UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID YANOFSKY, Plaintiff, v. U.S. DEPARTMENT OF COMMERCE, Defendant.	)	Civil Action No. 16-951 (KBJ)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiff has failed to overcome Defendant Department of Commerce's showing in its Motion for Summary Judgment. First, there is no basis to Plaintiff's procedural argument seeking to prevent the Court from considering the merits of DOC's defense. Contrary to Plaintiff's contention, DOC has not offered a new justification in this litigation but has consistently asserted that the records requested by Plaintiff were being withheld under the FOIA Displacement Provision, 5 U.S.C. § 552(a)(4)(A)(vi), which provides that FOIA fees are superseded by a fee displacement statute. Defendant has merely clarified the particular statute granting it authority to charge fees for the publications at issue. Plaintiff offers no authority holding that the Court may not consider the citation to a new statute and there is no conceivable reason why such a rule would exist. But even if DOC's citation to a new statute were somehow considered a new justification, DOC would be entitled to present new justifications here because DOC was deprived of the opportunity to clarify the record at the administrative stage when Plaintiff filed his Complaint prior to receiving DOC's response to his administrative appeal.

Second, Plaintiff has not overcome Defendant's showing that the Appropriations Act qualifies as a superseding fee statute under the Displacement Provision. The Appropriations Act identifies "particular types of records" and does so with greater specificity than other statutes previously held to be superseding. Also, the Appropriations Act, in conjunction with the Mutual Educational and Cultural Exchange Act of 1961 ("MECEA"), plainly provides for "setting the level of fees." And Plaintiff's argument that a superseding fee statute must mandate, not merely authorize, the agency to charge fees is undermined by on-point D.C. Circuit authority, the statutory text, and by comparison to other statutes held to be superseding or described as such in the legislative history.

Third, there can be no credible dispute that the FOIA Displacement Provision displaces not only the FOIA's fee setting provisions but also its fee waiver provision. The Displacement Provision clearly states that "[n]othing in this subparagraph" – referring to the subparagraph that includes the fee waiver – "shall supersede fees chargeable under" a qualifying statute. Thus, the FOIA's fee waiver provision cannot displace fees chargeable under another statute such as the Appropriations Act. This conclusion makes good sense as it would undermine numerous statute-based fee programs if agencies had to grant fee waivers under the conditions set forth by the FOIA.

Accordingly, for these reasons, as discussed in greater detail below, the Court should grant summary judgment in favor of Defendant and deny Plaintiff's Motion for Summary Judgment.[1]

I. Defendant has Consistently Maintained Throughout the Administrative Process and this Litigation that the Documents at Issue Were Properly Withheld Pursuant to the FOIA Displacement Provision

The FOIA states that "[i]n any action by a requester regarding the waiver of fees . . . the court shall determine the matter de novo: [p]rovided [t]hat the court's review shall be limited to the record before the agency." 5 U.S.C. § 552(a)(4)(A)(vii). Based on this provision, Plaintiff contends that the Court may only consider arguments made at the administrative level, despite there being no statutory language to that effect. Opp'n at 12-14. But assuming for purposes of argument that Plaintiff's characterization of the standard of review is correct, even a cursory glance at the administrative record reveals that DOC's justification for denying Plaintiff's application for a fee waiver has been consistent throughout the administrative process and this federal court litigation.

[1] Defendant does not herein address Plaintiff's arguments that Plaintiff meets the statutory requirements for a fee benefit and fee waiver, Opp'n at 8-12, because they are beyond the scope of the reason for Defendant's denial of Plaintiff's request.

As the record clearly reflects, DOC explained to Plaintiff in a March 30, 2015 letter that:

> Both the I-94 and the I-92 records are being withheld under 5 U.S.C. § 552(a)(4)(A)(vi), which provides that FOIA fees are superseded by 'fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.' This is referred to as the displacement provision.

Ex. D at 1; *see also* Pl's Statement of Material Facts as to Which There is No Genuine Issue ¶ 77. DOC's position remains the same in this litigation. In its summary judgment motion, DOC argued that its withholding of records is proper under Section 552(a)(4)(A)(vi) because Plaintiff has failed to pay applicable fees. *See generally* Motion. Accordingly, contrary to Plaintiff's contentions, DOC has not changed its position since the administrative proceeding.

To be sure, in its March 30, 2015 letter, DOC also cited 15 U.S.C. § 1525 as the relevant superseding fee statute, Ex. D at 1-2, and has since corrected that citation, *see* Motion at 4. In doing so, DOC plainly did not create a new justification for withholding records. Plaintiff's argument to the contrary is meritless and unsupported by relevant authority. Indeed, it was not necessary for DOC to include *any* citation to a superseding fee statute in its denial letter. *See Friends of the Coast Fork v. DOI*, 110 F.3d 53, 55 (9th Cir. 1997) (FOIA denial letter must only "be reasonably calculated to put the requester on notice as to the deficiencies in the requester's case"); *Judicial Watch, Inc. v. GSA*, 2000 U.S. Dist. LEXIS 22872, at *15 (D.D.C. Sept. 25, 2000) (same). DOC could have omitted entirely from its letter the paragraphs discussing 15 U.S.C. § 1525, in which case Plaintiff would be unable to make the argument it now asserts. Simply by supplying additional detail – a citation to the superseding fee statute – the agency did not somehow prevent itself from later citing another applicable statute.

The flaw in Plaintiff's argument, accordingly, is that his definition of a "new argument" is much too broad. A truly new argument would be, for example, that Plaintiff is not a "representative of the news media" as defined by 5 U.S.C. § 552(a)(4)(A)(ii)(III) or that the

records in question were not sought for a commercial use as required by Section 552(a)(4)(A)(ii)(II), because those arguments were not made in the denial letter. In contrast, here, DOC's justification for withholding – that Plaintiff failed to pay applicable fees as required by operation of Section 552(a)(4)(A)(vi) – was asserted both during the administrative process and again in this litigation. The only difference is the particular statute cited for providing DOC authority to charge fees.

Importantly, there is no logical reason why the mere citation of a new statute should preclude this Court's review. Whether a statute qualifies as a superseding fee statute is a pure question of law for the Court to resolve, not an issue requiring factual development at the administrative level. Indeed, the statement by Representatives English and Kindness, which Plaintiff is fond of citing, described the "purpose" of the standard of review provision in 5 U.S.C. § 552(a)(4)(A)(vii) as "to allow the courts to exercise independent judgment on the issue of whether a requester is entitled to a fee waiver." 132 Cong. Rec. H. 9455 (1986). Plaintiff's absurd contention that the Court may not consider newly-cited statutes in the exercise of its independent judgment is contrary to the very purpose of the standard of review provision. In the analogous situation of an appeal, in which parties are precluded from making arguments that they failed to raise in the district court, parties may nevertheless cite new authority in support of positions taken below. *See United States v. Rapone*, 131 F.3d 188, 196 (D.C. Cir. 1997) ("[The defendant] is not attempting to raise the issue of a jury trial for the first time on appeal. Rather, he simply offers new legal authority for the position that he repeatedly advanced before the district court—that he was entitled to have his case tried before a jury."); *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 773 n.20 (7th Cir. 2010) ("A litigant may cite new authority

on appeal."); *Costantino v. TRW, Inc.*, 13 F.3d 969, 981 n.13 (6th Cir. 1994) ("a new citation to relevant, binding authority is as welcome on appeal as in the court below").

Furthermore, even if, by citing to a new statute, DOC had somehow asserted a new justification, Plaintiff still would not prevail. Where, as here, a plaintiff claims constructive, as opposed to actual, exhaustion, the agency is not limited to arguments raised at the administrative level. DOC "cannot be faulted for failing to raise arguments during administrative proceedings when the Plaintiff elected to bypass administrative proceedings altogether." *Rosenberg v. United States Dep't of Immigration*, 954 F. Supp. 2d 1, 11 (D.D.C. 2013) (holding that because plaintiff had claimed constructive exhaustion, the agency was "not barred from raising the fee issue for the first time in this Court"). Plaintiff filed his complaint before the administrative record was complete, thus depriving DOC of the opportunity to correct the record at the administrative level.[2] Accordingly, because Plaintiff filed suit before the conclusion of the administrative process, DOC is not prohibited from raising new arguments, and certainly not from simply citing a new statute.

II. The Appropriations Act is a Superseding Fee Statute

Plaintiff has failed to overcome DOC's showing that the Appropriations Act is a statute "specifically providing for setting the level of fees for particular types of records" under 5 U.S.C. § 552(a)(4)(A)(vi).

Plaintiff argues that the Appropriations Act is not a superseding fee statute because it supposedly does not "identify any 'particular types of records.'" Opp'n at 17. Plaintiff, however, mischaracterizes the degree of specificity required in identifying types of records. In

[2] Plaintiff alleges that he filed an administrative appeal and that the appeal was still pending at the time Plaintiff filed suit. *See* Complaint ¶ 58; *see also Aftergood v. CIA*, 225 F. Supp. 2d 27, 29 (D.D.C. 2002) ("Constructive exhaustion occurs when the time limits by which an agency must reply to a FOIA claimant's request or appeal (if there is an appeal) expire.").

Oglesby v. U.S. Dep't of the Army, 79 F.3d 1172 (D.C. Cir. 1996), the D.C. Circuit found the FOIA Displacement Provision to be satisfied by a statute that referred generally to "materials transferred to [the Archivist's] custody[.]" *Id*. at 1177. "Although the 'types of records' [the statute] describes do indeed encompass the vast bulk of material the agency deals with, the material is nonetheless accurately identified." *Id*. Similarly, here the Appropriations Act identifies particular types of records because it refers to "services provided as part of these activities" with "these activities" referring to "international trade activities of the Department of Commerce." Pub. L. No. 114-113, 129 Stat. 2286-7 (2015). DOC's international trade activities specifically include programs to "collect and publish comprehensive international travel and tourism statistics," 22 U.S.C. § 2122, such as the I-92 and I-94 Programs. Thus, the "particular types of records" at issue are described with adequate specificity and, indeed, more specificity than was held sufficient in *Oglesby*, where the statute merely referred generally to "materials transferred to [the Archivist's] custody[.]"

Contrary to Plaintiff's argument (Opp'n at 17), the Appropriations Act is more descriptive than the User Fee Statute, which only refers to "a service or thing of value provided by the agency." 31 U.S.C. § 9701. Again, the Appropriations Act specifically addresses "services provided as part of" the "international trade activities of the Department of Commerce" and such activities include programs to "collect and publish comprehensive international travel and tourism statistics[.]" The description of "types of records" by the Appropriations Act is similar to the superseding fee statute in *Wade v. DOC*, 1998 U.S. Dist. LEXIS 23251, *8 (D.D.C. Mar. 16, 1998). The statute in *Wade* – 15 U.S.C. § 1153 – authorized DOC to establish fees for "services performed or for documents or other publications furnished under this Act." "[P]ublications furnished under this Act" necessarily included "scientific, technical, and

engineering information" identified in another statute, 15 U.S.C. § 1152. Thus, the statute in *Wade* was sufficiently specific to qualify as a superseding fee statute. Here, Plaintiff can offer no reasonable basis for treating the Appropriations Act differently than the statute at issue in *Wade*. Accordingly, the Appropriations Act more than adequately describes "particular types of records."

Plaintiff next argues that the Appropriations Act does not specifically provide for setting the level of fees for records, apparently, because it does not identify the amounts of the fees or state how fees will be determined. Opp'n at 18. But a superseding fee statute need only "provid[e] for setting the level of fees." 5 U.S.C. § 552(a)(4)(A)(vi). It need not also identify the fee amount or define a method to determine it. Even the OMB guidance relied upon by Plaintiff rejects Plaintiff's misinterpretation of the statute. OMB explained that "a number of commentators misquoted the plain wording of the [displacement] provision by insisting that a qualifying statute must set a specific level of fees rather than specifically providing for the setting of fees by an agency." 52 Fed. Reg. 10012.

Here, the Appropriations Act, in conjunction with the specifically cited provision of the MECEA, plainly provides "for setting the level of fees" because it authorizes DOC to accept "funds" which "shall include payment for assessments for services provided as part of" DOC's "international trade activities." 22 U.S.C. § 2455(f); Pub. L. No. 114-113, 129 Stat. 2286-7 (2015). Plaintiff's illogical interpretation is apparently that the Appropriations Act merely authorizes DOC to accept payment but not to set the amount of that payment. How, then, would the amount of the payment be set if not by DOC? Plaintiff can provide no credible answer. If nothing else, the statute's use of the term "assessments" strongly implies that DOC will set the level of the applicable fees. *See Strategic Hous. Fin. Corp. v. United States*, 608 F.3d 1317,

1325 (Fed. Cir. 2010) (defining "assess" as "[t]o settle, determine, or fix the amount of (taxation, fine, etc.) to be paid by a person or community"). Accordingly, the only reasonable interpretation of the Appropriations Act is that it provides DOC authority to set the level of fees.

The fact that, as Plaintiff observes (Opp'n at 18), some superseding fee statutes go further and indicate how fees will be set does not mean that every statute must do so in order to be considered a superseding fee statute under the FOIA. For example, Plaintiff conveniently ignores the superseding fee statute in *Wade*, which merely provided authority to "establish . . . a schedule or schedules of reasonable fees or charges" but did not specify the amount of fees or explain how the fees would be determined. *See* 15 U.S.C. § 1153.

Lastly, Plaintiff states that a superseding fee statute must mandate, not merely authorize, the agency to charge fees. Opp'n at 19-20. The D.C. Circuit disagrees. In *Oglesby*, the Court of Appeals squarely held that "on its face, the fee-waiver exception provision [of FOIA] requires neither a statutorily fixed fee nor a mandatory fee," and the Court rejected the plaintiff's argument, similar to Plaintiff's here, that such requirements were "implied by the legislative history of FOIA." 79 F.3d at 1177. The Court also specifically held that the statute in question in that case qualified as a superseding fee statute even though it did not "mandate[] the assessment of fees." *Id.*; *see also* Opp'n at 20 (conceding that the statute in *Oglesby* "only 'authorize[d]' the Archivist" to charge fees). Accordingly, D.C. Circuit precedent on this point is clear and should be followed in this case.

Attempting to escape the application of binding Circuit authority, Plaintiff resorts to arguing that this Court should disregard *Oglesby* because certain OMB guidelines that he believes compel a different result allegedly "were not before, and were not considered by, the *Oglesby* court." Opp'n at 20. But it is demonstrably untrue that the OMB guidance was not

considered by the *Oglesby* court. To the contrary, the briefing in that case reveals that the plaintiff, in arguing that "the assessment of fees must be mandatory rather than permissive" in order for a statute to qualify as a superseding fee statute, cited the same OMB guidance now relied upon by Plaintiff in this case:

> Under the FOIA, the Office of Management and Budget is charged with the duty of promulgating fee guidelines. 5 U.S.C. § 552(a)(4)(A)(i). Its "Uniform Freedom of Information Act Fee Schedule and Guidelines" state that a statute which qualifies under Subparagraph (vi) is one that "specifically requires a government agency, such as the Government Printing Office (GPO) or the National Technical Information Service (NTIS), to set the level of fees for particular types of records...." 52 Federal Register 10017 (March 27, (1987) (emphasis added). Thus, to come within the exception provided in subparagraph (vi), the assessment of fees must be mandatory rather than permissive. NARA's fee statute is discretionary.

Oglesby v. U.S. Dep't of the Army, No. 94-5408, Brief for Appellant, 1994 WL 16182793, at 25-26 (D.C. Cir.). In its responsive appellate brief, the defendant in *Oglesby* cited the same OMB guidance. *See id*., Brief for Appellees, 1996 WL 33662263, at *5-6. Thus, the OMB guidelines indisputably were before and considered by the D.C. Circuit in *Oglesby*. The Circuit necessarily rejected the argument that the OMB guidance indicates that a superseding fee statute must be mandatory, and so should this Court.[3]

[3] The OMB regulation relied on by Plaintiff references two examples of statutes that "specifically provid[e] for setting the level of fees for particular types of records," namely those pertaining to the Government Printing Office ("GPO") and the National Technical Information Service ("NTIS"). 5 C.F.R. § 1303.30(b). Neither statute, however, mandates the charging of fees. NTIS's statute (15 U.S.C. § 1153), discussed below, authorizes but does not require the agency to charge fees. Likewise, GPO's statute (44 U.S.C § 1708) only sets a cost but does not require a charge. It also states that "a discount may be allowed as determined by the Superintendent of Documents," which implies discretion as to the charge. *Id*. Accordingly, the OMB regulation plainly cannot be read to mean that superseding fee statutes must mandate fees, where the examples it provides do not do that. In any event, to the extent that the regulation is inconsistent with the statute, it is appropriate to follow the statute. *See Bellum v. PCE Constructors Inc.*, 407 F.3d 734, 738-39 (5th Cir. 2005) ("If a statute is unambiguous, then the statute prevails over an inconsistent regulation.").

Similarly, *Wade* was also decided years after OMB's guidance was issued and yet the superseding fee statute in *Wade* did not require the agency to charge fees. *See* 1998 U.S. Dist. LEXIS 23251, at *8 (citing 15 U.S.C. § 1153 ("authoriz[ing]" the Secretary of Commerce to establish a fee schedule)); *compare* 15 U.S.C. § 1152 ("direct[ing]" the Secretary of Commerce to establish a clearinghouse for information). Thus, in *Wade*, the fact that the statute authorized, but did not require, DOC to charge fees did not prevent that statute from displacing FOIA fees.

Plaintiff, in arguing that the FOIA Displacement Provision requires a superseding fee statute to mandate fees, curiously avoids mention of the actual statutory language – the starting point for statutory interpretation. *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989) ("The starting point for our interpretation of a statute is always its language."). Here, the FOIA Ddisplacement Provision, 5 U.S.C. § 552(a)(4)(A)(vi), contains no indication whatsoever that a statute falling within its scope must mandate fees, as opposed to authorizing them: "Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records." To the contrary, the statute's reference to "fees chargeable" conveys discretion to charge such fees.

The legislative history is in accord. Even the English-Kindness statement, cited repeatedly by Plaintiff, identifies 44 U.S.C. § 1708 as an "example of a qualifying statute" and states that the statute simply "*allows* the Public Printer to set charges . . . ." 132 Cong. Rec. H. 9455 (1986) (emphasis added); *see also* Opp'n at 15 (quoting this language). The use of the word "allows" indicates agency discretion.

In sum, the plain language of 5 U.S.C. § 552(a)(4)(A)(vi) is satisfied in this case. There can be no credible dispute that the Appropriations Act, in conjunction with the other statutes

discussed above, authorizes DOC to set the level of fees for its publications under the I-92 and I-94 Programs, as it has been doing for decades.[4]

III. The FOIA Displacement Provision Applies to the Fee Waiver Provision as Well as to the Fee Setting Provisions

Plaintiff next argues that, even if the fee-setting provisions of FOIA are displaced by the Appropriations Act, the fee waiver provision is not displaced. Opp'n at 21-24. Plaintiff's interpretation lacks support and ignores the plain language of the Displacement Provision, which unambiguously states that it displaces all other provisions in that subparagraph of the statute, including the fee waiver provision.[5]

The FOIA statute contains a series of provisions relating to FOIA fees in subparagraph 5 U.S.C. § 552(a)(4)(A), including the following pertinent provisions. Part (i) provides that each agency shall promulgate regulations specifying fee schedules for FOIA requests. Part (ii) provides that such fees shall be limited in certain respects under certain conditions, including, under part (ii)(II), when records are not sought for commercial use and are requested by a

[4] Plaintiff speculates that DOC's Notice of revised fee schedule was published as a "*post hoc* attempt to manufacture a purported justification for the position taken by the DOC in this case." Opp'n at 19 n.5. It is unclear if Plaintiff intends his argument be taken seriously. To the extent he does, he clearly fails to understand the amount of time necessary for an agency to prepare and submit such a notice, which certainly could not be done just weeks after DOC was served with the complaint in this case. Plaintiff is also incorrect that FOIA required the Notice be promulgated pursuant to notice and comment. DOC's Notice involves a benefit that ITA provides to those interested in obtaining the travel and tourism publications, and was therefore exempt from notice and comment under 5 U.S.C. § 553(a)(2). The Notice was cleared after obtaining approval from two OMB offices, the Office of Information and Regulatory Affairs and the Office of Federal Financial Management. In any event, whether the Court considers the Notice or not, it does not impact DOC's legal analysis of the fee provisions.

[5] Defendant pauses to address Plaintiff's freewheeling use of such loaded terms as "misleading" and "disingenuous." Opp'n at 21. What Plaintiff relies upon as the basis for such weighty allegations is nothing more than DOC's unremarkable statement that "D.C. Circuit authority fully supports DOC's position[.]" Mot. at 4. That statement is correct; as explained above, *Oglesby* fully supports the conclusion that the Appropriations Act is a superseding fee statute. DOC never stated or implied that *Oglesby* decided the separate issue of whether a superseding fee statute displaces FOIA's fee waiver provision.

representative of the news media. Part (iii) (the fee waiver provision) provides that documents shall be provided without charge or at a reduced charge if disclosure is in the public interest and is not primarily in the commercial interest of the requester. Part (iv) imposes certain limitations on what costs may be recovered through the FOIA fee schedules. Finally, part (vi), the Displacement Provision, states that "*[n]othing in this subparagraph* shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records." (Emphasis added).

Therefore, according to the clear language of the statute itself, "[n]othing" in subparagraph 4(A) of Section 552(a), which includes the fee waiver provision (part iii), "shall supersede fees chargeable under a [superseding fee statute]." Stated differently, if there is a qualifying superseding fee statute, "[n]othing" in Section 552(a)(4)(A) shall supersede the fees chargeable by that statute. There is nothing ambiguous about this language. Congress easily could have drafted the displacement provision to read, for example, "nothing in Section 552(a)(4)(A)(ii) shall supersede fees . . . ." but it did not; it stated that "[n]othing in this subparagraph" shall do so. Not even Plaintiff can deny that the fee waiver provision is contained within the subparagraph referenced by the Displacement Provision. Consequently, the only possible reading of the Displacement Provision is that, consistent with its express language, no provision within Section 552(a)(4)(A) – including the fee waiver provision – shall supersede fees chargeable under a qualifying fee statute.

Moreover, Plaintiff also fails to offer a coherent textual argument for reading the statute as he does. Plaintiff contends that a superseding fee statute modifies only FOIA's fee schedule provisions in Section 552(a)(4)(A)(ii), Opp'n at 27, but that is just an unsupportable assumption. Plaintiff simply assumes that a superseding fee statute displaces only the FOIA fee schedule

provisions and then concludes that, therefore, a superseding fee statute "does not apply to FOIA's separate fee *waiver* provision." *Id.* Why that should be so, Plaintiff cannot say. Accordingly, Plaintiff has failed to offer any credible text-based reason for interpreting the Displacement Provision as he does.

Lacking a coherent argument grounded in the statutory text, Plaintiff turns to regulations and legislative history to argue, unpersuasively, for his strained interpretation. First, Plaintiff claims that DOC's FOIA regulations support his interpretation because of the regulatory language in 15 C.F.R. § 4.11(k). Opp'n at 22. But the fact that the fee schedule does not apply to fees charged under another statute, does not mean that the fee waiver provision would still apply in such instance. There are numerous regulatory provisions, one of which is the fee waiver provision, that do not apply to requests made outside the context of FOIA. Indeed, 15 C.F.R. § 4.11(k) goes on to state: "If records responsive to requests are maintained for distribution by agencies operating such statutorily based fee schedule programs, components shall inform requesters how to obtain records from those sources. Provision of such records is not handled under the FOIA." Because provision of such records are not handled under the FOIA, the FOIA provisions, including the FOIA fee waiver provision, do not apply to such requests.

Next, Plaintiff points to a comment in the legislative history of the 1986 Amendments to FOIA that the Displacement Provision "does not change current law." Opp'n at 23. But this comment simply means that the Displacement Provision was not intended to limit the effect of statutes that already authorized fees for documents and information. Indeed, the statement quoted by Plaintiff goes on to explain that "[t]he new language simply clarifies that statutes setting specific alternative bases for recovering dissemination costs can supersede FOIA fees." 132 Cong. Rec. H. 9455 (1986). Moreover, applying the Displacement Provision to the fee

waiver provision did not change "current law" because the law never allowed the fee waiver provision to waive non-FOIA fees. As Representative Kindness stated in 1986, "[c]urrent law permits agencies to charge *fees for the search and duplication of records responsive to a FOIA request* and, it requires a waiver of *those fees* when disclosure of the information can be considered as primarily benefitting the general public." *Id*. (emphasis added). In other words, the fees that are subject to waiver are "fees for the search and duplication of records responsive to a FOIA request." *Id*. The fee waiver provision never functioned to waive non-FOIA fees, such as those at issue in this case. For the same reason, the statement in the congressional record that "[a]ll of the fees chargeable to any requester may be waived," Opp'n at 24, is a reference to fees chargeable under the FOIA – waivable fees do not include non-FOIA fees and costs. Consequently, Plaintiff has failed to show that legislative history supports his misinterpretation.

IV. DOC's Position in This Case is Fully Consistent with the Policies Underlying the 1986 FOIA Amendments and the FOIA Itself

In his last attempt to avoid the clear meaning of the statutory provision, Plaintiff argues that a report by the House Committee on Government Operations ("House Report") reflects Congress's intent in passing the 1986 FOIA amendments and that DOC's position is inconsistent with that intent. Plaintiff's reliance on the House Report, however, is dubious at best. "Committee reports are highly manipulable, often unknown by most Members of Congress and by the President, and thus ordinarily unreliable as an expression of statutory 'intent.'" *Agri Processor Co. v. NLRB*, 514 F.3d 1, 13 (D.C. Cir. 2008) (Kavanaugh, J., dissenting). "Committee reports are not passed by the House and Senate and presented to the President, as required by the Constitution in order to become law." *Id*. (citing U.S. CONST. art. I, § 7). Moreover, as the Supreme Court has cautioned, "judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give

unrepresentative committee members – or, worse yet, unelected staffers and lobbyists – both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

Furthermore, as its title makes clear, the House Report is nothing more than a background "[p]olicy [o]verview" regarding the collection and dissemination of electronic information by the government. House Report 99-560 at 1. It does not even mention the 1986 FOIA amendments, much less opine on their meaning (or the meaning of any other pertinent legislation for that matter).

Nevertheless, Plaintiff insists that the House Report somehow reflects "Congress's concern" in passing the 1986 amendments. Opp'n at 25. Specifically, Plaintiff contends that Congress wanted to limit fees to only a document's "dissemination costs." *Id*. at 25-27. The main problem with Plaintiff's argument is that the actual text of the Displacement Provision says nothing about limiting fees to "dissemination costs" nor does it contain any other limitation on fees. 5 U.S.C. § 552(a)(4)(A)(vi). Instead, it provides, essentially, that all "fees chargeable" under a qualifying fee statute remain effective despite the FOIA. *Id*. Accordingly, the House Report, even if it purported to interpret the Displacement Provision, – which it does not – could not overcome the plain language of the statutory text.

Plaintiff's supposed policy argument also ignores the policy underlying the Displacement Provision itself, the purpose of which was to maintain the ability for agencies to charge fees for documents where authorized by law. Agencies must remain free to use their authority where permitted to increase revenues from users of specialized government information systems as a

supplement to agency appropriations. In some instances, such fees may exceed dissemination costs.

Here, Congress has authorized DOC to charge fees for the I-92 and I-94 Program publications. As reflected by the Displacement Provision, it is the clear policy of the Congress to allow agencies such as DOC to continue to charge for these types of publications. As DOC has explained, "[t]he fees collected for these reports go to pay ITA costs to develop the reports as well as to support research for the continuation and expansion of improvement to the data provided by the NTTO." 81 Fed. Reg. 39895. It would severely undermine the congressionally-authorized fee structure if Plaintiff were permitted to use FOIA to obtain these reports free-of-charge.

Lastly, there is no basis to Plaintiff's suggestion that DOC is attempting to shield its operations from public view. Opp'n at 27-28. To the contrary, DOC is not claiming that the documents sought by Plaintiff are protected from disclosure by any FOIA exemptions. Indeed, the agency regularly provides these materials to members of the public who pay applicable, statutorily-authorized fees. Plaintiff's position, moreover, is illogical because the materials in question do not relate to DOC's operations. Rather, the data contained in these publications is collected from foreign travelers by another agency, the Department of Homeland Security, and processed by DOC for users who pay for that service through fees. DOC's reasonable request that Plaintiff pay for the publications it seeks is not in conflict with any FOIA policies but instead furthers the federal policy preserving DOC's right to charge for these types of publications.

CONCLUSION

For the reasons set forth above, Defendant respectfully requests that this Court grant summary judgment in Defendant's favor and deny Plaintiff's Motion for Summary Judgment.

Respectfully submitted,

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