

In a letter dated February 18, 2015, the OIR informed FGI that the DOE was not able to provide the records in a CDTF or TDTF format “as we do not have the technological capabilities to produce the records in [these] format[s].” OIR Response at 2. The OIR also stated that the DOE could not reasonably provide the information in Excel spreadsheets “because it would be prohibitively time-consuming and costly.” *Id.* The OIR estimated that producing the records in this format would take 134 hours and would cost in excess of \$8,000. However, the OIR offered to provide the material in Excel if FGI agreed to pay the expense. In the alternative, the OIR offered to provide a searchable pdf. copy of the information.

In its Appeal, dated February 19, 2015, FGI contests the OIR’s failure to provide the requested information in CDTF or TDTF format. FGI further alleges that the OIR’s fee estimate for providing the information in Excel spreadsheets is completely arbitrary and erroneous. FGI Appeal at 1.

II. ANALYSIS

The FOIA requires federal agencies to release all non-exempt agency records responsive to a request for production. 5 U.S.C. § 552(a)(3)(A). Under the E-FOIA amendments passed in 1996, agencies are also required to “provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.” 5 U.S.C. § 552(a)(3)(B). That regulatory provision also requires agencies to “make reasonable efforts to maintain their records in forms or formats that are reproducible for purposes of this section.” *Id.* Courts are to accord “substantial weight” “to an affidavit of an agency concerning the agency's determination” as to “reproducibility under paragraph (3)(B).” 5 U.S.C. § 552(a)(4)(B). However, this deference “does not amount to a blanket exemption from judicial review of the agency's justification for declining to comply with a specific format request or failing to maintain records in readily reproducible formats....” *Scudder v. CIA*, 25 F.Supp.3d 19, 39 (D.D.C.2014).

The E-FOIA amendments reflect “a Congressional choice to expand, rather than narrow, the agencies' obligations under FOIA and to encourage government agencies to use advancing computer technology ... not only to conduct agency business and store data but also ‘to enhance public access to records.’” *TPS, Inc. v. United States Department of Defense*, 330 F.3d 1191, 1195–96 (9th Cir.2003); *see also Nat'l Sec. Counselors v. CIA*, 960 F.Supp.2d 101, 202 (D.D.C.2013). The E-FOIA amendments also recognized that the burden on an agency to comply with a request to produce documents in a particular electronic format is a factor to consider in determining whether records are “readily reproducible.” *See, e.g.*, Electronic Freedom of Information Amendments of 1996, 104 H. Rpt. 795 (“An unreasonable effort would significantly interfere with the operations of the agency or the agency's use of its computers.”); *TPS, Inc.*, 330 F.3d at 1195 (“When an agency already creates or converts documents in a certain format ... requiring that it provide documents in that format to others does not impose an unnecessarily harsh burden, absent specific, compelling evidence as to significant interference or burden.”); *Scudder v. CIA*, 25 F.Supp.3d at 33 (rejecting argument that “readily reproducible” simply means technical capability or feasibility, without any analysis of burden on an agency).

In order to obtain further information about the technical feasibility and the burden on the DOE, if any, that would be caused by providing the information to FGI in the requested formats, we

contacted OIR. We were told that the DOE does not store any information in either CDTF or TDTF formats, and that the DOE is not currently able to convert any information into either of these formats. *See* March 20, 2015, e-mail from Celeste Moy, OIR, to Robert B. Palmer, Senior Staff Attorney, Office of Hearings and Appeals. It therefore appears that, although the DOE has made reasonable efforts to maintain its records in forms that are reproducible, the requested material is not “readily reproducible” in the CDTF or TDTF formats requested by FGI.

Ms. Moy also informed us that she obtained the estimated time and cost of reproducing the requested material in Excel format from the Office of the Chief Information Officer (OCIO). We contacted OCIO to determine how that estimate was done. We were informed by the OCIO FOIA Coordinator that because there was no one in her Office to whom she could assign the task of converting the information, she arrived at the estimate using an hourly cost rate based on her own salary. She then reproduced a small portion of the material in Excel, and then extrapolated from that the amount of time that it would take to convert all of the information. She then multiplied that number of hours by her hourly salary to arrive at the cost figure. *See* March 23, 2015, e-mail from Valerie Young, OCIO FOIA Coordinator, to Mr. Palmer. We find this to be a reasonable means of estimating the time and expense associated with reproducing the requested material in the form of Excel spreadsheets.

III. CONCLUSION

We therefore conclude that the OIR correctly found that the requested material was not “readily reproducible” in the formats requested by FGI, and that its estimate for producing the records in Excel spreadsheet form was reasonable. We will therefore deny FGI’s Appeal.

It Is Therefore Ordered That:

- (1) The Appeal filed on February 25, 2015, by FOIA Group, Inc., OHA Case No. FIA-15-0007, is hereby denied.
- (2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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Date: March 25, 2015