

# EXHIBIT A

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF RONALD ERDMANN

I, Ronald Erdmann, hereby declare:

1. I am the Deputy Director for Research within the National Travel and Tourism Office (“NTTO”) of the International Trade Administration (“ITA”), which is a bureau of the Department of Commerce (“DOC”). As such, I am responsible for overseeing the market research programs administered by the office. I have held this position for over 20 years.

2. The “I-92 Program” and “I-94 Program” are part of DOC’s international trade activities conducted through ITA. The programs sell government reports and data to the public.

3. The “I-92 Program” is a joint effort between the Department of Homeland Security, Customs and Border Protection, and the ITA NTTO, which uses the Program to provide international air traffic statistics to the government and the travel industry. The Program is a source of data on all international flights to and from the United States. It reports the total volume of air traffic and various subsets of traffic. The I-92 Program is administered by ITA.

4. ITA uses the statistics it collects under the I-92 Program to publish the *U.S. International Air Travel Statistics Report* on a monthly, quarterly, and annual basis. ITA sells

monthly, quarterly, and/or annual subscriptions to the report(s), or data files for a fee. ITA also maintains and utilizes a data file related to the report ("I-92 Data File"), which consists of anonymized data about air travelers between the United States and other countries.

5. The "I-94 International Arrivals Program" or "I-94 Program" provides data on monthly and annual overseas visitor arrivals to the United States along with select Mexican and Canadian visitor statistics. The information is presented in a report entitled the *Summary of International Travel to the United States* with 35 tables of information about non-U.S. resident visitor arrivals. ITA sells monthly, quarterly, and annual subscriptions to this report for a fee. ITA also sells quarterly and annual publications of a data file called "Air Arrivals I-94 Database (Detail Arrival Records)" ("I-94 Data File"), which consists of anonymized data about foreign visitors to the United States.

6. As part of the I-92 and I-94 Programs, ITA collects, retains, and expends user fees pursuant to delegated authority under the Mutual Educational and Cultural Exchange Act, as authorized in annual appropriations acts.

7. The I-92 and I-94 Program publications are provided only to those persons and entities that pay the applicable fee.

8. The NTTO has several subscribers to the I-92 Program publications, which tend to be aviation industry clients (airlines, airports, consultants, a manufacturer and related), foreign or regional national tourism offices, tourism industry consultants, tourism bureaus, and U.S. federal agencies. The NTTO has several subscribers to the I-94 Program publications, which tend to be state and city tourism offices, aviation/tourism industry consultants, shopping entities, federal agencies, and other travel related firms. In addition, interested individuals and entities may simply purchase annual reports and Excel files from either program.

9. On February 26, 2016, Plaintiff David Yanofsky filed a FOIA request, (the "Request") with ITA seeking records related to the I-94 Program and I-92 Program.

Specifically, Plaintiff sought:

access to and copies of [NTTO's] "Air Arrivals I-94 Annual Datafile" from 2015, 2014, 2013, 2012 and 2011 and its associated technical documentation [and] . . . access to and copies of [NTTO's] "U.S. International Air Travel Statistics Report (APIS/I-92) Data Files" for 2015, 2014, 2013, 2012 and 2011 and its associated technical documentation.

The Request is attached hereto as Exhibit A.

10. Plaintiff requested to receive the files in electronic format.

11. In the Request, Plaintiff sought a fee benefit as a representative of the news media pursuant to 5 U.S.C. § 552(a)(4)(A)(ii) and a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).

12. On March 28, 2016, Plaintiff's counsel submitted a letter, attached hereto as Exhibit B, which purported to "appeal[] ITA's failure to respond to [Plaintiff's] request within twenty business days[.]"

13. On March 29, 2016, DOC responded to Plaintiff's counsel in a letter, attached hereto as Exhibit C, stating that ITA had not received the Request and, hence, had not denied any records. The author of the letter further stated that he was redirecting the Request, attached to Plaintiff's March 28 letter, to ITA.


14. On March 30, 2016, ITA FOIA Officer Justin Guz sent a letter, attached hereto as Exhibit D, to Plaintiff stating that the records sought were being withheld under 5 U.S.C. § 552(a)(4)(A)(vi).

15. On March 31, 2016, Plaintiff's counsel submitted a letter, attached hereto as Exhibit E, appealing ITA's decision on the Request.

16. Plaintiff has not paid or agreed to pay the fee for the I-92 and I-94 publications it seeks through its FOIA request.

Pursuant to Title 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 28, 2016  
Washington, D.C.

  
\_\_\_\_\_  
Ronald Erdmann

## **Exhibit A**

### **February 26, 2016 Request**

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## FOIA Request

1 message

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**Marisa Johnson** <marisa@atlanticmedia.com>

Fri, Feb 26, 2016 at 1:31 PM

To: FOIA@trade.gov

Cc: David Yanofsky <y@qz.com>, Katie Townsend <ktownsend@rcfp.org>

Dear Sir or Madam:

Attached please find our request for documents.

Best,  
Marisa Johnson

MARISA M. JOHNSON | SENIOR COUNSEL  
600 NEW HAMPSHIRE AVE., NW | WASHINGTON, DC 20037  
o. 202-266-7756 | MJOHNSON@ATLANTICMEDIA.COM  
ATLANTICMEDIA

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 Yanofsky Letter - Feb26 Signed with Attachments.pdf  
3827K

# QUARTZ

Marisa Johnson  
Senior Counsel  
The Atlantic Monthly Group, Inc.  
600 New Hampshire Ave., NW  
Washington, D.C. 20037  
mjohnson@atlanticmedia.com

February 26, 2016

VIA EMAIL

Dear FOIA Officer,

I am writing as counsel to The Atlantic Monthly Group, Inc. and its publication Quartz (qz.com) on behalf of David Yanofsky, a journalist employed by Quartz. Please consider this letter a new request for records on behalf of Mr. Yanofsky under the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

As you may know, the Department of Commerce ("DOC") previously denied a FOIA request filed by Mr. Yanofsky in March 2015. In response to Mr. Yanofsky's prior FOIA request, the DOC asserted that the requested records were withheld under FOIA's "displacement provision," 5 U.S.C. § 552(a)(4)(A)(vi), and that the records Mr. Yanofsky sought could be obtained only pursuant to 15 U.S.C. § 1525, which operates as a superseding fee statute. Mr. Yanofsky administratively appealed the denial of his previous request, and his appeal was denied.

As discussed in more detail herein, and as I have outlined in prior correspondence, the DOC's position is erroneous. Mr. Yanofsky is entitled to obtain the records he has requested under FOIA, and he is entitled to a fee benefit as a representative of the news media, as well as a fee waiver. In an attempt to avoid unnecessary litigation over this matter, and to give the DOC an opportunity to revisit its incorrect position, Mr. Yanofsky is now submitting this new and updated FOIA request for access to and copies of the Office of Travel Tourism Industries' ("OTTI") "Air Arrivals I-94 Annual Datafile" and OTTI's "U.S. International Air Travel Statistics Report (APIS/I-92) Data Files" and their associated technical documentation. In responding to this request, the DOC should consider the arguments made in support of Mr. Yanofsky's prior request that it previously declined to consider, as well as the additional information provided below, that show that Mr. Yanofsky is entitled to the requested records, to a fee benefit as a representative of the news media, and to a fee waiver.

## Background

Mr. Yanofsky previously filed a FOIA request on March 10, 2015, for access to and copies of OTTI's "Air Arrivals I-94 Database Annual Datafile" and its associated technical documentation and OTTI's "U.S. International Air Travel Statistics Report (APIS/I-92) Data files" and its associated technical documentation from 2014, 2013, 2012 and 2011. A true and correct copy of that request is attached hereto as Attachment A. The International Trade Administration ("ITA") denied the request. A true and correct copy of that denial is attached hereto as Attachment B.



Mr. Yanofsky filed an administrative appeal of the denial of the request, a true and correct copy of which is attached hereto as Attachment C. The DOC denied that administrative appeal on November 17, 2015. A true and correct copy of that denial is attached hereto as Attachment D. In denying Mr. Yanofsky's administrative appeal, the DOC raised new legal issues not included in the ITA's initial denial of the request.

On December 14, 2015, I sent a letter on Mr. Yanofsky's behalf asking the DOC to reopen the administrative appeal. A true and correct copy of that letter is attached hereto as Attachment E. Among other things, that letter responded to the DOC's new purported grounds for denying the request that the DOC had raised for the first time in its November 17 denial of Mr. Yanofsky's administrative appeal, which Mr. Yanofsky had not previously had a chance to address. In response, the DOC declined to reopen the administrative appeal or consider the arguments in my letter. By letter dated December 28, 2015, a true and correct copy of which is attached hereto as Attachment F, the DOC stated that the November 17, 2015 denial of Mr. Yanofsky's administrative appeal constituted the agency's final administrative action on the matter.

#### FOIA Request

I now write on Mr. Yanofsky's behalf to resubmit his March 10, 2015 FOIA request, attached hereto as Attachment A, and to update that request to include records from 2015. Accordingly, you should consider this letter to be a new FOIA request by Mr. Yanofsky for the following records:

Mr. Yanofsky requests access to and copies of OTTI's "Air Arrivals I-94 Annual Datafile" from 2015, 2014, 2013, 2012 and 2011 and its associated technical documentation. Mr. Yanofsky also requests access to and copies of OTTI's "U.S. International Air Travel Statistics Report (APIS/I-92) Data Files" for 2015, 2014, 2013, 2012 and 2011 and its associated technical documentation. Mr. Yanofsky would like to receive the requested records in electronic format.

#### Request for a Fee Benefit

In connection with his request, Mr. Yanofsky requests a fee benefit as a representative of the news media pursuant to 5 U.S.C. § 552(a)(4)(A)(ii). Mr. Yanofsky, a journalist for Quartz, is a member of the news media. Mr. Yanofsky intends to use the requested records to gather information of potential interest to the public, namely, information about the operations of the DOC and other government agencies and about travel and tourism in the United States. Mr. Yanofsky will use his editorial skills to turn the requested records into a distinct work and will distribute that work to the readers of Quartz via its website, qz.com.

For these reasons, Mr. Yanofsky is entitled to a fee benefit as a representative of the news media and fees for his request shall be limited to a reasonable standard charge for document duplication. If you anticipate the duplication fees will exceed \$25.00, please contact me in advance of incurring the charges.

### Request for a Fee Waiver

In addition, Mr. Yanofsky requests a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). Mr. Yanofsky is entitled to a fee waiver because the disclosure of the requested records (1) sheds light on the operations or activities of the government; (2) is likely to contribute significantly to the public understanding of those operations or activities; and (3) is not primarily in the commercial interest of the requester. *See id.*; *Cause of Action v. Federal Trade Commission*, 799 F.3d 1108, 1115 (D.C. Cir. 2015).

The requested records shed light on the operations and activities of the DOC and other government agencies. Specifically, the requested records will provide:

- evidence of the information that the federal government collects from about foreign visitors to the United States, the information the federal government collects about air traffic to and from the United States, and the government's efficacy in collecting this information;
- information about how OTTI fulfills its mission to collect and disseminate travel and tourism information under the U.S. International Air Travel Statistics (I-92 data) Program and the Visitor Arrivals Program (I-94), which will allow the public to assess the efficacy of OTTI and its expenditure of funding allocated to it;
- official and up-to-date data on foreign travel to and from the United States, which will allow the public to test and evaluate the accuracy of official DOC and other government statistics on travel that are calculated using this data; and
- insight into the data that policy makers use to make decisions, such as visa allocation and levels of infrastructure investment at ports and border crossings.

The requested records are likely to contribute significantly to the public's understanding of the operations of the DOC and other government agencies because they provide the only source of data collected about foreign travel and tourism based on Form I-94 and Advanced Passenger Information System (APIS) arrival/departure records, formerly known as I-92 arrival/departure records.

Finally, the records are not requested primarily for the commercial benefit of Mr. Yanofsky. Rather, Mr. Yanofsky, a representative of the news media, intends to use the requested records to report and write news stories for Quartz about the operations of the DOC and other government agencies, as well as the impact of travel and tourism on the United States.

For these reasons, and those stated in the attached request, administrative appeal, and correspondence concerning Mr. Yanofsky's March 10, 2015 FOIA request, Mr. Yanofsky is entitled to a fee waiver.

### Arguments Raised in December 14, 2015 Letter

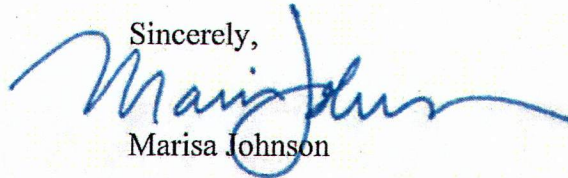
Based on the DOC's denial of Mr. Yanofsky's previous request and its denial of his administrative appeal, we understand that it is the DOC's position that the requested records are not available pursuant to FOIA and are available only pursuant to 5 U.S.C. § 1525. It is also our

understanding that, based on this position, the DOC is of the view that Mr. Yanofsky is not entitled to a fee benefit or a fee waiver. As a result, Mr. Yanofsky would be required to pay the fees listed on the OTTI website in order to obtain the requested records.<sup>1</sup> By our calculations, these fees would total \$173,775.00 for this request, which includes records from 2015.

For the reasons stated in my December 14, 2015 letter, we believe this position is incorrect as a matter of law. Mr. Yanofsky is entitled to the requested records under FOIA, in addition to a fee benefit and fee waiver. In the event that the DOC plans to again assert this erroneous legal position as a basis for denying Mr. Yanofsky's new request, we ask that you consider the arguments raised in my December 14, 2015 letter, attached hereto as Attachment E.

In submitting this new request, we hope that the DOC will revisit and reverse its incorrect legal position, which has deeply troubling ramifications for members of the news media who seek access to agency records under FOIA for the purpose of keeping the public informed about government conduct. We hope that by providing the DOC with the opportunity to take a fresh look at these issues, we can avoid unnecessary litigation. We look forward to your reply to Mr. Yanofsky's request within 20 business days, as required by FOIA. 5 U.S.C. § 552(a)(6)(A)(i).

Sincerely,

A handwritten signature in blue ink, appearing to read "Marisa Johnson", is written over the typed name.

Marisa Johnson

Enc.

cc: David Yanofsky  
Katie Townsend, Litigation Director, Reporters Committee for Freedom of the Press

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<sup>1</sup> See <http://travel.trade.gov/research/reports/i92/index.html> (Price for 2015 I-92 Data File); <http://travel.trade.gov/research/reports/i92/historical/index.html> (Price for historical I-92 Data Files); <http://travel.trade.gov/research/reports/i94/index.html> (Price for 2015 I-94 Data File); <http://travel.trade.gov/research/reports/i94/historical/index.html> (Price for historical I-94 Data Files).

**Exhibit B**

**March 28, 2016**

**Letter from Plaintiff's Counsel**

# QUARTZ

Assistant General Counsel for Litigation, Employment, and Oversight  
U.S. Department of Commerce  
Office of the General Counsel  
Room 5875  
14th and Constitution Avenue NW  
Washington, DC 20230  
[FOIAAppeals@doc.gov](mailto:FOIAAppeals@doc.gov)

March 28, 2016

RE: FREEDOM OF INFORMATION ACT APPEAL

Dear Mr. Friedman,

I am writing as counsel to The Atlantic Monthly Group, Inc. and its publication Quartz ([qz.com](http://qz.com)) on behalf of David Yanofsky, a journalist employed by Quartz. This letter constitutes an administrative appeal on behalf of Mr. Yanofsky of the failure of the International Trade Administration (“ITA”) of the Department of Commerce (“DOC”) to respond to Mr. Yanofsky’s February 26, 2016 request for records (the “Request”) under the federal Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, within the time limits prescribed by FOIA.

On February 26, 2016, I sent the Request on Mr. Yanofsky’s behalf to ITA by email to [FOIA@trade.gov](mailto:FOIA@trade.gov). A true and correct copy of the Request and its attachments is attached hereto as Attachment 1. Mr. Yanofsky filed the Request after having been previously denied access to certain records of the Office of Travel and Tourism Industries (“OTTI”), in order to give the DOC an opportunity to revisit its position in an attempt to avoid unnecessary litigation.

The Request seeks access to and copies of the OTTI’s (1) “Air Arrivals I-94 Annual Datafile” from 2015, 2014, 2013, 2012, and 2011 and its associated technical documentation and (2) “U.S. International Air Travel Statistics Report (APIS/I-92) Data Files” for 2015, 2014, 2013, 2012, and 2011 and its associated technical documentation. Mr. Yanofsky asked to receive the requested records in electronic format.

The Request also includes a request for a fee benefit as a representative of the news media pursuant to 5 U.S.C. § 552(a)(4)(A)(ii) and a request for a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(ii).

ITA has not responded to the Request within the time limits prescribed by FOIA. FOIA provides that each agency shall “determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after receipt of [a request for records under FOIA] whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor.” 5 U.S.C. § 552(a)(6)(A)(i). It has been over twenty business days since I sent the Request on Mr. Yanofsky’s behalf via email to ITA on February 26, 2016. Mr. Yanofsky has not received a determination of the Request from ITA or DOC, nor has he received a request for information or clarification from the agency, *see id.* § 552(a)(6)(A)(ii)(I)-(II), or

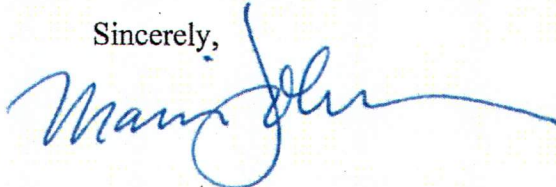
written notice of an extension of the time for response to the Request as a result of unusual circumstances, *see id.* § 552(a)(6)(B)(i). Accordingly, Mr. Yanofsky appeals ITA's failure to respond to his request within twenty business days as required by FOIA. *See id.* § 552(a)(6)(A)(i); 15 C.F.R. § 4.10(a) ("If a request for records to a component other than the Office of Inspector General . . . has not been timely determined . . . the requester may file an appeal.").

In this appeal, Mr. Yanofsky reiterates his requests for a fee benefit for the reasons stated in the Request. *See* Attachment 1. As stated in the Request, Mr. Yanofsky is entitled to a fee benefit as a representative of the news media, and fees for the Request must be limited to a reasonable standard charge for document duplication. Mr. Yanofsky is also entitled to and reiterates his request for a fee waiver for the reasons stated in the Request. *See* Attachment 1.

Based on the DOC's denial of Mr. Yanofsky's prior request and administrative appeal, as described in detail in the Request, *see* Attachment 1, we understand that it is the DOC's position that the requested records are not available pursuant to FOIA, that the requested records are available only pursuant to 5 U.S.C. § 1525, and that Mr. Yanofsky is not entitled to a fee benefit or a fee waiver. For the reasons stated in the Request and attachments thereto, including my letter of December 14, 2015 to the Assistant General Counsel for Litigation, Employment, and Oversight attached as Attachment 2, the DOC's position is incorrect as a matter of law. If the DOC plans to again assert this erroneous legal position as a basis for denying the Request, we ask that you review the arguments raised in my December 14, 2015 letter, which are incorporated by reference into the Request. We hope that the DOC will reconsider its denial of access to these records and, as a result, avoid unnecessary litigation over this matter.

We look forward to the determination of this administrative appeal within twenty business days, as required by FOIA. 5 U.S.C. § 552(a)(6)(A)(ii).

Sincerely,



Marisa Johnson

Enc.

cc: David Yanofsky  
Katie Townsend, Litigation Director, Reporters Committee for Freedom of the Press

**Exhibit C**

**March 29, 2016**

**DOC Response to Plaintiff's Counsel**



Marisa Johnson, Esq.  
600 New Hampshire Avenue, N.W.  
Washington, D.C. 20037

Dear Ms. Johnson;

This responds to your letter of March 28, 2016 to this office in which you purport to file an administrative appeal under the Freedom of Information Act (FOIA) (5 U.S.C. § 552). Your letter alleges that the International Trade Administration (ITA) has constructively denied a FOIA request that you filed on behalf of your client, David Yanofsky with ITA on February 26, 2016. This letter does not constitute a proper appeal because ITA has not received the February 26 request and, hence, has not denied any records.

An agency subject to the FOIA is required to disclose records in response to a FOIA request only if certain conditions are met. One of those conditions is that the requester must submit a FOIA request "in accordance with published rules stating the time, place, fees (if any) and procedures to be followed." 5 U.S.C. § 552(a)(3). An agency becomes obligated to search for and disclose responsive records only when it has received a FOIA request that "reasonably describes [the requested] records" and "is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed. *Smith v. Dep't of Justice*, 2015 WL 4450001 (D.D.C. July 20, 2015), at \*6. See also *Tyree v. Hope Village, Inc.*, 677 F.Supp.2d 109, 110 (D.D.C. 2009).

The Department's FOIA-implementing regulations provide:

A request for records of the Department which are not customarily made available to the public as part of the Department's regular informational services must be in writing (and may be sent by mail, facsimile, or E-mail), and shall be processed under the FOIA, regardless whether the FOIA is mentioned in the request. Requests should be mailed to the Department component identified in Appendix A to this part that maintains those records, or may be sent by facsimile or E-mail to the numbers or addresses, respectively, listed at the Department's "FOIA Home Page" link found at the Department's World Wide Web site (<http://www.doc.gov>).

The appropriate agency in this instance is ITA.

My staff has consulted with the ITA FOIA Officer, Justin Guz concerning the request that you claim to have sent to ITA on February 26, 2016. Mr. Guz has searched all files in all email accounts (including [Justin.guz@trade.gov](mailto:Justin.guz@trade.gov), [FOIA@trade.gov](mailto:FOIA@trade.gov), and his Clutter and Spam files) using the terms "Yanofsky," "Marisa Johnson," "Atlantic Media," and "Quartz" and has no record

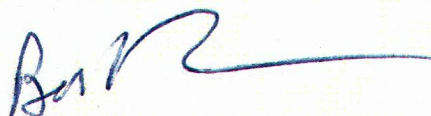


of having received any email requests in February 2016.<sup>1</sup> He also checked Mr. Yanofsky's account on FOIA OnLine and did not find any request dated on or about February 26, 2016 there.

Because ITA has no record of having received a request, it had no obligation to respond and, hence, has not denied any relief available under the FOIA. *See Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 139 (1980) ("When an agency has demonstrated that it has not "withheld" requested records in violation of the standards established by Congress, the federal courts have no authority to order the production of such records under the FOIA.")

I am redirecting to ITA the request that is attached to your March 28, 2016 letter for that bureau to respond to you. ITA's "date of receipt" for purposes of calculating the bureau's response deadlines under 5 U.S.C. § 552(a)(6)(A)(i) will be the date of this letter.

Sincerely,



Benjamin Friedman  
Assistant General Counsel  
for Litigation, Employment, and Oversight

cc: Justin Guz

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<sup>1</sup> While your letter attaches a copy of the FOIA request, it does not provide a copy of the email that you state forwarded the request to ITA.

**Exhibit D**

**March 30, 2016**

**ITA's Response to Request**



**SENT BY CERTIFIED MAIL – RETURN RECEIPT REQUESTED**

March 30, 2015

Mr. David M. Yanofsky  
*Quartz*  
613 Foothill Road  
Beverly Hills, California 90210

Ms. Marisa Johnson  
Senior Counsel  
The Atlantic Group, Inc.  
600 New Hampshire Avenue, N.W.  
Washington, D.C. 20037

RE: DOC-ITA-2016-000872

Dear Mr. Yanofsky and Ms. Johnson:

This letter is in response to your Freedom of Information Act (FOIA) request dated February 26, 2016, that the International Trade Administration (ITA) received March 29, 2016. On behalf of Atlantic Monthly Group, Inc., you sought “copies of the Office of Travel & Tourism Industries’ ‘Air Arrivals I-94 Database Annual Datafile’ from 2014, 2013, 2012, and 2011 and its associated technical documentation.” You also requested “copies of the Office of Travel & Tourism Industries’ ‘U.S. International Air Travel Statistics Report (APIS/I-92) Data files’ from 2014, 2013, 2012, and 2011 and its associated technical documentation.”

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

Under the displacement provision, where documents otherwise responsive to a FOIA request are maintained for distribution by an agency according to a fee schedule that is assessed pursuant to a “superseding fee statute,” requesters must obtain the documents from that source and pay the applicable fees designated by the agency under that statute (*see* OMB Fee Guidelines, 52 Fed. Reg. at 10,012-13, 10,017-18). The relevant superseding fee statute in this case is 15 U.S.C. § 1525, which provides in relevant part:



The Secretary of Commerce is authorized, upon the request of any person, firm, organization, or others, public or private, to make special studies on matters within the authority of the Department of Commerce; to prepare from its records special compilations, lists, bulletins, or reports; to perform the functions authorized by section 1152 of this title; and to furnish transcripts or copies of its studies, compilations, and other records; upon the payment of the actual or estimated cost of such special work.

Section 1525 “specifically provid[es] for setting the level of fees for particular types of records” and therefore qualifies as a FOIA displacement statute (5 U.S.C. § 552(a)(4)(A)(vi)). Additionally, Department of Commerce FOIA Regulations specifically recognize 15 U.S.C. § 1525 as a FOIA displacement statute (15 C.F.R. § 4.3(c)).

Both the 1-94 and 1-92 records you requested are compilations of data which the ITA has authority to assemble and provide to members of the private sector upon request and payment of the specified fees gathered in order to “support the cost of this program” (*see* <http://travel.trade.gov/research/index.html>, explaining how to purchase the 1-94 and 1-92 records and outlining the required fees). As a result, these records are not available under the FOIA pursuant to the displacement provision.

However, ITA’s National Travel and Tourism Office (NTTO) can help you obtain the records you seek. Enclosed with this letter is a form that will allow you to obtain these records through NTTO. Should you have any questions about the form, you may contact NTTO at [ntto@trade.gov](mailto:ntto@trade.gov) or by calling 202-482-0140.

In accordance with 15 C.F.R. §§ 4.10(a) and (b), you have the right to appeal this determination within 30 calendar days from the date of this letter. The Department deems appeals arriving after normal business hours (8:30 a.m. to 5:00 p.m., Eastern Time, Monday through Friday) as received on the next normal business day. If the 30<sup>th</sup> calendar day for submitting an appeal falls on a Saturday, Sunday or legal public holiday, an appeal received by 5:00 p.m., Eastern Time, the next business day will be deemed timely. The appeal should include a copy of the original request, this response, and a statement of the reasons why you consider the Department made this determination in error. Please mail written appeals to the below address:

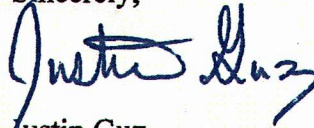
Assistant General Counsel for Litigation,  
Employment, and Oversight  
U.S. Department of Commerce  
1401 Constitution Avenue, N.W.  
Room 5898-C  
Washington, D.C. 20230

You may send an appeal via facsimile to (202) 482-2552, by e-mail to [FOIAAppeals@doc.gov](mailto:FOIAAppeals@doc.gov), or through FOIAonline at <https://foiaonline.regulations.gov>, if you have a FOIAonline account. Clearly mark “Freedom of Information Act Appeal” on the facsimile cover sheet, in the e-mail

subject line, or on both the appeal letter and envelope. The Department does not provide an opportunity for personal appearance, oral argument, or hearing of an appeal.

As for your request for a fee waiver, there are no fees to charge in processing this request. Thank you for your interest in the ITA. Should you have any questions regarding this response, please contact me at (202) 482-7937 or at [foia@trade.gov](mailto:foia@trade.gov).

Sincerely,

A handwritten signature in blue ink that reads "Justin Guz". The signature is written in a cursive, slightly slanted style.

Justin Guz  
FOIA Officer  
International Trade Administration

Enclosure

## National Travel and Tourism Office (NTTO) - Order Form

You may fax your completed form to NTTO at (202) 482-2887.

Items marked with an "\*" required

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Mail payments to: International Trade Administration, National Travel and Tourism Office (NTTO), 1401 Constitution Avenue, N.W., Room 10003, Washington, DC 20230

If you choose to pay by credit card, reports will be sent to within 3 business days upon confirmation of your credit card. Our office accepts the following credit cards: Visa, MasterCard, Discover and American Express. Please contact our office at 202-482-0140 to pay via credit card. Our office accepts electronic payment for some data, please contact our office regarding it.

If you have any questions on this order form or on orders, please contact our office by e-mailing us at: [ntto@trade.gov](mailto:ntto@trade.gov) or call us at (202) 482-0140.

**Exhibit E**  
**March 31, 2016**  
**Administrative Appeal**



# QUARTZ

Assistant General Counsel for Litigation, Employment, and Oversight  
U.S. Department of Commerce  
Office of the General Counsel  
Room 5875  
14th and Constitution Avenue NW  
Washington, DC 20230  
*FOIAAppeals@doc.gov*

March 31, 2016

RE: FREEDOM OF INFORMATION ACT APPEAL

Dear Mr. Friedman,

I am writing as counsel to The Atlantic Monthly Group, Inc. and its publication Quartz (qz.com) on behalf of David Yanofsky, a journalist employed by Quartz. This letter constitutes an administrative appeal on behalf of Mr. Yanofsky of the denial of Mr. Yanofsky's request for records (the "Request") under the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, by the International Trade Administration's ("ITA") of the Department of Commerce ("DOC").

## **I. Background and Procedural History**

On February 26, 2016, I sent the Request on Mr. Yanofsky's behalf to ITA by email to [FOIA@trade.gov](mailto:FOIA@trade.gov). A true and correct copy of my email, the Request, and its attachments is attached hereto as Attachment 1. Mr. Yanofsky filed the Request after having been previously denied access to certain records of the Office of Travel and Tourism Industries ("OTTI"), in order to give the DOC an opportunity to revisit its position in an attempt to avoid unnecessary litigation.

The Request seeks access to and copies of the OTTI's (1) "Air Arrivals I-94 Annual Datafile" from 2015, 2014, 2013, 2012, and 2011 and its associated technical documentation and (2) "U.S. International Air Travel Statistics Report (APIS/I-92) Data Files" for 2015, 2014, 2013, 2012, and 2011 and its associated technical documentation. Mr. Yanofsky asked to receive the requested records in electronic format.

The Request also includes a request for a fee benefit as a representative of the news media pursuant to 5 U.S.C. § 552(a)(4)(A)(ii) and a request for a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(ii).

Having received no response to the Request, on March 28, 2016, I sent via email an administrative appeal on Mr. Yanofsky's behalf of ITA's failure to responded to the Request within the time limits prescribed by FOIA. A true and correct copy of the administrative appeal, without its attachments, is attached hereto as Attachment 2.

On March 29, 2016, I received via email a letter from you, a true and correct copy of which is attached here to as Attachment 3. Your letter stated that ITA had not received the Request and therefore had not denied access to any records. Your letter stated that you were redirecting the Request to ITA for response within twenty business days of your letter.

The next day, on March 30, 2016, Mr. Yanofsky received via email a letter from ITA FOIA Officer Justin Guz denying the Request, a true and correct copy of which is attached hereto as Attachment 4. The denial letter stated the the requested records were being withheld under 5 U.S.C. § 552(a)(4)(A)(vi) because, according to Mr. Guz, 15 U.S.C. § 1525 acts as a superseding fee statute pursuant to that provision of FOIA. Attachment 4. The letter also stated that Mr. Yanofsky could purchase the requested records from ITA's National Travel and Tourism Office ("NTTO") for a fee. *Id.* In response to Mr. Yanofsky's request for a fee waiver, the denial letter stated that "there are no fees to charge in processing this request." *Id.*

## II. Argument

Mr. Yanofsky appeals ITA's determinations that the requested records are properly withheld pursuant to 5 U.S.C. § 552(a)(4)(A)(vi) (hereinafter "FOIA's Displacement Provision") and 15 U.S.C. § 1525, and that Mr. Yanofsky is not entitled to a fee waiver.

First, the requested records cannot be withheld under FOIA's Displacement Provision because 15 U.S.C. § 1525 does not qualify as a superseding fee statute under that provision. FOIA's Displacement Provision applies only when there is another "statute specifically providing for setting the level of fees for particular types of records." 5 U.S.C. § 552(a)(4)(A)(vi). Office of Management and Budget regulations define a "statute specifically providing for setting the level of fees for particular types of records" as:

any statute that specifically requires a government agency . . . to set the level of fees for particular types of records . . . . Statutes . . . which provide a general discussion of fees without explicitly requiring that an agency set and collect fees for particular documents do not supersede the Freedom of Information Act under section (a)(4)(A)(vi) of that statute.

5 C.F.R. § 1303.30(b).

Thus, FOIA's Displacement Provision applies only when a statute "require[s], not merely permit[s], an agency to establish fees for particular documents." *EPIC v. U.S. Forest Serv.*, 432 F.3d 945, 948 (9th Cir. 2005); *see also* 5 U.S.C. § 552(a)(4)(A)(vi) ("Nothing in this subparagraph shall supersede fees chargeable under a statute *specifically providing for* setting the level of fees for particular types of records" (emphasis added)).

15 U.S.C. § 1525 does not require the Secretary of Commerce to establish fees for particular documents. By its plain language, 15 U.S.C. § 1525 merely provides that the Secretary of Commerce "is authorized," upon request, to perform certain tasks upon the payment of the actual or estimated cost of "such special work." Accordingly, 15 U.S.C. § 1525 is not a "statute

specifically providing for setting the level of fees for particular types of records,” 5 U.S.C. § 552(a)(4)(A)(vi), and cannot qualify as a superseding fee statute under FOIA’s Displacement Provision.

Second, assuming *arguendo* that 15 U.S.C. § 1525 is a superseding fee statute under FOIA’s Displacement Provision—which it is not—FOIA’s Displacement Provision does not allow an agency to withhold, wholesale, records requested under FOIA. FOIA’s Displacement Provision provides: “Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.” 5 U.S.C. § 552(a)(4)(A)(vi). Thus, FOIA’s Displacement Provision allows an agency to charge fees pursuant to a statute specifically providing for setting the level of fees for particular types of records, rather than the fees set by FOIA.<sup>1</sup> However, it does not authorize an agency to withhold records entirely, as ITA has done here.

Third, again assuming *arguendo* that 15 U.S.C. § 1525 is a superseding fee statute under FOIA’s Displacement Provision—which it is not—FOIA’s Displacement Provision applies only to FOIA’s fee *setting* requirements and does not apply to FOIA’s fee *waiver* requirements. *See Oglesby v. United States Dep’t of the Army*, 79 F.3d 1172, 1178 (D.C. Cir. 1996) (acknowledging in dicta appellant’s argument that the FOIA Displacement Provision “excuses a qualified agency only from FOIA’s fee-*setting* requirements, and not from the fee-*waiver* provision” but declining to rule on the issue because appellant failed to raise it in a timely fashion); *Hilaire v. Dep’t of Justice*, Civil Action No. 91-00780-LFO, 1991 U.S. Dist. LEXIS 12724 at \*5 (D.D.C. Sept. 10, 1991) (“Clearly there is a question of statutory interpretation as to whether [FOIA’s Displacement Provision] encompasses the ‘waiving’ of fees as well.”).

FOIA’s fee waiver provision requires a fee waiver to be granted when disclosure of information is likely to contribute significantly to public understand of the operations or activities of the government and is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii) (providing that documents “shall” be furnished without charge or at a reduced charge if these criteria are met). If FOIA’s Displacement Provision allowed agencies to refuse categorically to provide fee waivers even when disclosure is in the public interest simply because agencies have made information available to, for example, commercial requesters for a set fee, the purpose of FOIA and its fee waiver provisions would be severely undermined.

As stated in the Request, *see* Attachment 1, Mr. Yanofsky is entitled to a fee waiver because disclosure of the requested records (1) will shed light on the operations or activities of the government; (2) are likely to contribute significantly to the public understanding of those

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<sup>1</sup> In addition, even assuming, *arguendo*, that 15 U.S.C. § 1525 is “a statute specifically providing for setting the level of fees for particular types of records” that falls within FOIA’s Displacement Provision—which, for the reasons discussed above, it is not—15 U.S.C. § 1525, by its own terms, permits the DOC to charge only the actual duplication costs associated with providing copies of the existing I-94 and I-92 databases and technical documentation requested by Mr. Yanofsky. *See* 15 U.S.C. § 1525 (authorizing the Secretary of Commerce to “furnish transcripts or copies of its studies, compilations, and other records; upon the payment of the actual or estimated cost of such special work”).

operations or activities; and (3) are not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(vi).

The requested records shed light on the operations and activities of the DOC and other government agencies. Specifically, the requested records will provide:

- evidence of the information that the federal government collects about foreign visitors to the United States, the information the federal government collects about air traffic to and from the United States, and the government's efficacy in collecting this information;
- information about how OTTI fulfills its mission to collect and disseminate travel and tourism information under the U.S. International Air Travel Statistics Program (I-92) and the Visitor Arrivals Program (I-94), which will allow the public to assess the efficacy of OTTI and the funding allocated to it;
- official and up-to-date data on foreign travel to and from the United States, which will allow the public to test and evaluate the accuracy of official DOC and other government statistics on travel that are calculated using this data; and
- insight into the data that policy makers use to make decisions, such as visa allocation and levels of infrastructure investment at ports and border crossings.

The requested records are likely to contribute significantly to the public's understanding of the operations of the DOC and other government agencies because they provide the only source of data collected about foreign travel and tourism based on Form I-94 and Advanced Passenger Information System (APIS) arrival/departure records, formerly known as I-92 arrival/departure records. The requested records will allow the public to confirm or dispute official government travel statistics calculated based on I-94 and I-92 records, including statistics related to the number of tourists and immigrants entering the United States, their countries of origin, and their destination.

This information is a matter of great interest to the public as evidenced by frequent news reporting on topics related the number of tourists and immigrants entering the United States. *See, e.g.,* Patrick Healy and Michael Barbaro, *Donald Trump Calls for Barring Muslims Entering U.S.*, N.Y. Times, Dec. 7, 2015, at <https://perma.cc/94MB-MUE8> (discussing estimates of the number of Muslims who enter and stay in the United States each year and data from the a Senate subcommittee on the number of green cards issued to migrants from Muslim-majority countries from fiscal year 2009 to fiscal year 2013); Patrick McGeehan, *Record Number of Tourists Visited New York City in 2015, and More Are Expected This Year*, N.Y. Times, Mar. 8, 2016, at <https://perma.cc/2N77-Y4ZP> (discussing industry forecasts of the number of tourists who will visit New York City in 2016 and estimating the number of tourists who visited in 2015).

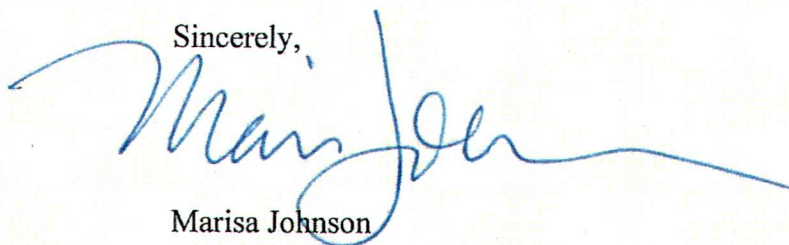
Finally, the records are not requested primarily for the commercial benefit of Mr. Yanofsky. Rather, Mr. Yanofsky, a representative of the news media, intends to use the requested records to report and write news stories for Quartz, an Atlantic Media publication, about the operations of the DOC and other government agencies, as well as the impact of travel and tourism on the

United States. *See Nat'l Sec. Archive v. Dep't of Def.*, 880 F.2d 1381, 1388 (D.C. Cir. 1989) (rejecting agency's argument that representatives of the news media seek records for a commercial purpose because they receive remuneration for their publishing activities).

For these reasons and those stated in the attachments to this administrative appeal, Mr. Yanofsky is entitled to a fee waiver and is not required to pay the fees listed on the OTTI website in order to obtain the requested records. By our calculations, which we ask that you confirm, these fees would total \$173,775.00 for this request, which includes records from 2015.<sup>2</sup>

We hope that the DOC will reconsider its denial of access to these records and, as a result, avoid unnecessary litigation over this matter. We look forward to the determination of this administrative appeal within twenty business days, as required by FOIA. 5 U.S.C. § 552(a)(6)(A)(ii).

Sincerely,



Marisa Johnson

Enc.

cc: David Yanofsky  
Katie Townsend, Litigation Director, Reporters Committee for Freedom of the Press

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<sup>2</sup> See <http://travel.trade.gov/research/reports/i92/index.html> (Price for 2015 I-92 Data File); <http://travel.trade.gov/research/reports/i92/historical/index.html> (Price for historical I-92 Data Files); <http://travel.trade.gov/research/reports/i94/index.html> (Price for 2015 I-94 Data File); <http://travel.trade.gov/research/reports/i94/historical/index.html> (Price for historical I-94 Data Files).