-profile blog circa 2002 would be negligible today.[151]

Looking to the traffic numbers of the highest-profile blogs and normalizing the standards to their traffic could sidestep many of these problems. For example, any site that has at least ten percent of the traffic of some reference high-profile blog could be deemed presumptively to qualify for a fee waiver. But this would effectively freeze out many lower-traffic, specialist blogs. Further, instead of allowing more and more blogs to qualify as representatives of the news media as overall traffic to the blogosphere increases, this approach would keep the number of eligible blogs more or less constant — the marginally qualifying blog would continually need to grow its audience in order to avoid losing its favored status.

Even discounting these issues, acquiring reliable numbers is itself problematic, as requesters would be self-reporting the size of their audience. Without access to the logs of the blogger's hosting service, a FOIA officer would simply have to take the blogger's assertions at face value.[152]

The court in *Electronic Privacy* also considered the length of time the newsletter at issue had been in existence — eight years in that case[153] — but again, this measure is not transparently applicable to the blogosphere. There are very few blogs, even those with the highest-profile, which had any existence worth noting before 2000.[154] Also, since blogs are usually the product of a single individual, they are more prone to vicissitude than are organizations. The blog Whiskey Bar, for example, has been quite prolific, but went on an extended hiatus from the summer of

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151. The blog Talking Points Memo registered 53,800 unique visitors in the month of July 2002. *See* Talking Points Memo, http://www.talkingpointsmemo.com/archives/000642.php (Feb. 2, 2003, 13:15 EDT). Monthly traffic had climbed to 698,963 unique visitors in September 2004. *See* Talking Points Memo, http://www.talkingpointsmemo.com/archives/003622.php (Oct. 7, 2004, 23:23 EDT).

152. There are some possible avenues by which a FOIA officer could double-check the self-reported figures. For example, The Truth Laid Bear attempts to set out a blogosphere "ecology" by counting the number of links a blog generates as a proxy for how important said blog is in the larger discourse. *See* General & About N.Z., http://truthlaidbear.com/FAQ.php (last visited Oct. 22, 2006). Still, this is a rather indirect and inefficient measure.

153. Elec. Privacy Info. Ctr. v. Dep't of Def., 241 F. Supp. 2d 5, 13–14 (D.D.C. 2003).

154. *See, e.g.*, Atrios, http://atrios.blogspot.com (Apr. 17, 2002) (first post); InstaPundit, http://instapundit.com (Aug. 8, 2001, 15:01:54) (first post); Talking Points Memo, http://www.talkingpointsmemo.com (Nov. 13, 2000, 15:37 EDT) (first post).

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2004 to early 2005.[155] The blogger Matthew Yglesias has written a number of blogs over the years, from a now-defunct personal blog to the *American Prospect*'s group-blog to his own individual blog on the Talking Points Memo-affiliated TPM Cafe.[156] Simply looking at individual site histories is thus problematic.

Due to the difficulties identified above, even relatively strict standards as to traffic or past publication history would require case-by-case determinations. While courts are adept at this type of reasoning, most requesters — especially bloggers — would likely not proceed to litigation, due to the time and expense involved. Therefore, the primary onus of implementing such a case-by-case approach would fall on the FOIA officers at each agency. Officers would have to look at the blog and determine whether it should qualify, based on considerations such as the officer's familiarity with the blog, its degree of professionalism and apparent standing in the blogosphere, and the kind and size of its audience. While this could provide precise determinations of the merit of extending the fee waiver to a particular blog, it would entail high administrative costs and the seemingly arbitrary process would invite appeals and likely lead to low uniformity of treatment even within a single agency.

A more formal approach to granting "representative of the news media" status might require blogs to apply for press credentials from a particular agency. Most agencies will presumably already have some mechanism for approving particular members of the media to cover their press events, so adapting these procedures would be reasonably simple.[157] Furthermore, this approach imposes no additional burden on FOIA officers, as granting or

155. *See* Whiskey Bar, http://billmon.org/archives/001771.html (Mar. 24, 2005, 19:38) (noting that the author was "[driven] away from blogging last summer" and that the blog re-opened in January of 2005).

156. *See* Matthew Yglesias, http://yglesias.blogspot.com/ (last visited Oct. 22, 2006) (defunct); TAPPED, http://www.prospect.org/weblog/ (last visited Oct. 22, 2006) (TAP's group blog); Matthew Yglesias | TPM Cafe, http://yglesias.tpmcafe.com/ (last visited Oct. 22, 2006).

157. In the wake of the Jeff Gannon scandal, in which a journalist issued a White House press pass was discovered to be a former male prostitute with very little previous journalistic experience, one blogger attempted to obtain a one-day White House pass to cover a press briefing. He was ultimately successful, but only after members of the conventional media intervened on his behalf. *See* FishBowlDC, http://www.mediabistro.com/fishbowlDC/ (multiple posts spanning Mar. 1, 2005 to Mar. 4, 2005).

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denying the waiver simply requires consulting the list of accredited persons.

Licenses of any kind, however, tend to create a bias towards those who are already well-established in their field,[158] while fee waivers are most useful to those who do not have significant resources to expend on journalistic activities. Indeed, agencies' accreditation procedures might legitimately be biased towards larger news organizations, to ensure broader coverage of their press events. Finally, this approach simply begs the question, as the agency must still determine whether a particular blogger deserves press treatment during the accreditation procedure. As such, this standard does not go very far towards effectuating FOIA's policy goals.

C. RESOLVING THE PROBLEM — CONTENT AS WELL AS ACTIVITIES

The objective is to ensure that FOIA's fee waivers optimally promote public understanding of the government on the one hand, while preventing an excess of fee waiver requests from draining agency funds and embroiling the FOIA officers in time-consuming case-by-case adjudication on the other. Reconciling these competing policy goals is vexing. The traditional approach of looking only at the characteristics of the requester is unsatisfactory, for the reasons discussed above. Permitting bloggers access to the fee waiver on a categorical basis is too costly, while prohibiting such access excludes otherwise-worthy journalists on the basis of format. Allowing some bloggers fee waivers is the preferred solution, but the mechanics of sorting the deserving from the undeserving are complex and could lead to great inefficiency.

This Note proposes that in determining the fee status of bloggers, agencies should employ a hybrid inquiry that looks not only at the characteristics of the particular blog, but also at the material requested. The usual activity-based test should be applied first, ensuring that the blogger shows a firm intention to publish the requested material through an established medium of com-

158. *See, e.g.*, Charles H. Baron, *Licensure of Health Care Professionals: The Consumer's Case for Abolition*, 9 AM. J. L. & MED. 335, 339 (1983).

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munication. Then, the FOIA officer should examine the subject matter of the material requested to determine whether its value as news suffices to justify a fee waiver.

In the first part of this approach, agency FOIA officers would sort out very low-traffic blogs and those that clearly have been set up only to gain access to the fee waiver. While the discussion above argues that a rigorous attempt to classify blogs according to their audience is likely to fail, weeding out these fringe cases is a far simpler task. The FOIA officer can engage in an inquiry similar to that employed by the *Electronic Privacy* court. The court did not set precise audience cut-offs, but simply ensured that the request was made in good faith and that the requested material would reach some non-negligible, interested audience.

In the second part, the FOIA officer would examine the subject matter of the request to ensure that extension of the news media fee waiver will serve FOIA's purpose of promoting public understanding of government functions. Agencies already engage in a limited form of subject-matter inquiry in adjudicating "representative of the news media" requests, because when a news organization makes a request for information solely in its commercial interest, it is not accorded favored fee status.[159] Further, according to agency regulations, a FOIA officer must determine that the information a requester publishes qualifies as "news" before granting the waiver.[160]

The latter requirement does not currently appear to be a significant barrier to requesters seeking fee waivers.[161] This state of affairs, however, is by no means compelled; FOIA officers have the latitude to pay more attention to the subject matter of the requested material in making fee waiver determinations. Agency regulations define "news" in a broad fashion — for example, according to both the Departments of State and Defense, it is "information that is about current events or that would be of current

159. *See, e.g.*, Department of State, Access to Information, 22 C.F.R. § 171.15(c) (2004) (to qualify for the fee waiver, the requester must meet the regulation's definition of "representative of the news media" and "the request must not be made for a commercial use").

160. *See, e.g., id.* § 171.11(o) (2004); Department of Defense, Freedom of Information Program, 32 C.F.R. § 286.28(e)(7)(i) (1998).

161. There do not appear to be any reported cases in which a requester was denied news media status because the material he or she published was not considered to be "news."

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interest to the public"[162] — but a strict application of this definition should weed out frivolous requesters. A blogger whose output is primarily personal and does not involve matters of public concern would not be eligible for the waiver. In this scenario, the relevant considerations would not be the size of the blogger's audience, but rather his or her commitment to providing information that will be of value to the American public.

It is a natural extension of these requirements to look not only at the publishing history of the blog, but at the nature of the instant request as well, to ensure that it too qualifies as "news" under the appropriate definitions. Where the requested information lacks value as news, the request is likely to be frivolous or motivated by private or commercial motives. Putting a greater focus on this aspect of the requirement is a shift of emphasis only, neither going beyond the statutory requirements nor requiring an inquiry into matters unfamiliar to FOIA officers. Requiring a closer look at news value thus will not appreciably decrease the administrative efficiency of the fee waiver in the way that being forced to sift through blog traffic statistics would.[163] While it does require the agency to engage in a form of case-by-case adjudication, rather than simply granting the waiver in every request made by a particular blogger, the limited scope of the inquiry will not impose high administrative costs, while simultaneously deemphasizing the vexing question of how best to position a particular blog within a particular taxonomy. Where the material requested would not be of interest to the public, this analysis would simply and properly require the blogger to bear his or her own costs.

Further, when a blogger makes more than one request, the FOIA officer will be able to look to the previous determination of his or her status. Neither the traditional activity-based analysis nor the assessment of the subject matter of past posts will need to be re-done absent a significant change in circumstances. A new request would therefore only require that the officer check to make sure that the request deals with a matter of public interest, rather than private and commercial concern, thereby retaining

162. 22 C.F.R. § 171.11(o) (2004); 32 C.F.R. § 286.28(e)(7)(i) (1998).
163. *See, e.g.*, Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1312 (D.C. Cir. 2003).

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much of the efficiency of the "representative of the news media" waiver.

This newsworthiness inquiry should not be a demanding one, unlike the separate statutory "public interest" fee waiver, which allows fees to be reduced if disclosure of the requested documents will serve the public interest, regardless of the identity of the requester.[164] While a detailed discussion of the doctrine of the public interest fee waiver is beyond the scope of this Note, this second waiver looks primarily to the material requested, rather than the requester. Correspondingly, it requires higher administrative costs to process, as a detailed four-part test must be re-evaluated each time a requester asks for a different document.[165] Because the requester must demonstrate how release of the documents will lead to greater public understanding of some particular government activity,[166] the public interest fee waiver is a tool best used when the requester already has some idea of the content of the requested material.

The news media waiver, in contrast, permits a news organization to obtain documents before knowing precisely what they contain. A reporter benefits from the "representative of the news media" fee waiver even before his or her various leads have cohered into a definitive shape, simply by virtue of his or her status as a journalist. While the public interest waiver allows access to documents whose public salience is clear, the news media waiver provides a rapid, efficient avenue for a journalist to sift through material whose importance might not be obvious, weeding out dead ends and piecing together a story. Requiring a blogger to demonstrate that the public value of requested information meets the high "public interest" standard in order to qualify for the categorical "representative of the news media" waiver would therefore undermine the distinct function of the two waivers, and abrogate congressional intent. But by looking at the newsworthiness of requested material, a FOIA officer can ensure that the requester is not using a well-camouflaged blog to gain privileged

164. 5 U.S.C. § 552(a)(4)(A)(iii) (2000).

165. *See Rossotti*, 326 F.3d at 1312 (court must evaluate (1) whether the requested material concerns the agency's activities; (2) whether it will contribute to understanding of those activities; (3) how the requester plans to distribute the requested material to the public; and (4) whether the requested information is already publicly available).

166. *See id.*

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access to material of private or commercial interest. In this way, an agency will best serve the intent and meaning of the news media waiver, keeping its administrative costs low by retaining its primary focus on the identity of the requesting party and according fee waivers even to requesters whose good-faith efforts cannot definitively fix the precise interest to be served. Simultaneously, looking to the content of the material will prevent public funds from being misused for exclusively private benefit.

The judgment as to whether a particular piece of information is newsworthy does require some exercise of judgment by the FOIA officer. But regulatory definitions and the large body of case law surrounding the public interest fee waiver,[167] which identify objective criteria for determining whether requested information would enrich public understanding of government activities, are available to guide the inquiry and constrain unwarranted discretion. And judicial review of such decisions is always available. Taken together, these safeguards will prevent an agency from abusing its definition of "news" to exclude valid requests.

This approach is still likely to increase the cost of FOIA programs, as more requesters will be eligible for fee waivers than is currently the case. But to the extent that this expansion represents an increased interest in government operations, it should be welcomed. By examining the subject matter of the request as well as the activities of Internet journalists, agencies will ensure that requests subsidized through taxpayer funding via fee waivers will actually serve the public interest. Further, agencies and courts would not need to ration agency dollars by engaging the vexing technological questions posed by blogs at a detailed level, and would look instead at the material requested. Also, because granting a waiver in a particular case will not bind the agency in all subsequent requests by that blogger, agencies will be more likely to waive fees. Finally, because the waiver will depend in part on the civic importance of the requested material, the risk of manipulation is significantly less than if bloggers could request any material for reduced fees, simply by virtue of their status.

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167. *See, e.g., id.*; Larson v. CIA, 843 F.2d 1481 (D.C. Cir. 1988); McLellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282 (9th Cir. 1987); *see also* Forest Guardians v. Dep't of Interior, 416 F.3d 1173 (10th Cir. 2005).

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VI. CONCLUSION

Before the rise of the Internet, the media landscape had remained unaltered for a very long time. The previous major innovations — 24-hour cable news channels and dedicated specialist talk radio stations — expanded access but did not significantly change the processes by which Americans informed themselves or the way journalists presented the news. The Internet, however, offers avenues of information distribution unanticipated by the terms of the 1986 FOIA amendments. A strict categorical approach to defining the news media no longer makes sense, and lowered barriers to engaging in journalistic activity mean that functional approaches have little analytic power.

A straightforward application of current "representative of the news media" case law will fail to effectuate the policy goals that animate FOIA. The rise of the blogosphere offers heightened opportunities for interested citizen-journalists to inform their readers about stories that might slip through the cracks of the conventional media. It has also broken down the traditional separation between the Fourth Estate and the public. As such, the premise of the "representative of the news media" fee waiver, that some persons are engaged in journalistic activities and others are not, is increasingly inaccurate — the Internet allows nearly anyone to "look like a journalist." Refusing to accord privileged access to bloggers is logically incoherent and jeopardizes FOIA's core purpose of promoting government understanding, but expanding the fee waiver to all bloggers qua bloggers will undermine the efficiency of the FOIA program and could dramatically increase its cost. The difficult questions of categorization raise the specter of enmeshing agency FOIA officers in time-consuming, costly evaluation, and threaten to gum up the system entirely.

A return to an inquiry focusing on the policy underpinnings of FOIA is necessary. The law was enacted to promote the general understanding of the operations and activities of government. To give effect to this policy imperative, it is necessary to move beyond a regime that exclusively considers the activities of bloggers, and look as well at the material requested to ensure that the public interest is being served. As the media environment becomes more and more fluid, journalists and readers will employ one for-

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mat or another based on pragmatic considerations — convenience, speed, editorial oversight, or interactivity — which should bear little weight in determining whether a reduction in FOIA fees is appropriate. The law should not impede this process by pointlessly recapitulating structural biases inherited from the 20th Century. Once, status as a news media organization was a sufficient proxy for the public service such an organization could provide; now, as that categorical assumption becomes less and less useful, focusing more directly on the public value served by a request is both necessary and appropriate.

EDITORS' PICKS: Party ID is No. 1 factor in how Americans view Obamacare: Gallup poll CONNECT:

VADUM: Obama uses taxpayer cash to back ACORN Name changes used to dodge the law

37 SIZE: + / - PRINT | REPRINTS

By Matthew Vadum - The Washington Times Monday, November 28, 2011

The Obama administration has showered its allies at ACORN Housing with $729,849 so far this year despite powerful, newly unveiled evidence of corruption and massive accounting irregularities at the longtime affiliate of ACORN (Association of Community Organizations for Reform Now).

Watchdog group Cause of Action recently pressured NeighborWorks America, a taxpayer-funded federal nonprofit that funneled more than $26.5 million in federal foreclosure-avoidance money to ACORN Housing, to disclose an internal audit furnished to then-Senate Banking Committee Chairman Christopher Dodd, Connecticut Democrat, late last year.

The audit, provided to Cause of Action last month, found that although ACORN Housing and voter-fraud-prone ACORN are legally separate entities, there were numerous financial transactions and "evidence [of] extensive relationships between both organizations that may undermine claims of an 'arm's length relationship' between them." ACORN Housing, the audit states, worked closely with ACORN and even subcontracted some of the counseling work to "four ACORN local state chapters."

It's still the same old ACORN, the same old venal organization. But none of this seemed to bother the Obama administration when it started cutting new checks to its old community organizing friends earlier this year.

ACORN Housing was incapable of administering the federal funds properly, the audit suggests. "We have determined that [ACORN Housing] lacks the accounting capacity to manage the size and complexity of the [foreclosure-avoidance] program funds," said the audit, dated Dec. 17, 2010. ACORN Housing had poorly trained staff, extraordinarily sloppy accounting procedures, and violated conflict-of-interest guidelines laid down by the Office of Management and Budget (OMB), the audit said.

ACORN Housing is the largest affiliate of ACORN, the notorious group brought down by undercover videos showing its employees facilitating child prostitution in 2009. ACORN Housing changed its name a year ago to Affordable Housing Centers of America (AHCOA) to escape the stigma of being associated with ACORN, the famously corrupt former employer and legal client of President Obama. ACORN's state chapters have restructured themselves and now go by names such as New York Communities for Change and Alliance of Californians for Community Empowerment, both of which have been heavily involved in organizing and financing the Occupy Wall Street movement.

Despite ACORN Housing's public posturing, there has never been a wall of separation between ACORN, the shell corporation that filed for bankruptcy on Election Day 2010, ACORN Housing and ACORN's 370-plus affiliates. In fact, ACORN and ACORN Housing shared the same office space across America in 2009 when James O'Keefe and Hannah Giles conducted their devastating video investigations.

ACORN itself is a nonprofit version of Enron, the infamous failed energy company that imploded under the pressure of hopelessly confusing, misleading and illegal accounting practices. The ACORN

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network has developed a tangled, deliberately complex mass of interlocking directorates and affiliated tax-exempt groups that routinely swap seven-figure checks and that has long cried out for a probe under federal racketeering laws.

Although ACORN and ACORN Housing are legally separate corporate entities, in practice they have been virtually indistinguishable. ACORN Housing's board is controlled by veteran ACORN activists, such as the corporation's president, Alton L. Bennett (active with ACORN since at least 1991) and Dorothy Amadi (active with ACORN since at least 1989). As before the name change, Mike Shea remains in charge of ACORN Housing's day-to-day operations as its executive director.

The U.S. Department of Housing and Urban Development (HUD), headed by longtime ACORN ally Shaun Donovan, gave $79,819 to AHCOA Miami on March 1, $300,000 to AHCOA on Aug. 11, and $350,030 to AHCOA Philadelphia on Sept. 2. No doubt, more grants are in the pipeline.

The Obama administration gave the grants to ACORN Housing based on a thinly reasoned legal opinion in which a government lawyer waxed philosophical on all the possible meanings of the word "affiliate" found in "Black's Law Dictionary." In September 2010, the lawyer accepted at face value ACORN Housing's claim it broke with ACORN without even considering the history of the ACORN network. Conveniently, the legal opinion became final in September 2011, a month before the audit became available.

The opinion allowed the administration to get around the ban on federal funding of ACORN that became law at the end of 2009.

While Dan Epstein, Cause of Action's executive director, applauded NeighborWorks for "publicly releasing a detailed federal audit revealing affiliation between ACORN and AHCOA," he said he "would look forward to GAO's explaining why it favored a dictionary definition over NeighborWorks' accounting and audit findings in assessing the relationships between ACORN's rebranded entities."

To add insult to injury, as of July, ACORN Housing and its subsidiaries owed $162,813 in back taxes, according to public records. The money is owed to the Internal Revenue Service, 11 states, the city of Philadelphia and two California counties. AHCOA in San Antonio, Texas, will receive an undisclosed percentage of a $619,696 federal foreclosure-avoidance grant as a subgrant.

Meanwhile, Bruce Dorpalen, public affairs director for AHCOA, is now lobbying Congress, asking it to provide $60 million for HUD housing counseling programs.

Whether that new taxpayer money will find its way into ACORN's political operations or voter fraud operations is an open question.

Matthew Vadum is a senior editor at Capital Research Center and author of "Subversion Inc.: How Obama's ACORN Red Shirts Are Still Terrorizing and Ripping Off American Taxpayers" (WND Books, 2011).

Newsletter Archives

News from Cause of Action	11/09/11
DID YOU KNOW YOU PAID TO LOBBY FOR MORE TAXES?	10/18/11
FEDERAL AUDIT: ACORN RECEIVED YOUR MONEY!	10/20/11
FTJ Files Petition with EPA	09/30/11
FTJ Probes White House Political Events	09/27/11
ACORN Receives $350,000 More in American Taxpayers' Money	09/19/11
News from the Freedom Through Justice Foundation	09/12/11
The Freedom Through Justice Foundation puts DOJ on the spot to enforce lobbying violations	09/10/11
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April 23, 2014

Definition of *alternative* in English:

alternative

Syllabification: al·ter·na·tive

Pronunciation: /ôl'tərnətiv /

ADJECTIVE

[ATTRIBUTIVE]

1 (Of one or more things) available as another possibility:

the various alternative methods for resolving disputes

the alternative definition of democracy as popular power

MORE EXAMPLE SENTENCES

SYNONYMS

1.1 (Of two things) mutually exclusive:

the facts fit two alternative scenarios

MORE EXAMPLE SENTENCES

1.2 Of or relating to behavior that is considered unconventional and is often seen as a challenge to traditional norms:

an alternative lifestyle

they have one foot in alternative music and the other in rock

MORE EXAMPLE SENTENCES

SYNONYMS

NOUN

Back to top

One of two or more available possibilities:

*audiocassettes are an interesting **alternative to** reading*

she had no alternative but to break the law

MORE EXAMPLE SENTENCES

Origin

mid 16th century (in the sense 'alternating, alternate'): from French*alternatif*, *-ive* or medieval Latin *alternativus*, from Latin *alternare*'interchange' (see alternate).

Usage

1 Alternate can be a verb, noun, or adjective, while **alternative** can be a noun or adjective. In both American and British English, the adjective**alternate** means ‘every other’ (*there will be a dance on* ***alternate****Saturdays*) and the adjective **alternative** means ‘available as another choice’ (*an* ***alternative*** *route*; ***alternative*** *medicine;* ***alternative****energy sources*). In American usage, however, **alternate** can also be used to mean ‘available as another choice’: *an* ***alternate*** *plan called for construction to begin immediately rather than waiting for spring*. Likewise, a book club may offer an ‘alternate selection’ as an alternative to the main selection. **2** Some traditionalists maintain, from an etymological standpoint, that you can have only two alternatives (from the Latin *alter* ‘other (of two); the other’) and that uses of more than two alternatives are erroneous. Such uses are, however, normal in modern standard English.

[1]se·lect *adjective* \sə-'lekt\

: chosen from a group to include the best people or things

: of the highest quality

Full Definition of SELECT

g+1 Like

1 : chosen from a number or group by fitness or preference

2 a : of special value or excellence **:** SUPERIOR, CHOICE

b : exclusively or fastidiously chosen often with regard to social, economic, or cultural characteristics

3 : judicious or restrictive in choice **:** DISCRIMINATING <pleased with the *select* appreciation of his books — Osbert Sitwell>

— **se·lect·able** *adjective*
— **se·lect·ness** *noun*
— **se·lec·tor** *noun*

See select defined for English-language learners »
See select defined for kids »

Examples of SELECT

Only a few *select* employees attended the meeting.

A *select* committee was formed to plan the project.

The group was small and *select*.

A *select* number of people are invited.

Only a *select few* will be accepted into the program.

He only drinks *select* wines.

Origin of SELECT

Latin *selectus,* past participle of *seligere* to select, from *se*-apart (from *sed, se* without) + *legere* to gather, select — more at SUICIDE, LEGEND

First Known Use: circa 1555

Related to SELECT

Synonyms
cherry-picked, choice, chosen, elect, favored, favorite, first-line, handpicked, picked, preferred, selected, of choice

Related Words
fashionable; exclusive; culled, picked over, screened, weeded (out), winnowed (out)

Near Antonyms
average, common, commonplace, ordinary, run-of-the-mill

more

Rhymes with SELECT

abject, advect, affect, aspect, bisect, cathect, collect, confect, connect, convect, correct, cowl-necked, defect, deflect, deject, detect...
[+] more

[2]select *verb*

: to choose (someone or something) from a group

computers : to choose (a particular action, section of text, etc.) especially by using a mouse

Full Definition of SELECT

transitive verb

: to choose (as by fitness or excellence) from a number or group **:** pick out

intransitive verb

: to make a choice

See select defined for English-language learners »

Examples of SELECT

Please *select* one item from the list.

The school will only *select* 12 applicants for enrollment.

Knowing the importance of making the right choice, he*selected* carefully.

Select "Insert" from the "Edit" menu.

First Known Use of SELECT

1566

Related to SELECT

Synonyms
cherry-pick, cull, elect, handpick, name, opt (for), pick, prefer, choose, single (out), tag, take

Antonyms
decline, refuse, reject, turn down

Related Words
preselect; appoint, designate, fix, mark, nominate, set, tab, tap; accept, adopt, embrace, espouse, settle (on *or* upon)

Near Antonyms
disapprove, negative, repudiate, spurn; discard, jettison, throw away, throw out

more

[3]select *noun*

Definition of SELECT

: one that is select —often used in plural

First Known Use of SELECT

1610

se·lect *intransitive verb* \sə-'lekt\ *(Medical Dictionary)*

Medical Definition of SELECT

: to cause a specified gene, trait, or organism to become more frequent or less frequent—usually used with *for* or*against* <animal breeders need to *select* simultaneously for improved conformity to breed characteristics and against defective genes causing disease>