



January 7, 2015

Office of Assistant General Counsel for Administration
U.S. Department of Commerce
Room 5898-C
14th and Constitution Avenue, N.W.
Washington, D.C. 20230

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Re: *FREEDOM OF INFORMATION ACT APPEAL*
AMENDED/MODIFIED/BIFURCATED FOIA REQUEST
NO. DOC-NOAA-2014-001694

Attention:

The nonprofit Institute for Trade, Standards and Sustainable Development (ITSSD) hereby submits the attached APPEAL of the Denial of Fee Waiver Request issued by the U.S. Department of Commerce National Oceanic and Atmospheric Administration Office of the Chief Information Officer, dated December 11, 2014.

Please acknowledge receipt of this APPEAL

We look forward to receiving your determination.

Very truly yours,

Lawrence A. Kogan

Lawrence Kogan
CEO
ITSSD

**FREEDOM OF INFORMATION ACT APPEAL
OF DENIAL OF ITSSD REQUEST FOR FEE WAIVER
CORRESPONDING TO
AMENDED/MODIFIED/BIFURCATED
FOIA REQUEST NO./# DOC-NOAA-2014-001694**

The nonprofit Institute for Trade, Standards and Sustainable Development (“ITSSD”) hereby appeals the December 11, 2014 denial¹ by the U.S. Department of Commerce National Oceanic and Atmospheric Administration Office of the Chief Information Officer (“DOC-NOAA-OCIO”) of ITSSD’s Request for Fee Waiver dated and filed on December 5, 2014.²

**I.
PROCEEDINGS BELOW**

This is a FOIA case with a long history of NOAA-OCIO obstructionism dating back to ITSSD’s first FOIA Fee Waiver Request filed in March 2014.^{3 4 5 6 7 8} The objective of the former request, like that of the present one, has been to secure disclosure of agency records of critical interest and importance to the American public. These FOIAs have sought disclosure of agency records substantiating NOAA’s compliance with its legal responsibilities under the Information Quality Act (“IQA”) and applicable IQA-implementing Office of Management and Budget (“OMB”) and NOAA peer review process and administrative review standards. NOAA had been obliged to ensure that the mostly third party peer reviews of ten (10) NOAA-developed highly influential scientific assessments used to support the Environmental Protection Agency’s 2009 Clean Air Act Section 202(a) Greenhouse Gas Endangerment Findings and subsequently triggered major emissions control regulations had been adequately validated prior to their public dissemination in conformance with the IQA’s, OMB’s and NOAA’s most rigorous and least discretionary peer review independence, conflict of interest, panel balance and administrative review standards applicable to HISAs.

On September 22, 2014, ITSSD filed with NOAA-OCIO its New FOIA Fee Waiver Request which was subsequently designated Request No. DOC-NOAA-2014-001694.⁹ On the same date, ITSSD filed its corresponding Fee Waiver Request.¹⁰

Thereafter, on September 30, 2014, ITSSD filed with NOAA-OCIO a supplement to its September 22, 2014 Fee Waiver Request.¹¹ It “provided additional material and relevant evidence of ITSSD’s satisfaction of NOAA’s six-factor fee waiver test of 15 C.F.R. §4.11(k)(1)-(3).”¹²

On September 30, 2014, NOAA-OCIO dispatched to ITSSD an oblique request for clarification of its New FOIA Request without identifying any specific item requiring clarification. Its restatement of 15 C.F.R. 4.4(c) strongly suggested that NOAA-OCIO did not believe the New FOIA Request overall “reasonably described [...] the requested records in enough detail to enable Department personnel to locate them with a reasonable amount of effort.”¹³ *Notwithstanding NOAA-OCIO’s failure to provide guidance concerning what details, in particular, were missing*, ITSSD responded, on October 1, 2014, by preparing and dispatching to NOAA-OCIO a good faith clarification of ITSSD’s New FOIA Request as NOAA-OCIO had requested.¹⁴

On October 10, 2014, NOAA-OCIO issued an adverse fee waiver determination in response to ITSSD's September 22, 2014 Fee Waiver Request. The NOAA-OCIO denial stated, *without explanation*, that ITSSD's "fee waiver justification was insufficient in detail to enable me to grant [its] fee waiver request. [...] NOAA is still without the clarity and information required to grant you a fee waiver."¹⁵ It also provided an initial FOIA fee estimate of \$7500 for search fees *unaccompanied by any explanation or substantiation concerning how the fee estimate had been derived.*¹⁶

NOAA-OCIO's October 10, 2014 fee waiver denial thereafter prompted a series of oral and written correspondences between ITSSD and NOAA-OCIO and NOAA-OAR representatives spanning from October 21, 2014 to November 7, 2014.^{17 18} These correspondences reveal there was a consensus of the Parties that ITSSD's New FOIA Request was too 'complex' and required simplification and narrowing of scope to facilitate expedited processing by NOAA-OCIO. They also confirm that NOAA-OCIO acknowledged and accepted ITSSD's filing of a simplified and more narrowly drafted Amended/Modified/Bifurcated FOIA Request No. DOC-NOAA-2014-001694 ("AMB FOIA Request"), dated October 27, 2014.¹⁹

Unlike ITSSD's New FOIA Request, the AMB FOIA Request seeks disclosure of the following well-defined groups of publicly unavailable government contracts further identified by specific name and number. A summary description of each of these groups is provided below along with references to their location in the AMB FOIA Request:

1. Six (6) contracts issued by NOAA (or on NOAA's behalf) commissioning the National Research Council/National Academy of Sciences to undertake the peer review of seven (7) of the ten (10) listed NOAA-developed scientific assessments (*See* AMB FOIA Request p. 4);
2. Three (3) contracts issued by NOAA (alone or jointly with another federal agency) commissioning the National Research Council/National Academy of Sciences to develop three new climate science-related reports (*See* AMB FOIA Request p. 4);
3. Thirty-nine (39) grant contracts/awards identified by alpha-numeric reference NOAA had issued to seventeen (17) universities and nonprofit institutes during 2004-2010 (*See* AMB FOIA Request pp. 5-6); *and*
4. One (1) or more unidentified grant contract(s)/award(s) NOAA issued to Oregon State University's Cooperative Institute for Oceanographic Satellite Studies (CIOSS) during said period (*See* AMB FOIA Request p. 6).

In addition, the AMB FOIA Request also seeks disclosure of specific agency files concerning a handful of NOAA-established *ad hoc* federal advisory committees identified by specific name. A summary description of this group is set forth below along with a reference to its location in the AMB FOIA Request:

5. Selection criteria and identities of each member of five (5) listed NOAA-established federal advisory committees involved with the development and/or peer review of five (5) of the ten (10) listed NOAA-developed scientific assessments (*See Amended/Modified/Bifurcated FOIA Request p. 3*).

In its November 7, 2014 email correspondence to ITSSD, NOAA-OCIO/NOAA-OAR representative Bruce Gibbs simultaneously thanked ITSSD for its simplified and narrowed AMB FOIA Request, and noted how NOAA-OCIO was “in the process of evaluating it to determine how to proceed.”²⁰

Thereafter, in an undated, unsigned and letterhead-free email correspondence received by ITSSD on November 12, 2014,²¹ NOAA-OCIO representative Gerald Fox provided a new FOIA Fee Estimate “to search for responsive records” in the amount of \$4,000. The language used in this highly irregular unfinished correspondence reverted back to ITSSD’s New FOIA Request and ignored the reduced scope of the AMB FOIA Request.²² *This fee estimate, as well, contained no explanation or substantiation concerning how the fee estimate had been derived.*

ITSSD responded by written correspondence dated November 14, 2014, seeking substantiation and reconciliation of the two fee estimates NOAA-OCIO/NOAA-OAR representatives had proffered, and reiterating its previous description of the easily searchable “specifically identified” NOAA files for which disclosure had been sought in ITSSD’s AMB FOIA Request.²³ Unfortunately, upon receiving the NOAA-OCIO/NOAA/OAR representative’s November 21, 2014 email response to its correspondence, ITSSD immediately recognized that NOAA-OCIO’s prior tone of ostensible cooperation had, once again, transformed into obstructionism. Remarkably, said representative’s email stated the following:

“[W]e are awaiting your confirmation or denial to pay the fee required for us to search for these records. The estimated fee is *for search* and not duplication. Please let us know of your intention before November 28, 2014. Please remember you have requested a fair amount of data, *that’s still somewhat vague in some areas*--but we will try to help you to the best of our ability” (emphasis added).²⁴

ITSSD thereafter dispatched another written correspondence dated, November 28, 2014, requesting substantiation and/or explanation of the bases for the search fee estimates that NOAA-OCIO/NOAA-OAR representatives had previously provided, and apprising the agency that ITSSD would be filing a Fee Waiver Request corresponding to its AMB FOIA Request.²⁵

On December 5, 2014, ITSSD filed the Fee Waiver Request NOAA-OCIO’s December 11, 2014 denial of *which is the subject matter of this Appeal*. It explains in detail why disclosure of the records specifically identified in ITSSD’s AMB FOIA Request is in the public interest and satisfies the six-factor fee waiver test set forth within the applicable NOAA FOIA fee waiver regulations.

II. NOAA-OCIO’S DENIAL OF ITSSD’S AMENDED/MODIFIED/BIFURCATED FEE WAIVER REQUEST

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A. NOAA-OCIO's Denial of ITSSD's AMB Fee Waiver Request Was Not Reasonably Calculated to Put ITSSD on Notice as to the Deficiencies in its Case

The December 11, 2014 NOAA-OCIO correspondence drafted by the designated NOAA FOIA Officer clearly constitutes an adverse determination of a fee waiver request within the meaning of 15 C.F.R. §4.7(b).²⁶ NOAA-OCIO has denied ITSSD's request for a fee waiver, *without explanation*, on the grounds that “your fee waiver justification was insufficient in detail to enable me to grant your fee waiver request.”²⁷ NOAA-OCIO issued this denial notwithstanding ITSSD's preparation of a detailed annotated Fee Waiver Request that was *42-pages* in length.

As the history of this case shows (Part I above), this is certainly not the first time NOAA-OCIO has issued to ITSSD an adverse fee waiver determination without either citing a basis for such determination or stating a need for additional information or clarification. It employed precisely the same obtuse obstructionist language in its October 10, 2014 denial of the Fee Waiver Request ITSSD had previously filed on September 22, 2014, which had corresponded to ITSSD's New FOIA Request.

And, as the history of this case shows, such practice is *not* in line with prior agency practice relating to ITSSD's Original FOIA Request initially filed in March 2014 and subsequently clarified in April 2014. In May 2014, when NOAA-OCIO had denied ITSSD's clarified fee waiver request, it had provided the following bases:

“I determined that your fee waiver justification was insufficient in detail for the records listed above. The fee waiver request does not show that you would significantly advance the public understanding of a specific government operation or activity. You have not expressed a distribution plan with details about which websites will distribute the records, if any, to the general public or publication where your staff and Board of Advisor members have written commitments to publish the information that would then be accessible to the general public.”²⁸

In contrast to such past practice, NOAA-OCIO has failed to provide *any* bases for its most recent denials of ITSSD's Fee Waiver Requests corresponding, respectively, with its New FOIA Request filed in September 2014 and its AMB FOIA Request filed in October 2014 – both prepared in response to NOAA-OCIO requests for *further* clarification!

NOAA-OCIO did not indicate whether ITSSD's AMB Fee Waiver Request failed to show that the requested records concern “identifiable operations or activities of the federal government,” that they would be “meaningfully informative about government operations or activities,” or that “they would increase public understanding to ‘a significant extent.’” Furthermore, NOAA-OCIO did not indicate whether ITSSD's AMB Fee Waiver Request failed to show that it (including current staff and Board of Advisors members “have ‘expertise in the subject area’ or the ‘ability...to effectively convey information to the public.’” As a result, ITSSD remains unable to ascertain the nature of the deficiencies in its AMB Fee Waiver Request for purposes of correcting them.

NOAA-OCIO's failure to cite in its recent denial letter relating to ITSSD's AMB FOIA Request *any* particular element or point for which it seeks additional information or clarification, or *any* specific basis for reaching its determination, violates the agency's legal obligation, consistent with 15 C.F.R. §4.7(b)(2),²⁹ which states that a "denial letter [...] shall include [...] a] brief statement of the reason(s) for the denial."³⁰ In addition, such failure violates NOAA-OCIO's obligation, pursuant to FOIA jurisprudence, to ensure that the denial letter was "reasonably calculated to put the requester on notice as to the deficiencies in the requester's case."³¹

Indeed, while NOAA-OCIO/NOAA-OAR has neglected to search for any of the agency records for which disclosure has been sought, as specifically identified in ITSSD's AMB FOIA Request, it certainly has made haste in searching for new excuses to justify imposing unsubstantiated document search fees and its continued denials of ITSSD's New and AMB Fee Waiver Requests!

B. The Failure of NOAA-OCIO to Include in its Denial of ITSSD's AMB Fee Waiver Request Any Particular Reference or Basis Therefor Constitutes a Failure to Render a Timely "Determination" Within the Meaning of FOIA, Entitling ITSSD to a Waiver or Substantial Reduction in FOIA Search Fees and Excusing ITSSD From its Obligation to Exhaust its Administrative Remedies Under FOIA and Pursue This Appeal

FOIA jurisprudence establishes that, "[t]he burden of producing evidence and the burden of proof is on the agency to establish compliance with the FOIA time limitations and *determination* requirements" (emphasis added).³² 5 U.S.C. §552(a)(6)(A)(i) provides that,

"[e]ach agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall— (i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such *determination* and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse *determination*" (emphasis added).³³

5 U.S.C. §552(a)(6)(C)(i) provides that,

"Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph."³⁴

FOIA jurisprudence indicates that NOAA's failure to include in its denial letter any basis for its denial of ITSSD's AMB Fee Waiver Request was tantamount to NOAA-OCIO's issuance of a mere "acknowledgement" letter. Consequently, NOAA-OCIO had failed to render a "determination" with respect to said request, and thus, failed to respond thereto within the statutorily prescribed period mandated by FOIA and applicable agency FOIA regulations, thereby entitling ITSSD, at the very least, to a substantially reduced search fee or no search fee at all, and at most, a legally sanctioned excuse for having to pursue this Appeal.³⁵ An agency "determination" with respect to a fee waiver

request must include at least “a statement of why the agency believes that waiver or reduction of the fee is not in the public interest and does not benefit the general public.”³⁶ The rationale behind this rule of interpretation is as follows:

“It would be impossible for a requesting person to effectively appeal an agency decision through the administrative process with any hope of changing the agency's mind if the person were denied access to adequate information about the adverse decision. A person cannot effectively appeal a decision about the releasability of documents or the charging of fees if he is not informed of at least a list of the documents to which he was denied access, what fees he will be charged for releasable documents, and why those decisions were made.”³⁷

Moreover, the District of Columbia Circuit clearly recognizes that the “[d]enial of this information would in all likelihood be a violation of due process as well as [an] effective[] gutting [of] the reasons for applying the exhaustion doctrine in FOIA cases.”³⁸ “A response is sufficient for purposes of requiring an administrative appeal if it includes: the agency’s determination of whether or not to comply with the request [setting forth] the reasons for its decision...”³⁹

Finally, FOIA jurisprudence holds that an agency’s failure to include any such particular reference in a denial letter, which is treated as part of the administrative record, will preclude a court of law, on judicial review, from considering it anew.^{40 41} Indeed, the administrative record that exists before NOAA at the time of this administrative appeal is limited to the initial FOIA request, the agency’s response and any subsequent materials related to the administrative appeal.⁴²

C. NOAA-OCIO’s Denial of ITSSD’s Fee Waiver Request Contravenes the Intent of Congress’ FOIA Amendments

The FOIA provides that an agency “shall” waive or reduce its fees “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”⁴³ Courts have held that FOIA’s fee waiver provision is to “be liberally construed in favor of waivers for *noncommercial* requesters” (emphasis added).⁴⁴ The District of Columbia Circuit Court of Appeals, in particular, has noted that,

“The legislative history discussed in *McClellan supra*, *National Security Archive v. U.S. Dept. of Defense*, 880 F.2d 1381 (D.C.Cir.1989), cert. denied, 494 U.S. 1029, 110 S.Ct. 1478, 108 L.Ed.2d 615 (1990), and other cases demonstrates that Congress intended independent researchers, journalists, and public interest watchdog groups to have inexpensive access to government records in order to provide the type of public disclosure believed essential to our society. Moreover, in the 1986 amendments to FOIA, Congress ensured that *when such requesters demonstrated a minimal showing of their legitimate intention to use the requested information* in a way that contributes to public understanding of the operations of government agencies, no fee attaches to their request” (emphasis added)⁴⁵

Furthermore, the D.C. Circuit has found that the objective of the fee-waiver was “to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.”⁴⁶

D. NOAA-OCIO’s Denial of ITSSD’s AMB Fee Waiver Request Coupled With its Unsubstantiated Estimates of Search Fee Costs Which Must be Prepaid Before a Search Will be Conducted Indicate that NOAA-OCIO Did Not Undertake A Good Faith Search of the Specifically Identified Agency Records Reasonably Described in ITSSD’s AMB FOIA Request

FOIA jurisprudence reflects that “[a]n agency fulfills its obligations under FOIA if it can demonstrate beyond material doubt that its search was ‘reasonably calculated to uncover all relevant documents.’”⁴⁷ “The agency is obligated to ‘make a good faith effort to conduct a search for the requested records using methods which can be reasonably expected to produce the information requested.’”⁴⁸ “The agency bears the burden of showing that its search was calculated to uncover all relevant documents.”⁴⁹ In order for an agency to “meet its burden” to conduct a good faith search, it must “provid[e] an affidavit or declaration which sets forth ‘the search terms and the type of search performed, and aver[] that all files likely to contain responsive materials...were searched.’”⁵⁰ Once provided, such an affidavit or declaration “enjoy[s] a presumption of good faith.”⁵¹ An agency’s release of documents “in a piecemeal fashion tends to show the agency’s good faith attempt to discover responsive files and release them when found.”⁵² In the end, “[a]n agency has a duty to make reasonable efforts to satisfy FOIA requests.”⁵³ “In determining reasonableness, the court’s inquiry is not whether responsive documents may exist that were not provided to the requester, but whether the manner in which the search was conducted was adequate.”⁵⁴ “An agency’s practices may constitute a ‘withholding’ of documents under FOIA if the practice results in significant impairment of the requester’s ability to obtain certain types of documents.”⁵⁵

As noted above, NOAA-OCIO’s undated, unsigned and letter-head free correspondence transmitted via email to ITSSD on November 12, 2014, NOAA-OCIO set forth a fee estimate of approximately \$4,000 relating to search for the agency records specifically identified and reasonably described in ITSSD’s AMB FOIA Request. However, NOAA-OCIO neglected to provide substantiation or explanation of that search fee estimate, as its only response was to state in a subsequent November 21, 2014 correspondence that, “Our current estimate is that it will take 98 hours to search for the documents you’ve requested, using professional labor at an average rate of \$41/hour.”⁵⁶ NOAA-OCIO provided no support for this estimate, and no other information beyond this bald statement. It did not provide, for example, how such estimate related to any search terms it may have used or planned to use to arrive at this result, or to any description of the type of search it would had already performed or planned to perform. In other words, if did not conduct a preliminary search that was “reasonably calculated to uncover all relevant documents,” it could not have come up with a reasonable FOIA fee estimate. Nevertheless, NOAA-OCIO has insisted, pursuant to 15 C.F.R. §4.11(i)(2) that ITSSD agree to prepay its estimate before the agency proceeds to ‘act’ on its request. This is nothing more than a disguised bad faith effort to conduct a good faith search for requested records under FOIA.

E. Notwithstanding NOAA-OCIO’s Failure to Render a Timely ‘Determination’ With Respect to its Denial of ITSSD’s AMB Fee Waiver Request, ITSSD Elects to Pursue this Appeal on the Merits by Resting on the Statements of Fact and Law and the Analyses Contained Therein

ITSSD submits that the Fee Waiver Request it filed on December 5, 2014 sufficiently explains how the AMB FOIA Request satisfies each and every one of the requirements of 15 C.F.R. §4.11(k)(1)-(3).

First, the AMB FOIA Request seeks disclosure of reasonably described agency records, including those relating to specifically identified NRC/NAS peer review contracts, NRC/NAS climate study/report development contracts, NOAA climate science research-related grant-funded contracts issued to universities and nonprofits participating in NOAA’s Cooperative Institutes Program, and NOAA-established ad hoc federal advisory committees involved with the development and/or peer review of NOAA-developed climate science-related HISAs:

- A. the subject of which records concern “identifiable operations or activities of the Federal Government,” consistent with 15 C.F.R. §4.11(k)(2)(i), as described in Section II, Factor 1 of the AMB Fee Waiver Request;
- B. which records, if disclosed, would be “meaningfully informative” about these critically important “government operations or activities”, and consequently, “likely to contribute to the [public’s] understanding” of them, consistent with 15 C.F.R. §4.11(k)(2)(ii), as described in Section II, Factor 2 of the AMB Fee Waiver Request;
- C. which records, if disclosed, would contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester, taking into account the requester’s demonstrated ability and intention to effectively convey such information to the public, consistent with 15 C.F.R. §4.11(k)(2)(iii), as described in Section II, Factor 3 of the AMB Fee Waiver Request; *and*
- D. which, if disclosed are likely to contribute ‘significantly’ to public understanding of government operations or activities, consistent with 15 C.F.R. §4.11(k)(2)(iv), as described in Section II, Factor 4 of the AMB Fee Waiver Request.

Second, the Requester (ITSSD) seeking disclosure of the agency records reasonably described in the AMB FOIA Request (as summarized above) has sufficiently demonstrated that:

- A. it has no known or identifiable direct commercial interest that would be furthered by the requested disclosure of such records, consistent with 15 C.F.R. §4.11(k)(3)(i), as described in Section II, Factor 5 of the AMB Fee Waiver Request; *and*
- B. any potentially identifiable indirect commercial interest it ultimately may have in the disclosure of such records is not sufficiently great in magnitude in comparison with the

public interest in disclosure thereof, such that the disclosure of the requested records is “not primarily in the commercial interests of the requester,” consistent with 15 C.F.R. §4.11(k)(3)(ii), as described in Factor 6 of the AMB Fee Waiver Request.

III. CONCLUSION

ITSSD’s AMB Fee Waiver Request shows not only “a connection between the material sought and a matter of genuine public concern, but...also indicate[s] that a fee waiver or reduction will primarily benefit the public.”⁵⁷ In other words, ITSSD’s AMB Fee Waiver Request shows ITSSD has satisfactorily demonstrated its satisfaction of the six fee waiver factors set forth in 15 C.F.R. §4.11(k)(1)-(3).

NOAA Office of General Counsel should recall that courts have held that if it is a ‘close call’ as to whether a requestor has met one of the factors, in light of Congressional intent that the fee waiver provision be liberally construed, a non-commercial entity should be given the benefit of the doubt and be granted the fee waiver.⁵⁸ In consideration thereof, NOAA-OCIO’s denial of ITSSD’s request to have its fees waived was made in error and should be overturned.

ENDNOTES

¹ See U.S. Department of Commerce, National Oceanic and Atmospheric Administration Office of the Chief Information Officer High Performance Computing and Communications, *Denial of ITSSD Fee Waiver Request on Amended/Modified/Bifurcated FOIA Request No. DOC-NOAA-2014-001694* (Dec. 11, 2014), available at: <https://nebula.wsimg.com/b9f484e2c03a5683085e8037aa75b443?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

² See Institute for Trade, Standards and Sustainable Development, *Request for Waiver of Fees With Respect to Amended/Modified/Bifurcated FOIA Request No. DOC-NOAA-2014-001694* (Dec. 5, 2014), available at: <https://nebula.wsimg.com/22066faa4e5166f932dca392680c8334?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

³ See Institute for Trade, Standards and Sustainable Development, *FOIA Request No. DOC-NOAA-2014-000714* (filed March 26, 2014), available at: <https://nebula.wsimg.com/1ec660f37bd6e62a136dbf64b95ff247?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1> (This FOIA request was originally filed as seven separate FOIA requests with NOAA-HQ and six NOAA Collaboration Team offices, but was immediately consolidated by NOAA-HQ as of April 1, 2014).

⁴ See U.S. Department of Commerce, National Oceanic and Atmospheric Administration Office of the Chief Information Officer, High Performance Computing and Communications, *Re: FOIA Request No. DOC-NOAA-2014-000714* (April 1, 2014), available at:

<https://nebula.wsimg.com/37bd0311492047e8e8a9a6cf331122b0?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1> (indicating that NOAA’s National FOIA Office (Office of the Chief Information Officer High Performance Computing and Communications (“OCIO”)) denied ITSSD’s FOIA fee waiver request on the grounds that it did not sufficiently “explain in detail how disclosure of the records requested would satisfy all the requirements for a fee waiver,” and that NOAA-OCIO also had sought clarification of such request by April 22).

⁵ See Institute for Trade, Standards and Sustainable Development, *ITSSD FOIA Request Clarification - Consolidated FOIA Request No. DOC-NOAA-2014-000714* (May 5, 2014), available at: <https://nebula.wsimg.com/c25e625aa81981536c980ec0f3307791?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1> (containing ITSSD’s May 5, 2014 filing with NOAA-OCIO of a detailed annotated FOIA request clarification).

⁶ See Institute for Trade, Standards and Sustainable Development, *ITSSD FOIA Fee Waiver Request Clarification Consolidated FOIA Request No. DOC-NOAA-2014-000714* (May 5, 2014), available at: <https://nebula.wsimg.com/8a36cc18e5e7c578018f7a8cf851766d?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1> (containing ITSSD’s filing of an annotated clarified FOIA fee waiver request of the same date).

⁷ See U.S. Department of Commerce, National Oceanic and Atmospheric Administration Office of the Chief Information Officer, High Performance Computing and Communications, *Re: FOIA Request No. DOC-NOAA-2014-000714* (May 28, 2014), available at: <https://nebula.wsimg.com/8b680576f0c313e223b87bf7c85995fa?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1> (containing NOAA-OCIO’s denial of ITSSD’s clarified fee waiver request because it did “not show that [ITSSD] would significantly advance the public understanding of a specific government operation or activity [...] and had] not expressed a distribution plan with details about which websites will distribute the records, if any, to the general public or publication where [ITSSD] staff and Board of Advisor members have written commitments to publish the information that would then be accessible to the general public”).

⁸ On June 12, 2014, ITSSD participated in a conference phone call with a representative from NOAA-OCIO and a representative from NOAA’s Office of General Counsel (“NOAA-OGC”). The purpose of the call was to address NOAA apparent ‘confusion(s)’ concerning the scope and focus of current ITSSD FOIA Request No. NOAA-HQ-2014-000714, particularly, its relevance to the FOIA requests and clarifications ITSSD had then filed with the EPA. During the call, these NOAA personnel indicated that NOAA would not respond to ITSSD’s FOIA request, even as clarified, and suggested that if ITSSD desired a response, at all, it would need to withdraw the current request and replace it with a newly filed FOIA request. This conference call had been recorded in accordance with New Jersey state privacy laws.

⁹ See Institute for Trade, Standards and Sustainable Development, *Filing of New ITSSD FOIA Request [[FOIA Request No. DOC-NOAA-2014-001694]; Withdrawal of FOIA Request No. DOC-NOAA-2014-000714* (Sept. 22, 2014), available at:

<https://nebula.wsimg.com/86e0c3d9f0c18e77b33e25d935498bcc?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹⁰ See Institute for Trade, Standards and Sustainable Development, *Filing of New FOIA Fee Waiver Request [FOIA Request No. DOC-NOAA-2014-001694] to Accompany New FOIA Request; Withdrawal of Fee Waiver Request Relating to Withdrawn FOIA Request No. DOC-NOAA-2014-000714* (Sept. 22, 2014), available at: <https://nebula.wsimg.com/f05a58d9e07c072567b5ba64b612b984?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹¹ See *Supplement to New FOIA Fee Waiver Request Accompanying New FOIA Request No. DOC-NOAA-2014-001694* (Sept. 30, 2014), available at: <https://nebula.wsimg.com/2b1651bcb6ed66d314bd552939b35b89?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹² *Id.*

¹³ See *DOC-NOAA Request for ITSSD FOIA Request Clarification Re: Request No. DOC-NOAA-2014-001694* (Sept. 30, 2014), available at: <https://nebula.wsimg.com/b975490b7cae26ae5075ec67e12b9eef?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹⁴ See *ITSSD Clarification of New FOIA Request No. DOC-NOAA-2014-001694* (Oct. 1, 2014), available at: <https://nebula.wsimg.com/43d251976355e191bb523611a8fd1cd2?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹⁵ See United States Department of Commerce National Oceanic and Atmospheric Administration, Office of the Chief Information Officer High Performance Computing and Communications, *Denial Re: FOIA Request No. DOC-NOAA-2014-001694* (Oct. 10, 2014), available at: <https://nebula.wsimg.com/31e7bfa1e15c1162c804285d7b5e8140?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹⁶ *Id.*, at p. 2.

¹⁷ See Institute for Trade, Standards and Sustainable Development, *FOIA Request No. DOC-NOAA-2014-001694 - Tranche/Cache of Clearly and Obviously Identified NOAA Files* (Oct. 27, 2014), available at: <https://nebula.wsimg.com/27e342084d64f57315a79f9a426c9800?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹⁸ See *DOC-NOAA Email Acceptance of ITSSD Amendment/Modification/Bifurcation of FOIA Request No. DOC-NOAA-2014-001694* (Nov. 7, 2014), available at: <https://nebula.wsimg.com/49d9ddec8309db3a37024d77c7b6d781?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹⁹ See Institute for Trade, Standards and Sustainable Development, *FOIA Request No. DOC-NOAA-2014-001694 - Tranche/Cache of Clearly and Obviously Identified NOAA Files* (Oct. 27, 2014), *supra*.

²⁰ See *DOC-NOAA Email Acceptance of ITSSD Amendment/Modification/Bifurcation of FOIA Request No. DOC-NOAA-2014-001694* (Nov. 7, 2014), *supra*.

²¹ See *Email Dated November 12, 2014 Transmitting New NOAA FOIA Office Undated, Unsigned and Letterhead-Free Fee Estimate* (Nov. 12, 2014), available at: <https://nebula.wsimg.com/789568e994112ab08c9be9ce348e5302?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

²² See *DOC-NOAA Undated, Unsigned and Letterhead-Free FOIA Fee Estimate Transmitted via Email Dated November 12, 2014* (Nov. 12, 2014), available at: <https://nebula.wsimg.com/05f5d2f53b3f56b30fed851d96020157?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

²³ See Institute for Trade, Standards and Sustainable Development, *ITSSD Reply to DOC-NOAA Undated, Unsigned and Letterhead-Free Fee Estimate Transmitted via Email Dated November 12, 2014* (Nov. 14, 2014), available at: <https://nebula.wsimg.com/03611f04fa470c17705a07ef2838bacf?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

²⁴ See *DOC-NOAA Response via Email Dated November 21, 2014, to ITSSD Reply of November 14, 2014* (Nov. 21, 2014), available at:

<https://nebula.wsimg.com/30902cbb39699e770159161528c33833?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

²⁵ See Institute for Trade, Standards and Sustainable Development, *ITSSD Reply of November 28, 2014, to DOC- NOAA Response via Email Dated November 21, 2014, Re: Amended/Modified/Bifurcated FOIA Request No. DOC-NOAA-2014-001694* (Nov. 28, 2014), available at: <https://nebula.wsimg.com/a3a245a8380ed13a3ac68c8d42439f36?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

²⁶ See 15 C.F.R. §4.7(b).

²⁷ See U.S. Department of Commerce, National Oceanic and Atmospheric Administration Office of the Chief Information Officer High Performance Computing and Communications, *Denial of ITSSD Fee Waiver Request on Amended/Modified/Bifurcated FOIA Request No. DOC-NOAA-2014-001694* (Dec. 11, 2014), *supra* at p. 2.

²⁸ See U.S. Department of Commerce, National Oceanic and Atmospheric Administration Office of the Chief Information Officer, High Performance Computing and Communications, *Re: FOIA Request No. DOC-NOAA-2014-000714* (May 28, 2014), *supra* at pp. 1-2.

²⁹ See 15 C.F.R. §4.7(b)(2).

³⁰ *Id.*

³¹ See *Friends of the Coast Fork v. U.S. Dept. of Interior*, 110 F.3d 53, 55 (9th Cir. 1997) (reiterating that agency's letter “must be reasonably calculated to put the requester on notice” as to reasons for the fee waiver denial).

³² See *Shermco Industries, Inc. v. SEC. of US Air Force*, 452 F. Supp. 306, 317 (N.D. Tex. 1978), citing *Seafarers International Union AFL-CIO v. Baldovin*, 508 F.2d 125 (5th Cir. 1975), vacated on other grounds, 511 F.2d 1161 (5th Cir. 1975); *Washington Research Project Inc. v. HEW*, 164 U.S.App. 169, 504 F.2d 238, cert den'd, 421 U.S. 963, 95 S.Ct. 1951, 44 L.Ed.2d 450 (1974).

³³ See 5 U.S.C. §552(a)(6)(A)(i)

³⁴ See 5 U.S.C. §552(a)(6)(C)(i).

³⁵ See *Shermco Industries, Inc. v. Secretary of the United States Air Force*, 452 F. Supp. at 317.

³⁶ *Id.*

³⁷ *Id.*, at fn 7.

³⁸ *Id.*, citing U.S. Const. Amendment 14.

³⁹ See *Oglesby v. Dep't of Army*, 920 F.2d 57, 65 (D.C. Cir. 1990) citing *Shermco Industries v. Secretary of the United States Air Force*, 452 F.Supp. 306 (N.D.Tex.1978), rev'd on other grounds, 613 F.2d 1314 (5th Cir.1980).

⁴⁰ See 5 U.S.C. § 552(a)(4)(A)(vii) (“(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo, provided that the court's review of the matter shall be limited to the record before the agency.”); See also *Independence Mining Co., Inc. v. Babbitt*, 105 F.3d 502, slip op. 649, 668 (9th Cir. 1997) (“On judicial review, we cannot consider new reasons offered by the agency not raised in the denial letter”), citing *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 631 n. 31, 65 L. Ed. 1010, 100 S. Ct. 2844 (1980) (“The rule barring consideration of *post hoc* agency rationalizations operates where an agency has provided a particular justification for a determination at the time the determination is made, but provides a different justification for that same determination when it is later reviewed by another body”).

⁴¹ See *Env'tl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 432 F.3d 945, 947 (9th Cir. 2005) (“ ; See *Friends of the Coast Fork v. U.S. Dept. of the Interior*, 110 F.3d 53, 55 (9th. Cir 1997) (“Our review is limited to the record before the agency, and this applies just as much to the reasons the agency offered for denial as it does to the evidence the agency offered, 5 U.S.C. §52(a)(4)(A)(vi); [*McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282 (9th Cir.1987)] MES, 835 F.2d at 1284. [...] Taken together, these principles lead us to the following conclusion: on judicial review, the agency must stand on whatever reasons for denial it gave in the administrative proceeding. If those reasons are inadequate, and if the requesters meet their burden, then a full fee waiver is in order.”) *Id.*

⁴² See *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (per curiam); *Schoenman v. FBI*, 604 F. Supp.2d 174, 188 (D.D.C. 2009) (citing, *inter alia*, *Forest Guardians*, 416 F.3d at 1177).

⁴³ See 5 U.S.C. § 552(a)(4)(A)(iii).

⁴⁴ See, e.g., *Forest Guardians v. Department of Interior*, 416 F.3d 1173, 1177-78 (10th Cir. 2005); *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003); *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987).

⁴⁵ See *Institute for Wildlife Protection v. U.S. Fish and Wildlife Service*, 290 F.Supp.2d 1226, 1232 (2003).

⁴⁶ See *Judicial Watch, Inc.*, 326 F.3d at 1311. See also *McClellan Ecological Seepage Situation*, 835 F.2d at 1284.

⁴⁷ See *Damon Elliott v. National Archives and Records Administration*, 518 F. Supp. 2d 257, 259 (D.C.D.C. 2007), quoting *Valencia-Lucena v. United States Coast Guard*, 336 U.S. App. D.C. 386, 180 F. 3d 321, 325 (D.C. Cir. 1999), quoting *Truitt v. Dep't of State*, 283 U.S. App. D.C. 86, 897 F.2d 540, 542 (D.C. Cir. 1990). See also *Elisabeth Kidder v. Federal Bureau of Investigation*, 517 F. Supp. 2d 17, 22 (D.C.D.C. 2007) quoting same.

⁴⁸ See *Damon Elliott v. National Archives and Records Administration*, 518 F. Supp. 2d at 259, quoting *Oglesby v. United States Dep't of Army*, 287 U.S. App. D.C. 126, 920 F.2d 57, 68 (D.C. Cir. 1990) (citing *Weisberg v. United States Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). See also *Elisabeth Kidder v. Federal Bureau of Investigation*, 517 F. Supp. 2d at 22 citing *Campbell v. United States Dep't of Justice*, 334 U.S. App. D.C. 20, 164 F. 3d 20, 27 (D.C. Cir. 1998).

⁴⁹ See *Elisabeth Kidder v. Federal Bureau of Investigation*, 517 F. Supp. 2d at 22 citing *Steinberg v. United States Dep't of Justice*, 306 U.S. App. 240, 23 F.3d 548, 551 (D.C. Cir. 1994), citing *Weisberg v. United States Dep't of Justice*, 745 F.2d at 1485.

⁵⁰ See *Damon Elliott v. National Archives and Records Administration*, 518 F. Supp. 2d at 259, quoting *Iturralde v. Comptroller of the Currency*, 354 U.S. App. D.C. 230, 315 F. 3d 311, 313-314 (D.C. Cir. 2003) (citing *Valencia-Lucena*, 180 F. 3d at 326).

⁵¹ See *Damon Elliott v. National Archives and Records Administration*, 518 F. Supp. 2d at 259, quoting *Chamberlain v. United States Dep't of Justice*, 957 F. Supp. 292, 294 (D.D.C.) aff'd per curiam, 326 U.S. App. D.C. 337, 124 F.3d 1309 (D.C. Cir. 1997).

⁵² See *South Yuba River Citizens League and Friends of the River v. National Marine Fisheries Service*, 2008 U.S. Dist. LEXIS 107177 at 50-51 (E.D.Ca. 2008), citing *Meeropol v. Meese*, 252 U.S. App. D.C. 381, 790 F.2d 942, 953 (D.C. Cir. 1986).

⁵³ See *South Yuba River Citizens League and Friends of the River v. National Marine Fisheries Service*, 2008 U.S. Dist. LEXIS 107177 at 50-51 (E.D.Ca. 2008), citing *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1328 (9th Cir. 1995); *Founding Church of Scientology of Washington, D.C. v. Nat'l Sec. Agency*, 197 U.S. App. D.C. 305, 610 F.2d 824, 837 (D.C. Cir. 1979).

⁵⁴ See *South Yuba River Citizens League and Friends of the River v. National Marine Fisheries Service*, 2008 U.S. Dist. LEXIS 107177 at 50-51 (E.D.Ca. 2008), citing *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d at 1328 (9th Cir. 1995).

⁵⁵ See *South Yuba River Citizens League and Friends of the River v. National Marine Fisheries Service*, 2008 U.S. Dist. LEXIS 107177 at 50-51 (E.D.Ca. 2008), citing *McGehee, III v. Central Intelligence Agency*, 697 F.2d 1095, 1110 (D.C. Cir. 1983).

⁵⁶ See *DOC-NOAA Response via Email Dated November 21, 2014, to ITSSD Reply of November 14, 2014* (Nov. 21, 2014), *supra*.

⁵⁷ See *National Treasury Employees Union v. Griffin*, 811 F.2d 644, 648 (D.C.Cir.1987).

⁵⁸ See *Forest Guardians v. Dept. of the Interior*, 416 F. 3d 1173 (10 Cir. 2005).