IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK ALLEN, Plaintiff,	)	
v.	)	Civil Action No. 81-2543
DEPARTMENT OF DEFENSE, et al., Defendants.	)	

DEFENDANT CENTRAL INTELLIGENCE AGENCY'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO FEE WAIVER DENIAL

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, defendant Central Intelligence Agency (CIA) hereby moves for Summary Judgment with respect to its decision to deny plaintff's request for a fee waiver in this Freedom of Information Act case. No genuine issue of material fact exists as to this question and defendant CIA is entitled to judgment as a matter of law. The Court is respectfully referred to the accompanying Memorandum of Points and Authorities and Statement of Material Facts as to which No Genuine Issue Exists in support of this motion.

Respectfully submitted,

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Acting Assistant Attorney General
Civil Division

JOSEPH E. DiGENOVA
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IN THE UNITED STATES DISTRICT COURT
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MARK ALLEN, Plaintiff,	)	
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STATEMENT OF MATERIAL FACTS AS TO WHICH NO GENUINE ISSUE EXISTS

Pursuant to Local Rule 1-9(h), defendant Central Intelligence Agency (CIA) herewith submits its statement of material facts as to which no genuine issue exists.

1. By letter dated December 15, 1980, plaintiff submitted his first Freedom of Information Act (FOIA) request for materials relating to the House Select Committee on Assassination (HSCA) investigation into the assassination of President John F. Kennedy. Complaint, Attachment 13.

2. In his letter, plaintiff requested a fee waiver on the grounds that he "[was] presently engaging in a program of scholarly research concerning the work of the [HSCA]. As the records involved in my request related to the assassination of an American president, I feel they are of important historical value and therefore would significantly benefit the public." Id.

3. By letter dated December 29, 1980, defendant CIA denied plaintiff's FOIA request on the ground that the material identified therein "are Congressional documents ... not subject to the FOIA." Id., Attachment 14.

4. By letter dated April 6, 1981, plaintiff submitted his second FOIA request for materials relating to the HSCA investigation into the assassination of President John F. Kennedy. Id., Attachment 17.

5. In his letter, plaintiff requested a few waiver "[f]or the reasons given in [his] December 15 letter."

6. By letter dated July 27, 1981, defendant CIA denied plaintiff's request for a fee waiver, pursuant to the CIA's FOIA regulations, and setting forth the reasons for its denial. Id., Attachment 20.

7. By letter dated August 13, 1981, plaintiff appealed the denial of his fee waiver request. Id., Attachment 21.

8. By letter dated September 21, 1981, defendant CIA addressed the points raised by plaintiff's August 13, 1981 letter and reaffirmed its denial of plaintiff's request for a fee waiver. Id., Attachment 23.

Defendant CIA specifically disagrees with plaintiff's contentions 1, 2, 10, 11, 12, 13 and 14 contained in the Rule 1-9(h) Statement attached to his memorandum. None of these contentions were disclosed to the CIA when plaintiff requested a fee waiver and are therefore irrelevant to the Court's consideration of plaintiff's summary judgment motion. Moreover, these contentions have never been placed before the CIA for the purpose of a fee waiver determination. In addition, as set forth in CIA's memorandum at pages 4 - 9, these contentions are unsupported by admissible evidence and are often speculative and conclusory, not factual (e.g., contention #1 "extensive research"; contention #11, "records ... are ... indispensible").

Lastly, although the CIA believes that because of their irrelevance and lack of evidentiary basis these contentions do not present genuine issues, should the Court believe otherwise, the CIA disputes these contentions, which would thus render this matter inappropriate for summary judgment.

Respectfully submitted,

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Acting Assistant Attorney General

JOSEPH E. DiGENOVA
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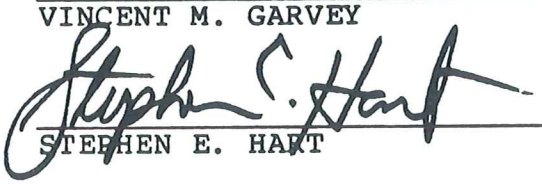
VINCENT M. GARVEY



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK ALLEN, Plaintiff,	)	
v.	)	Civil Action No. 81-2543
DEPARTMENT OF DEFENSE, et al., Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT CENTRAL INTELLIGENCE AGENCY'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO WAIVER OF COPYING COSTS

Respectfully submitted,

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PRELIMINARY STATEMENT

This case involves plaintiff's requests under the Freedom of Information Act (FOIA), 5 U.S.C. §552, for materials held by the Central Intelligence Agency (CIA) and the Defense Intelligence Agency (DIA) relating to the investigation of the House Select Committee on Assassinations (HSCA) into the assassination of President John F. Kennedy. By Memorandum Opinion dated 4 March 1983, this Court denied the defendants' motions for summary judgment, holding that the materials held by each defendant agency were not, with the exception of HSCA-originated materials, congressional materials exempt from the FOIA, and further holding that the materials were not collectively exempt from disclosure pursuant to exemption 5 of the FOIA, 5 U.S.C. §552(b)(5). This

Court also specifically held that the defendant agencies could withhold individual documents or portions thereof on the basis of appropriate FOIA exemptions.

On November 28, 1983, plaintiff filed his Motion For Partial Summary Judgment As To Waiver Of Copying Fees in regard to the documents held by the CIA. Plaintiff agreed, through counsel, to defendant CIA's request for an enlargement of time until December 30, 1983 to file a response to his motion. Defendant CIA herein opposes that motion and supports its own motion for partial summary judgment on that issue.

FACTS

By letter dated December 15, 1980, plaintiff submitted his first FOIA request to the CIA for the HSCA-related materials. In his letter, plaintiff requested a waiver of fees on the basis of his claim to being engaged in "scholarly research concerning the work of the [HSCA]," and his statement that "[a]s the records involved in my request relate to the assassination of an American president, I feel they are of important historical value and therefore would significantly benefit the public." Declaration of Plaintiff Mark A. Allen filed with plaintiff's Motion for Partial Summary Judgment, Exhibit 1 (hereafter "Allen Declaration"). By letter dated December 29, 1980, defendant CIA denied plaintiff's first FOIA request on the basis that the material identified in his request was Congressional material not subject to the FOIA. Id., Exhibit 2. Because plaintiff's request was denied on the basis that it involved materials not subject to the FOIA, defendant did not at that time address plaintiff's request for a fee waiver.

By letter dated April 6, 1981, plaintiff submitted his second FOIA request to the CIA for the HSCA-related materials. In his second request letter, plaintiff requested a waiver of fees "[f]or the reasons given in [his] December 15 letter." Id., Exhibit 5. By letter dated July 27, 1981, defendant CIA responded to plaintiff's appeal letter of June 28, 1981. In its response letter, the CIA set forth the reasons for its determination that plaintiff's request for a fee waiver should be denied:

> In reference to your request for a waiver of fees, we have reviewed and considered the terms of your FOIA request pursuant to §1900.25, Chapter XIX of Title 32 of the Code of Federal Regulations. We have determined that your request for a waiver fees should be denied notwithstanding the statement of reasons for requesting such a fee waiver set forth in your letter dated 15 December 1980. Your request for a waiver of fees is denied in light of the following: (1) the fact that release of any of this information would not be of significant benefit or usefulness to the public in light of the vast quantity of information already in the public domain concerning the assassination of President John F. Kennedy; (2) the fact that the House of Representatives has indicated to this Agency its judgment that such material not be publicly released without its prior written concurrence; and (3) the fact that the House Select Committee on Assassinations has, with the publication of its voluminous report and findings, made a determination as to what information concerning the assassination of President John F. Kennedy was significant enough to warrant the expenditure of public funds to release in printed form. Any materials not published in the House Select Committee's public study was determined by Congress to have insufficient usefulness or benefit to the

> public to warrant the expenditure of any further public funds to make it available to the public. In light of the foregoing, we have determined that it would not be in the public interest nor serve any interest of the government to grant your request for a fee waiver. Id., Exhibits 7, 8.

By letter dated Augusut 13, 1981, plaintiff appealed the CIA's denial of his fee waiver request. Id., Exhibit 9. By letter dated September 21, 1981, the CIA made its final reply to plaintiff's appeal letter of Augusut 13, 1981. In its letter, the CIA responded to each of the points raised by plaintiff in his appeal letter, and reaffirmed its initial determination to deny plaintiff's fee waiver request. Id., Exhibit 11.

ARGUMENT

For the reasons given below, this Court should deny plaintiff's motion for partial summary judgment on the grounds that (1) plaintiff's motion is based, in large part, on inadmissible evidence which cannot support a Rule 56 motion, and (2) plaintiff is not entitled to partial summary judgment as a matter of law.

I. PLAINTIFF'S MOTION IS NOT PROPERLY SUPPORTED BY ADMISSIBLE EVIDENCE

A. Fed. R. Civ. P. 56(e) Affidavits Must Be Evidentiary

Rule 56(e) of the Federal Rules of Civil Procedure states, in pertinent part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated therein. (emphasis added)

It is well settled that Rule 56 requires evidentiary affidavits based on personal knowledge of the affiant or otherwise setting forth facts that would be admissible in evidence at trial. Leo Winter Associates, Inc. v. Dept. of Health & Human Services, 497 F.Supp. 429, 432 (D.D.C. 1980); Lark v. West, 182 F.Supp. 794, 798 (D.D.C. 1960), aff'd, 289 F.2d 898 (D.C. Cir.), cert. denied, 368 U.S. 865 (1961).

Affidavits filed in support of a motion for summary judgment based on inadmissible hearsay or matters about which the affiant is not legally competent to testify are entitled to no weight under Rule 56. F.S. Bowen Electric Co. v. J.D. Hedin Construction Co., 316 F.2d 362, 364 (D.C. Cir. 1963); Pan Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 556 (5th Cir. 1980), cert. denied, 454 U.S. 927 (1981). When faced with affidavits, or portions thereof, that do not satisfy the requirements of Rule 56(e), courts will either (1) disregard or give no weight to such affidavits or the objectionable portions, Jameson v. Jameson, 176 F.2d 58, 60 (D.C. Cir. 1949), Leo Winter Associates, Inc. v. Dept. of Health & Humam Services, supra, 497 F.Supp. at 432, Rochambeau v. Brent Exploration, Inc., 79 F.R.D. 381, 383-84 (D. Colo. 1978), or (2) strike, upon motion of the opposing party, such affidavits or the objectionable portions. Carey v. Beans, 500 F.Supp. 580, 583 (E.D. Penn. 1980), aff'd. mem., 659 F.2d 1065 (3d. Cir. 1981); Human Resources Institute of Norfolk, Inc. v. Blue Cross of Virginia, 484 F.Supp. 520, 525-26 (E.D. Va. 1980); McSpadden v.

Mullins, 456 F.2d 428, 430 (8th Cir. 1972).*/

B. Critical Portions Of Plaintiff's Motion Fail To Satisfy Requirements Of Rule 56

Upon close examination, it is clear that various portions of plaintiff's motion for partial summary judgment fail to satisfy the requirements of Rule 56 and, therefore, should be stricken or disregarded by this Court.

Various paragraphs of plaintiff's declaration contain bare, conclusory statements of opinion concerning the expertise or qualifications of various individuals with respect to the assassination of President John F. Kennedy, See Allen Declaration, ¶3 ("Mr. Weisberg, a leading critic ..."), ¶4 ("I am considered very knowledgeable in this field. Numerous individuals regarded as experts on the murder of President Kennedy ... consider me a careful and responsible scholar."). Similarly, paragraph 10 of the Allen Declaration makes a bald conclusory statement that the records sought by plaintiff "are indispensible to a current and timely discussion of the Kennedy assassination." Such statements of the plaintiff's personal belief, however sincerely or deeply held, are not personal knowledge and, therefore, cannot support his Rule 56 motion. Jameson v. Jameson, supra, 176 F.2d at 60; Lark v. West, supra, 182 F.Supp. at 798; Areskog v. United States, 396 F.Supp. 834, 839 (D. Conn. 1975).

*/ The requirement of Rule 56 cannot be circumvented by incorporating assertions of fact in legal submissions, see British Airways Bd. v. Boeing Co., 585 F.2d 946, 952 (9th Cir. 1978), cert. denied, 440 U.S. 981 (1979), Wire Mesh Products, Inc. v. Wire Belting Association, 520 F.Supp. 1004, 1008 (E.D. Penn. 1981), Christophides v. Porco, 289 F.Supp. 403, 406-07 (S.D. N.Y. 1968), or by attaching inadmissible evidence or exhibits to legal briefs.

Similarly, plaintiff's memorandum of points and authorities in support of his motion for partial summary judgment contains various factual assertions and exhibits that are not properly admissible in support of a Rule 56 motion.

Newspaper articles are inadmissible hearsay when presented to establish the truth of the assertions contained therein. Ray v. Edwards, 557 F.Supp. 664, 674 (N.D. Ga. 1982); De La Cruz v. Dufresne, 553 F.Supp. 145, 149 (D. Nev. 1982); Zenith Radio Corp. v. Matshushita Electric Industrial Co., Ltd., 513 F.Supp. 1100, 1232 n. 198 (E.D. Penn. 1981). Accordingly, plaintiff cannot rely upon Attachments 3 and 4 to his brief, or the newspaper article attached to Exhibit 9 of his declaration, to support his motion for partial summary judgment. Nor may plaintiff rely on Attachment 6 or footnote 16 to his brief for similar reasons.

Plaintiff's reliance, in footnote 16 and 18 of his brief, on the doctrine of judicial notice is also misplaced. This Court may take judicial notice of facts that are "either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" Fed. R. Evid. 201(b). This Court may likewise take judicial notice of historical fact "that, although outside the common knowledge of the community, is nevertheless ascertainable with certainty without resort to cumbersome methods of proof." Melong v. Micronesian Claims Commission, 643 F.2d 10, 12 n. 5 (D.C. Cir. 1980). See Southern Railway Co. v. United States, 156 F.Supp. 740, 743 (Ct. Cl. 1957) (judicial notice taken of "fact that the war in Europe

ended on May 6, 1945"). However, plaintiff asks this Court to take judicial notice not of historical facts "ascertainable with certainty without resort to cumbersome methods of proof," but, rather, opinions about historiography. Such matters are not proper subjects for judicial notice.

Plaintiff's reliance on the affidavit of former HSCA Chief Counsel G. Robert Blakey is misplaced as well. "[N]o member of a legislature, outside of the legislature, is empowered to speak with authority for that body." Dept. of Energy v. Westland, 565 F.2d 685, 690 (C.C.P.A. 1977); Selman v. United States, 498 F.2d 1354, 1359 n. 6 (Ct. Cl. 1974); National School of Aeronautics, Inc. v. United States, 142 F.Supp. 933, 938 (Ct. Cl. 1956). Similarly, the remarks of individual congressmen, "being merely the expression of the opinion of the individual speaker, do not constitute reliable indicia of Congressional intent." H.J. Justin & Sons, Inc. v. Brown, 519 F.Supp. 1383, 1389 n. 3 (E.D. Cal. 1981), mod. on other grounds, 702 F.2d 758 (9th Cir. 1983). Accordingly, even assuming arguendo, that the statements of former Chief Counsel and Staff Director Blakey were entitled to be accorded the same consideration as those of a current member of Congress, it is clear that such statements do not constitute an authoritative statement by Congress nor do they constitute "reliable indicia of Congressional intent." While Mr. Blakey's affidavit may contain his personal beliefs or recollections as to his understandings of the workings of the HSCA, such beliefs or recollections do not constitute an authoritative statement by the

HSCA or Congress, nor do they constitute "reliable indicia of [HSCA] intent." Therefore, plaintiff cannot rely upon the Blakey affidavit to support his motion.

Finally, factual assertions or statements of opinion contained in legal briefs are not evidentiary and cannot be relied upon to support plaintiff's motion. Accordingly, this Court should disregard various factual assertions in the memorandum of points and authorities filed in support of plaintiff's motion. See, e.g., Memorandum at 24-25 (assertions concerning value of disclosures concerning Kennedy assassination).

In view of the foregoing, it is clear that plaintiff's motion for partial summary judgment is based, in large part, upon matters not properly admissible into evidence. Therefore, plaintiff cannot rely on such inadmissible matters to support his motion.

II. PLAINTIFF IS NOT ENTITLED TO PARTIAL SUMMARY JUDGMENT AS A MATTER OF LAW

Defendant CIA respectfully submits that it has fully considered plaintiff's request for a waiver of fees associated with his FOIA requests and that it has properly determined that plaintiff failed to demonstrate his entitlement to such a waiver of fees. Accordingly, plaintiff is not entitled, as a matter of law, to partial summary judgment on the fee waiver issue.

A. Fee Waivers Under FOIA Are Discretionary And Are To Be Granted Only When The Release Would Primarily Benefit The Public

The FOIA leaves the decision as to whether or not to grant a

fee waiver to the discretion of the agency involved. Specifically, 5 U.S.C. §552(a)(4)(A) provides, in relevant part,

> Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public. (emphasis added)

The CIA regulations which implement this portion of the FOIA, 32 C.F.R. §1900.25(a), provide in pertinent part,

> Records shall be furnished without charge or at a reduced rate whenever the Coordinator determines that a waiver or reduction of the charge is in the public interest because furnishing the information can be considered as primarily benefiting the general public. Thus, the Coordinator shall determine the existence and extent of any identifiable benefit which would result from furnishing the requested information and he shall consider the following factors in making this determination:
>
> (1) The public or private character of the information sought;
>
> (2) The private interest of the requester;
>
> (3) The numbers of the public to be benefited;
>
> (4) The significance of the benefit to the public; and
>
> (6) The quantity of similar or duplicative information already in the public domain.
>
> In no case will the assessment of fees be utilized as an obstacle to the disclosure of the requested information. The Coordinator may also waive or reduce the charge whenever he determines that the interest of the government would be served thereby.

Thus, the CIA regulations on fee waiver enumerate factors which

are to be taken into consideration, and it is the task of the CIA's Information and Privacy Coordinator to determine whether, in light of one or more of those factors, release of the documents sought by an FOIA requestor will primarily benefit the public and therefore, qualify that request for a waiver of fees.

Significantly, the Department of Justice guidelines on fee waivers, promulgated by the Attorney General on January 5, 1981, state in pertinent part that

> satisfaction of the statutory standard may largely turn upon the prospects that release of the information to the requester will result in its effective dissemination to the general public.

The 1981 Department of Justice guidelines also provided that, with respect to determining the requester's intent, an agency is not obligated to collect facts about the requestor and need not

> give much weight to bare, unsupported general assertions by a requester that he/she is a scholar or expert in a particular field, or that he/she is a journalist or writer who will disseminate the information to the public.

Cited with approval in Buriss v. CIA, 524 F.Supp. 448, 449 (M.D. Tenn. 1981).*/

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*/ A copy of the 1981 Department of Justice guidelines are attached hereto for the Court's convenience. The Department of Justice issued new guidelines on fee waivers on January 7, 1983, but the CIA's fee waiver determination in this case was made on the basis of the guidelines and regulations in effect when plaintiff's request was decided.

B. Defendant CIA Properly Determined That Release Of The Information Sought Would Not Primarily Benefit The Public

The proper standard of review of an agency denial of a fee waiver request is whether the decision was arbitrary and capricious. Allen v. FBI, 551 F.Supp. 694, 696 (D.D.C. 1982); Blakey v. Dept. of Justice, 549 F.Supp. 362, 364 (D.D.C. 1982); Eudey v. CIA, 478 F.Supp. 1175, 1176 (D.D.C. 1979; Bussey v. Bresson, Civil Action No. 81-0536 (D.D.C., June 6, 1981), reprinted in 2 GDS ¶81,228 (P-H). Defendant CIA submits that it has properly determined, in light of the information available to it, that the release of the information sought by plaintiff would not primarily benefit the public. Thus, its decision to refuse to grant a fee waiver was entirely reasonable and clearly not arbitrary and capricious.

The CIA considered the vast amount of information already available to the public on the subject of the assassination of President Kennedy and the fact that the HSCA had, "with the publication of its voluminous report and findings, made a determination as to what information concerning the assassination of President John F. Kennedy was significant enough to warrant the expenditure of public funds to release in printed form." Allen Declaration, Exhibit 8. See also Id., Exhibit 11. Plaintiff's only response to the CIA's determination to refuse his request for a fee waiver was to reiterate his personal beliefs as to why release of the information sought would primarily benefit the general public.

Allen Declaration, Exhibit 9.*/ Significantly, plaintiff provided the CIA with no information concerning his fee waiver request, other than his bare assertion of his conducting "scholarly research concerning the work of the [HSCA]," which would allow the CIA to conclude that he would disseminate the information to the public. Mr. Allen gave no details whatsoever concerning his intent to disseminate or his ability to disseminate any released material to the public. Therefore, the CIA had no reason to believe that any released material would even be disseminated to the public in general or to any group in particular. See Buriss v. CIA, supra, 524 F.Supp. at 449 ("[A]gency obviously has not abused its discretion by denying plaintiff's request based upon a mere representation that he is a researcher who plans to author a book.") In fact, Mr. Allen's characterization of his position here even falls short of the plaintiff's minimal showing in Burris, which was clearly rejected in that case.

In view of the foregoing, it is clear that defendant CIA's decision to deny plaintiff's request for a fee waiver was not

*/ Plaintiff's reliance, in part, on a Washington Post article attached to his letter of 13 August 1981 did not provide the CIA with any meaningful information on the subject. The CIA cannot give such articles much credence because it knows nothing about the preparation of the articles, or about their authors, the reliability or credibility of the author's sources, the author's knowledge or lack thereof, or the accuracy of any purported quotations. See Zenith Radio Corp. v. Matshushita Electric Industrial Co., Ltd., supra, 513 F.Supp. at 1232 n. 198. And, in any event, the post hoc statements of individual Congressmen (two years after the demise of the HSCA) are not reliable indicia of the intent of Congress or the HSCA. See United States v. Clark, 445 U.S. 23, 33 n.9 (1980); Allyn v. United States, 461 F.2d 810, 811 (Ct. Cl. 1972) (en banc); Epstein v. Resor, 296 F.Supp. 214, 216 (N.D. Cal. 1969), aff'd., 421 F.2d 930 (9th Cir. 1970), cert. denied, 398 U.S. 965 (1970).

arbitrary and capricious. Aside from the evidentiary defects of the materials relied upon by plaintiff in his motion for partial summary judgment, plaintiff's reliance thereon for the first time in late 1983 cannot, as a matter of fact or law, form the basis that the CIA's 1981 decision to refuse plaintiff's fee waiver request was arbitrary and capricious.

CONCLUSION

Accordingly, defendant CIA respectfully submits that plaintiff's motion for partial summary judgment be denied and that its decision to deny plaintiff's request for a fee waiver be upheld.*/

Respectfully submitted,

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*/ If the Court denies the CIA's motion, the proper course would be to remand the fee waiver issue to the CIA for consideration in light of the current Department of Justice guidelines on fee waivers and plaintiff's new submission. However, in view of the plaintiff's original submission, which clearly would not support a fee waiver, the CIA believes it inappropriate now to reward him for tardiness and failure to provide available information to the CIA at the proper time.

18 USC §216 (1940)

"It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, or the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment."

19 USC §1335 (1940)

"It shall be unlawful for any member of the commission, or for any employee, agent, or clerk of the commission, or any other officer or employee of the United States, to divulge, or to make known in any manner whatever not provided for by law, to any person, the trade secrets or processes of any person, firm, copartnership, corporation, or association embraced in any examination or investigation conducted by the commission, or by order of the commission, or by order of any member thereof. Any offense against the provisions of this section shall be a misdemeanor and be punished by a fine not exceeding $1,000, or by imprisonment not exceeding one year, or both, in the discretion of the court, and such offender shall also be dismissed from office or discharged from employement."

ATTORNEY GENERAL'S MEMORANDUM

FREEDOM OF INFORMATION ACT FEE WAIVERS

January 5, 1981

MEMORANDUM TO: HEADS OF ALL FEDERAL DEPARTMENTS AND AGENCIES

FROM: Benjamin R. Civiletti, Attorney General

[¶300,793] Based on information I have received from many different sources, I have concluded that the Federal Government often fails to grant fee waivers under the Freedom of Information Act when requesters have demonstrated that sufficient public interest exists to support such waivers. Attached hereto is a copy of a policy statement promulgated by this Department's Office of Information Law and Policy that should assist you in identifying those requests where either complete or partial fee waivers are appropriate. No amount of policy guidance can substitute, however, for a clear and simple statement of the goal towards which we should be striving.

Except in extraordinary cases, the decision to grant a fee waiver under the Freedom of Information Act is vested in the discretion of the agency concerned. Congress clearly intended that this discretion be exercised generously in all cases where either the content of the records being released or the identity of the requester suggest that the public interest would be served by doing so. Examples of requesters who should ordinarily receive consideration for partial fee waivers, at minimum, would be representatives of the news media or public interest organizations, and historical researchers. Such waivers should extend to both search and copying fees, and in all appropriate cases, complete rather than partial waivers should be granted. Neither individual prejudices regarding what constitutes the public interest nor such impermissible considerations as the quantity of material likely to be released after processing have any place in our application of a sound fee waiver policy.

The absence of a generous fee waiver practice must operate to thwart the purposes for which this Act was passed. What I am seeking now is your cooperation in identifying

those requests that are supported by a substantial public interest and in granting fee waivers in all such cases.

Thank you for your assistance in this matter.

Attachment

OFFICE OF INFORMATION LAW AND POLICY MEMORANDUM

Interim Fee Waiver Policy

December 18, 1980

TO: All Federal Departments and Agencies Attention: Principal Legal and Administrative Contacts on Freedom of Information Act (FOIA) Matters

FROM: Robert L. Saloschin, Director Office of Information Law and Policy

SUBJECT: Interim fee waiver policy for administering the provision for waiver or reduction of search and duplication fees in subsection (a)(4)(A) of the Freedom of Information Act (FOIA), 5 USC 552.

(Note: The following memorandum is an interpretation of law and a statement of interim policy within the meaning of 5 USC §552(a)(2)(B) which was adopted on the above date and which is being placed in the Department of Justice reading room.)

[¶300,794] This memorandum provides additional and comprehensive guidance to agencies for their administration of the fee waiver provisions of FOIA. It was prepared in response to continuing indications from agencies and others of a need for additional guidance on this subject, and it has been reviewed by the Department's Freedom of Information Committee, by persons in various agencies, and by the Associate Attorney General. Comments are invited from members of the public, now or at any time, on whether there is a need for different or still further guidance on this subject. It is contemplated that this interim policy may be reissued, with or without modifications, after review of such comments and of experience under this interim guidance.

Outline

I. Introduction: Summary of Policy and of Legal Context

II. Factors for Agency Use in Determining Whether to Waive or Reduce Fees Otherwise Due From FOIA Requesters

A. General Policies
1. Policy of Act's Objectives
2. Policy of Collecting Lawful Fees to the Extent That Waiver or Reduction of Fees Should Not be Granted

B. Principal Factors that Are Applicable in Estimating Whether and to What Extent the General Public Will Benefit from Furnishing the Information
1. Preliminary Analysis—dissemination of information or of benefits—effective dissemination of beneficial information to "general public"
2. Identity of the requester (journalists, scholars, etc.)
3. The types of information which are, or may be, contained in the records sought
(a) Pertinence
(b) Quality
(c) Value added over information already available

C. Other Factors that Are Applicable in Considering Fee Waivers or Reductions
1. The extent, if any, by which the cost of computing and handling the fee may exceed the amount of the fee
2. Meeting the needs of indigent persons or relieving substantial personal hardship
3. Indications that a requester has sought to formulate or reformulate a costly request so as better to specify, help locate, or process the request at less cost to the government, or to obtain the same information from readily available sources

4. The absence of indications that furnishing the information is likely to benefit primarily the commercial or other private interests of the requester rather than the general public

III. Suggested Procedures for Administering the Fee Waiver Provision
- A. Administrative appeals on fee waiver isues; timing of work on the issue during initial and appeal stages.
- B. Blanket, in futuro waivers for particular requesters
- C. Amount of staff time to devote to resolving requests for waiver or reduction of fees and to making an administrative reord of the consideration and disposition of the request; nature and use of the administrative record; use of informal committees in acting upon fee waiver requests
- D. Importance of the provision for a reduction rather than a complete waiver of FOIA fees
- E. Coordination with other agencies

Appendices:
- A. The Provision's Legislative History and Case Law
- B. Prior Guidance from the Attorney General on Fee Waivers

Discussion

I. Introduction: Summary of Policy and of Legal Context.

As amended in 1974, the Freedom of Information Act (FOIA), 5 USC 552, after providing for agencies to issue regulations fixing search and duplication fees to be charged to requesters, goes on to provide for the waiver or reduction of such fees as follows:

> Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public. (5 USC 552(a)(4)(A)).

It is the policy of the Justice Department, as the agency responsible for "encouraging agency compliance" with FOIA (§552(d)), that all federal agencies should grant full or partial fee waivers in the cases contemplated by the foregoing provision. For guidance in determining which cases are within the provision, see Part II, below.

As to the law, agencies should be aware that, although an agency's determination whether the statutory basis for a waiver or reduction exists in a particular case is a question clearly confided to the agency's discretion, such agency determinations are judicially reviewable under Administrative Procedure Act standards if the requester claims that the agency's refusal to waive or reduce fees was arbitrary and capricious and thus an abuse of discretion. The waiver provision contains the word "shall," and thus if a requester has presented to the agency a sufficiently strong showing of the statutory basis for a waiver, or if the agency otherwise knows of such a strong basis, an agency refusal to grant at least a substantial reduction of the fees may be an abuse of discretion. In other words, if the case for a waiver is sufficiently strong, it is mandatory that the agency grant at least a substantial reduction of the fees.

For a further discussion of the legal background and meaning of the fee waiver provision, see Appendix A hereto.

II. Factors for Agency Use in Determining Whether to Waive or Reduce Fees Otherwise Due From FOIA Requesters

A. General Policies: There are two policies which should be considered in approaching agency decisions on whether to waive or reduce FOIA fees—policies which point in opposite directions, and which underlie the more specific factors hereinafter described. These general policies are:

1. Policy of Act's Objectives. This policy is to administer the fee waiver provision so as better to achieve the principal policy objectives of the Act. These objectives can be summarized as:

(a) Strengthening the ability of citizens to exercise their rights and responsibilities to understand, evaluate, and by voting, petition, and other lawful means to establish, support, modify or terminate national laws, programs, and policies of all kinds, and

(b) Strengthening major aspects of national life in well-organized areas of public concern where such strengthening will significantly benefit the general public, particularly such areas as public safety, public health, economic well-being, and integrity and efficiency in government. For brevity and convenience, the Act's objectives in these two major respects may be characterized as the enhancement of informed civic activity and of the quality of national life.

In every case where a FOIA request is accompanied by a request for a waiver or reduction of fees made in accordance with agency regulations, the agency should consider whether granting the request in whole or part would release information that will primarily benefit the general public, by enhancing civic activity or the quality of national life as discussed above. In those cases whether the requester has not furnished and the agency does not otherwise have any substantial basis to conclude that such benefits are likely to result, summary consideration will usually suffice. In all other cases—that is, where there appears to be a prospect of such benefits that ranges between the substantial and the certain—further consideration must be given to the nature, importance, and likelihood of the benefits and to the other factors discussed herein before the agency exercises its discretion whether to grant or deny a waiver or reduction of fees.

2. Policy of collecting unlawful fees to the extent that waiver or reduction of fees should not be granted.

The other general policy factor to bear in mind in approaching decisions whether to waive or reduce FOIA fees is the general need to exercise proper control over the use by an agency of valuable staff services that constitute resources provided by the taxpayers—resources which might otherwise be conserved, or used for other federal work (including the processing of other FOIA requests).

This factor is not pertinent to an agency fee waiver decision if the statutory basis for a waiver is present, because Congress has mandated that a waiver or reduction of fees "shall" be granted in such circumstances. In other cases, however, the agency should consider the proper utilization of valuable agency resources paid for with appropriated funds, in view of the general desirability of reducing or recouping unnecessary government spending and the taxes it requires.

The annual cost of administering FOIA is substantial; only a small fraction of the cost is recovered through fees; and the cost of processing particular requests is not invariably or even usually proportionate to the public benefits which flow from those particular requests.[1]

Accordingly, to the extent the statutory basis for a waiver or reduction is not found, decisions on whether to reduce or waive a fee should take into account the question of financial loss to the government, especially if the fee involved is sizable. Where it appears that the statutory benefit standard has been satisfied to some degree, but that the magnitude of the benefits to the public is quite limited or the likelihood they will actually occur is quite uncertain, the policy of minimizing financial loss to the government may be reconciled with the previously discussed general policy of enhancing such benefits, for example, by reducing instead of waiving completely the fees involved.

B. Policy factors that are applicable in estimating whether and to what extent the general public will benefit from furnishing the information

1. Preliminary Analysis—dissemination of information or of benefits—effective dissemination of beneficial information to "general public."

The process of estimating whether and to what extent the general public may benefit from furnishing the requester with the information in the requested records may be analytically divided into two principal inquiries, namely, (i) whether such information contains a significant potential for benefitting the general public, and (ii) whether releasing such information to the requester is likely to result in such potential benefits actually being received by the general public.

[Footnote ¶300,794] (1) See generally, on the costs and benefits of administering FOIA, articles entitled "Estimating FOIA Costs" and "Costs and Benefits—FOIA," respectively, in Vol. 1, No. 2 and Vol. 1, No. 3 of FOIA UPDATE, a quarterly newsletter published by this Office (Winter 1980 and Spring 1980 issues).

Note that the information containing such potential public benefits need not itself be conveyed to the public, so long as the benefits in it are. For example, specialized scientific information which can significantly advance medical research on serious illnesses need not be disseminated to the general public if it will be disseminated to researchers so as to assist in the development of better treatments for such illnesses. Comparable benefits may be involved if specialized historical information enables historical researchers to provide better foundations of understanding for the development of future public policies.

However, in cases where potentially beneficial information can be readily understood and utilized by members of the general public who are not specialists, satisfaction of the statutory standard may largely turn upon the prospects that release of the information to the requester will result in its effective dissemination to the general public. In this context, the term "general public" does not necessarily mean the entire public, but it does mean a substantial part of the public, such as public library patrons, newspaper readers, broadcast audiences, or other population groups of a national, regional, or local nature, including homemakers, students, parents, commuters, investors, retirees, factory workers, etc., which are not demarcated in exclusive terms, such as the stockholders of a particular company.

The effectiveness of dissemination fo such a general public may depend on many aspects of communications, such as speed, cost, form, accuracy, accessibility, storability, retrievability, and the percentage of the audience that is reached, but the ultimate test of effective dissemination of information to nonspecialists is the likelihood that significant numbers of persons will have the information when it may benefit them, or benefit other members of the general public.

Benefits to members of the public other than the recipients of the information may be important for nonspecialized as well a for technical or complex information. For example, effective dissemination to commuters of information on car operation or maintenance which will help them to conserve motor fuel would not only benefit them but also would benefit a larger general public through its effects on the nation's energy supply and inflation problems.

2. Identity of the requester. While the identity of a FOIA requester is usually not a proper factor for agencies to consider in granting or denying requests for access to records,[2] the requester's identity and attributes, such as his or her experience, purposes, plans, and capabilities, may sometimes be proper or even important factors to consider in acting on a request for a fee waiver.

These attributes of the requester may be pertinent to fee waivers in at least three respects: first, a requester's expertise on the subject of the requested records may sometimes help an agency estimate whether the records contain information of potential benefit to the general public. Such requesters may include, e.g., scholars, scientists, historians, former agency officials, or others with extensive background on the subject of the requested records.

Second, where the potential benefits of the information in the records seems clear but specialized knowledge will be required if the benefits are to be extracted and conveyed to the public, the requester's attributes may sometimes help the agency estimate whether such benefits will actually be realized by the public. Here, the agency should consider both the requester's expertise and whether he/she is likely to extract the potential benefits from the specialized information and convey them to the public, for example, by research and publication.

Third, where the potential public benefits do not require specialized subject matter expertise to appraise or effectively convey, requesters may vary in their ability to see that the information will be effectively disseminated. Agencies should remember that journalists and popular writers are more likely than a random requester to improve the prospects that beneficial information will actually be conveyed to the general public.

The foregoing does not mean that the attributes of a particular requester are themselves dispositive on a fee waiver, but only that such facts may and sometimes should be considered. The agency is not under an obligation to solicit or collect facts about the re-

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[Footnote ¶300,794 continued]

(2) For a recent discussion of the circumstances in which the identity and purposes of a requester may properly be taken into account in deciding whether to grant access, see the May 29, 1980 letter from this Office to the FTC, which is available to all agencies and the public, at 3-7 (as regards discretionary releases of exempt material) and at 7 (as regards determination of whether requested records are legally withholdable from the requester).

quester, nor need it ordinarily give much weight to bare, unsupported general assertions by a requester that he/she is a scholar or expert in a particular field, or that he/she is a journalist or writer who will disseminate the information to the public.

There are two cautions concerning agency consideration of a requester's identity in acting on fee waivers. First, agencies should hesitate to ascribe a definite or uniform quantum of weight or importance to the characterization of a requester (assuming the agency accepts it) as a "journalist," or "scholar," or "historian," or "scientist," or "writer," or the like. Second, agencies should not employ rigid tests for deciding whether a particular requester should be deemed within such a characterization, although an agency may properly use such characterizations for convenience. Both of these cautions rest on a common reason: the weight to be accorded to a requester's attributes should be based upon the underlying facts, to the extent known to the agency, which may be the basis for such characterizations. These underlying facts might include, e.g., the requester's affiliations with such institutions as a university, government agency, or professional or civic organization; the length and nature of his/her education and experience in pertinent areas; publications, distinctions or reputation among peers or others; and whether currently or recently active in pertinent areas full-time or part-time, vocationally or avocationally.

The point is that not all requesters who may be described as "journalist" or "historian" or the like are the same. Within each characterization, requesters may vary in their likelihood of contributing to the benefits of which the statute speaks. For example, if a requester seeks a waiver for a request for records on international economic policy during the past decade as a "journalist" or "historian," it would be pertinent to consider facts showing he/she is a "journalist" in that he/she is a sportswriter as opposed to a full-time reporter and analyst of foreign monetary and industrial trends for recognized business publications, or that he/she is a "historian" of the Civil War or for a local historical society, as opposed to a professor of economic history and a consultant to various organizations on modern international economic developments. These examples can serve as reference points for facts of intermediate significance. At the same time, agencies should guard against attaching undue importance to prominence or fame as such, as these are only indications of professional activity and competence.

3. The types of information which are, or may be, contained in the records sought.

This is generally a key factor in considering fee waiver requests, because under the statutory standard the benefits to the public are those which can be realized from the information in the records sought. The following discussion is intended to provide help in determining the types of information which are likely to contain potential benefits for the general public, the benefits in question are chiefly those already referred to under heading II, A, 1, above, as those which reflect the general policy objectives of the Act,—objectives there characterized as the enhancement of informed civic activity and of the quality of national life, especially as regards such areas of concern as public safety, public health, economic well-being, and the integrity and efficiency of government.

Each of these important areas of concern consists of a number of sub-areas to which particular types of information may relate. Thus, public safety may include transportation safety, minimizing death or injury from crimes, natural calamities, or other violence from domestic or foreign sources, etc. A sub-area such as transportation safety may be further subdivided into such fields as air safety, road safety, sea, rail, or pipeline safety; these in turn may be broken down into, e.g., the operator, vehicle, highway, or enforcement aspects of road safety.

(a) The first test of a type of information as a factor supporting a waiver is its pertinence—whether the information is pertinent to an area or sub-area of public concern where there is a clear public interest in effecting improvement or preventing deterioration. Pertinence may be a matter of degree, with lesser pertinence where the information just has something to do with the area of concern, and higher pertinence where the type of information can reasonably be expected to have a significant relation to public interest objectives. Thus, with respect to highway safety, a collection of a thousand newsclippings about traffic accidents would probably have less pertinence than a comprehensive collection of data obtained by highway safety specialists on the same thousand accidents that

is systematically focused on their specific conditions to facilitate analysis of causal factors.

(b) The second test of a type of information as a factor supporting a waiver is its quality. High quality information is more likely to contain potential public benefits than low quality information. The elements that help determine quality may vary with the subject and the particular uses to which the information may be put, but in general, the quality of information is likely to depend on such elements as: whether it is true rather than false or uncertain; whether it is precise rather than a rough estimate or approximation; whether it is comprehensive rather than fragmentary or incomplete; whether it can be placed in an appropriate context of time, place, conditions or "controls" (in the scientific sense of comparable information on a similar data mix which, however, lacks the thing being tested), and whether it is in, or can readily be converted to, a usable form without the need for substantial efforts to translate, analyze, interpret or extract it from useless information, with an attendant risk that such processing may introduce errors. Other elements in the quality of information may include whether the information may have been degraded through repeated restatements (hearsay or multiple hearsay); whether it came from an observer or a source who may have been untrained, excited careless, subject to conscious or unconscious bias, or not an effective communicator; and whether or not the information has been verified in reliable ways.

(c) The third test of the type of information as a factor supporting a waiver is its value. Value depends partly on quality but it is different from quality. Furnishing high quality information in agency records is of little value if essentially the same or very similar information is readily available elsewhere, while information of only fair quality in agency records may be of great value if those records are the only practicable source of such information and if the information is highly pertinent to matters with a strong need for attention in a significant area of public concern.

Agency knowledge to support reasonable estimates of the pertinence, quality, and value of the information in requested records may vary greatly. Such knowledge and estimates may depend upon many factors, e.g., the agency's special expertise on the subject to which the records pertain; the breadth and depth of the agency's perspectives on the subject's significance for related matters; how recently and extensively work involving the records has been performed by agency personnel who are or might be involved in handling the fee waiver request; and the facts surrounding the creation or acquisition of the records.

Often the agency will be in a better position to determine whether the type of information in requested records is likely to confer benefits on the general public after such records have been found and examined. Sometimes the requester may be able to assist the agency in making such a determination without even seeing the records,[3] particularly if he/she is a researcher with considerable background on the subject to which they pertain. Thus, it is desirable that agencies invite requesters seeking fee waivers to explain why information of the type the requester expects to find in the records might produce benefits for the general public.

C. Other Factors that are Applicable in Considering Fee Waivers or Reductions

1. The extent, if any, by which the cost of computing and handling the fee may exceed the amount of the fee.

The legislative history of the 1974 Amendments mentioned $3.00 as an amount below which fees should not ordinarily be collected. This may be adjusted for inflation. Moreover, agencies may vary considerably in the types of request they receive, the salaries of persons who process them, and other cost factors. Thus, agencies may be losing money for the government if they compute, charge, collect, and transmit to the Treasury fees of less than $3.00, $5.00, or perhaps $10.00 or even more.

If an agency can determine a fee level as a "floor" below which it will not ordinarily charge fees for these reasons, it is desirable to make the level known, particularly if this type of waiver occurs frequently. However, agencies should exercise care in wording any such announcement or regulation, to take account of a situation where a costly FOIA request may be divided into several smaller requests sent separately by the requester, or

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[Footnote ¶300,794 continued]

(3) If the question of a fee waiver has not been resolved at the time the records are made available to a requester, the requester may be able to explain after studying them how the information contained in them benefits the general public, so as to support a cancellation or refund of the fee in whole or part

by several requesters acting in concert, to avoid fees. This can be covered by stating that fees will not be charged when they amount to less than $—— for "a request or series of related requests," or that they will not be charged "ordinarily," or preferably both. See, e.g., 28 C.F.R. §16.9(a).

Some cases in which waivers would be justified as a savings to the government may not be susceptible to quick disposition by a specified "floor." Where determining the fee is time consuming, (e.g., where employees in 45 field offices work on a search, most of them for just a few minutes, and there is no easy way to approximate the total time without collecting reports from all), the cost of computing and collecting a particular fee may be substantially higher than the general "floor" level. In such a case, agency discretion could properly be exercised to waive it.

2. Meeting the needs of indigent persons or relieving substantial personal hardship.

Indigency is a factor which an agency may properly consider in making fee waiver determinations, and in some agencies it may be a sufficient basis for waiver in most requests from indigents. See the legislative history in the Appendix, and see 28 C.F.R. §16.9. However, indigency does not automatically entitle the requester to a waiver. An opposite conclusion would mean that all requests from indigents, even very costly ones otherwise involving large fees, would be processed wholly at tne expense of the taxpayers. Moreover, indigents could be used to file very costly requests for other persons seeking to avoid fees.

The usual justifications for a fee waiver for an indigent are: (a) personal need for records which he/she cannot pay for, and (b) the ability of the agency to comply with his/her request without undue detriment to other agency work, including that on other FOIA requests. Need might exist, e.g., where the records may help the requester obtain economic benefits, employment, education, or basic rights or services.

Since indigency is not a completely rigid and clear-cut concept, the justification for giving weight to indigency on fee waiver requests may apply to some degree to persons who are not indigent in every sense but who are of very limited means—for example, certain persons with high expenses for ncessities living only on Social Security payments—if they have similar personal needs for access to records and if paying the regular fees would be a substantial or severe hardship.

Agencies need not accept uncritically a requester's bare assertion that he or she is indigent. At a minimum, the requester claiming indigency or very limited means should provide some information about himself or herself to corroborate the claim, e.g., residence in a public housing project, a recently discharge in bankruptcy, imprisonment with indebtedness to lawyers, or status as a student on a scholarship based on need. In some situations, as where the request involves much work and sizable fees, agencies may invite more adequate supporting information for an indigency claim.

3. Indications that the requester has sought to formulate or reformulate a costly request so as better to specify, help locate, or process the requested records at less cost to the government, or to obtain the same information from readily available sources.

This factor may be important chiefly as an auxiliary consideration in cases where there is a colorable but not wholly convincing justification for a waiver under the statutory standard of benefits to the general public and where the request would be quite costly to process. The factor typically pertains to those broad categorical requests which might be recast in narrower terms and still serve the requester's purposes at less cost to the government. Savings to the government may include not only reducing search and duplication, but also, e.g., reduce time-consuming examination of records for screening purposes.

There are various ways broad requests may sometimes be narrowed and still serve the requester. Where all records on a given subject are sought and many agency components or field offices are involved, records of a key component or selected offices may sometimes reasonably meet the need; where the request covers records of many years, a recent period may be adequate, or if the requester wishes to trace trends, perhaps records of every third or fourth year will do.

Where categorical requests have been framed very broadly to insure inclusion of the matters of real interest to the requester, or because the requester did not realize the time

and cost needed to process it, informal discussion may help. Sometimes a random sample of the records may be almost as instructive as the total number. Agencies may point out in such discussions that a requester's agreement to narrow a categorical request does not preclude him from later filing a new request to cover material dropped from the pending request.

Even where the request is for a specific record, there are at least two situations where restating the request might achieve the requester's purposes at a savings to the government: first, where the search would be reduced if the requester furnishes additional information to help locate the record; and second, where the requester is willing to state his purpose in seeking the record,[4] which might enable the agency to satisfy it more speedily and economically, as by providing the desired information in other records or by taking other action.

Where recasting or restating a request results in considerable savings to the government, a waiver or reduction of fees below the amount chargeable for the recast or restated request may be appropriate, although the requester will probably save fees from the recasting or restatement itself.

If there is a substantial reason to believe that the information sought by the requester is readily available from other sources, this is pertinent to the fee waiver issue because the value to the general public of furnishing the information from the requested records may be less, as discussed under heading II, B, 3, (c) above. If the requester helps explore this question and shows that the information can or cannot be readily obtained elsewhere, the agency may properly take account of such help; to the extent the information is available elsewhere, the result may be an amended request that is less expensive to process, and to the extent it is not, there may be a stronger case for waiving or reducing the fees.

4. The absence of indications that furnishing the information is likely to benefit primarily the commercial or other private interests of the requester rather than the general public.

Where there is reason to believe the request was primarily made for and is chiefly likely to benefit the commercial, financial, or other private interests of the requester, the facts that support such a belief also tend to undercut application of the statutory fee waiver standard. In general, FOIA requests by business corporations or their agents, and requests for records pertaining to the requester, are more likely primarily to benefit the requester rather than the general public. Accordingly, such requests rarely justify a waiver under the express statutory standard, although they may justify such action for the separate reasons discussed above under headings C. 1., C. 2., and C. 3.

In rare instances, a waiver or reduction of fees for a business firm may be justified under the primary benefit to the general public standard. For example, if a small business firm obtained records that demonstrated major waste, inefficiency, corruption or favoritism in a large procurement, the fact that the requester's motive was to obtain business should not be disqualifying for a fee waiver if the benefit to the general public was more important than that to the requester. Large grant programs could involve similar situations.

In cases involving journalists and authors, confusion may arise when a substantial financial gain to the requester or his/her employer is likely to flow from furnishing the information, although the request might otherwise qualify for a waiver or reduction of fees under the statutory standard of primary benefit to the general public. Typically, this involves a requester who may reap financial gain from publishing a book or the like based on the information in question, or a requester working for a newspaper or other enterprise whose circulation and earnings can be expected to benefit. In such situations, two considerations should be borne in mind. First, the fact or prospect of financial gain to the requester or his/her employer usually does not seriously undercut the jurisdiction for a waiver or reduction of fees if such waiver or reduction is clearly called for on all the other facts known to the agency. Thus, a historian who uses records obtained under FOIA to research and publish a book which throws important light on a significant aspect of history that assists in determining future national policies by better insight into

[Footnote ¶300,794 continued]

(4) Requesters are generally not obligated to state their purposes in making a FOIA request, because purposes are seldom relevant in determining entitlement to access, and agencies should be careful not to mislead requesters to believe that purposes must be stated, but there is nothing improper in telling a requester that purposes may have a bearing on discretionary matters such as fee waivers.

the past, should not be adversely affected in seeking a waiver just because the book may sell well. Second, where the public benefit justification for a waiver or reduction of fees is quite doubtful without regard to the question of gain to the requester or his employer, a strong set of facts that financial gain is a major object or predictable effect of the request may properly be given some weight under the statutory standard.

III. Suggested Procedures for Administering the Fee Waiver Provision.

A. Administrative appeals on fee waiver issues; timing of work on the issue during the initial and appeal stages.

A refusal of, or failure to grant, a request to waive fees is ordinarily not a "denial of the request for records" within the meaning of subparagraph (a)(6)(A)(ii) of FOIA, and therefore, it ordinarily is not administratively appealable as of right unless agency regulations otherwise provide.

Nevertheless, agencies should, as a matter of sound policy and practice, generally permit administrative appeals from such a refusal or failure.[5] First, it is possible that the initial determination authority charged an illegal or incorrect fee. Second, the refusal or failure to waive or reduce the fee may have been arbitrary and capricious. Third, assuming a legally proper exercise of discretion, the appeal officials may decide to exercise discretion differently. Fourth, allowing appeals of such refusals may reduce litigation.

It does not follow, however, that such appeals should routinely be entertained as soon as the initial determination authority refuses to waive the fee. Piecemeal appeals are rarely good practice, and if practicable, an appeal on a fee waiver dispute should be heard after the access request has been acted upon so that the same appeal can cover objections to denials or deletions of the records sought, and so that there is a better basis for resolving the fee dispute because it will be more clear what information is being furnished.

The case for making waiver appeals part of the main appeal may be stronger where the initial determination authority has told the requester that decision on the waiver is being deferred until it can more intelligently be made, i.e., after the records are found, examined, and the extent of release is determined, so that the agency knows what information is being furnished so as to consider whether it will primarily benefit the general public. Alternatively, the requester could be told of the option to seek reconsideration of a fee waiver denial if the records furnished afford gounds for it.[6]

Despite the reasons just discussed against premature consideration of fee waiver requests at the initial or appeal stages, situations will arise where a fee waiver request should probably be considered, initially and on appeal, before the basic request for records has been processed. Such a case might be where the requester asserts, with colorable support, that refusal to waive fees would be or was arbitrary and capricious, and argues that it amounts as a practical matter to an improper denial of his basic request for access. The case for early consideration of the waiver issue is stronger if the agency has considerable knowledge as to what information would be found and released. In such cases, the convenience of the requester, the agency, or both may be served by an early determination of the waiver dispute.

B. Blanket, in futuro waivers for particular requesters.

In rare instances, requesters may seek advance commitments for fee waivers for their future requests. The statutory fee waiver provision does not authorize an agency to promise waivers with respect to FOIA requests not yet received. The standard looks basically to the benefits of the information produced by the particular request, although the requester's identity, purpose, or other attributes may be pertinent in estimating such benefits. Also, blanket commitments to waive fees could discriminate among requesters and subject the government to undue loss.

[Footnote ¶300,794 continued]

(5) The statement in the text applies not only to a requester's objections to a refusal or failure to waive fees, but also to objections to an allegedly insufficient reduction of fees. A 10% reduction of fees by the initial determination authority should not foreclose an appeal of the failure to waive the entire fee.

(6) If a deposit against estimated fees is required and made in lieu of accepting assurances from the requester that fees (or fees up to a stated amount) will be paid if not waived, the agency should inform the requester that in case the requested fee waiver or reduction is granted, the deposit will be refunded to the extent necessary to effect such waiver or reduction. To facilitate such a possible refund, agencies transmitting funds to the Treasury may request the funds be placed in a suspense account.

Nevertheless, agencies may properly inform requesters or the public concerning factors likely to result in fee waivers as to records in particular agency programs. Such expressions may encourage the use of government-held information to benefit the public through research or dissemination by FOIA requesters.

C. Amount of staff time to devote to resolving fee waiver requests and to making an administrative record of the consideration and disposition of the request; nature and use of the administrative record; use of informal committees on fee waiver requests.

Since fee waiver determinations based on appraising benefits to the general public may involve masses of data, unknown factors, and complex or uncertain predictions and value judgments, efforts to achieve the best resolution reasonably possible could require great amounts of time. But resources could be allocated to such efforts to an extent that impairs other agency functions, including other FOIA work. Accordingly, the time given to such efforts may have to be commensurate not only their difficulty, but also with their importance in competing for available resources.

There is no formula for how much staff time to use on a fee waiver request. Where no showing is made and no merit appears for a particular waiver, it should receive short shrift. Where there is difficulty, the importance of the issue should be considered, a question which may partly turn on the size of the fees. Whether to waive a $10,000 fee merits more attention than if the fee is $100, other things being equal.[7] Importance also depends upon the nature, magnitude and likelihood of the benefits to the general public and on whether such benefits may be delayed or lost forever if a waiver is not granted, as where the benefits are related to an event which will occur soon, or where the access request is contingent on the fee waiver and no one else is likely to seek and utilize the beneficial information.

If the requester seeks judicial review of an allegedly arbitrary and capricious refusal to waive fees, the administrative record of the agency's consideration of the waiver request may be critical to the court's decision on this issue.[8]

There are no uniform requirements as to the form or content of such an administrative record, except it should show that any support for the waiver by the requester or known to the agency was considered by those who acted on it. In particular, there is no general requirement to prepare an opinion, findings, or report describing the factors taken into account in the agency's consideration, or explaining the agency's evaluation of such factors. Indeed, it would ordinarily be a poor practice to prepare such detailed documentation, which might simply serve as a target for further dispute, and the time required to prepare it might sometimes be better spent on more inquiry and deliberation on the issue itself. Nevertheless, where there has been substantial prima facie showing for a waiver but none is to be granted, the administrative record should include references to the limitations or shortcomings of the showing, or to countervailing factors, to make clear that the adverse decision was reasonable.

There are several uses to which an administrative record of consideration of a fee waiver request, or information in or referred to in such an administrative record, may be put. While the most obvious is as a basis for affidavits defending in court against a charge of an arbitrary and capricious refusal to waive fees, there are various administrative uses. Important among them is assuring a requester who has made some showing for a waiver that it was considered. While such assurance may not be legally necessary, a timely statement to the requester on this point is usually good policy. Moreover, if there was a prima facie showing for a waiver which is being denied, it is desirable to go beyond a simple statement that the showing was considered to indicate, e.g., the number of

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[Footnote ¶300,794 continued]

(7) While as a general practice, the cost of agency staff time spent on resolution of a fee waiver request and making an administrative record of such resolution should not exceed or even approach the size of the fee or prospective fee involved, there may be special instances where an amount of staff time not warranted by the size of the particular fee is warranted by other considerations, for example, to develop expertise or as training for the better administration of the Act as regards future fee waiver matters.

(8) In some cases, the court can dispose of such a claim without an administrative record of the agency's consideration of the fee waiver request, for example, where the pleadings, exhibits, or other matter before the court indicates that no showing was made by the requester and no other grounds were before the agency which should have been considered on the question whether furnishing the information would primarily benefit the general public, or where it is clear that no information from the requested records was furnished because they were properly withheld, did not exist, etc.

persons involved in the consideration and/or some reasons for the denial.[9] If such a statement is given to the requester in writing, the file copy becomes part of the administrative record on the matter.[10]

In difficult cases better decisions on waivers, savings of time, or both may be attainable if, instead of consideration by a single person, perhaps with successive reviews by others, a panel of talents and backgrounds is used to provide a more sophisticated, balanced, and assured judgment.[11] If such an informal committee is used, that should be noted in the administrative record, with an indication of their qualifications, familiarity with the particular case, and background on the nature and public significance of the records and programs involved.

D. Importance of the provision for a reduction rather than complete waiver of FOIA fees.

Difficulties of agencies in responding to fee waiver requests would often be alleviated if greater attention were paid to the statutory provision for a reduction of fees, as an alternative to either granting or denying a waiver completely. When the issue is debatable or close—where there is a substantial but not clearly convincing showing that furnishing the information will primarily benefit the general public—reducing may be better than wholly waiving or not waiving the fees.

A reduction is not appropriate if the agency, after due consideration, easily concludes that the fees should be either wholly waived or paid in full. But where the agency reasonably concludes that, although a full waiver should not be granted, there is substantial support for an opposite conclusion, a substantial reduction (usually at least 20% below the full fees) would be appropriate. In addition, a reduction is a persuasive indication that the agency considered the fee waiver issue and acted within its discretion.[12]

The lack of a convenient formula for determining the proper percentage of a reduction should not discourage reductions. In entrusting these matters to agency discretion in the light of the broad statutory standard of public benefit, Congress did not provide or mandate the use of any formula for computing reductions. Moreover, where many complex and uncertain variables are involved in predicting benefits to the general public, it is doubtful whether a reduction formula of much value could be devised. Therefore, in cases where some reduction is in order, the percentage should be determined on a judgment basis as an executive act, and any reasonable judgment would be appropriate. For example, an agency might reasonably approach the amount of reductions with 50% as a tentative percentage to be adjusted up or down to fit the particular case. But an agency might, with equal reasonableness, determine the percentage of the reduction at some point between 20% and 80% on a case-by-case basis. The possiblity that an 80% reduction made in good faith in one case might seem inconsistent with only a 20% reduction also made in good faith in a different case at a later time or by a different official, because the second case is arguably just as meritorious as the first, should not invalidate either reduction unless the difference in treatment amounts to an irrational or otherwise improper discrimination.

The more widespread use of reductions will advance Congress' objective of encouraging agencies to use their discretion to waive or reduce fees for public interest reasons, and it will also assist agencies in the sometimes difficult task of administering the provision. Both these important goals will be thwarted if agency discretion to reduce fees is curbed by undue inhibitions about an essential step in the process, namely, fixing the percentage

[Footnote ¶300,794 continued]

(9) A brief statement of some of the reasons should suffice, and ordinarily it should be so worded as not to suggest that the reasons stated fully cover all the factors taken into account, e.g., "among the factors which we believe indicate the unlikelihood of benefits to the general public from this information are . . ."

(10) Documents which are part of the administrative record of an agency's consideration of a fee waiver request are, of course, "agency records" under FOIA, and ordinary FOIA principles of law and policy apply if FOIA access to them is sought. For example, a deliberate predecisional staff memorandum on the pros and cons of a requested waiver is within Exemption 5 unless the memorandum has been "adopted" by the decisionmaker as an explanation of his decision.

(11) A group which brings together these qualifications can also contribute greater continuity and consistency to the handling of fee waiver requests.

(12) One situation in which a reduction might be helpful as well as appropriate is where the prospective benefits of furnishing the information are divided between benefits to the requester and those to the general public, with difficulty in determining which will primarily benefit.

of a reduction. Thus, agencies should have little fear that any good faith and reasonable percentage reduction will be upset on judicial review because of a dispute about the percentage.[13] Of course, the administrative record which shows consideration of the fee waiver request should also indicate that the same factors were considered in determining the amount of the reduction.

E. Coordination With Other Agencies

When an agency faced with a waiver request has reason to believe that another agency may be faced with a similar waiver request from the same or another requester seeking similar records with a similar justification for waiver, it should informally contact the other agency. While discretion implies that different agencies may reach different results on similar facts, and while the records of the agencies may be different in terms of the statutory standard, each agency can make a more informed determination if it receives input from the other agency.

APPENDIX A

The Statutory Fee Waiver Provision, Legislative History, and Case Law

The statutory provision here involved is paragraph (4)(A) of subsection (a) of FOIA, 5 USC 552, which, after certain provisions for the issuance of agency regulations specifying search and duplication fees, goes on to provide in the sentence here pertinent as follows:

> Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

This provision, which was added in the 1974 amendments to FOIA, orginated in the Senate version of those amendments. The Senate Report on the provision as it was originally framed stated:

> Finally, S. 2543 allows documents to be furnished without charge or at a reduced charge where the public interest is best served thereby. This public-interest standard should be liberally construed by the agencies; it is borrowed from regulations in effect at the Departments of Transportation and Justice. In addition to establishing the general rules, the amendment specifies that fees shall ordinarily not be charged whenever the person requesting the records is indigent, when the aggregate fee would amount to less than $3, when the records requested are not found, or when the records located are withheld. (Senate Rept. No. 93-854 of May 16, 1974 at 12.)

The Conference Committee made minor changes which resulted in the provision as it was enacted, and explained its action as follows:

> The Senate amendment . . . provided that an agency could furnish the records requested without charge or at a reduced charge if it determined that such action would be in the public interest. It further provided that no fees should ordinarily be charged if the person requesting the records was indigent, if such fees would amount to less than $3, if the records were not located by the agency, or if they were determined to be exempt from disclosure under subsection (b) of the law.
>
> The conference substitute . . . retains the agency's discretionary public-interest waiver authority but eliminates the specific categories of situations where fees should not be charged.
>
> By eliminating the list of specific categories, the conferees do not intend to imply that agencies should actually charge fees in those categories. Rather, they felt, such matters are properly the subject for individual agency determination in regulations implementing the Freedom of Information law. The conferees intend that fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information. (Conference Report (Senate No. 93-1200) of October 1, 1974 at 8.)

There has been little in the way of judicial review of agency decisions not to waive or reduce fees. In 1977, two courts considered the question whether an agency's refusal to waive fees and its refusal to release non-exempt records until the fees were paid might constitute an improper withholding which could be enjoined under FOIA's judicial review provision. 5 USC §552(a)(4)(B). Rizzo v Tyler, 438 F. Supp. 895 (S.D.N.Y. 1977); Lybarger v Cardwell, 438 F. Supp. 1075 (D. Mass. 1977). They both held that it might, but differed on the standard of review to be used in determining whether the agency's refusal to waive was unlawful. In Rizzo, the court held that, since the review was under FOIA subsection (a)(4)(B), it was a de novo one[1], while in Lybarger, the court, without

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[Footnote ¶300,794 continued]

(13) The statement in the text is not designed to apply to, e.g., a situation where the agency, faced with overwhelming support to justify a full waiver, granted a reduction of 10%.

(1) Rizzo also held that the indigency of a requester does not, without more, require a fee waiver.

mention of subsection (a)(4)(B), employed an APA "arbitrary and capricious" standard.

Earlier that year another court had held, without discussing whether refusal to waive fees might be an improper withholding, that an agency's refusal to waive fees was reviewable on an arbitrary and capricious standard. Fitzgibbon v Central Intelligence Agency, No. 76-700 (D.D.C. 1977). It described an arbitrary and capricious refusal as one where "there is nothing in the agency's refusal of fee waiver which indicates that furnishing the information requested cannot be considered as primarily benefitting the general public." Slip opinion at 1. The court then found the refusal to have been arbitrary and capricious.

Regardless of the result reach in that case, the quoted language should not be read as meaning that every agency refusal or failure to grant a fee waiver request must contain some statement that the statutory standard for waivers has not been met. Wholly unsupported fee waiver requests are far from rare, and there is no requirement for the routine issuance of particular statements rejecting them. However, where a substantial showing or basis for a fee waiver appears, an agency should consider such showing or basis in acting upon the waiver request, and should take care that the administrative record indicates that such consideration was in fact given.

Recently, the same court that decided Fitzgibbon considered another refusal to waive fees by the CIA. Eudey v Central Intelligence Agency, 478 F. Supp. 1175 (D.D.C. 1979). It reaffirmed its earlier decision that "the proper standard for judicial review of an agency denial of a fee waiver is whether that decision was arbitrary and capricious." Id. at 1176. It went on to give the most detailed statement to date of what this review entails:

> The statute indicates that the issue to be considered by the agency is whether furnishing the information will primarily benefit the public at large or whether any benefit will inure primarily to the specific individual requesting the documents. The agency's decision not to waive fees will be rational, and therefore not arbitrary and capricious, if it is based upon some factor shedding light on that central issue. The identity of the requester and the nature of the information sought under the Act are proper factors for the agency to consider when faced with a fee waiver request. . . . If, after considering such factors, the agency concludes that furnishing particular information will not primarily benefit the general public but rather will primarily benefit the individual requestor and the agency then denies a request for a fee waiver on that basis, its denial of a waiver will not be arbitrary and capricious. (Emphasis added.) (Id. at 1177)

The court found the CIA's refusal to have been arbitrary and capricious because it was based on an "assessment that few documents will be released in response to Plaintiff's request." Id. It held that this factor was outside of those which subsection (a)(4)(A) permits the agency to consider (because it does not relate to the issue of whether the release will primarily benefit the general public).[2]

Agencies should consider the underscored language in the above quotation as a correct and useful statement of the law, bearing in mind that the two factors noted as "proper" are not generally either exclusive or controlling factors for agency consideration. However, several comments are in order on the possible pertinence to a fee waiver of facts as to the volume of an actual or prospective agency release of requested records, such as are suggested by an observation that "few documents will be released." First, whether few or many documents will be or have been released ordinarily has little or no bearing on the statutory standard that ". . . furnishing the information can be considered as primarily benefiting the general public." (Emphasis supplied.) Obviously, even one document could contain much information benefiting the public, while many documents might in the aggregate contain none producing such a result.

Second, if no documents at all are furnished, either because they do not exist or because they are all exempt and are withheld, the expressed statutory basis for a waiver, "furnishing" the information, etc., is absent. While some related information might be furnished, namely, that the agency does not have the requested records or that it does but is withholding them, the statute's use of the article "the" before "information" suggests as a natural reading that "the information" in question is that contained in the re-

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[Footnote ¶300,794 continued]

(2) See also as supporting use of the arbitrary and capricious standard in judicial review of fee waiver disputes, Reith v IRS, Civil Action No. F-80-87 (N.D. Ind. Sept. 10, 1980) (memorandum of decision at 13-14). And cf. Burke v Dept. of Justice, 232 F. Supp. 251 (D. Kan. 1976), aff'd, 559 F.2d 1182 (10th Cir. 1977), holding that FOIA does not empower a court "to control . . . administrative discretion" in fee waiver disputes. That holding is correct but is not inconsistent with judicial review under the arbitrary and capricious standard.

quested records; in any event, merely to furnish information that the agency does or does not have records within the scope of the request would seem likely to produce at best speculative and insubstantial benefits to the public in all but extraordinary situations.

Third, in any case where no records covered by a request are made available, either because the agency does not have them or because they are all exempt and are withheld, special factors failings outside the language of the fee waiver provision should be taken into account. Requestors may understandably be surprised and upset if they are charged substantial fees but get no records. Yet very costly and time consuming agency searches may be legally requisite for requests which result—perhaps predictably result—in no records actually being found and made available. The time thus consumed not only represents an expenditure of public funds but also of resources which could be used to process the FOIA requests of other persons. In these circumstances, the legislative history of the fee waiver provision and sound principles of public administration help fill the gap left by the language of the provision. The Senate and Conference Reports on the provision in question, as quoted above, clearly show support for a policy, previously reflected in some departmental regulations, that fees shall not "ordinarily" be charged if no records are furnished. However, if the search time is substantial, and if the requester has been notified of the estimated cost and has been specifically told that the agency cannot determine in advance whether any records will be made available, fees may be charged. See, for an example of a regulation providing for such notice, 28 C.F.R. §16.9(a), as amended in 40 Fed. Reg. 7265 (Feb. 19, 1975).

APPENDIX B

Prior Guidance from the Attorney General and Administrative Experience To Date

The Attorney General's Memorandum ("Blue Book") on the 1974 FOIA Amendments, issued in February, 1975, after quoting the new provision on fee waivers, set forth guidance (pp. 15-16) as follows:

> Where an agency perceives a substantial question whether release of requested information can be considered as "primarily benefiting the general public" it should consider exercising its discretion under this provision. What is required is the application of good faith in determining whether public payment should be made for essentially public benefits. In its consideration of the matter, the agency need not employ any particular formalized procedure, and may draw upon both special expertise and general knowledge concerning such matters as the size of the public to be benefited, the significance of the benefit, the private interest of the requester which the release may further, the usefulness of the material to be released, the likelihood that tangible public good will be realized, and other factors which may be pertinent to the appropriateness of public payment. Deliberate, irrational discrimination between one case and the next is of course improper; but neither is it necessary to develop a system of rigid guidelines or inflexible case precedents.
>
> There is no doubt that waiver or reduction of fees is discretionary. The statute provides that it "shall" be done only "*where the agency determines* that waiver or reduction * * * is in the public interest because furnishing the information *can be considered* as primarily benefiting the general public." (Emphasis supplied.) The most authoritative expression of legislative history on the point, the Conference Report, refers to the provision as establishing a "discretionary public-interest waiver authority." (Conf. Rept. p. 8.)

The foregoing guidance is still valid and useful on the points which it addressed. However, experience since it was issued has shown much uncertainty among agencies in applying the provision, to the detriment of both agencies and the public. The basic memorandum which this Appendix accompanies is designed as additional guidance to help assure better administration of the fee waiver provision.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December, 1983, I caused the foregoing Motion for Partial Summary Judgment, Memorandum of Points and Authorities in Support thereof and Rule 1-9(h) Statement to be served by first-class mail, postage prepaid, to:

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