

National Aeronautics and Space Administration

Headquarters
Washington, DC 20546-001

February 22, 2018



Reply to Attn of:

Office of the General Counsel

Mr. Robert J. Katerberg,
Arnold & Porter LLP
601 Massachusetts Avenues, NW
Washington, DC 20001

In your December 5, 2017 appeal received by the National Aeronautics and Space Administration (NASA or the Agency) on December 14, 2017, you, as counsel to the requester, Dr. Nathan Myhrvold (Requester) appealed NASA's final determination under the Freedom of Information Act (FOIA), 5 U.S.C. §552 *et seq.*, issued by Krista Paquin, Associate Administrator for Mission Support Directorate, dated November 14, 2016. This letter is NASA's final decision on your appeal.

I. BACKGROUND

This appeal arises in the context of a series of FOIA requests submitted by the Requester to NASA.

NASA Headquarters

Beginning with the first FOIA request on July 11, 2016, Requester submitted to NASA Headquarters FOIA Office (NASA HQ), as follows:

"1. Recipients of Request

This request is directed towards any office, subdivision, or personnel who may have responsive records, and in particular the following offices, subdivisions, and personnel who are familiar with the subject area of this request and will be able to identify and locate responsive records with a reasonable amount of effort:

- a. Office of the Administrator
- b. Office of the Deputy Administrator
- c. Office of the Chief of Staff
- d. Office of the Chief Scientist
- e. Office of the Chief Technologist
- f. Office of Communications

g. Science Directorate

2. Detailed Description of the Records Sought

We request production of the following records:

- a. All documents related to Nathan Myhrvold, his research, and his inquiries to NASA's NEOWISE team and to other NASA officials. Subject matter of such documents may include:
 - i. Nathan Myhrvold's claims regarding Krichhoff's law;
 - ii. Nathan Myhrvold's inquiries leading up to the attached paper Comparing NEO Search Telescopes; and
 - iii. Nathan Myhrvold's inquiries about NEOWISE.
- b. All documents referencing the following articles (as a courtesy, we have attached a compilation of these articles in this request) [*electronic links to articles omitted*]:
 - i. Kenneth Chang, How Big Are Those Killer Asteroids? A Critic Says NASA Doesn't Know, New York Times (May 23, 2016);
 - ii. Eric Hand, Billionaire technologist accuses NASA asteroid mission of bad statistics, Science (May 23, 2016);
 - iii. Lee Billings, For Asteroid-Hunting Astronomers, Nathan Myhrvold Says the Sky is Falling, Scientific American (May 27, 2016);
 - iv. Rachel Feltman, That study critiquing NASA's 'bad science' on asteroids is pretty bad science, Washington Post (May 25, 2016);
 - v. Alan Boyle, Tech titl Nathan Myhrvold stirs up debate over search for killer asteroids, GeekWire (May 23, 2016).
- c. All documents discussing the accuracy of NEOWISE diameter estimates, including:
 - i. How the estimates were calculated;
 - ii. How the estimates should be described;
 - iii. Different approaches to calculation; and
 - iv. Policies or decisions regarding the accuracy and how NEOWISE-related papers or presentations should refer to them.

- d. All documents regarding comments about or criticism of NEOWISE data analysis by other researchers.
- e. All documents regarding policies or procedures regarding how to handle inquiries from external researchers about NEOWISE data.

These requests seek records stored in any form, whether recorded in writing, electronically, or by any other means.”

On July 19, 2016, the NASA HQ responded, indicating that it was unable to process the request since it was unclear what specific NASA records Requester was seeking, unless he provided additional clarification within 20 days, it would close the case. On August 5, 2016, Requester responded to the above letter, arguing that the request already described the records sought. Requester provided additional clarification and information, and then concluded that these suggestions and clarifications would allow for a proper search for the requested records. On August 10, 2016, the NASA HQ issued an initial response that it was unable to process the request indicating that Requester “did not provide any new information to clarify your [Requester] request.”

On August 29, 2016, the NASA HQ issued an initial determination indicating the Requester still had not provided any further clarification that would allow it to conduct a “reasonable and non-random search for Agency records,” and closed the case file.

Jet Propulsion Laboratory

On July 11, 2016, Requester submitted a second and similar FOIA request to the NASA Management Office (NMO) FOIA Office (NMO or JPL), as follows:

“1. Recipients of Request

This request is directed towards any office, subdivision, or personnel who may have responsive records, and in particular the following offices, subdivisions, and personnel who are familiar with the subject area of this request and will be able to identify and locate responsive records with a reasonable amount of effort:

- a. The NEOWISE team, including team members:
 - i. Amy Mainzer (JPL),
 - ii. Joseph Masiero (JPL),
 - iii. Lindley Johnson (NASA),
 - iv. Thomas Statler (NASA),
 - v. All other NEOWISE team members and affiliated personnel.
- b. Office of the Inspector General – JPL
- c. The Office of the Director Michael Watkins
- d. The Office of Deputy Director Larry James

- e. The Office of Chief Scientist Daniel McCleese
- f. Astronomy, Physics and Space Technology Directorate – JPL
- g. Engineering and Science Directorate – JPL
- h. The JPL division of the NASA Management Office

2. Detailed Description of the Records Sought

We request production of the following records:

[a-e: Same as in request to HQ FOIA Office discussed above]

- f. All documents related to papers or analyses regarding WISE/NEOWISE done by the NEOWISE team (*see, e.g.,* the following papers: Mainzer/TMC, Mainzer/NEO, Masiero/MB) [*footnotes with citations to articles not included herein*], including:
 - i. Model fitting and details thereof;
 - ii. Any documents including least squares fitting, chi-square fitting or other model fitting approaches;
 - iii. Any documents on least squares algorithms (which could also be called least squares minimization or optimization). For example, the Levenberg-Marquardt algorithm or variations thereof;
 - iv. Linear adjustment to the W3 band as described in Mainzer/TMC, Mainzer/NEO, Mainzer/MB;
 - v. Changes to per-observation estimated errors due to onset of saturation as described in Mainzer/TMC, Mainzer/NEO, Mainzer/MB, and other NEOWISE papers/analyses;
 - vi. All documents about the use of diameter estimates from prior radar, stellar occultation or spacecraft flyby in Mainzer/TMC, Mainzer/NEO, Mainzer/MB, and other NEOWISE papers/analyses;
 - vii. Documents expressing or indicating the rules or procedures for eliminating data from analyses conducted by the NEOWISE team, including any analysis expressed in Mainzer/TMC, Mainzer/NEO, Mainzer/MB;
- g. Any and all documents related to NEOWISE analysis of Ryan and Woodward 2010, or IRAS (Tedesco et al 2002) (*see, e.g.,* Mainzer/TMC and Mainzer et al 2011) [*footnotes with citations to articles omitted*].
- h. All correspondence about NEOWISE or any of the above topics to or from:
 - i. Edward Wright (UCLA);

- ii. Tommy Grav (Planetary Sciences Institute);
- iii. Timothy Spahr (originally at Minor Planet Center, more recently elsewhere).

These requests seek records stored in any form, whether recorded in writing, electronically, or by any other means.”

On July 18, 2016, JPL responded, indicating it was unable to process your request based on the information you provided and would close Requester’s file unless Requester supplied the necessary clarification within 20 work days. On August 5, 2016, Requester responded to the above letter, arguing that the request already sufficiently described the records sought. Requester provided additional clarification and information. As with the NASA HQ case, Requester concluded that these suggestions and clarifications would allow for a proper search for the requested records.

On August 11, 2016, the JPL issued an initial determination indicating it was still unclear what specific records were being requested and closed the case.

Consolidated Administrative Appeal

Requester submitted a consolidated appeal of the initial determinations issued by the NASA HQ and JPL FOIA Offices in a letter dated September 8, 2016.

On November 14, 2016, a decision on the September 8, 2016 appeal was issued. The Agency’s final determination affirmed the initial determinations by the NASA HQ and JPL, regarding two categories of requests that are insufficiently specific to support a reasonable search: (1) “All documents regarding comments about or criticisms of NEOWISE data analysis by other researchers;” and (2) All documents regarding policies or procedures regarding how to handle inquiries from external researchers about NEOWISE data or results.” For the remaining requests, the Agency remanded the respective cases to the NASA HQ and JPL and directed that searches be conducted for records responsive to Requester’s remaining requests consistent with the final determination.

Remand

In the November 14, 2016 decision, both of the earlier initial determinations were remanded to the NASA HQ and JPL FOIA Offices for further action. NASA HQ advised Requester that the remaining two requests would be consolidated into one new case number, No. 17-HQ-F-00141 on November 29, 2016.

Further, NASA HQ responded on November 29, 2016, stating how the Agency would implement that consolidated action and notified Requester of being placed in the “Commercial Use” category for fee assessment. On December 6, 2016, Requester responded to the November 29, 2016 letter from NASA HQ arguing that the search to be

implemented was not broad enough and also disputing his categorization as a “commercial use” user for fee assessment purposes, but agreed to provide payment under protest to avoid delays in processing his requests.

NASA HQ Action after November 14, 2016 Remand

Following the remand, NASA HQ, on behalf of NASA HQ and JPL, sent a letter to Requester on November 29, 2016 informing Requester how the offices would conduct the search. NASA HQ informed Requester that the offices would: (1) process request (c) by conducting an electronic search of email accounts of identified individuals who were involved in the NEOWISE program for records containing “NEOWISE” and “diameter”; (2) limit the temporal scope of the search to January 1, 2010 to July 9, 2016. In addition, the letter informed Requester that he was being placed in the commercial fee category.

On March 21, 2017, NASA HQ released 683 pages in full and 113 pages in part. Consequently, Requester objected to the omission of email attachments for the released documents. In response, NASA HQ, on April 27, 2017, released an additional 62 pages in full. Overall, NASA HQ released 745 pages in full, 113, in part, and withheld, in full, 474 pages pursuant to FOIA exemptions (b)(4), (b)(5), and (b)(6). On September 21, 2017, NASA HQ sent a letter to Requester stating that appeals rights would be afforded once JPL concluded processing its request.

JPL Action after November 14, 2016 Remand

Between May 2, 2017 and September 6, 2017, JPL made six releases of Agency records, noting the exception of certain records withheld and redacted under FOIA exemptions (b)(5) and (b)(6). On September 6, 2017, JPL sent a letter to Requester stating that the final release constituted NASA’s initial determination of the consolidated request, allowing for an appeals process to follow.

Appeal

In a letter dated December 5, 2017, you, on behalf of Requester, appealed NASA’s September 6, 2017 initial determination. In your appeal, you assert the NASA HQ and JPL did not conduct adequate searches regarding the request sought. Second, you assert that NASA HQ and JPL improperly withheld records, in part and in full, on the basis of FOIA exemption (b)(5). Third, you challenge the Agency’s decision to classify the requests as “commercial use” for fee purposes under FOIA. Lastly, you assert that NASA HQ and JPL unduly delayed the processing of the requests.

Your appeal has been reviewed and processed pursuant to applicable statutes and regulations, including 14 CFR §1206. This process involved consideration of the requests, the Agency’s September 6, 2017 initial determination and other correspondence, and the arguments set forth in your appeal.

II. DETERMINATION ON APPEAL

Based upon this review, and in accordance with applicable statutes and regulations, I am Affirming the initial determination, in part, and Reversing with a Remand, in part, for further action.

I am Affirming the initial determination that the search conducted by NASA HQ was adequate. However, I am remanding the request to JPL for additional searches to include electronic and paper records for the timeframe June 1, 2010 through July 9, 2016, in the following categories, consistent with the information provided by the Requestor: (c) Documents Discussing the Accuracy of NEOWISE Diameter Estimates; (f), Documents Related to WISE/NEOWISE Papers or Analyses; (g), Documents Related to NEOWISE Analysis of Ryan & Woodward or IRAS Papers; and (h) Relevant Correspondence with Wright, Gray, or Spahr. I am directing these searches to be conducted on an expedited basis.

I am Affirming, the initial determinations as to the records that were withheld by NASA HQ and remanding to JPL the 2 documents that were partially withheld to provide an opportunity to consider whether they were properly withheld under FOIA exemption (b)(5). I was unable to ascertain if earlier distribution of these records was limited to intra-Agency personnel from the list of recipients of those 2 records.

Lastly, I am further Remanding Requester's classification as a "commercial use" user for the purposes of fees, to the NASA HQ FOIA Office. As part of this remand consideration, given NASA's tardiness in responding within the timelines established by FOIA regulations, I am directing that all fees paid by the Requestor be reimbursed, and no further fees be levied on the Requestor related to this FOIA. The bases for these decisions are set forth below.

III. DISCUSSION

Adequacy of the Search

When a proper FOIA request is received, the Agency is required to conduct a search that is "reasonably calculated to uncover all relevant documents." Weisberg v DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983). A "reasonable" search is one based on a reasonable interpretation of the scope of the request and the records sought. See Larson v Dep't of State, 565 F.3d 857 (D.C.C. 2009). The scope of a FOIA request is not only determined by subject-matter of the records sought, but also defined by when the requested records were created. This temporal scope is established by the Agency's use of a cut-off date, which results in a "much fuller search and disclosure" rather than based on the date(s) of the request(s). McGhee v. CIA, 697 F.2d 1095, 1104 (D.C. Cir. 1983), vacated on other grounds on panel reh'g & reh'g en banc denied, 711 F.2d 1076 (D.C. Cir. 1983). The Agency's use of a cut-off date to a request for records sought concerning events that already occurred and records that had already been created is reasonable. Blazy v. Tenet, 979 F. Supp. 10, 17 (D.C.C. 1997).

The reasonableness of an agency's search can depend on whether the agency properly determined where responsive records were likely to be found, and searched those locations. The reasonableness of a search can also include whether an agency improperly

limited its search of certain record systems. In some instances, an agency's search may be insufficient by limiting the search to one record system if others are likely to contain responsive records. Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990). However, a speculative allegation as to the existence of a record does not cast doubt on the adequacy of a search. Manchester v. FBI, No. 96-0137, 2005 WL 3275802, at *3 (D.D.C. Aug. 9, 2005).

HQ

Requester's appeal alleges that the Agency's search for request (c), Documents Discussing the Accuracy of NEOWISE Diameter Estimates, was inadequate. With regard to NASA HQ, I find that the search, as conducted, was reasonable for the reasons set forth below.

Although NASA HQ limited its search to: [1] the email archival system; and [2] a computer query, these decisions were reasonable based on the particular facts in this case. A search for records outside of email archival system was unnecessary because a NASA employee familiar with how Agency records at HQ are maintained, based on his support to the NEOWISE team and his position as Planetary Defense Officer, stated that NASA HQ does not maintain records outside of email correspondence. HQ's communications about the project with JPL are through email. The cases of Gates and American-Arab Anti-Discrimination Commission supports this position, in which the courts held that whether a search would be futile and unnecessary can be supported by a *statement* when the person appears to be in a position within the agency to know whether alternative record systems exist that are likely to turn up relevant documents. Law Offices of Snider & Assocs., LLC v. Gates, 45 F. Supp. 3d 100, 104 (D.D.C. 2014) (citing American-Arab Anti-Discrimination Comm. V. DHS, 516 F. Supp. 2d 83, 87-88 (D.D.C. 2007)).

Moreover, limiting the search to a computer query was reasonable because more than one HQ person would likely have had responsive emails, and thus the search had to accommodate multiple accounts. The search terms "NEOWISE" and "diameter" were used to broadly capture the information sought by the Requestor. This approach is supported in the holding in Thompson. In that case, the U.S. District Court of D.C. held that a relatively simple computer search and queries *are reasonable* for data that does not exist in a single computer or document file. Thompson Publ'g Group, Inc. v. Health Care Fin. Admin., No. 92-2431, 1994 WL 116141, at *1 (D.D.C. Mar. 15, 1994) (emphasis added). Therefore, the search conducted by NASA HQ was adequate because it demonstrated that it was reasonably calculated to uncover all relevant documents.

JPL

As discussed above, in responding to a FOIA request, an agency must undertake a search that is "reasonably calculated to uncover all relevant documents." Weisberg, 705 F.2d at 1351. JPL, like NASA, conducted its search to include only emails at the instruction of the NASA HQ FOIA Office. However, in the case of JPL, this limitation was not reasonable, and the resulting search not adequate because of the manner in which the NEOWISE project personnel at JPL communicated with each other. They did not limit their communication to the email method in their day-to-day interactions. Given that JPL had already represented that the bulk of their records, other than in email archival system, were not searched and possibly some paper files existed, any reasonable

search would have to include such paper files. Therefore, I am remanding this FOIA to JPL to conduct additional search for all responsive documents, regardless the mode, that address the categories of information you seek: (c), Documents Discussing the Accuracy of NEOWISE Diameter Estimates, (f), Documents Related to WISE/NEOWISE Papers or Analyses, (g), Documents Related to NEOWISE Analysis of Ryan & Woodward or IRAS Papers, and (h) Relevant Correspondence with Wright, Grav, or Spahr. I am directing these searches to be undertaken on an expedited basis.

Application of Exemption 5 to documents that were withheld in full or in part.

Exemption (b)(5) exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). As such, Exemption (b)(5) has been construed "to encompass the protections traditionally afforded certain documents pursuant to evidentiary privileges in the civil discovery context." Taxation With Representation Fund v. IRS, 646 F.2d 666, 676 (D.C. Cir. 1981).

In order for the deliberative process privilege to apply, the government must establish that the material at issue is both "predecisional" and "deliberative" in nature. In re Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997). A document is "predecisional" if it was "prepared in order to assist an agency decision maker in arriving at his decision, rather than to support a decision already made." Petroleum Info. Corp. v. Dep't of the Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992). Further, a document is "deliberative" in nature if "it reflects the give-and-take of the consultative process." Coast States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980). The deliberative process privilege focuses on "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." Nat'l Labor Relations Bd. v. Sears, Roebuck & CO., 421 U.S. 132, 150, 95 S.Ct. 1504, 44 1.Ed.2d 29 (1979). The purpose of the deliberative process privilege is "to assure that within an agency it will feel free to provide the decision-maker with their uninhibited opinions and recommendations without fear of latter being subject to public ridicule or criticism . . . and to protect against confusing the issues and misleading the public by the dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action." Coastal States, 617 F.2d at 866. Documents such as drafts, recommendations, proposals, and suggestions that reflect personal opinions of the author rather than the policy of the agency are thus protected under this privilege. Coastal States, 617 F.2d at 866. If the disclosure of material would tend to "discourage candid discussion within an agency," it is often found to be deliberative. Access Reports v. Dep't of Justice, 926 F.2d 1192, 1195 (D.C. Cir. 1991). Further, the pre-decisional nature of the document does not necessarily turn on identifying a specific decision in connection with which the document was prepared, but can relate to the *role played by the document* in the decision-making process. Access Reports, 926 F.2d. at 1195 (emphasis added); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 N. 18 (extending protection to records that are part of decision-making process even where process does not produce actual decision by agency).

Requester states that the records withheld were not subject to the deliberative process privilege because they revolve around scientific analysis and data and do not

involve the setting of agency policy. NASA evaluated the documents that were released and redacted consistent with your assertion.

For HQ, you identified 12 documents that you believed should have been released. Evaluating those records specifically, they include [I] 2 documents that were prepared specifically for Congressional budget preparation purposes; [II] 2 documents that capture opinions of individuals in the project regarding how to evaluate NEO survey concepts; [III] 5 draft copies of information that was proposed for inclusion in the Report of the Near-Earth Object Science Definition Team, "Update to Determine the Feasibility of Enhancing the Search and Characterization of NEOs (September 2017),(hereinafter, Science Definition Team Report); [IV] 2 drafts of papers for publication; and [V] 1 draft response to potential media queries related to NEOWISE.

Specifically, NASA has reviewed the documents you identify in your December 5, 2017 letter and concluded that all the HQ documents, above, were properly withheld because they were all pre-decisional – either information related to budget preparation, program acquisition planning, media questions, or they are draft sections of reports or publications that were not yet final and may not reflect the final Agency positions as to that subject matter. Withholding such drafts, even in a scientific context is consistent with Administration Guidance (OMB Circular A-110). Indeed, 5 of the withholdings (roman numeral III, above) were drafts of information now available in a published version. That information was finalized and included in the Science Definition Team Report, posted at: https://www.nasa.gov/sites/default/files/atoms/files/2017_neo_sdt_final_e-version.pdf. Similarly, the two draft reports (roman numeral IV, above) also appear to have been more recently published according to an internet search - - Report on the Larger Synoptic Survey Telescope (LSST) authored by T.Grav and others; and Near-infrared Thermal Emission from near-Earth Asteroids: Aspect-dependent variability by Nicholas Moskovitz and others. The first report was not released, however, the second report was released with the authors names and affiliations redacted. Those three pages are herein, provided to you. The basis for this release is that since the report was already provided to you as part of the Agency's initial determination, there doesn't appear to be a basis for redacting the first three pages. However, this release is discretionary and is not mandated by Exemption 5 of the FOIA, since the report is a draft version. Likewise, the reason for withholding the other draft papers and sections of draft papers is that they were draft versions of the Science Definition Report. Such releases would adversely affect the ability of the Agency to conduct its work, because it would have a chilling effect on any individual's willingness to be part of that communication process that predates a final Agency decision. This type of communication is essential to the Agency's ability to successfully conduct its missions. Accordingly, with respect to the NASA HQ records, I have determined that they were appropriately withheld under the FOIA "deliberative process privilege" which protects such pre-decisional records to enhance the Agency's decisionmaking process. See Coastal States, 617 F.2d at 866.

For JPL, you identified two documents that you believe should have been released to you without redactions because they include large portions of data and cover scientific and technical discussion. The first record was an agenda for a "SDT Redux Team" meeting at Cal Tech, which although the agenda items were provided to you, opinions about each agenda item that were notated below each proposed topic were redacted. The

second record was an email communication relating to "Earth Impactors" between project personnel, which again, while portions of it were released to you, other information was redacted. Upon review, I am unable to ascertain whether the list of individuals who were part of the communication of these 2 records was limited to individuals comprised of only project personnel. A broader distribution, particularly outside NASA and its contractors assigned to this project, could affect whether the documents could be withheld under Exemption 5 as intra-Agency records. For this reason, I am remanding these 2 documents to the JPL FOIA office for further review as to their releasability under the FOIA.

Commercial Fee

Pursuant to Office of Management and Budget ("OMB") guidelines, an agency's determination of the appropriate category for the purposes of fee assessment is dependent upon the intended use of the information sought and in some instances, the identity of the requester. The FOIA provides three types of fees that may be assessed in response to FOIA requests: search, review, and duplication. See 5 U.S.C. § 552(a)(4)(A)(i)-(iii) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10,012, 10,018 (Mar. 27, 1987). NASA regulations provide information about how the fee category determination is made by the Agency. The regulations state that a requester should indicate a fee category. If the requestor does not provide this information, the FOIA office will make a determination based on other information provided by the Requestor. See 14 CFR § 1206.507(a). The NASA regulations provide that, if a requestor does not agree with the Agency fee category determination, "he/she will be afforded the opportunity to provide information to support a different fee category." 14 CFR 1206.507(a).

FOIA provides three types of categories of requesters: (1) commercial use requesters; (2) educational institutions, noncommercial scientific institutions, and news media representatives; and (3) all other requesters who do not fall in the first two categories. For the purposes of this appeal, only categories one and three need be discussed as relevant to your appeal. The term "commercial use request" means a request from, or on behalf of, one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of either the requestor or the person on whose behalf the request is made.

Upon careful review of all the information you have submitted, including in your appeal letter, I find that the present record is insufficient to demonstrate that Requester should be categorized as a commercial fee user, especially given that the Agency's November 29, 2016 letter did not provide a basis for placing Requester under commercial fee category. Based on the foregoing, I remand the initial determination as to the fee classification to the NASA HQ FOIA Office, in order to allow the information provided in your appeal supporting assignment to another fee category, be considered.

Finally, your appeal makes the case that NASA charged Requester extra fees in contravention of the fees allowable under the FOIA. The FOIA recognizes three categories of fees – search, review and duplication – and requires agencies to publish those fees in their FOIA regulations, which the Agency has done. In addition, FOIA

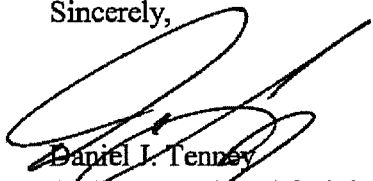
requires that any processing charges be reviewed for consistency with the FOIA and NASA's FOIA regulations, and I do not see where this process may have taken place in your case. Also, there is the additional factor related to fees and the handling of your initial determination, in that NASA failed to meet its statutory deadlines for responding to you. Under the FOIA Improvement Act of 2016, NASA is precluded from charging Requester search fees due to the delay in processing requests and, as a result, at a minimum, NASA should refund all such fees to the Requester. Consequently, I am directing that all fees paid by the Requestor be reimbursed, and no further fees be levied on the Requestor related to this FOIA.

IV. CONCLUSION

The initial determination is affirmed, in part; and reversed with a remand, in part, in accordance with the analysis and direction set forth above. This is a final Agency decision and is subject to judicial review under the provisions of 5 U.S.C. § 552 (a) (4), a copy of which is enclosed.

For your information, the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; e-mail at ogis@nara.gov; telephone at 301-837-1996; toll free at 1-877-684-6448, facsimile at 301-837-0348.

Sincerely,



Daniel J. Tenney
Acting Associate Administrator
Mission Support Directorate

Enclosure