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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Daniel Saul Coven,)	
)	
Plaintiff,)	No. CIV-07-1831-PHX-RCB
)	
vs.)	O R D E R
)	
United States Office of)	
Personnel Management,)	
)	
Defendant.)	
_____)	

Introduction

Plaintiff *pro se*, Daniel Saul Coven, "is sole proprietor of federalgovernmentjobs.us[,] a website that provides job search and notification services to job seekers." Co. (doc. 1) at 2. From roughly July 2005 through June 2007, plaintiff was among those who requested and received data feed via defendant United States Office of Personnel Management ("OPM") regarding all federal job vacancy announcements. Harrison Decl'n (doc. 39-3) at 5; see also Co. (doc. 1) at 2. Effective June 30, 2007, however, "OPM directed its contractor, MGS [Monster Government Solutions] to cease the compilation of th[at] [job vacancy]

1 July 2004 to June 30, 2007, MGS was directed to compile a data feed
2 which included all vacancy announcement information submitted by
3 Federal agencies for the purpose of providing this data feed to the
4 U.S. Department of Labor (DOL) for the America's Jobs Bank
5 [{"AJB"}] program." Id. at 4, ¶ (14). DOL instituted that program
6 and web site, among other things, "to distribute federal job
7 vacancies to State and local unemployment agencies[.]" Id. at 5, ¶
8 (14). OPM's contractor, MGS, maintained and updated vacancy
9 announcement information in an active database for OPM, but "OPM
10 neither received nor regularly accesse[d] the content of the . . .
11 database." Id. "The data feed was primarily established for the
12 convenience of the [DOL] and other Federal agencies and to provide
13 an archive of vacancy announcements as required for compliance with
14 regulatory guidance." Id. The USAJOBS® web site was the vehicle
15 for fulfilling OPM's statutory mandate which, in essence, is to
16 disseminate information regarding competitive service job
17 announcements for federal agencies. See 5 U.S.C. §§ 3327 and 3330.
18 OPM "made th[at] data feed publicly available to anyone who
19 requested it when it was being produced." Harrison Decl'n (doc.
20 39-3) at 5, ¶ (14). Plaintiff was among the beneficiaries of that
21 data feed from some time in 2005 until July 2007. Co. (doc. 1) at
22 2; see also Harrison Decl'n (doc. 39-3) at 5,
23 ¶ (14).

24 In January 2007, DOL informed OPM of its intent to shut down
25 its AJB program. Harrison Decl'n (doc. 39-3) at 5, ¶ (14). DOL
26 made that decision partially due to the "success and availability
27 of . . . the USAJOBS® site," and the resultant savings from
28 eliminating the duplication of effort through the AJB site. Id.

1 The following month, February 2007, OPM notified "all known
2 recipients/users of the [AJB] data feed of the pending
3 termination[,]" effective June 30, 2007. Id. OPM also "directed
4 its contractor, MGS, to cease the compilation of th[at] data on a
5 daily basis . . . [e]ffective 30 June 2007." Id. MGS complied and
6 "[t]he feed was terminated and is no longer available." Id.
7 "[A]ll relevant vacancy announcement information continues to be
8 available . . . on the USAJOBS® web site." Id.

9 After the decision to terminate the daily data feed through
10 AJB, on July 13, 2007, plaintiff made a FOIA request of OPM
11 enumerating 29 separate categories of information which he wanted
12 from the "electronic copies of the data contained in the
13 USAJOBS.gov job vacancy database." Doc. 27 at 4; see also Harrison
14 Decl'n (doc. 39-3) at 2, ¶ (4). Plaintiff emphasized that he was
15 "request[ing] daily copies of these files on an ongoing basis."
16 Id. Plaintiff based his request for "*expedited service*" on the
17 theory that "these records are time sensitive as most vacancies
18 hav[e] only a two week application period and because these files
19 will be used to disseminate the information to the public." Id.
20 (emphasis in original).

21 In his request, plaintiff opined that "there should be no fees
22 for providing copies of reasonably sized electronic records," but
23 he sought to be advised if "the cost would exceed \$1 per day." Id.
24 Plaintiff concluded by notifying OPM that he could "receive the
25 files as is or compressed (.zip or .gz) by electronic mail, web or
26 through FTP[.]" Id. Likewise, plaintiff advised, "We can provide
27 an upload server, or can download from a [MGS] or OPM provided
28 server[.]" Id.

1 On September 10, 2007, OPM responded to that July 13th FOIA
2 request advising plaintiff, as it had previously, that "due to
3 security risk issues that could potentially affect the integrity of
4 the data, OPM shut down data feeds to all requestors [sic],
5 . . . on June 30, 2007." Id. at 5. OPM added that "termination"
6 of that "data-feed . . . coincided with the permanent closure of"
7 DOL's AJB program. Id. OPM further explained that given that
8 termination, the requested data "is now available only on the
9 USAJOBS® and StudentJobs® web sites." Id.¹ Because the requested
10 data "is not offered in any other format; or, from any other
11 source[,]" OPM informed plaintiff that it had "no records
12 responsive to [his] request." Id. OPM concluded its response by
13 further informing plaintiff of his appeal rights. Id.

14 Plaintiff immediately responded that same day via e-mail,
15 indicating that "[t]he appeal process was initiated on 8/23/97."
16 Harrison Decl'n (doc. 39-3) at 2, ¶ (6). Although plaintiff
17 "acknowledged that 'much of the requested information is contained
18 in the USAJOBS® website,'" some of it, such as the "'location codes
19 . . . and date of last modification'" were not displayed on that
20 website." Id. That e-mail was incorrectly addressed. Id.
21 Therefore, OPM had no record of any aspect of an August 23, 2007,
22 appeal from plaintiff. Id.

23 Prior to exhausting his administrative remedies, on
24 September 25, 2007, plaintiff commenced the present FOIA action.
25 Eventually, the court stayed this action pending notification as to
26 "whether or not plaintiff ha[d] exhausted his administrative
27

28 ¹ This emphasis appears to be in the original document, although the court cannot be certain given the poor quality of this copy.

1 remedies." Doc. 24 at 1:22-23. During the administrative appeal
2 process, due to a "change in [its] policy[,]" Harrison Decl'n (doc.
3 39-3) at 3, ¶ (10), OPM "decided to provide all available records
4 requested by Plaintiff." DSOF (doc. 39) at 2, ¶ 4:4-6. In
5 particular, "[a]fter reviewing the issues surrounding the
6 provisions of USAJOBS® data, around October 2007, OPM decided to
7 revive the availability of a modified version of the previous data
8 feed." Id. at 5, ¶ (14). OPM made that decision primarily to
9 facilitate widespread dissemination of the availability of federal
10 jobs.

11 Due to ongoing concerns as to the "integrity of the
12 information" though, OPM decided that recipients of the data feed
13 would be required to "sign a 'term of use agreement' limiting their
14 use and manipulation of the data." Id. at 6,
15 ¶ (14). Organizations such as Google, Inc., Microsoft Network and
16 Yahoo "currently receiv[e] a data feed of USAJOBS® data which MGS
17 has been compiling since about December 2007." Id. at 6, ¶ (15).
18 Those entities have entered into term of use agreements with OPM.
19 Id.

20 During the pendency of this action, "plaintiff was made aware
21 of the availability of the data feed and sent a copy of the terms
22 of use agreement[.]" Id. Nonetheless, plaintiff has refused to
23 sign that agreement believing that "it unduly limit[s] his use of
24 the data." Id. Despite OPM's express "willingness to modify the
25 terms of use agreement in an effort to accommodate plaintiff's
26 concerns[,]" he "has not contacted the USAJOBS® office to discuss
27 [such] modifications[.]" Id.

28 Eventually OPM granted plaintiff's appeal to the extent it

1 agreed to provide him with the requested job vacancy records, but
2 it denied his appeal for a fee waiver or reduction, expedited
3 processing and daily, ongoing copies of those records. See Doc.
4 39-2 at 1-2. OPM's rationale for each of these determinations will
5 be fully discussed herein. Suffice it to say for now that
6 plaintiff is challenging each of those three adverse
7 determinations. He is also seeking attorney's fees and costs.

8 Before determining whether either party is entitled to summary
9 judgment in whole or in part, the court must address plaintiff's
10 motion to strike.

11 Discussion

12 I. Motion to Strike

13 Pursuant to Fed. R. Civ. P. 12(f), plaintiff is seeking to
14 strike almost all of OPM's response as it relates to attorney's
15 fees and costs. Plaintiff asserts that the court should strike
16 that portion of OPM's response (doc. 52, § VI, p. 7:26-9:4) because
17 it is immaterial and contradicts arguments in OPM's pending summary
18 judgment motion.

19 OPM counters that even if it is not material to OPM's own
20 motion, that particular response argument is material to
21 "Plaintiff's own request for attorneys[,] fees and costs." Resp.
22 (doc. 61) at 1. Additionally, OPM argues, as explained below, that
23 plaintiff is improperly relying upon Rule 12(f) as the basis for
24 his motion to strike. The court agrees that there are both
25 procedural and substantive reasons for denying this motion to
26 strike.

27 Rule 12(f), which is the sole basis for this motion, provides
28 in relevant part that "[u]pon motion made by a party

1 . . . , the court may order stricken from any *pleading* any . . .
2 immaterial, . . . matter.” Fed. R. Civ. P. 12(f) (emphasis added).
3 Rule 7, in turn, essentially defines pleadings as complaints and
4 answers. See Fed. R. Civ. P. 7(a). Therefore, “Rule 12(f) cannot
5 serve as a procedural vehicle for striking language contained in
6 motion papers.” Holyoak v. United States, 2009 WL 1456472, at *1
7 (D.Ariz. May 21, 2009) (internal quotation marks and citation
8 omitted). Indeed, the Ninth Circuit has plainly held that “[u]nder
9 the express language of the rule, *only* pleadings are subject to
10 motions to strike.” Sidney-Vinstein v. A.H. Robins Co., 697 F.2d
11 880, 885 (9th Cir. 1983) (emphasis added). Likewise, LRCiv
12 7.2(m)(1) prohibits this motion because it does not fall into the
13 narrow category of motions to strike which that Rule allows.

14 The court also denies Plaintiff’s motion to strike on the
15 merits. In his complaint, one form of relief which plaintiff is
16 seeking is an award of costs. Co. (doc. 1) at 5, ¶ 2). In his
17 cross-motion for summary judgment, plaintiff explicitly expands
18 that request to include attorney’s fees. See Cross-Mot. (doc. 46)
19 at 10, § VI. Based upon the foregoing, undoubtedly OPM’s response
20 addressing the issues of attorney’s fees and costs is material.
21 Hence, there is no basis for striking that aspect of OPM’s
22 response. Accordingly, the court denies plaintiff’s motion to
23 strike. Denial of this motion is in keeping with the general view
24 that “such motions are disfavored and infrequently granted.” See
25 Garcia-Barajas v. Nestle Purina Petcare Co., 2009 WL 2151850, at *2
26 (E.D.Cal. July 16, 2009) (citation omitted); see also 5C Wright &
27 A. Miller, Federal Practice and Procedure
28 § 1380 (3d ed. 2004) (same) (citing cases).

1 **II. Summary Judgment Motions**

2 **A. Governing Legal Standards**

3 Pursuant to Fed.R.Civ.P. 56©, a party is entitled to summary
4 judgment "if the pleadings, depositions, answers to
5 interrogatories, and admissions on file, together with the
6 affidavits, if any, show that there is no genuine issue as to any
7 material fact and that the moving party is entitled to a judgment
8 as a matter of law." It is beyond dispute that "[t]he moving party
9 bears the initial burden to demonstrate the absence of any genuine
10 issue of material fact." Horphag Research Ltd. v. Garcia, 475 F.3d
11 1029, 1035 (9th Cir.2007) (citation omitted). "Once the moving
12 party meets its initial burden, . . . , the burden shifts to the
13 nonmoving party to set forth, by affidavit or as otherwise provided
14 in Rule 56, specific facts showing that there is a genuine issue
15 for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248,
16 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (internal quotation marks and
17 citations omitted). When assessing the record to determine whether
18 there is a "genuine issue for trial the court must "view the
19 evidence in the light most favorable to the nonmoving party,
20 drawing all reasonable inferences in his favor." Horphag, 475 F.3d
21 at 1035 (citation omitted). "This is true even though[,]" as
22 here, "the court is presented with cross-motions for summary
23 judgment[.]" High Tech Gays v. Defense Ind. Sec. Clearance Office,
24 895 F.2d 563, 574 (9th Cir.1990) (citation omitted).

25 "Although the mandate of FOIA calls for broad disclosure of
26 Government records, the Act represents a careful balance between
27 'public rights and agency obligations designed to foster greater
28 access to agency records than existed prior to its enactment.'"

1 Laughlin v. C.I.R., 103 F.Supp.2d 1219, 1222 (S.D.Cal. 1999)
2 (quoting Kissinger, 445 U.S. at 150, 100 S.Ct. 960). Thus,
3 “[s]ummary judgment for the defendant is appropriate in a FOIA case
4 ‘when the agency proves that it has fully discharged its
5 obligations under FOIA, after the underlying facts and the
6 inferences to be drawn from them are construed in the light most
7 favorable to the FOIA requester.’” Id. (quoting Miller v. U.S.
8 Dep’t of State, 779 F.2d 1378, 1382 (8th Cir. 1985) (other citation
9 omitted). In determining whether an agency has improperly withheld
10 records from a complainant, the court must conduct a *de novo*
11 review. See 5 U.S.C. § 552(a)(4)(B) (West 2007). “[T]he burden is
12 on the agency [OPM] to sustain its action.” Id. These principles
13 guide the court’s consideration of the parties’ respective summary
14 judgment arguments.

15 **B. “Ongoing, Daily Disclosure”**

16 The sole jurisdictional basis in plaintiff’s complaint is
17 5 U.S.C. § 552(a)(4)(B). That provision of the FOIA “vests
18 jurisdiction in federal district courts to enjoin an ‘agency from
19 withholding agency records and to order the production of agency
20 records improperly withheld from the complainant.’” Kissinger v.
21 Reporters Comm. for Freedom of the Press, 445 U.S. 136, 139, 100
22 S.Ct. 960, 963 (1980) (quoting 5 U.S.C.
23 § 552(a)(4)(B)). “Federal jurisdiction” under section 552(a)(4)(B)
24 “is dependent upon a showing that an agency has (1) ‘improperly’;
25 (2) ‘withheld’” (3) ‘agency records.’” Kissinger, 445 U.S. at 150,
26 100 S.Ct. 960. A district court’s “authority to devise remedies
27 and enjoin agencies can *only* be invoked, under the jurisdictional
28 grant conferred by § 552, if the agency has contravened *all* three

1 components of this obligation." Id. (emphasis added); see also
2 U.S. Department of Justice v. Tax Analysts, 492 U.S. 136, 142, 109
3 S.Ct. 2841, 106 L.Ed.2d 112 (1989) ("Unless each of these criteria
4 is met, a district court lacks jurisdiction to devise remedies to
5 force an agency to comply with the FOIA's disclosure
6 requirements.") As can be seen, the issue of FOIA jurisdiction is
7 inextricably linked with whether an agency has improperly withheld
8 its records - a fact the parties herein did not consider.

9 Focusing strictly upon the temporal aspect of plaintiff's
10 request, OPM contends that he is not entitled "a 'daily feed' of
11 *future* records pursuant to the FOIA." Mot. (doc. 40) at 3:21-22
12 (citations omitted) (emphasis added). Put differently, OPM asserts
13 that the FOIA does not entitle plaintiff "to obtain records created
14 *after* the agency responds to his request." Id. at 3:20-21
15 (emphasis added). In light of the foregoing, and the fact that
16 "during the administrative appeal[,] OPM "decided . . . to provide
17 all available records Plaintiff requested in this matter[,] OPM
18 argues that summary judgment in its favor is mandated because it
19 has not improperly withheld any agency record. Id. at 4:5-8.

20 OPM does not frame its argument in jurisdictional terms.
21 Indeed, at the outset OPM expressly states that it is "*not*
22 contest[ing] jurisdiction[.]" Id. at 1 (emphasis added). At the
23 same time, however, OPM accurately notes that unless it has
24 improperly withheld an agency record, this court lacks
25 jurisdiction. See id. Therefore, the court finds that OPM's
26 argument that it is entitled to summary judgment because plaintiff
27 is not entitled to "ongoing, daily copies" is more properly
28 analyzed in jurisdictional terms.

1 Plaintiff concedes that OPM has "partially granted" his
2 request by providing "those records current at the time of
3 processing[.]" Pl. Opp'n (doc. 44) at 1; and Reply (doc. 59) at
4 2:3-4 (emphasis added). Undoubtedly, OPM's voluntary provision of
5 those records deprives this court of jurisdiction over this aspect
6 of plaintiff's action. See Beech v. C.I.R., 190 F.Supp.2d 1183,
7 1187 (D.Ariz. 2001) (citing, *inter alia*, Carter v. Veterans Admin.,
8 780 F.2d 1479, 1481 (9th Cir. 1986)) (plaintiff's FOIA claim mooted
9 where defendant provided requested records, so court dismissed for
10 lack of jurisdiction), aff'd, 37 Fed. Appx. 324 (9th Cir. 2002).
11 Plaintiff adheres to the view, however, that OPM "has not complied
12 with FOIA" because it will not provide him with "future records[]"
13 based upon his initial request. Pl. Opp'n (doc. 44) at 1; and
14 Reply (doc. 59) at 2:4. Plaintiff posits that by not being
15 provided with "daily, ongoing copies of [OPM's] job vacancy
16 records," he will "effectively [be] denied access to job
17 vacancies that would close before subsequent FOIA request[s] could
18 be processed." PSOF (doc. 49) at 3 (emphasis added). Thus, "in
19 order to eliminate future disagreement[,]" plaintiff seeks "to have
20 this court find that . . . ongoing, daily disclosure is not a
21 matter of agency discretion, but a matter of law[.]" Cross-Mot.
22 (doc. 46) at 7:17-19. Hence, plaintiff argues, he is entitled to
23 summary judgment on the issue of ongoing, daily disclosure.

24 Given the parties' divergent views as to OPM's obligation to
25 provide future records, the issue, as OPM accurately frames it, is
26 whether the FOIA requires OPM "to provide daily[,] ongoing copies
27 of the job vacancy announcements." Resp. (doc. 52) at 1. If OPM
28 has such an obligation, then admittedly it has not met that

1 obligation. Thus, OPM would be deemed to have improperly withheld
2 agency records, and the court would have jurisdiction to grant
3 summary judgment in plaintiff's favor on this issue. Conversely,
4 if OPM does not have any obligation under FOIA to provide ongoing,
5 daily copies, then its failure to do so does not amount to improper
6 withholding of agency records. The court, therefore, would lack
7 jurisdiction over this aspect of plaintiff's action.

8 As OPM points out, agencies are not under an obligation to
9 continuously update responses to a FOIA request. In Lybarger v.
10 Cardwell, 577 F.2d 764 (1st Cir. 1978) ("Lybarger II")², for
11 example, the plaintiff nonprofit advocacy organization requested a
12 variety of government materials and handbooks from the Social
13 Security Regional Commissioner's Office. That organization also
14 requested that it "be placed on a mailing list to receive as a
15 matter of routine any updated materials." Id. at 765. The
16 organization challenged, among other things, the Commissioner's
17 "refus[al] to provide [it] with updated materials automatically."
18 Id. at 766. The district court held that the Commissioner did not
19 violate FOIA by declining "to provide periodic updates and
20 revisions of th[o]se materials automatically as they [we]re
21 issued." Lybarger I, 438 F.Supp. at 1077.

22 The First Circuit affirmed because it could not "find any
23 language in the [FOIA] which imposes such an explicit obligation on
24 agencies." Lybarger II, 577 F.2d at 767. Moreover, the
25 Commissioner "agreed to make updated materials available in
26

27 ² Evidently failing to recognize that Lybarger had been affirmed, OPM
28 relies only upon the district court's decision, Lybarger v. Cardwell, 438 F.Supp.
1075 (D.Mass. 1977) ("Lybarger I"), as, in turn, does plaintiff Coven.

1 response to individual [subsequent] requests[;]" and plaintiffs
2 gave the Court no "basis for believing that the commission w[ould]
3 not comply with the statutory mandate of the [FOIA] and reply
4 promptly to such requests." Id. Thus, because "[t]he Commissioner
5 is required by law to meet only that specific responsibility[,]"
6 the First Circuit found that it could not "hold that he [wa]s
7 required to do more, no matter how efficient or beneficial other
8 forms of disclosure may be." Id.; see also Mandel Grunfeld and
9 Herrick v. United States Customs Service, 709 F.2d 41, 43 (11th
10 Cir. 1983) ("Nothing in the FOIA can be construed as requiring an
11 agency to set up a mailing list to automatically disseminate agency
12 records or information.") As one court has so succinctly put it,
13 "'FOIA creates a right of access to records, not a right to
14 personal services.'" Smith v. F.B.I., 2008 WL 115350, at *4
15 (E.D.Cal. 2008) (quoting Sands v. U.S., 1995 WL 552308, at *5
16 (S.D.Fla. 1995) (other citation omitted)). Indeed, in a different
17 context, the Supreme Court has recognized "that agencies generally
18 are not obligated to provide extensive service in fulfilling FOIA
19 requests." Kissinger, 445 U.S. at 154, 100 S.Ct. at 970.

20 Consistent with the foregoing, in Church of Scientology of
21 Texas v. I.R.S., 816 F.Supp. 1138 (W.D.Tex. 1993), the court held
22 that "[d]ocuments generated subsequent to the date specified in the
23 request are outside the scope of the request and need not be
24 disclosed." Id. at 1148. The court soundly reasoned that "[t]he
25 FOIA does not expressly or implicitly require an agency to locate
26 documents outside the dates specified in the request." Id.
27 "Furthermore, it is unreasonable to expect an agency to locate and
28 determine the disclosability of documents generated subsequent to

1 the date specified in a request." Id. Finding that "[t]he agency
2 should only be required to make one thorough search per request[,]"
3 the court held that "[t]he most logical deadlines [for documents to
4 satisfy a given request] is the date specified in that request."
5 Id.

6 Administratively, that deadline "makes the most sense[,]" the
7 court found, because "a search would be a never ending process if
8 the cut-off date for records responsive to the request is a date
9 other than the date specified in the request." Id. Furthermore,
10 requiring the agency to conduct more than one search would be
11 counter to the "premium" which the FOIA "places . . . on rapidly
12 processing FOIA requests." Id. (internal quotation marks and
13 citation omitted). For all of these reasons, the court opined that
14 "[i]f the requester desires documents from dates other than those
15 specified in the request the requester simply has to file another
16 request." Id.

17 This court is fully aware that the issue in Church of
18 Scientology was what date restrictions an agency may place on a
19 FOIA request, as opposed to the issue here of whether an agency has
20 an obligation to provide ongoing daily copies. Nonetheless, the
21 court finds that rationale applies with equal force in the present
22 case.

23 Plaintiff readily concedes the validity of OPM's position,
24 *i.e.*, there are "a number of cases ruling *against requiring*
25 agencies to automatically provide additional records as they become
26 available." Reply (doc. 59) at 10:14-16 (emphasis added). Perhaps
27 that is why plaintiff does not cite to a single case requiring an
28 agency to provide a requester with ongoing, daily copies of

1 documents prior to the time a FOIA request is made for such
2 documents. In any event, despite plaintiff's concession, he
3 persists in arguing that the court should compel OPM to provide him
4 with ongoing, daily feed of job vacancy announcements. None of
5 plaintiff's proffered reasons for providing daily feed are
6 convincing however, especially given the complete paucity of
7 applicable case law.

8 Plaintiff's first tack is to argue that he will sustain
9 "[i]rreparable injury" if the court denies his "request for
10 ongoing, daily files[.]" Cross-Mot. (doc. 46) at 7:21. Plaintiff
11 claims that he has shown irreparable harm because "[n]o other
12 methods," besides ongoing, daily files, "can produce complete and
13 timely disclosure of the job vacancy information." Id. at 7:21-22.
14 According to plaintiff, this is due to the relatively short amount
15 of time federal job vacancies remain open.

16 Irreparable harm or injury is a necessary element of a
17 preliminary injunction. See, e.g., Independent Living Ctr., So.
18 Cal. v. Maxwell-Jolly, 572 F.3d 644, 651 (9th Cir. 2009) (internal
19 quotation marks and citation omitted) (Among other things, "[t]o
20 warrant injunctive relief, a plaintiff must establish . . . , that
21 he is likely to suffer irreparable harm in the absence of
22 preliminary relief[.]") As OPM is quick to point out, however,
23 plaintiff Coven is not seeking a preliminary injunction. Thus, he
24 is invoking the wrong legal standard; the existence or non-
25 existence of irreparable harm is not an issue here.

26 Second, plaintiff cites to Morrow v. F.B.I., 2 F.3d 642 (5th
27 Cir. 1993); Aguilera v. F.B.I., 941 F.Supp. 144 (D.D.C. 1996); and
28 Cleaver v. Kelly, 415 F.Supp. 174 (D.D.C. 1976), which he believes

1 establish his "entitle[ment] to ongoing, daily copies of the
2 requested information." Cross-Mot. (doc. 46) at 7:15. These
3 cases are wholly inapposite, however. In the first place, all
4 three involved requests for expediting processing under FOIA - not
5 requests for ongoing, daily copies of agency records absent a FOIA
6 request. Nothing in any of these three cases even remotely
7 supports plaintiff's position that OPM must provide ongoing, daily
8 copies of its records. The court will not broaden the scope of
9 those holdings to impose an obligation upon OPM which FOIA clearly
10 does not contemplate.

11 Aguilera v. F.B.I., 941 F.Supp. 144 (D.D.C. 1996), the only
12 case plaintiff cites where the court did grant a preliminary
13 injunction also is readily distinguishable. Aguilera, a state
14 court criminal defendant, was easily able to establish irreparable
15 harm by showing that he was facing a 25 year to life prison
16 sentence if convicted and, that if not expedited, his FOIA request
17 would not be reached for approximately seven years, "after a
18 significant portion of his sentence has been served." Id. at 151-
19 152. Accordingly, the Aguilera court granted a preliminary
20 injunction requiring the F.B.I. to expedite the handling of
21 plaintiff's FOIA request. Plainly the circumstances of the present
22 case, OPM's refusal to provide daily copy of job vacancy
23 announcements, are a far cry from the irreparable harm which
24 warranted a preliminary injunction in Aguilera.

25 Bolstering the finding that OPM is under no obligation to
26 provide plaintiff with ongoing, daily copies of job vacancy
27 announcements is the fact that plaintiff has "voluntarily declined
28 to accept the daily data feed which is available outside the FOIA

1 process." Resp. (doc. 52) at 6:26-27. As Willie A. Harrison,
2 OPM's Deputy Director of the USAJOBS® program, explains it:

3 There are approximately four organizations and
4 individuals currently receiving data feed of
5 USAJOBS®[.] Among the recipients of the data are
6 Google, Inc., Microsoft Network and Yahoo (Via RSS
7 Feeds)[.] Current recipients of the data have entered
8 into a terms of use agreement with OPM, outlining the
9 responsibilities of this data feed.

7 Decl'n of Willie A. Harrison (doc. 39-3) at 6, ¶ (15).

8 Significantly, Deputy Director Harrison further explains that:

9 [w]hile this suit was pending, plaintiff was
10 made aware of the availability of the data feed and
11 sent a copy of the terms of use agreement, which he
12 refused to sign because he felt that it unduly limited
13 his use of the data. OPM has since indicated its
14 willingness to modify the terms of use agreement in an
15 effort to accommodate plaintiff's concerns. To date,
16 plaintiff has not contacted the USAJOBS® office to
17 discuss modification of the agreement.

14 Id. Thus, because plaintiff's asserted need for daily feed arises
15 from his own claimed commercial need, and because he has
16 voluntarily refused to accept daily feed which is available outside
17 the FOIA process, the court finds no merit to plaintiff's argument
18 that FOIA entitles him to ongoing, daily copies as a matter of law.

19 Third, the court gives no credence to plaintiff's assertion
20 that "unusual circumstances," supposedly justify an order requiring
21 OPM to provide him with ongoing, daily copies of job vacancy
22 announcements. Plaintiff cites to 5 U.S.C. §§ 3327 and 3330 as the
23 basis for his first claimed "unusual circumstance." Basically, the
24 former statute requires OPM to "provide information concerning
25 opportunities to participate in competitive examinations . . . [to]
26 be made available to the employment offices of the United States
27 Employment Services."

28 5 U.S.C. § 3327(a) (West 2007). Among other things, the latter

1 statute, section 3330, requires OPM to "establish and keep current
2 a comprehensive list" of certain types of announcements of vacant
3 competitive service positions. 5 U.S.C. § 3330 (West 2007).
4 Nothing in either of those statutes can fairly be construed as
5 mandating OPM to provide ongoing, daily copies of job vacancy
6 announcements as part of its obligations in responding to a FOIA
7 request.

8 Further, the "short time frame" for federal hiring activities
9 is not an "unusual circumstance" requiring, in plaintiff's words,
10 the "more extreme remedy" of ordering OPM to providing ongoing,
11 daily copies. See Reply (doc. 59) at 10:18 and 20. Plaintiff
12 claims that he, along with "his customers" will be "significant[ly]
13 harm[ed]" if OPM is not required to provide him with ongoing, daily
14 copies. Id. at 10:24. As previously discussed, however, there are
15 other means outside the FOIA process available to plaintiff and his
16 customers to obtain this information. Thus, there is nothing about
17 the "short time frame" of the requested information which convinces
18 the court to depart from the settled rule that an agency has no
19 obligation to provide documents generated after a given FOIA
20 request.

21 Lastly, even if, as plaintiff maintains, his request would
22 demand "almost no effort" by OPM, that is immaterial. See id. at
23 11:1. OPM's obligations under the FOIA are not dependent upon how
24 easy or convenient it is for that agency to provide the requested
25 information. Moreover, as earlier noted, requiring OPM to provide
26 information generated after a given FOIA request places an
27 additional burden upon OPM which FOIA did not intend.

28 For the reasons set forth above, the court grants OPM's

1 summary judgment motion to the extent it is based upon plaintiff's
2 claimed entitlement to ongoing, daily copies of job vacancy
3 announcements. Conversely, the court denies plaintiff's summary
4 judgment motion based upon that same claim.

5 **C. Expedited Processing**

6 Another way, according to plaintiff, in which OPM allegedly
7 violated FOIA is by not providing him with expedited processing
8 pursuant to 5 U.S.C. § 552(a)(6)(E)(i)(I). That statute requires
9 agencies to promulgate regulations "providing for expedited
10 processing of requests for records- . . . in cases in which the
11 person requesting the records demonstrates a compelling need[.]" 5
12 U.S.C. § 552(a)(6)(E)(i)(I) (West 2007). A "compelling need" in
13 turn means:

14 (I) that a failure to obtain requested records
15 on an expedited basis . . . could reasonably be
16 expected to pose an imminent threat to the life or
17 physical safety of an individual; or

17 (II) with respect to a request made by a person
18 primarily engaged in disseminating information,
19 urgency to inform the public concerning actual
20 or alleged Federal Government activity.

19 5 U.S.C. § (a)(6)(E)(v)(I) and (II) (West 2007). OPM argues that
20 plaintiff cannot demonstrate a "compelling need" within the meaning
21 of that statute. In particular, OPM reasons that the information
22 which plaintiff is seeking in his expedited request is "widely
23 available on the USAJOBS website[,]" as well as being "available on
24 the daily feed" which OPM provides. Mot. (doc. 40) at 3:13-14.
25 Therefore, OPM asserts that it also is entitled to summary judgment
26 as to plaintiff's claim that OPM did not expedite his FOIA request.

27
28 Plaintiff counters that he has shown the requisite "compelling

1 need" in that he "operates federalgovernmentjobs.us, a website that
2 distributes job vacancies[,]" and that there is "[a]n urgency to
3 inform the public" that "job vacancies exist[.]" Cross-Mot.
4 (doc. 46) at 2, ¶¶ C(2) and (D). In response to OPM's argument as
5 to the availability of the requested information elsewhere,
6 plaintiff asserts that FOIA does not include an "exemption from
7 expedited processing because similar information is available on a
8 government website." Id. at 3, ¶ E(1). There is no need for the
9 court to become mired down in the issue of whether plaintiff Coven
10 has shown compelling need so as to warrant expedited processing.
11 The court need not engage in that inquiry because, as more fully
12 explained below, it does not have jurisdiction to review OPM's
13 denial of expedited processing here - a factor both parties fail to
14 recognize.

15 When discussing his claimed "entitle[ment] to [e]xpedited
16 [p]rocessing[.]" plaintiff explicitly states that "5 USC
17 552(a)(4)(E)(**iii**)" is the jurisdictional basis for this claim.
18 Cross-Mot. (doc. 46) at 2 (emphasis added). There is no such
19 statute, however. Additionally, subsections (i) and (ii) of
20 section 552(a)(4)(E) govern when a complainant may recover
21 attorney's fees and costs. Therefore, even if plaintiff intended
22 to rely upon those particular subsections, they do not provide a
23 jurisdictional basis for his expedited processing request.

24 Moreover, FOIA unequivocally states that "[a] district court
25 of the United States shall *not* have jurisdiction to review an
26 agency denial of expedited processing of a request for records
27 after the agency has provided a complete response to the request."
28 5 U.S.C. § 552(a)(6)(E)(iv) (emphasis added). As previously noted,

1 since the filing of this lawsuit, OPM has provided plaintiff with
2 all of the information in his FOIA request, except for future
3 records, which the court has found OPM has no statutory obligation
4 to provide. Thus, because OPM has "provided a complete response"
5 to plaintiff Coven's request, id., "this Court no longer has
6 subject matter jurisdiction over the claim that [OPM] failed to
7 expedite processing of plaintiff's request." See Judicial Watch,
8 Inc. v. United States Naval Observatory, 160 F.Supp.2d 111, 112
9 (D.C.C. 2001); see also Citizens for Responsibility & Ethics in
10 Washington v. Dep't of Justice, 535 F.Supp.2d 157, 160 (D.C.C.
11 2008) (reasoning, based upon 5 U.S.C. § 552(a)(6)(E)(iv), that
12 because defendant had "completed processing" plaintiff's request,
13 "claim for failure to grant expedited processing[]" was "moot");
14 and Al-Fayed v. C.I.A., 254 F.3d 300, 301 n.1 (D.C.Cir. 2001)
15 (citing to § 552(a)(6)(E)(iv), the Court found that the agencies
16 which had "completed processing plaintiffs' underlying document
17 requests[]" were "no longer subject to appeal[]"). Thus, in
18 conducting, as it must, a *de novo* review of OPM's denial of
19 plaintiff's request for expedited processing, see Gerstein v.
20 Central Intelligence Agency, 2006 WL 3462658, at *4 (N.D.Cal. 2006)
21 (internal quotation marks and citation omitted), the court has
22 little difficulty finding that it lacks jurisdiction to entertain
23 plaintiff's claim that OPM improperly denied him expedited
24 processing of his FOIA request. Accordingly, the court grants OPM
25 summary judgment in this regard as well; and necessarily, denies
26 plaintiff's cross-motion for summary judgment on the expedited
27 processing claim.

28 **D. Fee Waiver/Reduction**

1 evidence in the record supporting the waiver." Id. (citing Friends
2 of the Coast Fork v. United States Dept' of the Interior, 110 F.3d
3 53, 55 (9th Cir. 1997)).

4 Applying that standard of review here means that this court
5 "may not consider reasons not offered by the agency [OPM] in the
6 denial letter." Western Watersheds Project v. Brown, 318 F.Supp.2d
7 1036, 1039 (D.Idaho 2004) (citation omitted). In other words,
8 *post-hoc* rationalizations are prohibited; OPM "must adhere to the
9 reasons given at the administrative level[.]" Institute For
10 Wildlife Protection v. U.S. Fish and Wildlife Serv., 290 F.Supp.2d
11 1226, 1228 (D.Or. 2003). "If those reasons are inadequate, and if
12 the requesters meet their burden then a full fee waiver is in
13 order." Friends of the Coast Fork, 110 F.3d at 55.

14 This *de novo* standard has different implications for plaintiff
15 Coven. His "fee waiver request should be evaluated based on [its]
16 face and the reasons given by [him] in support of the waiver[.]"
17 Center for Medicare Advocacy, 577 F.Supp.2d at 241 (internal
18 quotation marks and citations omitted). As a requester plaintiff
19 Coven, "bear[s] the initial burden of satisfying the statutory and
20 regulatory standards for a fee waiver[.]" Friends of the Coast
21 Fork, 110 F.3d at 55 (citation omitted); see also Citizens For
22 Responsibility & Ethics in Washington v. U.S. Dep't of Justice, 602
23 F.Supp.2d 121, 125 (D.D.C. 2009) (citation omitted) ("Parties
24 requesting a fee waiver under FOIA bear the burden of proving their
25 entitlement to such a fee waiver."); Center for Medicare Advocacy,
26 577 F.Supp.2d at 239 (citing, *inter alia*, McClellan, 835 F.2d at
27 1284-85) ("burden of satisfying the 'public interest standard' is
28 on" plaintiff); and 5 C.F.R. § 294.109(f)(3) ("In all cases the

1 burden of proof shall be on the requester to present evidence or
2 information in support of a request for a waiver or reduction of
3 fees.") With this standard of review firmly in mind, the court has
4 carefully examined the documents before it which evidently
5 constitute the administrative record here.⁴

6 **1. § 552(a)(4)(A)(iii) Waiver**

7 FOIA sets forth a two prong test for determining whether an
8 agency is required to waive fees. First, the disclosure must "be
9 likely to contribute significantly to public understanding of the
10 operations or activities of the government[.]" 5 U.S.C.

11 § 552(a)(4)(iii) (West 2007); see also McClellan, 835 F.2d at 1284.

12 Second, the disclosure must be "not primarily in the commercial
13 interest of the requester." Id.; see also McClellan, 835 F.2d at
14 1284. Pursuant to FOIA, an agency such as OPM "must promulgate
15 regulations establishing procedures and guidelines to determine
16 when such fees should be waived or reduced." Center for Biological
17 Diversity, 546 F.Supp.2d at 728 (citing 5 U.S.C. §
18 552(a)(4)(A)(1)). OPM's fee waiver regulation mirrors the two-
19 party statutory test. In accordance with that regulation, OPM
20 "will furnish documents without any charge, or at a reduced charge,
21 if disclosure of the information is in the public interest because
22 it is likely to contribute significantly to public understanding of
23 the operations or activities of the Government, *and* release of the
24 material is not primarily in the commercial interest of the

25
26 ⁴ Somewhat surprisingly, OPM did not specifically designate which parts
27 of the record now before this court were part of the administrative record.
28 Presumably, that administrative record at least encompassed the following: (1)
plaintiff's July 13, 2007 FOIA request (doc. 27 at 4; (2) OPM's September 10, 2007
response (doc. 27 at 5); (3) plaintiff's July 10, 2008 FOIA appeal (doc. 27) at 3;
and (4) OPM's September 4, 2008 response to that appeal (doc. 39-2) at 1-2.

1 requester." 5 C.F.R.

2 § 294.109(f)(emphasis added). The court will separately consider
3 whether plaintiff met his burden before OPM as to each of these
4 elements.

5 **a. "Public Understanding"**

6 As to the first prong of the public interest standard, OPM has
7 promulgated a regulation setting out four criteria for "determining
8 whether disclosure is in the public interest because it is likely
9 to contribute significantly to public understanding of the
10 operations or activities of the Government[.]" See 5 C.F.R. §
11 294.109(f)(1). Those criteria are: (i) "[t]he subject of the
12 request[;] (ii) [t]he information value of the information to be
13 disclosed[;] (iii) [t]he contribution to an understanding of the
14 subject by the general public likely to result from disclosure[;]
15 [and] (iv) [t]he significance of the contribution to public
16 understanding[.]" 5 C.F.R. § 294.109(f)(1)(i)-(iv).

17 "[A] requester seeking a fee waiver bears the initial burden
18 of identifying the public interest to be served." McClellan, 835
19 F.2d at 1285 (internal quotation marks and citation omitted). A
20 requester must offer more than "conclusory statements of public
21 interest[.]" Id. at 1286. The request must "explain with
22 reasonable specificity how disclosure will contribute to public
23 understanding." Id. at 1285. When "public interest is asserted
24 but not identified with reasonable specificity, and circumstances
25 do not clarify the point of the requests[,]. . . an agency may
26 infer a lack of substantial public interest[.]" Id. (internal
27 quotation marks and citation omitted).

28 Confining itself to the facts and arguments before OPM, as it

1 must, readily persuades the court that plaintiff did not meet his
2 burden as to public understanding. The subject matter is easily
3 ascertainable from plaintiff's request - "electronic copies of the
4 data contained in the USAJOBS.gov job vacancy database." Doc. 27
5 at 4. However, that request does not explain at all, much less
6 with "reasonable specificity," how disclosure of that data will
7 contribute to public understanding for purposes of FOIA's fee
8 waiver provision. Plaintiff's FOIA request does mention that the
9 requested "files will be used to disseminate the [job vacancy]
10 information to the public." Id. At best, this is nothing more
11 than a "conclusory statement" of public interest which is not
12 sufficient to meet plaintiff's burden here.

13 Plainly, mere dissemination to the public, without more, does
14 not show that such disclosure "is likely to contribute
15 significantly to public understanding of the operations or
16 activities of the government[.]" See 5 U.S.C. § 552(a)(4)(iii)
17 (West 2007). Plaintiff's appeal is similarly deficient. Further,
18 given the relative brevity of plaintiff Coven's FOIA request and
19 his appeal, "circumstances do not clarify the point of [his]
20 request[.]" See McClellan, 835 F.2d at 1285 (internal quotation
21 marks and citation omitted). Given this lack of proof, the court
22 finds that plaintiff Coven did not meet his burden as to the first
23 prong of FOIA's public interest fee waiver provision - public
24 understanding.

25 Three additional factors reinforce this finding. First, in
26 his cross-motion plaintiff baldly asserts that disclosure of the
27 requested data "will contribute significantly to the public
28 understanding of the operations of government hiring[.]" Cross-Mot.

1 (doc. 46) at 7, ¶ (E) (3) (citation omitted). Even disregarding
2 the conclusory, unsubstantiated nature of that statement, plaintiff
3 could not now rely thereon because a requester cannot, "at the
4 district court level, cure [his] failure to demonstrate a public
5 interest before the agency[.]" See Citizens for Responsibility &
6 Ethics in Washington v. U.S. Dep't of Educ., 593 F.Supp.2d at 268
7 (citing Nat'l Treasury Employees Union v. Griffin, 811 F.2d 644,
8 648 (D.C.Cir. 1987)).

9 Second, the present case stands in sharp contrast to those
10 where courts have found the public understanding prong has been
11 met. Citizens for Responsibility & Ethics in Washington v. U.S.
12 Dep't of Justice, 602 F.Supp.2d 121 (D.D.C. 2009), is illustrative.
13 There, a non-profit organization requested information regarding a
14 significant reduction in penalties sought by the Department of
15 Justice ("DOJ") in tobacco industry litigation. The court rejected
16 DOJ's contention "that the claim was too 'ephemeral' to be likely
17 to contribute to public understanding." Id. at 125 (citation
18 omitted). In part, the court reasoned that "given the well-
19 publicized nature of and interest in the reduction of fees in the
20 tobacco litigation,

21 . . . , the contention that information on th[at] issue would
22 inform the public understanding is not such a bare allegation as to
23 warrant rejection by th[e] Court." Id. at 125-126. Therefore, in
24 granting the organization's summary judgment motion on its
25 entitlement to a fee waiver under FOIA, the court found, *inter*
26 *alia*, that that request was in the public interest. See also
27 Institute for Wildlife Protection, 290 F.Supp.2d at 1231 (plaintiff
28 entitled to a fee waiver under the public interest exception where

1 in its request and appeal it "stated that the information was of
2 great public interest because the records concerned endangered
3 species, [it] cited the public and Congressional interest in recent
4 reports on [the agency']s use (or misuse) of science in endangered
5 species actions, and gave an example of how GIS [Geographic
6 Information Systems] information would be of interest to the
7 public[]").

8 Third, as OPM notes, the requested job vacancy announcement
9 information is available on OPM's own website, as well as on "other
10 web sites using the daily data feed." Resp. (doc. 52) at 5. This
11 fairly widespread availability further undermines the view that the
12 requested information "is likely to contribute *significantly* to
13 public understanding of the operations or activities of the
14 government[.]" See 5 U.S.C. § 552(a)(4)(iii) (West 2007).

15 **b. "Commercial Interest"**

16 Because plaintiff Coven has not met the first prong of the
17 public interest exception, the court could end its inquiry here.
18 However, for the moment, the court will assume that plaintiff did
19 satisfy that first prong. Even with that assumption, the result
20 does not change. As more fully explained below, plaintiff Coven
21 also is unable to satisfy the second prong of that exception - that
22 the requested data is not primarily in his commercial interest.

23 In his cross-motion, plaintiff enumerates several reasons as
24 to why he should not be deemed a commercial requester. Plaintiff
25 stresses that he "is primarily engaged in disseminating federal job
26 vacancies free of charge." Cross-Mot. (doc. 46) at 5, ¶ (C)(2).
27 Plaintiff states that the "[r]equested records are not intended for
28 sale or as part of a commercial product or service." Id. at 5, ¶

1 (C)(4). Further attempting to distinguish himself from a
2 commercial use requester, plaintiff notes that the “[r]ecords will
3 be used to validate and verify federalgovernmentjobs.us current
4 existing systems[.]” Id. at 5, ¶ (C)(2)(b). Thus, from
5 plaintiff’s standpoint, “there is little additional commercial
6 value[.]” to be gained from his having access to these records. See
7 id. Based upon the foregoing, plaintiff maintains that
8 “[d]isclosure of the [requested] [i]nformation ‘is Not Primarily in
9 the Commercial Interest of the Requester.’” Id. at 6, ¶(D)(6)
10 (emphasis in original). Yet, plaintiff likens his “business model
11 . . . to free online news media[,]” which “[a]cquir[e] and
12 publish[] information *using advertising to generate revenue.*” Id.
13 at 5, ¶ (C)(2)(a) (emphasis added). In any event, in plaintiff’s
14 view he is not a commercial requester. Accordingly, he claims that
15 the OPM erred in finding that he was not entitled to a fee waiver.

16 OPM insists, however, that plaintiff will be using the
17 requested data “for ‘commercial use’ - to support his commercial,
18 for-profit jobs website.” Resp. (doc. 52) at 5. Therefore, OPM
19 maintains that as a commercial requester, plaintiff cannot obtain a
20 fee waiver. Given the limited scope of this court’s review, which
21 both parties overlook, there is no need to delve into plaintiff’s
22 argument that he has been “misclassified . . . as [a] ‘Commercial
23 use requestor [sic]’ and is therefore entitled to reduced or waived
24 fees.” Cross-Mot. (doc. 46) at 5, ¶ (C).

25 Confining itself to the administrative record, as the court
26 must, it finds that plaintiff did not meet his burden of showing
27 that he is not a commercial requester. In his July 13th FOIA
28 request, as noted above, plaintiff’s stated purpose for requesting

1 electronic copies of the data contained in the USAJOBS® database
2 was "to disseminate th[at] information to the public." Doc. 27 at
3 4. Beyond that, plaintiff provided OPM with no other information
4 as to how he intended to use the requested information, or the
5 context in which he was making that request. Plaintiff's FOIA
6 appeal was similarly lacking in detail, stating simply that his
7 "purpose is to publish these job vacancies[.]" Id. at 3.

8 Unlike his cross-motion, plaintiff does not advise OPM that he
9 will be publishing that information free of charge, so as to
10 arguably take him outside the realm of a commercial requester.⁵
11 Thus, plaintiff did not meet his initial burden of establishing
12 that he does not have a commercial interest in the requested data.
13 Indeed, the scant information in plaintiff's July 13, 2007 FOIA
14 request and his subsequent appeal readily explains why OPM did not
15 assert plaintiff's status as a commercial requester as a reason for
16 denying his fee waiver request. Rather, as previously discussed,
17 OPM denied plaintiff's request because he did "not fit into the
18 category of an educational institution, non-commercial scientific
19 institution, or representative of the news media." Doc. 39-2 at 1
20 (citation omitted).

21 The present case is markedly different from Center for
22 Medicare Advocacy, 577 F.Supp.2d 221, where plaintiff noted in its

24 ⁵ Based upon plaintiff's description of his "business model" as "similar
25 to free online news media, [a]cquiring and publishing information using advertising
26 to generate revenue[.]" seemingly there may be a revenue generating component to
27 his endeavor. See Cross-Mot. (doc. 46) at 5, ¶ (C)(2) a). While perhaps plaintiff
28 is operating the federalgovernmentjobs.us website for purely altruistic reasons,
it appears that ultimately plaintiff hopes to derive a profit therefrom.
Moreover, even without charging a fee, the posting of federal job vacancies appears
to be "information . . . relate[d] to commerce, trade, or profit[.]" and hence
"commercial." See Carlson v. U.S. Postal Service, 504 F.3d 1123, 1128 (9th Cir.
2007) (internal quotation marks and citation omitted).

1 fee waiver request that it was "a well-known not-for-profit
2 organization that educates and advocates on behalf of Medicare
3 beneficiaries nationwide." Id. at 242. Based upon that statement
4 in the administrative record, the court readily concluded that
5 plaintiff "established that it does not have a commercial interest
6 in the disclosure of the [requested] information." Id. As just
7 explained, neither plaintiff Coven's initial fee waiver request nor
8 his appeal included any similar statements as to his status.

9 As the foregoing shows, plaintiff Coven did not meet his
10 threshold burden of establishing that the requested data was not
11 primarily in his commercial interest. Therefore, plaintiff failed
12 to meet his burden as to both prongs of FOIA's public interest fee
13 waiver exception. Moreover, as outlined below, in its denial of
14 plaintiff's appeal as to the fee waiver, OPM's proffered reason is
15 adequate.

16 **2. Adequacy of OPM's Reasons for Denying Fee Waiver**

17 In arguing for summary judgment on the fee waiver
18 issue, OPM notes that plaintiff has previously indicated that he
19 "operates a business (federalgovernmentjobs.us[.]" Mot. (doc. 40)
20 at 2:15 (internal quotation marks and citation omitted). OPM thus
21 reasons that because plaintiff is "a commercial requester seeking
22 job vacancy announcements which are widely available at the USAJOBS
23 website," he does not qualify for a fee waiver or reduction. Id.
24 at 2:15-18. In denying plaintiff's appeal of his fee waiver
25 request, however, as set forth earlier, OPM's only proffered reason
26 was that plaintiff did "not fit into the category of an educational
27 institution, non-commercial scientific institution, or
28 representative of the news media." Doc. 39-2 at 1 (citing 5 CFR

1 294.103; 294.109). OPM must stand by that reason now and cannot
2 expand its justification for denying plaintiff's fee waiver to
3 include its belief that he is a commercial requester. See Western
4 Watersheds, 318 F.Supp.2d at 1039.

5 In his cross-motion, plaintiff does not mention whether he
6 qualifies as an "educational institution" or a "non-commercial
7 scientific institution," as OPM's regulations define those terms.⁶
8 Perhaps that is because he realizes the futility of such an
9 argument. Regardless, the court deems plaintiff's silence as a
10 concession that he does not qualify under either of those
11 definitions, and hence is not entitled to a fee waiver or reduction
12 on those grounds.

13 Plaintiff readily concedes that he is "not a representative of
14 the news media[.]" Cross-Mot. (doc. 46) at 5, ¶ III (C)(2)b).
15 Despite that concession, offering no rationale whatsoever,
16 plaintiff asserts that he "meets all the requirement[s] of that
17 classification under 5 CFR 294.103©." Id. Plaintiff reasons that
18 "Federal jobs vacancies are of current interest to the public and
19 [he] is a person who gathers that information for distribution to
20 the public." Reply (doc. 59) at 12:4-6.

21 The applicable regulation defines a "representative of the
22 news media" as "any person actively gathering news for an entity
23 that is organized and operated to publish, broadcast, or otherwise
24

25 ⁶ Section 294.103(b)(1) defines an "educational institution" as "any
26 public or private, preschool, elementary, or secondary school, institution of
27 undergraduate or graduate higher education, or institution of professional or
28 vocational education, which operates a program or programs of scholarly or
scientific research." 5 C.F.R. § 294.103(b)(1). "[N]on-commercial scientific
institution refers to an institution that is not operated on a commercial basis
. . . , and which 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).

1 disseminate news to the public." 5 C.F.R.
2 § 294.103©. Arguably gathering federal job vacancy announcements,
3 such as plaintiff is attempting to do, could come within that
4 regulation's definition of "news" in that such information "would
5 be of current interest to the public." See id. Even giving
6 plaintiff that latitude, however, the court cannot find that he
7 qualifies as a "representative of the news media" because he has
8 not shown that he is gathering such information "for an entity that
9 is organized and operated to publish, broadcast, or otherwise
10 disseminate news to the public." See 5 C.F.R. § 294.103©.

11 Plaintiff has not suggested, for example, that he is gathering
12 this information for "television or radio stations broadcasting to
13 the public at large," or for "publishers of periodicals who make
14 their products available for purchase or subscription by the
15 general public." See id. Thus, the court has little difficulty
16 finding that OPM accurately found that plaintiff is not entitled to
17 a fee waiver because he is not a "representative of the news
18 media." OPM also accurately found, as set forth above, that
19 plaintiff did not qualify for a fee waiver because he does not fall
20 within the regulatory definition of either a non-commercial
21 scientific institution or an educational institution.

22 In sum, because plaintiff did not meet his threshold burden of
23 showing entitlement to a fee waiver under 5 U.S.C.
24 § 552(a)(4)(A)(vii), and because OPM offered an adequate reason for
25 denying that request, the court grants summary judgment in OPM's
26 favor to the extent it is based upon OPM's denial of a fee waiver.
27 On the other hand, the court denies plaintiff's cross-motion for
28 summary judgment on that same issue.

1 **E. "Excessive" Fees**

2 The only aspect of plaintiff's appeal which OPM granted was
3 for "the job vacancy records contained in USAJOBS." Doc. 39-2 at
4 2. However, because OPM found that plaintiff was "not eligible for
5 a fee waiver," it advised him that he would "be subject to
6 applicable fees under 5 CFR 294.109." Id. Very basically, *inter*
7 *alia*, that regulation sets forth rates used to compute fees for
8 document searching, review and duplication. The rate, for example,
9 for "[c]omputer time" is the "[a]ctual direct cost[]" to OPM. 5
10 C.F.R. § 294.109(b). "Actual direct costs[]" also is the
11 regulatory rate for "[s]upplies and other materials[,]" but the
12 rate for "[e]mployee time" is "[s]alary rate plus 16% to cover
13 benefits." Id.

14 By letter dated October 17, 2008, OPM notified plaintiff that
15 "[t]he labor and machine costs associated with []his request was,
16 for "initial creation of report[,] . . . "[l]abor & [m]achine time
17 35 hours @ \$250.00 per hour = \$8750" and for "[s]ubsequent
18 reports[,] . . . [l]abor 20 hours @ \$250 = \$5000.00[.]" Doc. 52-2
19 at 1 (emphasis omitted). There is no dispute that plaintiff
20 appealed that fee assessment as "excessive[,]" but his December 16,
21 2008 appeal is not part of the record before this court. See Doc.
22 60-2 at 1.

23 There is no dispute as well that "[p]laintiff has not paid the
24 estimate[d]" fees." Resp. (doc. 52) at 6. Therefore, OPM has "not
25 yet released any records in response to plaintiff's request."
26 Reply (doc. 59) at 6:14. In his cross-motion plaintiff takes the
27 position that the assessed fees are "excessive" in that they are
28 based on "exaggerated labor requirements and exaggerated hourly

1 rates." Cross-Mot. (doc. 46) at 4, ¶ III (B). Plaintiff outlines
2 the reasons which he believes support that position, such as
3 "[e]mployee time[] is to be charged at the hourly salary rate plus
4 16% to cover benefits, not \$250 per hour." Id. at 4, ¶ III (B)(2)
5 (footnote added). The first part of this statement is accurate in
6 that, as noted above, it reflects the rate for "employee time"
7 found in
8 5 C.F.R. § 294.109(b). Plaintiff is overlooking the fact, however,
9 that the \$250 hourly rate, as reported by OPM, reflects "labor and
10 machine costs[,] " not just "employee time." See Doc. 60-2 at 1
11 (emphasis added). Therefore, because OPM did not distinguish
12 between those types of costs, it does not necessarily follow, as
13 plaintiff implies, that the labor costs which OPM estimates are
14 excessive.

15 There is a much more fundamental defect in plaintiff's
16 argument though. His December 16, 2008 appeal of OPM's fee
17 estimate is not before the court. Therefore, it is impossible for
18 the court, as it must, to evaluate that appeal on its "face and the
19 reasons given by [plaintiff] in support" of his argument that the
20 estimated fee is excessive. See Center for Medicare Advocacy, 577
21 F.Supp.2d at 241 (internal quotation marks and citations omitted).
22 Not only that, but because that appeal is not part of this record,
23 the court has no way of knowing the precise relief which plaintiff
24 sought therein, *i.e.* fee waiver or fee reduction.

25 Plaintiff states in his reply that besides claiming that the
26 estimated fee was excessive, he claimed that it was "not in
27 compliance with . . . OPM's own regulation to charge actual direct
28 costs and not to charge more than 16% more than the salary of

1 employee's actual salary[.]” Reply (doc. 59) at 2:17-19.
2 Purportedly another ground for that appeal was that the assessed
3 fee was “not similar to the fees charged to other similar
4 requestors [sic].” Id. at 2:19-20.

5 The court has no reason to doubt that plaintiff made those
6 arguments to OPM, but the court cannot ignore the limited scope of
7 its review; and the fact remains that the appeal itself is not part
8 of this record. The court simply has no way of knowing, and it
9 declines to speculate, as “to the facts and arguments in the record
10 before” OPM. See Center for Biological Diversity, 546 F.Supp.2d at
11 728 (citations omitted). Simply put, without that appeal the court
12 is unable to determine whether plaintiff, as the requester, met his
13 initial “burden of . . . present[ing] evidence or information in
14 support or [his] request for [a] . . . reduction of fees[.]” because
15 allegedly those fees are excessive. See 5 C.F.R. § 294.109(f)(3).

16 Additionally, plaintiff misconceives the nature of his burden
17 at this juncture. He maintains that he “has show[n] a significant
18 amount of evidence that the fee isn’t reasonable.” Reply (doc. 59)
19 at 13:22-23. He thus reasons that factual issues as to the
20 “excessive fee assessment” preclude summary judgment in OPM’s favor
21 on that issue. See id. What plaintiff fails to recognize,
22 however, is that there is no way for the court to ascertain whether
23 that purported evidence was before OPM when it denied his appeal on
24 the fee assessment issue. Plaintiff has not shown, for example,
25 that any of the evidence which he is now proffering, such as select
26 pages from “MGS['] GSA 2008 Catalog[,]” was presented to OPM as
27 part of his December 16, 2008 appeal. See id. at 9:7, and exh. 4
28 thereto. Just like OPM cannot now expand the administrative

1 record to include reasons for denial upon which it did not
2 previously rely, plaintiff cannot expand the scope of that record
3 to include evidence, facts and arguments which he did not present
4 to OPM in his December 16, 2008 appeal. Thus, as with the fee
5 waiver issue, the court necessarily concludes that plaintiff has
6 not met his burden of demonstrating the excessiveness of the fee
7 estimate.

8 Moreover, OPM's reasons (which are part of this record) for
9 disagreeing with plaintiff's argument that the fee estimate is
10 excessive are adequate. In denying plaintiff's December 2008
11 appeal, OPM explained that the requested information "must be
12 produced by . . . MGS, OPM's technology provider for USAJOBS
13 information." Id. at 2. Further, OPM explained that "[t]he
14 assessed fees . . . are based on an estimate from MGS for the
15 expenditures that OPM will actually incur from MGS in creating the
16 custom report necessary to provide [plaintiff] with the information
17 [he] requested." Id. OPM thus reasoned that "the assessed fees
18 represent the direct costs of providing services pursuant to 5 CFR
19 294.109 and are therefore appropriate." Id. OPM did offer
20 plaintiff the option of "further confer[ring] with OPM staff to
21 reformulate [his] request . . . to attempt to meet [his] needs at a
22 lower cost[.]" Id. Evidently plaintiff did not avail himself of
23 this opportunity, however, just as he has not contacted OPM
24 regarding the possibility of a modified term of use agreement.
25 Accordingly, the court grants OPM's motion for summary judgment as
26 to the estimated fees and denies plaintiff's cross-motion in that
27 regard.

28 **F. "Electronic Format"**

1 In his July 13, 2007, FOIA request, and in his appeal of that
2 request, plaintiff expressly states that he is seeking "electronic
3 copies of the data contained in the USAJOBS.gov job vacancy
4 database." Doc. 27 at 3 and 4. Plaintiff concluded his FOIA
5 request stating that he could "receive the files as is or
6 compressed (.zip or .gz) by electronic mail, web, or through
7 FTP[.]" Id. at 4. He further indicated that he could "provide an
8 upload server, or c[ould] download form [MGS] or OPM provided
9 server[.]" Id.

10 In his administrative appeal, citing to 5 U.S.C.
11 § 552(a)(3)(B), plaintiff noted that the requested "records should
12 be delivered in the format requested (specifically daily electronic
13 data files delivered through FTP,⁷ email, or web) and that OPM has
14 the responsibility to maintain the records in that format." Id.
15 Plaintiff concedes that "[o]ther formats such as the gateway file[]
16 might be acceptable[,] if they contain all the data elements listed
17 in [his] request for all vacancies posted to USAJOBS.gov." Id.
18 Plaintiff added that in his view, "regardless of data feed
19 generation issues, OPM would still have the responsibility to
20 deliver electronic records contained in their database." Id.

21 In its response to that appeal, OPM recognized that plaintiff
22 is "requesting electronic copies of the job vacancy records
23 contained in USAJOBS[.]" and it granted plaintiff's appeal in that
24 "regard[.]" Doc. 39-2 at 1 and 2. OPM's response does not
25 indicate the manner of delivery however.

26 FOIA requires that a government agency such as OPM "provide
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28 ⁷ According to plaintiff, "FTP" is an acronym for "File Transmission Protocol[,] a commonly used method to transfer electronic file[s] through the Internet creating a 'copy' in the process." Cross-Mot. (doc. 46) at 10:25 n.1.

1 the record in any form or format requested by the person if the
2 record is readily reproducible by the agency in that form or
3 format." 5 U.S.C. § 552(a)(3)(B) (West 2007). OPM indicates that
4 it can "readily reproduce the information requested and provide it
5 to Plaintiff in its *electronic format*[,] " which is what plaintiff
6 sought in his FOIA request. See Resp. (doc. 52) at 7 (emphasis
7 added). In light of the foregoing, and the court's previous ruling
8 herein that plaintiff is not entitled to daily electronic data
9 feeds, the court denies as moot the parties' respective motions for
10 summary judgment on the issue of electronic format.

11 **G. Attorney's Fees and Costs**

12 Plaintiff maintains that if he prevails on any aspect of this
13 litigation, or, if the court finds that OPM "has had a change of
14 position and [his] complaint is [not] insubstantial," he is
15 entitled to attorney's fees and "other [l]itigation costs" pursuant
16 to 5 U.S.C. § 552(a)(4)(E)(i). Cross-Mot. (doc. 46) at 10. That
17 section provides that "[t]he court may assess against the United
18 States reasonable attorney fees and other litigation costs
19 reasonably incurred in any case under this section in which the
20 complainant has substantially prevailed." 5 U.S.C.
21 § 552(a)(4)(E)(i) (West Supp. 2009). Plaintiff Coven fails to take
22 into account, however, that even if he can establish that he has
23 "substantially prevail[ed]" within the meaning of that statute, as
24 a *pro se* litigant, he cannot recover attorney's fees thereunder.
25 See Crews v. Internal Revenue, 2000 WL 900800, at *6 (C.D.Cal.
26 April 26, 2000) (citing Carter v. Veterans Admin., 780 F.2d 1497,
27 1481 (9th Cir. 1986)) ("A *pro se* litigant may not recover
28 attorney's fees under the FOIA.").

1 On the other hand, despite plaintiff's *pro se* status, in the
2 court's discretion, he may be able to obtain an award of costs
3 under that statute. See id. (citation omitted). The court agrees
4 with OPM, though that an award of costs, if any, would be premature
5 at this time in that no judgment has yet been entered in this case.
6 Plaintiff is advised, however, that if he does decide to pursue his
7 costs, he will be held to the same standard of "substantially
8 prevail[ing]." See Laughlin v. I.R.S., 117 F.Supp.2d 997, 1002
9 (S.D.Cal. 2000) (citing 5 U.S.C. § 552(a)(4)(E)).

10 For the reasons set forth above, the court grants OPM's motion
11 for summary judgment to the extent plaintiff is seeking to recovery
12 statutory attorney's fees. Conversely, the court denies
13 plaintiff's summary judgment motion in that regard. As to
14 plaintiff's claim for costs, the court denies OPM's summary
15 judgment motion on that claim. It likewise denies plaintiff's
16 motion insofar as he is seeking costs, but it denies his motion
17 without prejudice to renew.

18 Conclusion

19 For the reasons set forth above, the court hereby ORDERS that:

20 (1) the motion for summary judgment by defendant, the United
21 States Office of Personnel Management (doc. 38) is GRANTED as to
22 plaintiff's claims for: (a) "ongoing, daily copies" of USAJOBS® job
23 vacancy announcements; (b) expedited processing; © denial of a fee
24 waiver; and (d) attorney's fees; but DENIED as moot with respect to
25 plaintiff's claim for the requested data in electronic format; and
26 DENIED as to plaintiff's claim for costs;

27 IT IS FURTHER ORDERED that:

28 (2) the motion for summary judgment by plaintiff Daniel Saul

1 Coven (doc. 44) is DENIED as to his claims for: (a) "ongoing,
2 daily" copies of USAJOBS® job vacancy announcements; (b) expedited
3 processing; © denial of a fee waiver; (d) to have the requested
4 data provided in electronic format; and
5 (e) attorney's fees; but plaintiff's claim for costs is DENIED
6 without prejudice to renew; and

7 IT IS FINALLY ORDERED that:

8 (3) plaintiff *pro se* Daniel Saul Coven's Motion to Strike
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1 (doc. 56) is DENIED.

2 DATED this 28th day of September, 2009.

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13 Copies to counsel of record and plaintiff *pro se*

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Robert C. Broomfield
Senior United States District Judge