To: Ginger McCall
From: [redacted] & [redacted]
Re: Definition of "noncommercial scientific institution"
Date: October 23, 2014

The Freedom of Information Act establishes that requesters are entitled to fee reduction and/or favorable fee status when the requester is "an educational or noncommercial scientific institution ... or a representative of the news media" and the records sought "are not sought for commercial use." 5 U.S.C. § 552(a)(4)(A)(ii)(II). A "non-commercial scientific institution" is an institution that is not operated "on a commercial basis" and that "is operated solely to conduct scientific or scholarly research, the results of which are not intended to promote any particular product or industry." 5 C.F .R. § 294.103(b)(2); *Coven v. U.S. Dept. of Personnel Mgt.*, 2009 WL 3174423 (D. Ariz. 2009).

There is very little case law addressing the interpretation of "noncommercial scientific institution." However, the D.C. district court has credited an agency interpretation of "noncommercial." In *Rozet v. Department of Housing and Urban Development*, 59 F.Supp.2d 55 (D.D.C. 1999), the court upheld HUD's denial of favorable fee status where the agency had relied on its own regulations to find that the requester was non "noncommercial." The relevant regulation, defined "commercial use" as "for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made." *Id.*, quoting 24 C.F.R. § 15.15(2).

The Rozet court also determined that a requester's statement that he will not put the information to a commercial use" was insufficient alone to qualify him for as a "noncommercial" requester — at least where other circumstances suggested that the intended use was likely commercial. ("Mr. Rozet filed his initial FOIA requests five months after HUD had brought its lawsuit against him and his corporations. The nexus with the lawsuit established by the timing of the FOIA requests and their content demonstrates conclusively that the FOIA requests advance Mr. Rozet's commercial interest, rather than the public interest." *Id.*)

Though the opinion does not state whether HUD complied on its own regulations regarding *how* to make a determination as to a requester's commercial or noncommercial status, it did mention the agency's standard:

> In determining whether a requester properly belongs in the category, HUD must determine the use to which a requester will put the documents requested. Moreover, where HUD has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, HUD will seek additional clarification before assigning the request to a specific category.

In holding that the agency's determination was proper and quoting the procedural regulation, the court at least *suggested* that that regulation was appropriate.

In *Eagle v. U.S. Dept. of Commerce*, 2003 WL 21402534 (N.D. Ca. 2003), the Northern District of California stated that a requester who establishes that the records he requests will be used for an academic purposes does not necessarily qualify for a *full* fee waiver. This conclusion was based on construction of the FOIA, which the court said precluded the alternative reading (that educational an noncommercial scientific institution requesters are entitled to complete fee

waivers *per se*) by stating that such institutions are eligible for partial fee reduction. *Id.* However, academic institutions *may* be entitled to complete fee waiver if, in addition to establishing that status, they establish that disclosure of the requested records would serve the public interest. *Id.* However, the court's opinion presumes that the requester is an educational or noncommercial scientific institution and finds that the parties had no real dispute over the interpretation of the FOIA's fee waiver provision — so court's conclusions as to the significance of "noncommercial scientific institution" status are only dicta.

In *Coleman v. Drug Enforcement Administration*, 714 F.3d 816 (4th Cir. 2013), the Fourth Circuit considered an appeal for commercial waivers wherein the DEA allowed several response deadlines to lapse. In appealing the determination, Coleman told the Agency he was a noncommercial requester because he was "a researcher and an author who . . . has published medical and scientific articles in professional journals for which [he] neither sought nor received remuneration." *Id*. at 821. The Agency denied the request saying that Coleman was a commercial requester because "he was affiliated with a for-profit firm that offered consulting services to pharmaceutical companies seeking government approval of their new drugs." *Id*. at 822. Coleman claimed he exhausted his administrative remedies for a fee waiver determination.[1]

The court relied on the definitions of "commercial requester" and "nonscientific institution" provided in the 32 C.F.R. § 16.11(b) stated that a "requester need not provide the agency with every nuance and detail of a particular claim before exhaustion can be found." *Id.* at 825. Also, "requests for fee waivers must be made with "reasonable specificity." *Id.* at 826 (quoting *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003)). The court found that "Coleman met these requirements here." *Id.*[2]

[1] The specific issue before the court was whether Coleman exhausted his administrative remedies, not the specific determination of his status as a noncommercial scientific institution.

[2] Court reversed motion for summary judgment, holding that Coleman had not exhausted his administrative remedies.