Exclusions*

In amending the Freedom of Information Act in 1986, Congress provided special protection for three categories of particularly sensitive law enforcement information.[1] Shortly thereafter, the Department of Justice issued a memorandum concerning these new provisions.[2] The three provisions of subsection (c),[3] referred to as record "exclusions," are reserved for certain specified circumstances where publicly acknowledging even the existence of the records could cause harm to law enforcement or national security interests. The record exclusions expressly authorize federal law enforcement agencies, under these three specifically defined and limited circumstances, to "treat the records as not subject to the requirements of [the FOIA]."[4]

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* This section primarily includes case law, guidance, and statutes up until May 31, 2024. While some legal authorities after this date may be included, for a comprehensive accounting of all recent court decisions, please visit OIP's Court Decisions webpage (https://www.justice.gov/oip/court-decisions-overview). Please also note that this section generally only includes subsequent case history in the citations when it is relevant to the point for which the case is being cited.

[1] See 5 U.S.C. § 552(c) (2018).

[2] See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act (Dec. 1987) (providing guidance on implementation of law enforcement amendments); cf. NARA v. Favish, 541 U.S. 157, 169 (2004) (noting Supreme Court's reliance on "the Attorney General's consistent interpretation of" FOIA in successive such Attorney General memoranda).

[3] 5 U.S.C. § 552(c)(1), (c)(2), (c)(3).

[4] Id.; see, e.g., Labow v. DOJ, 831 F.3d 523, 532 (D.C. Cir. 2016) (explaining that "when an exclusion applies, the government may 'treat the records as not subject to the requirements' of FOIA at all, and can thus withhold the documents without comment"); ACLU of Mich. v. FBI, 734 F.3d 460, 469 (6th Cir. 2013) (distinguishing "exclusions" from exemptions "since the requirements of the FOIA do not apply at all"); Tanks v. Huff, No. 95-568, 1996 WL 293531, at *5 (D.D.C. May 28, 1996) ("In other words, an agency applying an exclusion will respond to the request as if the excluded records did not exist.").

In 2012, the Department of Justice reviewed past agency practices with regard to implementation of the FOIA's exclusion provisions and issued guidance advising agencies to take a series of steps to bring about greater public awareness and understanding regarding the use of the FOIA's statutory exclusions.[5] As discussed in greater detail below (see Exclusions, Procedural Considerations, below), the guidance details the procedures that agency components that maintain criminal law enforcement records must follow in responding to FOIA requests, which brings greater awareness to the existence of exclusions in general while not revealing in any particular case whether an exclusion was employed.[6] Agency components that maintain criminal law enforcement records should advise requesters in their FOIA responses that the statute excludes certain records and that the response only pertains to those records that are subject to the requirements of the FOIA.[7] This notification should be included in all FOIA responses, regardless of whether an exclusion was invoked in a particular case.[8] With any excluded records addressed by virtue of this notification, the component can then respond to the remainder of the request in the usual way, advising the requester of the handling of any records that exist that are subject to the requirements of the FOIA.[9]

Any agency considering invoking an exclusion or having any other questions as to the implementation of the exclusion provisions should consult with the Office of Information Policy at (202) 514-3642.[10]

Record Exclusions and "Glomarization"

At the outset, it is important to recognize the somewhat subtle, but very significant, distinction between the result of employing a record exclusion and the concept that is colloquially known as "Glomarization."[11] That latter term refers to the situation in which

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[5] See OIP Guidance: Implementing FOIA's Statutory Exclusion Provisions [hereinafter OIP Exclusion Guidance] (posted 9/14/2012).

[6] See id.

[7] See id.

[8] See id.

[9] See id.

[10] See id. ("This will help ensure that all aspects of the request and possible excludable records are reviewed and analyzed before determining whether use of an exclusion is warranted.").

[11] See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act at n.47 (Dec. 1987); see also Benavides v. DEA, 968 F.2d 1243, 1246-48 (D.C. Cir. 1992) (initially confusing exclusion mechanism with "Glomarization"), modified, 976 F.2d 751, 752-53 (D.C. Cir. 1992) (clarifying that earlier opinion was not intended to rule on proper response when exclusion mechanism is applied); Memphis Publ'g Co. v. FBI, 879 F. Supp. 2d 1, 6-7 (D.D.C. 2012) (explaining distinction between "Glomar" responses and

an agency expressly refuses to confirm or deny the existence of records responsive to a request.[12] (A more detailed discussion of "Glomarization" can be found under Exemption 1 and also under Exemption 7(C).) While "Glomarization" remains adequate to provide necessary protection in most situations, the special record exclusions are invaluable in addressing the exceptionally sensitive situations in which even "Glomarization" is inadequate to the task.[13] The Court of Appeals for the Sixth Circuit explained that the exclusion provisions were added to the FOIA because the "Glomar" response "was not well-suited to certain disclosure problems of law enforcement agencies."[14] The Sixth Circuit went on to explain why a "Glomar" response, which is tethered to an exemption, is not always sufficient protection, noting that in certain situations "if the FBI is required to identify a specific exemption for the withholding — even hypothetically — the criminal organization or terrorist may 'already have the information they want.'"[15]

As noted by the District Court for the District of Columbia, when an agency employs a "Glomar" response or otherwise withholds records using a FOIA exemption, "the agency must reveal the fact of and grounds for any withholdings," while the exclusions "permit the government to treat requests for records as falling outside the scope of the statute altogether."[16]

The (c)(1) Exclusion

The first exclusion, known as the "(c)(1) exclusion," provides as follows:

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exclusions); cf. ACLU of N.J. v. FBI, 733 F.3d 526, 534 & n.9 (3d Cir. 2013) (characterizing claim that legislative history of exclusion provisions "evidences an intent to incorporate a 'Glomar-like procedure'" for litigating exclusion issues as "inconclusive at best"). But cf. Shapiro v. DOJ, No. 12-313, 2020 WL 3615511, at *20 (D.D.C. July 2, 2020) (explaining that (c)(3) exclusion "permits the FBI to issue a so-called 'Glomar' response"); McClanahan v. DOJ, 204 F. Supp. 3d 30, 55 (D.D.C. 2016) (describing (c)(3) exclusion as "Glomar response"); Light v. DOJ, 968 F. Supp. 2d 11, 30 (D.D.C. 2013) (characterizing government's alleged use of exclusion as "Glomar" response). See generally OIP Guidance: Implementing FOIA's Statutory Exclusion Provisions [hereinafter OIP Exclusion Guidance] (posted 9/14/2012) (explaining limitations on using Glomar response).

[12] See, e.g., Gardels v. CIA, 689 F.2d 1100, 1103 (D.C. Cir. 1982); Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976).

[13] See OIP Exclusion Guidance.

[14] ACLU of Mich. v. FBI, 734 F.3d 460, 469 (6th Cir. 2013).

[15] Id. (quoting legislative history).

[16] Memphis Publ'g Co. v. FBI, 879 F. Supp. 2d 1, 6-7 (D.D.C. 2012); see also Labow v. DOJ, 831 F.3d 523, 532 (D.C. Cir. 2016) (observing that exclusions differ from FOIA exemptions because exclusions can be claimed without informing requester that they are being employed).

> Whenever a request is made which involves access to records described in subsection (b)(7)(A) and (A) the investigation or proceeding involves a possible violation of criminal law; and (B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.[17]

In most cases, Exemption 7(A) provides sufficient protection against any impairment of law enforcement investigations or proceedings during their pendency.[18] However, an agency must consistently state that it is invoking the exemption both administratively and in court.[19] The concern with affirmatively invoking the exemption arises in specific situations in which the very fact of an investigation's existence is yet unknown to the investigation's subject or target.[20] In those cases, invoking Exemption 7(A) in response to a request about the subject or target of an investigation could alert that subject or target to the investigation's existence.[21] Relatedly, if the agency were to respond by using a "Glomar" response, "it would have to answer that way for all requests where someone asked for records on themselves, because a Glomar response is not effective unless it is used for all similar requests."[22] To avoid both of these scenarios, the first exclusion, (c)(1), authorizes the agency to "treat the records as not subject to the requirements of the FOIA."[23] This exclusion "permits an agency to respond to a request seeking excluded records without revealing their existence, while also allowing the agency to respond to the vast majority of requests in the traditional manner, i.e., by advising the requester whether records exist, and if they do, by releasing any information that is not exempt and asserting exemptions for any material properly protected from disclosure."[24]

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[17] 5 U.S.C. § 552(c)(1) (2018); see also Labow v. DOJ, 831 F.3d 523, 532-33 (D.C. Cir. 2016) (setting forth criteria for employing (c)(1) exclusion).

[18] See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum].

[19] See id.

[20] See id.; see also OIP Guidance: Implementing FOIA's Statutory Exclusion Provisions [hereinafter OIP Exclusion Guidance] (posted 9/14/2012).

[21] See id.

[22] OIP Exclusion Guidance (stating that under such circumstances "vast majority" of first-party requesters would receive "Glomar" responses even though likelihood that particular requester was subject of ongoing criminal investigation would be very remote).

[23] 5 U.S.C. § 552(c)(1); see also OIP Exclusion Guidance.

[24] OIP Exclusion Guidance.

To qualify under the first exclusion from the FOIA, the records in question must first otherwise be withholdable in their entireties under Exemption 7(A),[25] which authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings."[26] Additionally, the records must relate to an "investigation or proceeding [that] involves a possible violation of criminal law."[27] Notably, while records pertaining to a purely civil law enforcement matter may qualify for Exemption 7(A) protection, these records cannot be excluded from the FOIA under the (c)(1) exclusion provision. Despite that limitation, "the statutory requirement that there be only a 'possible violation of criminal law,' by its very terms, admits a wide range of investigatory files maintained by federal agencies, not merely those of criminal law enforcement agencies."[28]

The next two requirements should be considered in tandem to ensure that agencies properly consider the harm in acknowledging the existence of an investigation.[29] An agency must determine whether it has "reason to believe" that the investigation's subject is not aware of its pendency and whether the agency's disclosure of the very existence of the records in question "could reasonably be expected to interfere with enforcement proceedings."[30] There is no concern of a "tip off" harm when all investigatory subjects are already aware of an investigation's pendency.[31] Thus, "the language of this exclusion expressly obliges agencies contemplating its use to consider the level of awareness already possessed by the investigative subjects involved."[32] Agencies must make this determination according to a good-faith, "reason to believe" standard.[33] As such, "[w]hile

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[25] See 5 U.S.C. § 552(c)(1); see also Attorney General's 1986 Amendments Memorandum.

[26] 5 U.S.C. § 552(b)(7)(A).

[27] 5 U.S.C. § 552(c)(1)(A).

[28] Attorney General's 1986 Amendments Memorandum at n.37 (explaining that files of agencies that are not primarily engaged in criminal law enforcement activities may be eligible for protection if they contain information about potential criminal violations that are pursued with possibility of referral to Department of Justice for further prosecution).

[29] Id. at n.20 (noting that these requirements go to very heart of particular harm addressed through (c)(1) exclusion).

[30] 5 U.S.C. § 552(c)(1)(B).

[31] See Attorney General's 1986 Amendments Memorandum.

[32] Id.

[33] See id.

it is always possible that an agency might possess somewhat conflicting or even contradictory indications on such a point, it should be firmly resolved that a subject is aware of an investigation before an agency risks impairing it through any telling FOIA disclosure."[34] Moreover, agencies are not obligated to accept any bald assertions by investigative subjects that they "know" of ongoing investigations against them; such assertions might well constitute no more than sheer speculation.[35] Because such speculation, if accepted, could defeat the exclusion's clear statutory purpose, agencies should rely upon their own objective indicia of subject awareness and consequent harm.[36]

In the great majority of cases, invoking Exemption 7(A) will protect the interests of law enforcement agencies in responding to FOIA requests for active law enforcement files. The (c)(1) exclusion should be employed only in the exceptional case in which an agency concludes that, given its belief of the subject's unawareness of the investigation, the mere invocation of Exemption 7(A) could reasonably be expected to cause harm to the investigation — a judgment that should be reached only after careful consideration of the expected harms.[37]

Finally, the clear language of this exclusion specifically restricts its applicability to "during only such time" as these circumstances continue to exist.[38] This limitation "comports with the extraordinary nature of the protection afforded by the exclusion, as well as with the basic temporal nature of Exemption 7(A) underlying it."[39] Accordingly, an agency cannot rely on this exclusion if changing circumstances no longer support its use.[40] Therefore, "[o]nce a law enforcement matter reaches a stage at which all subjects are aware of its pendency, or at which the agency otherwise determines that the public disclosure of that pendency no longer could lead to harm, the exclusion should be regarded as no longer applicable."[41] If such occurs while the FOIA request is pending, the agency must identify the records as responsive to the request and process the records in an ordinary fashion.[42] However, an agency is not legally obligated to reopen a closed

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[34] Id.

[35] See id. at n.38.

[36] Id.

[37] See id.

[38] 5 U.S.C. § 552(c)(1)(B)(ii).

[39] Attorney General's 1986 Amendments Memorandum at 21.

[40] See id.

[41] Id.

[42] See id.; see also Barnard v. DHS, 598 F. Supp. 2d 1, 4 n.4 (D.D.C. 2009) (noting that agency initially applied (c)(1) exclusion but then determined it was no longer applicable and asserted exemptions).

FOIA request or a litigation case on its own initiative to process formerly excluded records: "By operation of law, the records simply were not subject to the FOIA during the pendency of the request."[43]

When an agency reaches the judgment that it is necessary and appropriate that the (c)(1) exclusion be employed in connection with a request, it should consult with the Office of Information Policy before invoking the exclusion.[44] As discussed above, any agency component that maintains criminal law enforcement records should include a standard notification in all FOIA response letters informing the requester that the FOIA excludes certain records from the FOIA's requirements and that the agency's response only addresses those records that are subject to the FOIA.[45]

The (c)(2) Exclusion

The second exclusion applies to a narrower situation, which involves the threatened identification of confidential informants in criminal investigations or proceedings.[46] The "(c)(2) exclusion" provides as follows:

> Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of [the FOIA] unless the informant's status as an informant has been officially confirmed.[47]

By its terms, the (c)(2) exclusion is limited to "informant records maintained by a criminal law enforcement agency."[48] This exclusion addresses the situation in which a savvy requester could attempt to use the FOIA to identify an informant.[49] Ordinarily,

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[43] Attorney General's 1986 Amendments Memorandum at n.39.

[44] See OIP Exclusion Guidance ("This will help ensure that all aspects of the request and possible excludable records are reviewed and analyzed before determining whether use of an exclusion is warranted.").

[45] See id.

[46] See OIP Guidance: Implementing FOIA's Statutory Exclusion Provisions [hereinafter OIP Exclusion Guidance] (posted 9/14/2012); Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum].

[47] 5 U.S.C. § 552(c)(2) (2018).

[48] Id.

[49] See Attorney General's 1986 Amendments Memorandum.

Exemption 7(D) should prove sufficient to allow a law enforcement agency to withhold information in order to prevent the identification of confidential sources.[50] That is because, in most instances, the assertion of Exemption 7(D) does not identify a particular individual as a source. It only tells the requester that source-derived information is contained within some portion of the withheld records. As with Exemption 7(A), under ordinary circumstances the disclosure of this fact presents no direct threat.[51] But under certain extraordinary circumstances, this disclosure could result in devastating harms to the source and to the system of confidentiality existing between sources and criminal law enforcement agencies.[52]

One scenario in which the exclusion is likely to be employed is one in which the ringleaders of a criminal enterprise suspect that they have been infiltrated by a source and attempt to use the FOIA to identify that person within their criminal organization by submitting targeted FOIA requests for the records of these suspected sources.[53] Such requests would normally trigger a privacy-based "Glomar" response, in which the agency would advise the requester that it can neither confirm nor deny the existence of law enforcement records on third parties pursuant to Exemption 7(C) of the FOIA,[54] thus adequately protecting any of the third parties who may actually be confidential sources.[55] This response will not be available, however, if the ringleaders force all participants in the criminal venture to execute privacy waivers authorizing disclosure of their files in response to third-party requests.[56] In such a situation, with privacy no longer a bar to disclosure, a law enforcement agency would be in an untenable position where invoking Exemption 7(D) to protect the informant would tip off the criminal enterprise that it had

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[50] See id.; see also, e.g., Williams v. FBI, 69 F.3d 1155, 1159 (D.C. Cir. 1995) (finding information provided under express assurances of confidentiality to be exempt from disclosure); cf. DOJ v. Landano, 508 U.S. 165, 179-81 (1993) (concluding that although "the government is not entitled to a presumption that a source is confidential within the meaning of Exemption 7(D) whenever the source provides information to the FBI in the course of a criminal investigation," it should "often" be able to identify circumstances supporting inference of confidentiality).

[51] See Attorney General's 1986 Amendments Memorandum; see also OIP Exclusion Guidance.

[52] See Attorney General's 1986 Amendments Memorandum.

[53] See id.

[54] See 5 U.S.C. § 552(b)(7)(C) (2018).

[55] See Attorney General's 1986 Amendments Memorandum.

[56] See id.

been infiltrated.[57] Likewise, if a FOIA requester seeks informant records for a deceased person, Exemption 7(C) cannot be used to protect such records, but the (c)(2) exclusion could potentially be used to prevent the release of the existence of informant records about that deceased individual, although the two courts that have opined on this issue reached differing conclusions.[58]

The (c)(2) exclusion is principally intended to permit an agency to escape the necessity of giving a response that would be tantamount to identifying a named party as a law enforcement source.[59] Criminal law enforcement agencies thus are authorized to treat such requested records "within the extraordinary context of such a FOIA request,"[60] as "not subject to the requirements of [the FOIA]."[61] Similar to the (c)(1) exclusion, the agency would have "no obligation to acknowledge the existence of such records in response to such request."[62]

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[57] See id.; Tanks v. Huff, No. 95-568, 1996 WL 293531, at *5-6 (D.D.C. May 28, 1996) (dictum) (noting that purpose of (c)(2) exclusion is to "protect against the possible use of the FOIA to discover the identities of confidential informants" by placing law enforcement agency in "untenable position of having to respond [with an assertion of Exemption 7(D)] to a valid FOIA request directly targeted at a named informant's files").

[58] Compare Memphis Publ'g Co. v. FBI, 879 F. Supp. 2d 1, 7-8 (D.D.C. 2012) (dictum) (expressing skepticism with plaintiff's argument that (c)(2) exclusion "applies only to a narrow set of circumstances involving living individuals, cooperating in narcotics or organized crime investigations," where compliance with FOIA request for informant records "could endanger the integrity of an investigation or the safety of an informant," noting that "the (c)(2) exclusion as written does not contain any of the limitations that plaintiffs ask the court to read into the statute [and instead] it applies 'whenever' informant records are requested in a certain manner"), with Tanks, 1996 WL 293531, at *5-6 (dictum) (noting that (c)(2) exclusion "is reserved for circumstances in which a confidential source is compelled by the criminal organization with which he is associated to surrender his privacy interests [for purposes of making a first-party FOIA request]," placing law enforcement agency "in the untenable position of having to respond to a valid FOIA request directly targeted at a named informant's files").

[59] See Attorney General's 1986 Amendments Memorandum; see also Tanks, 1996 WL 293531, at *6 (stating that "[t]he (c)(2) exclusion is principally intended to permit an agency to avoid giving a response that would identify a named party as a source" (citing Attorney General's 1986 Amendments Memorandum at 23)).

[60] See Attorney General's 1986 Amendments Memorandum.

[61] See 5 U.S.C. § 552(c)(2).

[62] S. Rep. No. 98-221, at 25 (1983).

By its terms, the exclusion becomes inapplicable if and when the individual's status as a source has been officially confirmed.[63] In one decision, the District Court for the District of Columbia found that the agency "officially confirmed" an individual's status as an informant for purposes of the (c)(2) exclusion even though the disclosure of that fact was inadvertent.[64] In so holding, the court expressly stated that its ruling was based on the unique circumstances of the case,[65] and cautioned that its ruling should not be construed as "establish[ing] a general principle that inadvertent disclosure will always constitute official confirmation."[66] Conversely, the District Court for the Eastern District of Louisiana found that an individual had not been "officially confirmed" as a source for purposes of the (c)(2) exclusion.[67] The court found that "official confirmation" of a source's status in a different case is not relevant to whether the (c)(2) exclusion can be applied in the case before it.[68]

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[63] See 5 U.S.C. § 552(c)(2); ACLU of Mich. v. FBI, 734 F.3d 460, 471 (6th Cir. 2013) (dictum) (stating that "Congress intended that agencies must acknowledge the existence of documents responsive to a request about an 'officially confirmed' informant, although ultimately disclosure may be precluded by [particular FOIA exemptions]"); Gonzalez v. FBI, No. 99-5789, slip op. at 18 (E.D. Cal. Aug. 11, 2000) (recognizing that subsection (c)(2) "requires an agency to treat the records as subject to the requirements of [the FOIA] if the informant's status as an informant has been officially confirmed"), aff'd, 14 F. App'x 916 (9th Cir. 2001); Valencia-Lucena v. DEA, No. 99-0633, slip op. at 8 (D.D.C. Feb. 8, 2000) (concluding that "[subs]ection (c)(2) is irrelevant to the resolution of this action" because subject's status as informant was "officially confirmed at [requester's] criminal trial"), summary affirmance granted sub nom. Lucena v. DEA, No. 00-5117, 2000 WL 1582743 (D.C. Cir. Sept. 7, 2000); Tanks, 1996 WL 293531, at *5 (holding that "given the fact that the status of [the subjects] as government informants in Plaintiff's case is confirmed, the (c)(2) exclusion simply has no bearing on the instant case").

[64] See Memphis Publ'g Co., 879 F. Supp. 2d at 13-14 (noting that, despite agency's claim of inadvertence, records were released as part of agency's official response to FOIA request and were released again when they were filed as exhibits with court).

[65] See id. at 10-14 (observing that even if release was inadvertent, release involved matters of great historical public interest where harm from official confirmation would not be bodily harm but embarrassment or stigma to surviving family; further noting agency's lack of care in processing documents, failure to attempt to remedy inadvertent disclosure, and failure to file in camera declaration with court when plaintiff first raised exclusion issue).

[66] Id. at 14.

[67] See Rahim v. FBI, 947 F. Supp. 2d 631, 644 (E.D. La. 2013) (concluding that plaintiff failed to present any evidence that alleged source's status as an informant was "officially confirmed").

[68] Id. ("Any purported confirmation of [subject's] status as an informant as to [a different] case is of no moment as to this case.").

Courts have held that even when a source has been "officially confirmed," a law enforcement agency is not thereby obligated to confirm the existence of any specific records regarding that source.[69] Thus, courts have not viewed the (c)(2) exclusion as automatically requiring disclosure of source-related information once a source has been officially confirmed,[70] so long as such information may properly be protected under a FOIA exemption.[71]

When a criminal law enforcement agency determines that the (c)(2) exclusion applies, it should consult with the Office of Information Policy to ensure that all aspects of the request, the potentially excludable records, and the relevant legal standards are fully analyzed before the agency invokes the (c)(2) exclusion.[72] As discussed above, any

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[69] See Gonzalez v. FBI, No. 99-5789, slip op. at 18 (E.D. Cal. Aug. 11, 2000) (finding that "nowhere within [subsection (c)(2)] does it state that the privacy exemptions found at subsections (b)(6) and (b)(7) are invalidated because a person is a confirmed informant"); Valencia-Lucena v. DEA, No. 99-0633, slip op. at 8 (D.D.C. Feb. 8, 2000) (rejecting plaintiff's argument that when subsection (c)(2) does not apply, because subject is known DEA informant, FBI is barred from asserting "Glomar" response for any FBI records); Tanks v. Huff, No. 95-568, 1996 WL 293531, at *5-6 (D.D.C. May 28, 1996) (holding that because "it is undisputed that the two subjects" of request were government informants in plaintiff's trial, no claim of subsection (c)(2) would have been appropriate, and yet, it was still appropriate to assert "Glomar" response for any possible unrelated law enforcement records).

[70] See Benavides v. DEA, 968 F.2d 1243, 1248 (D.C. Cir. 1992) ("There is no evidence that Congress intended subsection (c)(2) to repeal or supersede the other enumerated FOIA exemptions or to require disclosure whenever the informant's status has been officially confirmed."), modified on other grounds, 976 F.2d 751, 753 (D.C. Cir. 1992); Memphis Publ'g Co. v. FBI, 879 F. Supp. 2d 1, 14 (D.D.C. 2012) (clarifying that court's determination that exclusion is inapplicable does not mean that agency must produce records, but merely that agency must review informant file and then withhold or release records as appropriate under FOIA); cf. Valencia-Lucena, No. 99-0633, slip op. at 8-9 (holding that once subsection (c)(2) was rendered inapplicable by official confirmation of source's status as DEA source, FBI appropriately relied on Exemptions 6 and 7(C) to "Glomar" existence of any FBI records).

[71] ACLU of Mich. v. FBI, 734 F.3d 460, 471 (6th Cir. 2013) (dictum) ("[C]ourts have concluded that Congress intended that agencies must acknowledge the existence of documents responsive to a request about an 'officially confirmed' informant, although ultimately disclosure may be precluded by [particular FOIA exemptions]."); Benavides, 968 F.2d at 1248 ("The legislative history suggests, in fact, that Congress intended to permit the DEA to withhold documents under 7(C) and 7(D), even if the agency must, under subsection (c)(2), acknowledge their existence."); Tanks, 1996 WL 293531, at *6 ("Accepting the status of [two named individuals] as government informants, the FBI explained why disclosure of any information in its files unrelated to the Plaintiff and his prosecution would constitute an unwarranted invasion of personal privacy pursuant to Exemption 7(C), 5 U.S.C. § 552(b)(7)(C).").

[72] See OIP Exclusion Guidance ("This will help ensure that all aspects of the request and possible excludable records are reviewed and analyzed before determining whether use of an exclusion is warranted.").

agency component that maintains criminal law enforcement records should include a standard notification in all FOIA response letters informing the requester that the FOIA excludes certain records from the FOIA's requirements and that the agency's response only addresses those records that are subject to the FOIA.[73]

The (c)(3) Exclusion

The third exclusion pertains only to certain law enforcement records that are maintained by the FBI.[74] The "(c)(3) exclusion" provides as follows:

> Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in [Exemption 1], the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of [the FOIA].[75]

This exclusion recognizes the exceptional sensitivity of the FBI's activities in the areas of foreign intelligence, counterintelligence, and international terrorism, as well as the fact that the classified files of these activities can be particularly vulnerable to targeted FOIA requests.[76] Sometimes, within the context of a particular FOIA request, the very fact that the FBI does or does not hold any records on a specified person or subject can itself be a sensitive fact, properly classified in accordance with the applicable executive order on the protection of national security information[77] and protectable under FOIA Exemption 1.[78] There can be situations, however, where acknowledging the existence of the records by invoking Exemption 1 to withhold them could provide information to the requester which would have an extremely adverse effect on the government's interests.[79]

Congress acknowledged this through the (c)(3) exclusion, as it allows the FBI to protect itself against such harm in connection with any of its records pertaining to

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[73] See id.

[74] See 5 U.S.C. § 552(c)(3) (2018); Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum].

[75] 5 U.S.C. § 552(c)(3).

[76] See Attorney General's 1986 Amendments Memorandum.

[77] See, e.g., Exec. Order No. 13,526, 3 C.F.R. § 13526 (2010).

[78] See 5 U.S.C. § 552(b)(1); see also Attorney General's 1986 Amendments Memorandum.

[79] See Attorney General's 1986 Amendments Memorandum.

"foreign intelligence, or counterintelligence, or international terrorism."[80] The third exclusion applies to those situations where, in the context of a particular request, the very existence or nonexistence of responsive records is itself a classified fact.[81] This allows an agency to treat the excluded records as "not subject to the requirements of [the FOIA]" as long as their existence, based on the context of the request, "remains classified information."[82]

Additionally, it should be noted that while the statute refers to records maintained by the FBI, exceptional circumstances could possibly arise in which it would be appropriate for another component of the Department of Justice or another federal agency to invoke this exclusion jointly on a derivative basis as well.[83] Such a situation could occur where information in records of another component or agency is derived from FBI records which fully qualify for (c)(3) exclusion protection.[84] In such extraordinary circumstances, the agency processing the derivative information should consult with the FBI regarding the possible joint invocation of the exclusion to avoid a potentially damaging inconsistent response.[85]

Notably, in the single reported case in which a plaintiff alleged that an agency improperly excluded records on the basis of the (c)(3) exclusion, the court upheld the agency's action without confirming whether the exclusion was used or not.[86]

When an agency reaches the judgment that it is necessary and appropriate that the (c)(3) exclusion be employed in connection with a request, before invoking the exclusion it should consult with the Office of Information Policy.[87] As discussed throughout this

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[80] 5 U.S.C. § 552(c)(3).

[81] See id.; see also Attorney General's 1986 Amendments Memorandum at n.44 (addressing overlap with subsection (c)(1)).

[82] 5 U.S.C. § 552(c)(3).

[83] See Attorney General's 1986 Amendments Memorandum at n.45 (explaining that although this exclusion was created primarily for use by the FBI, "it is conceivable that records derived from such FBI records might be maintained elsewhere, potentially in contexts in which the harm sought to be prevented by this exclusion is no less threatened").

[84] See id.

[85] See id.

[86] See ACLU of Mich. v. FBI, 734 F.3d 460, 472 (6th Cir. 2013) (affirming district court's finding that, if agency used (c)(3) exclusion, its use "was and remains amply justified," but refusing to confirm or deny whether in fact such exclusion was used).

[87] See OIP Guidance: Implementing FOIA's Statutory Exclusion Provisions (posted 9/14/2012) ("This will help ensure that all aspects of the request and possible excludable

section, any agency component that maintains criminal law enforcement records should include a standard notification in all FOIA response letters informing the requester that the FOIA excludes certain records from the FOIA's requirements and that the agency's response only addresses those records that are subject to the FOIA.[88]

Procedural Considerations

Several procedural considerations regarding the implementation and operation of these special record exclusions should be noted. When an agency reaches the judgment that it is necessary to employ an exclusion, it should do so as a specific official determination that is reviewed carefully by appropriate supervisory agency officials.[89] In addition, as noted above, the Department of Justice's guidance on implementation of the exclusion provisions states that agencies contemplating the possible use of an exclusion "should consult first with the Office of Information Policy."[90] Furthermore, the particular records covered by an exclusion action should be concretely and carefully identified and segregated from any responsive records that are to be processed according to ordinary procedures.[91]

In an effort "to bring greater accountability and transparency" to this process, the Department of Justice's exclusion guidance requires that any FOIA response made by an agency component that maintains criminal law enforcement records should specifically advise the requester that the FOIA excludes certain categories of records from its provisions.[92] It should further advise the requester that the response only addresses those records that are subject to the FOIA.[93] To prevent disclosure of the fact that an exclusion was invoked in any particular case, while ensuring that requesters are made aware of the existence of exclusions generally, this notification should be provided in every FOIA response made by the agency component, whether or not an exclusion was actually

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records are reviewed and analyzed before determining whether use of an exclusion is warranted.").

[88] See id.

[89] See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum].

[90] See OIP Guidance: Implementing FOIA's Statutory Exclusion Provisions [hereinafter OIP Exclusion Guidance] (posted 9/14/2012) ("This will help ensure that all aspects of the request and possible excludable records are reviewed and analyzed before determining whether use of an exclusion is warranted.").

[91] See Attorney General's 1986 Amendments Memorandum.

[92] See OIP Exclusion Guidance.

[93] See id.

invoked in a particular instance.[94] The text of this required notification is as follows: "For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist."[95]

This notification requirement ensures that requesters are on notice regarding three important facts: 1) the existence of the three statutory exclusions; 2) the fact that excluded records are not subject to the FOIA's requirements; and 3) the fact that any excluded records "are not part of the response being provided by the agency."[96]

The FOIA Improvement Act of 2016 requires each agency to publicly report the number of times that exclusions were employed by the agency during each fiscal year in its Annual FOIA Report.[97]

Lastly, the exclusion guidance requires agencies to provide greater transparency regarding the government's use of exclusions by ensuring that all agency websites contain a description of each of the three statutory exclusions.[98] This ensures that any requester who reviews an agency's website before making a FOIA request will be placed on notice regarding the existence of the statutory exclusions.[99]

Agencies should prepare in advance a uniform procedure to handle administrative appeals and any court challenges that seek review of the possibility that an exclusion was employed in a given case.[100] In responding to administrative appeals, agencies should accept any request for administrative appellate review of the possible use of an exclusion and specifically address it in evaluating and responding to the appeal.[101]

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[94] See id.

[95] Id.

[96] Id.

[97] See 5 U.S.C. § 552(e)(1)(P) (2018); see also OIP Guidance: New Requirements for Agency Annual Freedom of Information Act Reports (posted 10/8/2016).

[98] See OIP Guidance: New Requirements for Agency Annual Freedom of Information Act Reports (posted 10/8/2016).

[99] See id.

[100] See generally Attorney General's 1986 Amendments Memorandum.

[101] See Attorney General's 1986 Amendments Memorandum (superseded in part by FOIA Update, Vol. XII, No. 2, at 5 (noting that in wake of Oglesby decision [Oglesby v. Dep't of the Army, 920 F.2d 57 (D.C. Cir. 1990)] "no records" responses constitute adverse determinations for which agencies must provide administrative appeal rights)).

In the exceptional case in which an exclusion was invoked, the appellate review authority should examine the appropriateness of that action and come to a judgment as to the exclusion's continued applicability as of that time.[102] In the event that an exclusion is found to have been improperly employed or to be no longer applicable, the requester should be advised that the appeal is to be remanded for prompt conventional processing of all formerly excluded records.[103] "Where it is determined either that an exclusion was properly employed or that, as in the overwhelming bulk of cases, no exclusion was used, the result of the administrative appeal should, by all appearances, be the same: The requester should be specifically advised that this aspect of his appeal was reviewed and found to be without merit."[104]

Such administrative appeal responses, of course, necessarily must be stated in such a way that does not indicate whether an exclusion was in fact invoked.[105] Moreover, to preserve the exclusion mechanism's effectiveness, requesters who inquire in any way whether an exclusion has been used should routinely be advised that it is the agency's standard policy to refuse to confirm or deny that an exclusion was employed in any particular case.[106]

Exclusion issues in court actions must be handled with similarly careful and thoughtful preparation.[107] First, judicial review of a suspected exclusion determination must be conducted ex parte, based upon an in camera court filing submitted directly to the judge.[108] Second, it is "essential to the viability of the exclusion mechanism that

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[102] See id.

[103] See id.; see also Barnard v. DHS, 598 F. Supp. 2d 1, 4 n.4 (D.D.C. 2009) (noting that after initially administratively invoking (c)(1) exclusion, agency later asserted exemptions in litigation).

[104] Attorney General's 1986 Amendments Memorandum.

[105] See id.

[106] See id. at n.52; see also Steinberg v. DOJ, No. 93-2409, 1997 WL 349997, at *1 (D.D.C. June 18, 1997) (refusing to "confirm[] or deny[] the existence of any exclusion . . . and conclud[ing] that if an exclusion was invoked, it was and remains amply justified").

[107] See Attorney General's 1986 Amendments Memorandum.

[108] See id.; see also, e.g., Price v. DOJ, No. 18-1339, 2020 WL 3972273, at *8 (D.D.C. July 14, 2020) (explaining that "[t]o the extent that the agency did apply section 552(c) exclusion(s), the appropriate procedure is for the agency to submit an ex parte declaration explaining its reliance, if any, on the exclusion(s)"); Light v. DOJ, 968 F. Supp. 2d 11, 30 (D.D.C. 2013) (noting that agency properly complied with its exclusion policy by filing ex parte in camera declaration in response to plaintiff's allegation that agency employed exclusion to withhold records from plaintiff); Rahim v. FBI, 947 F. Supp. 2d 631, 646 (E.D. La. 2013) (stating that

requesters not be able to deduce whether an exclusion was employed at all in a given case based upon how any case is handled in court."[109] Given this, it is imperative that the in camera defenses of exclusion issues occur not just in those cases in which an exclusion actually was employed and is actually being defended.[110]

As such, "it is the government's standard litigation policy in the defense of FOIA lawsuits that wherever a FOIA plaintiff raises a distinct claim regarding the suspected use of an exclusion, the government will routinely submit an in camera declaration addressing that claim, one way or the other."[111] When an exclusion was in fact employed,

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agency "is permitted to file an in camera declaration, which explains either that no exclusion was invoked or that the exclusion was invoked appropriately"); ACLU of N.J. v. DOJ, No. 11-2553, 2012 WL 4660515, at *5 (D.N.J. Oct. 2, 2012) (noting that, if plaintiff alleges that agency invoked exclusion, agency may file in camera declaration explaining that exclusion was properly invoked or was not invoked at all), aff'd, 733 F.3d 526 (3d Cir. 2013); Steinberg, 1997 WL 349997, at *1 (approving use of agency in camera declaration where plaintiff "alleged that certain requested information may have been excluded pursuant to [sub]section 552(c)"); cf. Islamic Shura Council of S. Cal. v. FBI, 779 F. Supp. 2d 1114, 1124-25 (C.D. Cal. 2011) (noting that while exclusion provisions allow agencies to withhold records from FOIA requesters without disclosing basis for doing so, agencies cannot withhold such information from courts).

[109] Attorney General's 1986 Amendments Memorandum; see also Price, 2020 WL 3972273, at *8 (directing agency to submit ex parte declaration "out of an abundance of caution").

[110] See id.; see also ACLU of Mich. v. FBI, 734 F.3d 460, 470-71 (6th Cir. 2013) (explaining government's standard litigation practice of using in camera declarations to address allegations of use of FOIA exclusions and importance of handling such claims consistently whether or not agency actually invoked exclusion so that information sought to be protected by exclusion is not inadvertently revealed (citing Attorney General's 1986 Amendments Memorandum)); Light, 968 F. Supp. 2d at 30 ("[I]t is vital to the integrity of the application of exclusions that requesters not be able to deduce whether an exclusion was or was not employed at all in any given case." (quoting agency declaration)).

[111] Attorney General's 1986 Amendments Memorandum; see also, e.g., Labow v. DOJ, 831 F.3d 523, 533-34 (D.C. Cir. 2016) (concluding that district court did not abuse its discretion by reviewing agency's in camera declaration to adjudicate plaintiff's allegation that exclusion was employed); ACLU of N.J. v. FBI, 733 F.3d 526, 534 (3d Cir. 2013) (observing that courts have "generally approved" government's practice of filing in camera declaration to address allegation that it employed exclusion in particular case); ACLU of Mich., 734 F.3d at 470-71 (observing that "'government's standard litigation policy'" is to submit in camera declaration when plaintiff asserts that exclusion was used (quoting Attorney General's 1986 Amendments Memorandum)); Freedom of the Press Found. v. DOJ, 493 F. Supp. 3d 251, 268 (S.D.N.Y. Oct. 9, 2020) (explaining that other than ex parte declaration, "[n]othing more is required" of agency); Light, 968 F. Supp. 2d at 30 (citing Attorney General's 1986 Amendments Memorandum); Steinberg v. DOJ, No. 91-2740, 1993 WL 524528, at *2 (D.D.C. Dec. 2, 1993) (noting that agency "volunteered an in camera submission related to the allegation of covert reliance on § 552(c)").

the correctness of that action will be justified to the court.[112] When an exclusion was not actually employed, the in camera declaration will simply state that it is being submitted to the court so as to mask whether or not an exclusion is being employed, thus preserving the integrity of the exclusion process overall.[113] "In either case, the government will of course urge the court to issue a public decision which does not indicate whether it is or is not an actual exclusion situation."[114] This public decision, like an administrative appeal determination as discussed above, should state only that a full review of the claim was made "and that, if an exclusion was in fact employed, it was, and remains, amply justified."[115] The Court of Appeals for the Sixth Circuit has noted that if an agency has

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[112] See Attorney General's 1986 Amendments Memorandum; see also ACLU of Mich., 734 F.3d at 470-71 (noting that agency's standard practice is to use in camera declaration to address plaintiff's claim that exclusion was used (citing Attorney General's 1986 Amendments Memorandum)); Light, 968 F. Supp. 2d at 30 (noting that when exclusion has been used, in camera declaration should state that it was justifiably used).

[113] See Attorney General's 1986 Amendments Memorandum; see also Light, 2013 WL 3742496, at *12 (referencing DOJ policy and noting that "where a § 552(c) exclusion is used, the in camera declaration asserts that it was justified; where a § 552(c) exclusion is not used, the in camera declaration states that fact").

[114] See Attorney General's 1986 Amendments Memorandum; see also ACLU of Mich., 734 F.3d at 471 (recognizing that court's public decision should not reveal whether exclusion was used (citing Attorney General's 1986 Amendments Memorandum)).

[115] Attorney General's 1986 Amendments Memorandum; see also, e.g., Labow, 831 F.3d at 534 (noting that "[the court], like the district court, will not comment on whether the FBI in fact relied on an exclusion" and holding "that no documents have been withheld pursuant to any impermissible use of an exclusion"); ACLU of Mich., 734 F.3d at 472 ("On review of the agency's declaration, [the court] conclude[s] that the district court did not err in finding that if an exclusion was employed, it was and remains amply justified."); Shapiro v. DOJ, No. 12-313, 2020 WL 3615511, at *21 (D.D.C. July 2, 2020) (concluding that "if such an exclusion in fact were employed, it was and continues to remain, amply justified"), reconsideration denied, 2020 WL 5970640 (D.D.C. Oct. 8, 2020); Freedom of the Press Found., 493 F. Supp. 3d at 268 (finding plaintiff's objections regarding any potential use of an exclusion "unavailing"); McClanahan v. DOJ, 204 F. Supp. 3d 30, 55 (D.D.C. 2016) ("The Court has conducted a full review of the claim and, if such an exclusion in fact were employed, it was and continues to remain, amply justified."), aff'd sub nom., McClanahan v. DOJ, 712 F. App'x 6 (D.C. Cir. 2018); Light, 968 F. Supp. 2d at 30 (noting that "any . . . exclusion, if employed, was amply justified"); Rahim v. FBI, 947 F. Supp. 2d 631, 647 (E.D. La. 2013) (finding that "if an exclusion was in fact employed, it was, and continues to remain, amply justified"); ACLU of N.J. v. DOJ, No. 11-2553, 2012 WL 4660515, at *5 (D.N.J. Oct. 2, 2012) (concluding, based on the agency's in camera declaration, that "without confirming or denying the existence of any exclusion . . . if an exclusion was invoked, it was and remains amply justified"); Steinberg v. DOJ, No. 93-2409, 1997 WL 349997, at *1 (D.D.C. June 18, 1997) (where plaintiff alleged possible use of exclusion, "without confirming or denying the existence of any exclusion, the Court finds and concludes [after review of agency's in camera declaration] that if an exclusion was invoked, it was and remains amply justified"). But see Friedman v. U.S. Secret Serv., 282 F. Supp. 3d 291, 307 (D.D.C. 2017) (denying plaintiff's

invoked an exclusion and the court does not find the agency's declaration to be adequate, the court may then order in camera inspection of the underlying documents at issue.[116] The Sixth Circuit noted that "[a]s public recognition of [such an] order would reveal that an exclusion was invoked, its existence [would be] kept secret from the public."[117]

The Courts of Appeals for the Third, Sixth, and District of Columbia Circuits have all rejected plaintiffs' proposals that, rather than the government filing an in camera declaration, both parties should file public declarations addressing the hypothetical question of whether any excluded records existed, and if so, whether they would properly fall under the FOIA's exclusion provisions.[118] The Sixth Circuit observed that such a procedure "is neither workable nor protective of government secrets, and would provide less effective review than does the district judge's in camera review."[119] The Third Circuit found that no legal authority compelled such a procedure for the litigation of exclusion matters.[120] The Third Circuit also opined that it was not "convinced that adopting" the proposed procedure "would be wise from a policy perspective," observing that "this procedure would do little to facilitate judicial review."[121] The court explained that the government's long-standing in camera review procedure provides for "*more* meaningful

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motion relating to alleged misuse of a FOIA exclusion and deciding to state in opinion that "[d]efendant does not invoke the (c)(1) exclusion").

[116] See ACLU of Mich., 734 F.3d at 471.

[117] See id.

[118] See Labow, 831 F.3d at 533-34 (observing that plaintiff's proposed approach would require courts to "be in the business of considering and deciding abstract questions about the theoretical applicability of a FOIA exclusion in circumstances in which the government might have never relied on the exclusion in the first place"); ACLU of N.J. v. FBI, 733 F.3d 526, 533-35 (3d Cir. 2013); ACLU of Mich., 734 F.3d at 469-72.

[119] ACLU of Mich., 734 F.3d at 472.

[120] See ACLU of N.J., 733 F.3d at 534 (agreeing with government's long-standing litigation practice of filing in camera declarations to address allegations of use of exclusions, noting that courts have "generally approved" this practice and rejecting argument that legislative history supported proposed approach, finding evidence for that claim to be "inconclusive at best" (citing ACLU of Mich., 734 F.3d at 471-72)).

[121] Id. at 534-35 (reciting concerns articulated by Sixth Circuit regarding plaintiff's proposed "Glomar-like" procedure including fact that such litigation "will consist of little more than speculation," with agency "then tasked with responding to these shots in the dark, a strange and difficult task given that few are likely to be tethered to reality, and fashioning a response is fraught with concerns of accidentally disclosing the existence or nonexistence of secret information" (citing ACLU of Mich., 734 F.3d at 472)).

judicial review" because the court reviews the actual excluded information (if any) rather than "adjudicating '[o]pen ended hypothetical questions.'"[122]

[122] Id. at 535 (quoting ACLU of Mich., 734 F.3d at 472).