



Procedural Requirements

The Freedom of Information Act requires federal agencies to make their records promptly available to any person who makes a proper request for them.¹ To provide a general overview of the Act's procedural requirements, this section first will discuss President Obama's FOIA Memorandum,² Attorney General Holder's FOIA Guidelines,³ and the OPEN Government Act of 2007⁴ amendments to the FOIA, followed by a roughly chronological discussion of how a typical FOIA request is processed -- from the point of determining whether an entity in receipt of a request is subject to the FOIA in the first place to the review of an agency's initial decision regarding a FOIA request on administrative appeal. (The subject of fees under the Act is discussed more fully and separately under Fees and Fee Waivers, below.) In administering the Act's procedural requirements, agencies should remember President Obama's pronouncement that "[a] democracy requires accountability, and accountability requires transparency."⁵ Accordingly, agencies should administer the FOIA "with a clear presumption: [i]n the face of doubt, openness prevails."⁶

¹ 5 U.S.C. § 552(a)(3)(A) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (providing that "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person"). But see id. at § 552(a)(3)(E) (prohibiting certain agency FOIA disclosures to foreign governments or representatives of such governments); *FOIA Post*, "FOIA Amended by Intelligence Authorization Act" (posted 12/23/02) (advising on 2002 amendment of subsection (a)(3)).

² Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act [hereinafter President Obama's FOIA Memorandum], 74 Fed. Reg. 4683 (Jan. 21, 2009).

³ Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009), available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>.

⁴ Pub. L. No. 110-175, 121 Stat. 2524.

⁵ President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683; see *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

⁶ President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683.

President Obama's FOIA Memorandum
and Attorney General Holder's FOIA Guidelines

The President and Attorney General have issued memoranda to all agencies emphasizing that the FOIA reflects a "profound national commitment to ensuring an open Government" and directing agencies to "adopt a presumption in favor of disclosure."⁷ On his first full day in office, President Obama called for federal executive departments and agencies to administer the FOIA so as to achieve an unprecedented level of openness and transparency in the work of the Executive Branch, stating that agencies should administer the FOIA with "a clear presumption: [i]n the face of doubt, openness prevails."⁸ The President directed agencies not to withhold information "merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."⁹ He instructed agencies to respond to requests "promptly and in a spirit of cooperation."¹⁰ In addition, the President encouraged agencies to proactively release records, without waiting for specific requests, so that citizens can be informed "about what is known and done by their [g]overnment."¹¹ The President directed the Attorney General to issue FOIA Guidelines for the Executive Branch that "reaffirm[] the commitment to accountability and transparency."¹²

On March 19, 2009, Attorney General Eric H. Holder, Jr. issued new FOIA guidelines for the Executive Branch.¹³ The Attorney General's FOIA Guidelines renew the commitment to open government that the President proclaimed, and underscore the importance of effective FOIA administration.¹⁴ Attorney General Holder reiterated that agencies should administer

⁷ Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) [hereinafter President Obama's FOIA Memorandum]; accord Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009) [hereinafter Attorney General Holder's FOIA Guidelines], available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>; see *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

⁸ President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683.

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ Attorney General Holder's FOIA Guidelines, available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>.

¹⁴ Id. at 1-2.

the FOIA with a presumption of openness.¹⁵ He encouraged agencies to make discretionary releases when appropriate, and to make partial disclosures of records when full disclosures are not possible.¹⁶ Significantly, he emphasized that "the responsibility for effective FOIA administration belongs to all of us – it is not merely a task assigned to an agency's FOIA staff," and he noted that "[i]mproving FOIA performance requires the active participation of agency Chief FOIA Officers."¹⁷ The Attorney General stated that "[u]nnecessary bureaucratic hurdles have no place in the 'new era of open [g]overnment' that the President has proclaimed,"¹⁸ and he noted that the "[t]imely disclosure of information is an essential component of transparency."¹⁹ He also called on agencies to "readily and systematically post information online in advance of any public request."²⁰ To ensure effective FOIA administration, the Attorney General directed agency Chief FOIA Officers to report their improvement activity to the Department of Justice each year pursuant to forthcoming reporting guidelines from the Department's Office of Information Policy.²¹

In issuing these new guidelines, Attorney General Holder rescinded the October 12, 2001 Attorney General Memorandum on the FOIA,²² and he established a new "foreseeable harm" standard for defending agency decisions to withhold information.²³ Under this new standard, the Department of Justice will defend an agency's denial of a FOIA request "only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."²⁴ In keeping with the President's commitment to openness and with the Attorney General's FOIA Guidelines, agencies must now include the "foreseeable harm" standard as part of the FOIA analysis at the initial request stage and the administrative appeal stage.²⁵

¹⁵ Id.

¹⁶ Id. at 1.

¹⁷ Id. at 2.

¹⁸ Id.

¹⁹ Id. at 3.

²⁰ Id.

²¹ Id.

²² Id. at 1.

²³ Id. at 2.

²⁴ Id.

²⁵ See id. at 1 (stating that "[a]n agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption"); *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (providing guidance to agencies on implementing new transparency standards).

OPEN Government Act

The OPEN Government Act of 2007 amended several procedural aspects of the FOIA, setting forth new agency requirements and statutorily mandating existing practices that assist requesters and facilitate the processing of FOIA requests.²⁶ Among these practices, the Act requires that agencies assign request tracking numbers, provide request status information, and maintain a FOIA Public Liaison to assist requesters.²⁷

Specifically, agencies must assign, and provide to requesters, an individualized tracking number for any request that will take longer than ten days to process.²⁸ Agencies must also establish a telephone line or an internet site where requesters, using the assigned tracking number, can obtain information regarding the status of their request, including the date the agency received the request and an estimated date when the agency will complete its action on it.²⁹

The OPEN Government Act statutorily mandated the role of FOIA Public Liaisons, who are "responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes."³⁰ Likewise, the role of the Chief FOIA Officer is now statutorily mandated. This official has "agency-wide responsibility for efficient and appropriate compliance" with the FOIA and reports to top agency officials and to the Attorney General regarding the agency's performance in implementing the FOIA.³¹

In addition, the OPEN Government Act established a new office within NARA to "offer mediation services" and it directed GAO to audit agencies on their implementation of the FOIA.³² The OPEN Government Act set forth extensive new reporting requirements for agencies' annual FOIA reports³³ and established new reporting requirements for the Attorney

²⁶ See OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also *FOIA Post*, "Congress Passes Amendments to the FOIA" (posted 1/9/08) (summarizing substantive sections of OPEN Government Act).

²⁷ OPEN Government Act §§ 6, 7, 10 (to be codified at 5 U.S.C. § 552(a)(6)(B)(ii), (a)(7), (l)).

²⁸ *Id.* § 7; see also *FOIA Post*, "OIP Guidance: Assigning Tracking Numbers and Providing Status Information for Requests" (posted 11/18/08).

²⁹ OPEN Government Act § 7; see also *FOIA Post*, "OIP Guidance: Assigning Tracking Numbers and Providing Status Information for Requests" (posted 11/18/08).

³⁰ OPEN Government Act § 10; see also *id.* § 6; *FOIA Post* "OIP Guidance: New Limitations on Assessing Fees" (posted 11/18/08).

³¹ OPEN Government Act § 10.

³² *Id.*

³³ *Id.* § 8 (to be codified at 5 U.S.C. § 552(e)); see also *FOIA Post* "2008 Guidelines for Agency Preparation of Annual FOIA Reports" (posted 5/22/08).

General and the Special Counsel concerning referrals to the Special Counsel.³⁴ (For a discussion of these Attorney General and Special Counsel reporting requirements, see Litigation Considerations, Referral to Special Counsel and Limitations on Filing Frivolous Suits, below).

The OPEN Government Act also amended the definition of agency records and established new rules concerning FOIA's time limits, routing of misdirected requests, assessment of fees, and document marking.³⁵ (For a discussion of these provisions, see Procedural Requirements, "Agency Records;" Procedural Requirements, Time Limits; and Procedural Requirements, "Reasonably Segregable" Obligation, below).

Finally, the Act statutorily mandated the definition of a "representative of the news media"³⁶ for fee purposes, and the definition of a "substantially prevail[ing]" party for attorney fees purposes.³⁷ (For a discussion of these provisions, see Fees and Fee Waivers, Fees, Requester Categories; and Attorney Fees, Eligibility, below).

Entities Subject to the FOIA

Agencies within the Executive Branch of the federal government, including independent regulatory agencies and some components within the Executive Office of the President, are subject to the provisions of the FOIA.³⁸ The FOIA does not, however, apply to entities that "are neither chartered by the federal government [n]or controlled by it."³⁹

³⁴ OPEN Government Act § 5 (to be codified at 5 U.S.C. § 552(a)(4)(F)).

³⁵ Id. §§ 6, 9, 12 (to be codified at 5 U.S.C. § 552(a)(6)(A), (b), (f)(2)).

³⁶ Id. § 3 (to be codified at 5 U.S.C. § 552(a)(4)(A)).

³⁷ Id. § 4 (to be codified at 5 U.S.C. § 552(a)(4)(E)).

³⁸ 5 U.S.C. § 552(f)(1) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see, e.g., Energy Research Found. v. Def. Nuclear Facilities Safety Bd., 917 F.2d 581, 584-85 (D.C. Cir. 1990) (determining that Defense Nuclear Facilities Safety Board is an agency because its functions include, inter alia, "investigat[ing], evaluat[ing] and recommend[ing]").

³⁹ H.R. Rep. No. 93-1380, at 14 (1974), reprinted in House Comm. on Gov't Operations and Senate Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents at 231-32 (1975); see Forsham v. Harris, 445 U.S. 169, 179-80 (1980) (holding that private grantee of federal agency is not itself subject to FOIA); Missouri v. U.S. Dep't of Interior, 297 F.3d 745, 750 (8th Cir. 2002) (holding that "[t]he provision of federal resources, such as federal funding, is insufficient to transform a private organization into a federal agency"); Pub. Citizen Health Research Group v. HEW, 668 F.2d 537, 543-44 (D.C. Cir. 1981) (stating that medical peer review committees are not agencies under FOIA); Irwin Mem'l Blood Bank v. Am. Nat'l Red Cross, 640 F.2d 1051, 1057 (9th Cir. 1981) (determining that American National Red Cross is not an agency under FOIA); Holland v. FBI, No. 04-2593, slip

Accordingly, state and local governments,⁴⁰ foreign governments,⁴¹ municipal entities,⁴² the

³⁹(...continued)

op. at 8 (N.D. Ala. June 30, 2005) (citing Irwin Mem'l Blood Bank, 640 F. Supp. 2d 1051) (same); Gilmore v. DOE 4 F. Supp. 2d 912, 919-20 (N.D. Cal. 1998) (finding that privately owned laboratory that developed electronic conferencing software, for which government owned nonexclusive license regarding its use, is not "a government-controlled corporation" as it is not subject to day-to-day supervision by federal government, nor are its employees or management considered government employees); Leytman v. N.Y. Stock Exch., No. 95 CV 902, 1995 WL 761843, at *2 (E.D.N.Y. Dec. 6, 1995) (relying on Indep. Investor Protective League v. N.Y. Stock Exch., 367 F. Supp. 1376, 1377 (S.D.N.Y. 1973), to find that although "[t]he Exchange is subject to significant federal regulation . . . it is not an agency of the federal government"); Rogers v. U.S. Nat'l Reconnaissance Office, No. 94-B-2934, slip op. at 7 (N.D. Ala. Sept. 13, 1995) (observing that "[t]he degree of government involvement and control over [private organizations which contracted with government to construct office facility is] insufficient to establish companies as federal agencies for purposes of the FOIA"). But see Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat'l R.R. Passenger Corp., 376 F.3d 1270, 1277 n.5 (11th Cir. 2004) (citing 49 U.S.C. § 24301(e) (2006)) (noting that "[a]lthough [defendant] Amtrak is not a federal agency, it must comply with FOIA's requirements"); Cotton v. Adams, 798 F. Supp. 22, 24 (D.D.C. 1992) (holding that Smithsonian Institution is agency under FOIA on basis that it "performs governmental functions as a center of scholarship and national museum responsible for the safe-keeping and maintenance of national treasures"), questioned on appeal of attorney fees award sub nom. Cotton v. Heyman, 63 F.3d 1115, 1119 & n.2, 1123 (D.C. Cir. 1995) (refusing to examine district court's agency status holding due to doctrine of direct estoppel but noting, in context of analyzing entitlement to attorney fees, that Smithsonian Institution "could reasonably interpret our precedent to support its position that it is not an agency under FOIA" and stressing that agency status holding "is binding only between these two parties"); cf. Dong v. Smithsonian Inst., 125 F.3d 877, 879 (D.C. Cir. 1997) (holding that Smithsonian Institution is not an agency for purposes of Privacy Act of 1974 (5 U.S.C. § 552a (2006)), as it is neither "establishment of the [E]xecutive [B]ranch" nor "government-controlled corporation").

⁴⁰ See, e.g., Moreno v. Curry, No. 06-11277, 2007 WL 4467580, at *1-2 (5th Cir. Dec. 20, 2007) (unpublished disposition) (affirming district court finding that FOIA does not apply to state or municipal agencies); Dunleavy v. New Jersey, 251 F. App'x 80, 83 (3d Cir. 2007) (unpublished disposition) (stating that FOIA does not impose obligations on state agencies), cert. denied, 128 S. Ct. 1483 (2008); Blankenship v. Claus, 149 F. App'x 897, 898 (11th Cir. Sept. 7, 2005); Lau v. Sullivan County Dist. Att'y, 201 F.3d 431 (2d Cir. Nov. 12, 1999) (unpublished disposition); Martinson v. DEA, No. 96-5262, 1997 WL 634559, at *1 (D.C. Cir. July 3, 1997); see also Willis v. DOJ, 581 F. Supp. 2d 57, 67-68 (D.D.C. 2008) (Missouri Police Department); Miller v. S.C. Dep't of Prob., Parole, and Pardon Servs., No. 08-3836, 2008 WL 5427754, at *3 (D.S.C. Dec. 31, 2008) (state agencies or departments); Rayyan v. Sharpe, No. 08-324, 2008 WL 4601427, at *3 (W.D. Mich. Oct. 15, 2008) (state agencies); Foley v. Village of Weston, No. 06-350, 2006 WL 3449414, at *5 (W.D. Wis. Nov. 28, 2006) (local county government, sheriff's department, and sheriff); Brown v. City of Detroit, No. 05-60162, 2006 WL 3196297, at *1 (E.D. Mich. Sept. 11, 2006) (magistrate's recommendation) (state or local governments), adopted, No. 05-60162, 2007 WL 1796228 (E.D. Mich. Oct. 30, 2006); Gabbard v. Hall County, Ga., No. 06-37, 2006 U.S. Dist. LEXIS 56662, at *4 (M.D. Ga. Aug. 14, 2006) (state or local agencies);

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courts,⁴³ other entities of the Judicial Branch,⁴⁴ Congress,⁴⁵ private citizens and corporations,⁴⁶

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Davis v. Johnson, No. 05-2060, 2005 U.S. Dist. LEXIS 12475, at *1 (N.D. Cal. June 20, 2005) (state or county agency); Dipietro v. EOUSA, 357 F. Supp. 2d 177, 182 (D.D.C. 2004) (citing Beard v. DOJ, 917 F. Supp. 61, 63 (D.D.C. 1996)) (county sheriff's department); Mount of Olives Paralegals v. Bush, No. 04-C-620, 2004 U.S. Dist. LEXIS 8085, at *6 (N.D. Ill. May 6, 2004) (state agencies); McClain v. DOJ, No. 97-C-0385, 1999 WL 759505, at *2 (N.D. Ill. Sept. 1, 1999) (state attorney general), aff'd, 17 F. App'x 471 (7th Cir. 2001); Beard v. DOJ, 917 F. Supp. 61, 63 (D.D.C. 1996) (District of Columbia Police Department).

⁴¹ Moore v. United Kingdom, 384 F.3d 1079, 1089-90 (9th Cir. 2004) (finding that "[n]o cause of action lies under FOIA against a foreign government").

⁴² See Nelson v. City of Plano, No. 06-102, 2007 WL 1438694, at *2 (E.D. Tex. May 14, 2007) (dismissing FOIA claims against municipal corporation); Cruz v. Superior Court Judges, No. 04-1103, 2006 WL 547930, at *1 (D. Conn. Mar. 1, 2006) (municipal police department); Jones v. City of Indianapolis, 216 F.R.D. 440, 443 (S.D. Ind. 2003) (municipal agencies).

⁴³ See, e.g., Megibow v. Clerk of the U.S. Tax Court, 432 F.3d 387, 388 (2d Cir. 2005) (per curiam) (affirming district court's conclusion that U.S. Tax Court is not subject to FOIA); United States v. Casas, 376 F.3d 20, 22 (1st Cir. 2004) (stating that "[t]he judicial branch is exempt from the Freedom of Information Act"); United States v. Choate, 102 F. App'x 634, 635 (10th Cir. 2004) (federal courts); United States v. Mitchell, No. 03-6938, 2003 WL 22999456, at *1 (4th Cir. Dec. 23, 2003) (same) (non-FOIA case); United States v. Alcorn, 6 F. App'x 315, 317 (6th Cir. 2001) (same) (non-FOIA case); Gaydos v. Mansmann, No. 98-5002, 1998 WL 389104, at *1 (D.C. Cir. June 24, 1998) (per curiam); Warth v. DOJ, 595 F.2d 521, 523 (9th Cir. 1979); United States v. Neal, No. 90-0003, 2007 U.S. Dist. LEXIS 10176, at *2 (D. Ariz. Feb. 13, 2007) (federal district courts); Scott v. United States, No. 98-CR-00079, 2006 WL 4031428, at *1 (E.D.N.C. May 9, 2006) (federal courts), aff'd, 202 F. App'x. 623, 624 (4th Cir. Oct. 3, 2006) (unpublished disposition); Benjamin v. U.S. Dist. Court, No. 05-941, 2005 WL 1136864, at *1 (M.D. Pa. May 13, 2005) (same); Carter v. U.S. 6th Circuit of Appeal, No. 05-134, 2005 WL 1138828, at *1 (E.D. Tenn. May 12, 2005).

⁴⁴ See Andrade v. U.S. Sentencing Comm'n, 989 F.2d 308, 309-10 (9th Cir. 1993) (Sentencing Commission, as independent body within judicial branch, is not subject to FOIA.); Thornton-Bey v. Admin. Office of U.S. Courts, No. 09-0958, 2009 WL 1451571, at *1 (D.D.C. May 21, 2009) (finding that Administrative Office of U.S. Courts is part of judicial branch and not agency under FOIA); Banks v. DOJ, 538 F. Supp. 2d 228, 231-32 (D.D.C. Mar. 16, 2008) (U.S. Probation Office and Administrative Office of the U.S. Courts); Coleman v. Lappin, No. 06-2255, 2007 WL 1983835, at *1 n.1 (D.D.C. July 3, 2007) (unpublished disposition) (stating that "Office of Bar Counsel is a creature of the District of Columbia Court of Appeals, and is not a federal agency to which the FOIA applies"); United States v. Richardson, No. 2001-10, 2007 U.S. Dist. LEXIS 77, at *3 (W.D. Pa. Jan. 3, 2007) (federal grand jury); Woodruff v. Office of the Pub. Defender, No. 03-791, slip op. at 3 (N.D. Cal. June 3, 2004) (Federal Public Defender's Office, which is controlled by courts, is not agency under FOIA.); Wayne Seminoff Co. v. Mecham, No. 02-2445, 2003 U.S. Dist. LEXIS 5829, at *20 (E.D.N.Y. Apr. 10, 2003) ("[T]he Administrative Office of the United States Courts is not an agency for purposes of FOIA."), aff'd, 82 F. App'x 740 (2d Cir.

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and presidential transition teams⁴⁷ are not subject to the FOIA.

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2003); United States v. Ford, No. 96-00271-01, 1998 WL 742174, at *1 (E.D. Pa. Oct. 21, 1998) ("The Clerk of Court, as part of the judicial branch, is not an agency as defined by FOIA."); Callwood v. Dep't of Prob., 982 F. Supp. 341, 342 (D.V.I. 1997) ("[T]he Office of Probation is an administrative unit of [the] Court . . . [and] is not subject to the terms of the Privacy Act.").

⁴⁵ See, e.g., United We Stand Am. v. IRS, 359 F.3d 595, 597 (D.C. Cir. 2004) ("The Freedom of Information Act does not cover congressional documents."); Dow Jones & Co. v. DOJ, 917 F.2d 571, 574 (D.C. Cir. 1990) (holding that Congress is not an agency for any purpose under FOIA); Dunnington v. DOD, No. 06-0925, 2007 WL 60902, at *1 (D.D.C. Jan. 8, 2007) (ruling that U.S. Senate and House of Representatives are not agencies under FOIA); see also Mayo v. U.S. Gov't Printing Office, 9 F.3d 1450, 1451 (9th Cir. 1994) (deciding that Government Printing Office is part of congressional branch and therefore is not subject to FOIA); Owens v. Warner, No. 93-2195, slip op. at 1 (D.D.C. Nov. 24, 1993) (ruling that office of Senator John Warner is not subject to FOIA), summary affirmance granted, No. 93-5415, 1994 WL 541335 (D.C. Cir. May 25, 1994).

⁴⁶ See, e.g., Henderson v. Office & Prof'l Employees Int'l Union, 143 F. App'x 741, 744 (9th Cir. 2005) (finding that "district court properly dismissed [FOIA claim] because the defendants are not 'agencies' and therefore cannot be held liable under the FOIA"); Henderson v. Sony Pictures Entm't, Inc., 135 F. App'x 934, 935 (9th Cir. 2005) (same); Mitchell, 2003 WL 22999456, at *1 (private attorney and law firms); In re Olsen, No. UT-98-088, 1999 Bankr. LEXIS 791, at *11 (B.A.P. 10th Cir. June 24, 1999) (bankruptcy trustee); Buemi v. Lewis, No. 94-4156, 1995 WL 149107, at *2 (6th Cir. Apr. 4, 1995) (concluding that FOIA applies only to federal agencies and not to private individuals); Jackson v. Ferrell, No. 09-00025, 2009 U.S. Dist. LEXIS 24893, at *3 (E.D. Mo. Mar. 25, 2009) (finding that federal attorney is not an agency); Montgomery v. Sanders, No. 07-470, 2008 WL 5244758, at *6 (S.D. Ohio Dec. 15, 2008) (analyzing defense contractor's relationship with agency and finding that contractor is not "government-controlled corporation" subject to FOIA); Few v. Liberty Mut. Ins. Co., 498 F. Supp. 2d 441, 452 (D.N.H. 2007) (private corporations and individuals); Furlong v. Cochran, No. 06-05443, 2006 WL 3254505, at *1 (W.D. Wash. Nov. 9, 2006) (lawyer and law firm); Torres v. Howell, No. 03-2227, 2004 U.S. Dist. LEXIS, at *8 (D. Conn. Dec. 6, 2004) (private business and nonfederal attorney); Allnut v. DOJ, 99 F. Supp. 2d 673, 678 (D. Md. 2000) (holding that records possessed by private trustee acting as agent of U.S. Trustee are not "agency records" subject to FOIA), aff'd per curiam sub nom. Allnut v. Handler, 8 F. App'x 225 (4th Cir. 2001); Simon v. Miami County Incarceration Facility, No. 05-191, 2006 WL 1663689, at *1 (S.D. Ohio May 5, 2006) (communications company); Germosen v. Cox, No. 98 Civ. 1294, 1999 WL 1021559, at *20 (S.D.N.Y. Nov. 9, 1999) (private individuals); Allnut v. U.S. Trustee, Region Four, No. 97-02414, slip op. at 6 (D.D.C. July 31, 1999) (holding private trustee of bankruptcy estates is not subject to FOIA even though trustee "cooperates [with] and submits regular reports to the United States Trustee," who is subject to FOIA), appeal dismissed for lack of jurisdiction, No. 99-5410 (D.C. Cir. Feb. 2, 2000).

⁴⁷ See Ill. Inst. for Continuing Legal Educ. v. U.S. Dep't of Labor, 545 F. Supp. 1229, 1231-33 (N.D. Ill. 1982); cf. Wolfe v. HHS, 711 F.2d 1077, 1079, 1082 (D.C. Cir. 1983) (dictum) (treating presidential transition team as not agency subject to FOIA and citing with approval Ill. Inst.,

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Offices within the Executive Office of the President that lack "substantial independent authority" and whose functions are limited to advising and assisting the President also do not fall within the definition of "agency."⁴⁸ Such offices include the Offices of the President and of the Vice President, as well as their respective staffs.⁴⁹ The Court of Appeals for the District of Columbia Circuit illustrated this functional definition of "agency" when it held that the former Presidential Task Force on Regulatory Relief -- chaired by the Vice President and composed of several cabinet members -- was not an agency subject to the FOIA because the cabinet members acted not as heads of their departments "but rather as the functional equivalents of assistants to the President."⁵⁰

Under this functional definition of "agency," however, Executive Branch entities whose responsibilities exceed merely advising and assisting the President generally are considered

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545 F. Supp. at 1231-33).

⁴⁸ Citizens for Responsibility & Ethics in Washington v. Office of Administration, 566 F.3d 219, 221-24 (D.C. Cir. 2009) (citing Armstrong v. Executive Office of the President, 90 F.3d 553, 558 (D.C. Cir. 1996), and Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980)) (holding that Office of Administration is not an agency under FOIA as "everything [it] does is directly related to the operational and administrative support of the work of the President and his [Executive Office of the President] staff"); see S. Conf. Rep. No. 93-1200, at 14 (1974), reprinted in 1974 U.S.C.C.A.N. 6285, 6293; see also Judicial Watch, Inc. v. DOE, 412 F.3d 125, 127 (D.C. Cir. 2005) (concluding that National Energy Policy Development Group not agency subject to FOIA, because "its sole function [was] to advise and assist the President" (citing Meyer v. Bush, 981 F.2d 1288, 1292 (D.C. Cir. 1993))); Rushforth v. Council of Econ. Advisers, 762 F.2d 1038, 1042-43 (D.C. Cir. 1985) (ruling that Council of Economic Advisers is not an agency under FOIA); Nation Co. v. Archivist of the United States, No. 88-1939, slip op. at 5-6 (D.D.C. July 24, 1990) (finding that Tower Commission is not an agency under FOIA); Nat'l Sec. Archive v. Executive Office of the President, 688 F. Supp. 29, 31 (D.D.C. 1988) (concluding that Office of Counsel to President is not an agency under FOIA), aff'd sub nom. Nat'l Sec. Archive v. Archivist of the United States, 909 F.2d 541 (D.C. Cir. 1990).

⁴⁹ See Sweetland v. Walters, 60 F.3d 852, 855-56 (D.C. Cir. 1995) (finding Executive Residence staff, which is "exclusively dedicated to assisting the President in maintaining his home and carrying out his various ceremonial duties," is not an agency under FOIA); Nat'l Sec. Archive v. Archivist of the United States, 909 F.2d 541, 544 (D.C. Cir. 1990) ("The Supreme Court has made clear that the Office of the President is not an 'agency' for purposes of the FOIA." (citing Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980))); Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group, 219 F. Supp. 2d 20, 55 (D.D.C. 2002) ("[T]he Vice President and his staff are not 'agencies' for purposes of the FOIA."); McDonnell v. Clinton, No. 97-1535, 1997 WL 33321085, at *1 (D.D.C. July 3, 1997) (holding that "Office of the President, including its personal staff . . . whose sole function is to advise and assist the President, does not fall within the definition of agency" (citing Kissinger, 445 U.S. at 150-55)), aff'd, 132 F.3d 1481 (D.C. Cir. 1997) (unpublished table decision).

⁵⁰ Meyer v. Bush, 981 F.2d 1288, 1294 (D.C. Cir. 1993).

"agencies" under the FOIA.⁵¹ For example, the D.C. Circuit concluded that the Council on Environmental Quality (a unit within the Executive Office of the President) was an agency subject to the FOIA because its investigatory, evaluative, and recommendatory functions exceeded merely advising the President.⁵² Conversely, when the D.C. Circuit evaluated the structure of the NSC, its proximity to the President, and the nature of the authority delegated to it, the D.C. Circuit determined that the NSC is not an agency subject to the FOIA.⁵³

Finally, it should be noted that Congress has removed from the scope of the FOIA certain parts of the operations of some intelligence agencies. The CIA became the first entity to obtain such special FOIA treatment for its "operational files" through the Central Intelligence Agency Information Act of 1984.⁵⁴ Through the National Defense Authorization Act for Fiscal Year 2006,⁵⁵ Congress placed the "operational files" of the Defense Intelligence Agency beyond the scope of the FOIA.⁵⁶ Section 933(a) of that Act added a section to the National Security Act of 1947 that provides that "[t]he Director of the Defense Intelligence Agency, in coordination with the Director of National Intelligence, may exempt operational files of the Defense Intelligence Agency from the provisions of [the FOIA], which require publication, disclosure, search, or review in connection therewith."⁵⁷ This special statutory protection is quite similar to counterpart Exemption 3 provisions that have been relied on by such other intelligence agencies as the CIA, the NSA, the National Reconnaissance Office, and the National Geospatial-Intelligence Agency (formerly the National Imaging and Mapping Agency and, before that, the Defense Mapping Agency).⁵⁸ (For further discussion of this subject, see Exemption 3, "Operational Files" Provisions, below.)

⁵¹ See Citizens for Responsibility & Ethics in Washington, 566 F.3d at 222-23 (declaring that "common to every case in which we have held that an [Executive Office of the President] unit is subject to FOIA has been a finding that the entity in question 'wielded substantial authority independently of the President'" (quoting Sweetland, 60 F.3d at 854)); Soucie v. David, 448 F.2d 1067, 1075 (D.C. Cir. 1971); see also Ryan v. DOJ, 617 F.2d 781, 784-89 (D.C. Cir. 1980).

⁵² Pac. Legal Found. v. Council on Env'tl. Quality, 636 F.2d 1259, 1263 (D.C. Cir. 1980).

⁵³ Armstrong v. Executive Office of the President, 90 F.3d 553, 559-65 (D.C. Cir. 1996).

⁵⁴ 50 U.S.C. § 431 (2006); see also FOIA Update, Vol. V, No. 4, at 1-2 (discussing statutory removal of CIA "operational files" from scope of FOIA as threshold matter).

⁵⁵ Pub. L. No. 109-163, § 933(a), 119 Stat. 34 (codified at 50 U.S.C. § 432c (2006)).

⁵⁶ Id.; see also 50 U.S.C. § 432b (2006) (providing same protective treatment to "operational files" of NSA).

⁵⁷ 50 U.S.C. § 432c.

⁵⁸ See 50 U.S.C. §§ 403-5b, 403-5d (2006); see also FOIA Post, "Agencies Rely on Wide Range of Exemption 3 Statutes" (posted 12/16/03) (observing that 2003 enactment regarding NSA parallels other Exemption 3 statutes that intelligence agencies such as CIA, National Reconnaissance Office, and National Geospatial-Intelligence Agency have relied on for number of years).

"Agency Records"

The FOIA applies to "records," not tangible, evidentiary objects,⁵⁹ and while courts initially construed the term "record" according to its traditional dictionary definition,⁶⁰ the Supreme Court subsequently broadened the term to include "machine readable materials . . . regardless of physical form or characteristics," as defined in the Records Disposal Act.⁶¹ Courts have recognized that "computer-stored records, whether stored in the central processing unit, on magnetic tape, or in some other form, are records for the purposes of the FOIA."⁶² The question of whether computer software is included within the definition has been decided according to the particular nature and functionality of the software at issue.⁶³ The statutory language of the FOIA itself defines the term "record" as including "any information that would be an agency record . . . when maintained by an agency in any format, including an electronic format."⁶⁴

⁵⁹ See Matthews v. USPS, No. 92-1208, slip op. at 4 n.3 (W.D. Mo. Apr. 14, 1994) (holding that computer hardware is not a "record"); Nichols v. United States, 325 F. Supp. 130, 135-36 (D. Kan. 1971) (holding that archival exhibits consisting of guns, bullets, and clothing pertaining to assassination of President Kennedy are not "records"), aff'd on other grounds, 460 F.2d 671 (10th Cir. 1972).

⁶⁰ See DiViaio v. Kelley, 571 F.2d 538, 542 (10th Cir. 1978) ("[R]eliance may be placed on the dictionary meaning . . . as that which is written or transcribed to perpetuate knowledge."); Nichols, 325 F. Supp. at 135 (stating that reliance may be "placed on a dictionary of respected ancestry [(i.e., Webster's)]").

⁶¹ Forsham v. Harris, 445 U.S. 169, 183 (1980) (quoting Records Disposal Act, 44 U.S.C. § 3301 (1980)); see also N.Y. Times Co. v. NASA, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (holding that audiotape of Space Shuttle *Challenger* astronauts is a "record," as "FOIA makes no distinction between information in lexical and . . . non-lexical form"); Save the Dolphins v. U.S. Dep't of Commerce, 404 F. Supp. 407, 410-11 (N.D. Cal. 1975) (finding that motion picture film is a "record" for purposes of FOIA).

⁶² Yeager v. DEA, 678 F.2d 315, 321 (D.C. Cir. 1982); see Long v. IRS, 596 F.2d 362, 364-65 (9th Cir. 1979); see also FOIA Update, Vol. XI, No. 2, at 4 n.1 ("Department of Justice Report on 'Electronic Record' FOIA Issues – Part I").

⁶³ Compare Gilmore v. DOE, 4 F. Supp. 2d 912, 920-21 (N.D. Cal. 1998) (holding that video conferencing software developed by privately owned laboratory was not a record under FOIA because it was "not designed to be . . . responsive to any particular database" and "does not illuminate anything about [agency's] structure or decisionmaking process"), with Cleary, Gottlieb, Steen & Hamilton v. HHS, 844 F. Supp. 770, 781-82 (D.D.C. 1993) (concluding that software program was a record because it was "uniquely suited to its underlying database" such that "the software's design and ability to manipulate the data reflect the [agency's study]," thereby "preserving information and 'perpetuating knowledge.'" (quoting DiViaio, 571 F.2d at 542)). Cf. Essential Info., Inc. v. USIA, 134 F.3d 1165, 1166 n.3 (D.C. Cir. 1998) (dictum) (suggesting that internet addresses are not records but merely means to access records).

⁶⁴ 5 U.S.C. § 552(f)(2)(A) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-
(continued...)

The Supreme Court has articulated a two-part test for determining what constitutes "agency records" under the FOIA: "Agency records" are records that are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request.⁶⁵ Inasmuch as the "agency record" analysis typically hinges upon whether an agency has "control" over a record,⁶⁶ courts have identified four factors to consider when evaluating agency "control" of a record: "(1) the intent of the document's creator to retain or relinquish control over the record[]; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and

⁶⁴(...continued)

175, 121 Stat. 2524.

⁶⁵ DOJ v. Tax Analysts, 492 U.S. 136, 144-45 (1989) (holding that court opinions in agency files are agency records); *see, e.g.,* Judicial Watch, Inc. v. DOE, 412 F.3d 125, 132 (D.C. Cir. 2005) (holding that records of agency employees detailed to National Energy Policy Development Group (NEPDG), chaired by the Vice President, were not agency records when "as a practical matter," detailees were employees of NEPDG, not of agency).

⁶⁶ *See, e.g.,* Int'l Bhd. of Teamsters v. Nat'l Mediation Bd., 712 F.2d 1495, 1496 (D.C. Cir. 1983) (determining that transitory possession of gummed-label mailing list, as required by court order, was not sufficient to give agency "control" over record); Am. Small Bus. League v. SBA, No. 08-00829, 2008 WL 3977780 (N.D. Cal. Aug. 26, 2008) (concluding that records in procurement database maintained by GSA were under SBA "control" because, inter alia, SBA directed GSA to analyze database and extract information for SBA use, and because fact that "a list was never printed out . . . or never exported and saved as a separate electronic file apart from the raw database" does not mean records were not "created" at time of FOIA request); McErlean v. DOJ, No. 97-7831, 1999 WL 791680, at *11 (S.D.N.Y. Sept. 30, 1999) (finding that agency had no "control" over requested records because it agreed to restrictions on their dissemination and use that were requested by confidential source who provided them); KDKA v. Thornburgh, No. 90-1536, 1992 U.S. Dist. LEXIS 22438, at *16-17 (D.D.C. Sept. 30, 1992) (concluding that Canadian Safety Board report of aircrash, although possessed by NTSB, is not under agency "control," because of restrictions on its dissemination imposed by Convention on International Civil Aviation); Teich v. FDA, 751 F. Supp. 243, 248-49 (D.D.C. 1990) (holding that documents submitted to FDA in "legitimate conduct of its official duties" are agency records notwithstanding FDA's presubmission review regulation allowing submitters to withdraw their documents from agency's files (quoting Tax Analysts, 492 U.S. at 145)); Rush v. Dep't of State, 716 F. Supp. 598, 600 (S.D. Fla. 1989) (finding that correspondence between former ambassador and Henry Kissinger (then Assistant to the President) were agency records of Department of State as it exercised control over them); McCullough v. FDIC, No. 79-1132, 1980 U.S. Dist. LEXIS 17685, at *6 (D.D.C. July 28, 1980) (concluding that state report transmitted to FDIC remains under control of state and is not agency record under FOIA in light of state confidentiality statute, but that other reports transmitted to agency by state regulatory authorities might be agency records because "it is questionable whether [state authorities] retained control" over them); *see also* FOIA Post, "FOIA Counselor Q&A" (posted 1/24/06) (advising that "electronic databases to which an agency has no more than 'read only' access" -- e.g., "LexisNexis, Westlaw, and other such data services" -- are not "agency records" under the FOIA); FOIA Update, Vol. XIII, No. 3, at 5 (advising that records subject to "protective order" issued by administrative law judge remain within agency control and are subject to FOIA).

(4) the degree to which the document was integrated into the agency's record systems or files.⁶⁷ Agency "control" is the predominant consideration in determining whether records generated or maintained by a government contractor are "agency records" under the FOIA.⁶⁸

⁶⁷ Burka v. HHS, 87 F.3d 508, 515 (D.C. Cir. 1996) (quoting Tax Analysts v. DOJ, 845 F.2d 1060, 1069 (D.C. Cir. 1988)); see also Consumer Fed'n of Am. v. USDA, 455 F.3d 283, 288 n.7 (D.C. Cir. 2006) (noting four relevant factors discussed in Burka, 87 F.3d at 515); Judicial Watch, 412 F.3d at 127 (holding that "records created or obtained by employees detailed from an agency to the NEPDG [an advisory group within Office of the Vice President] are not 'agency records' subject to disclosure under the FOIA"); Missouri v. U.S. Dep't of Interior, 297 F.3d 745, 750-51 (8th Cir. 2002) (holding that records maintained in agency office by agency employee who was acting as full-time coordinator of nonprofit organization that had "cooperative" relationship with agency were not "agency records," because they were not integrated into agency files and were not used by agency in performance of its official functions); Katz v. NARA, 68 F.3d 1438, 1442 (D.C. Cir. 1995) (holding that autopsy x-rays and photographs of President Kennedy, created and handled as personal property of Kennedy estate, are presidential papers, not records of any agency); Gen. Elec. Co. v. NRC, 750 F.2d 1394, 1400-01 (7th Cir. 1984) (determining that agency "use" of internal report submitted in connection with licensing proceedings renders report an agency record); Wolfe v. HHS, 711 F.2d 1077, 1079-82 (D.C. Cir. 1983) (holding that transition team records, although physically maintained within "four walls" of agency, were not agency records under FOIA); Citizens for Responsibility & Ethics in Washington v. DHS, 527 F. Supp. 2d 76, 92-98 (D.D.C. 2007) (analyzing four "control" factors to find that agency controls White House visitor access records despite agency's stated intent otherwise, as "intent" factor is "substantially outweighed" by other three factors); Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 11-12 (D.D.C. 1995) (following Wash. Post v. DOD, 766 F. Supp. 1, 17 (D.D.C. 1991), to find that transcript of congressional testimony provided "solely for editing purposes," with cover sheet restricting dissemination, is not an agency record), aff'd on other grounds, 76 F.3d 1232 (D.C. Cir. 1996); Marzen v. HHS, 632 F. Supp. 785, 801 (N.D. Ill. 1985) (declaring that records created outside federal government which "agency in question obtained without legal authority" are not agency records), aff'd on other grounds, 825 F.2d 1148 (7th Cir. 1987); Ctr. for Nat'l Sec. Studies v. CIA, 577 F. Supp. 584, 586-90 (D.D.C. 1983) (holding that agency report, prepared "at the direct request of Congress" with intent that it remain secret and transferred to agency with congressionally imposed "conditions" of secrecy, is not an agency record, nor is duplicate copy of report maintained in agency's files); cf. SDC Dev. Corp. v. Mathews, 542 F.2d 1116, 1120 (9th Cir. 1976) (reaching "displacement-type" result for records governed by National Library of Medicine Act (last codified at 42 U.S.C. §§ 275-280a-1 (1982))); Baizer v. U.S. Dep't of the Air Force, 887 F. Supp. 225, 228-29 (N.D. Cal. 1995) (holding that database of Supreme Court decisions, used for reference purposes or as research tool, is not an agency record); Waters v. Pan. Canal Comm'n, No. 85-2029, slip op. at 5-6 (D.D.C. Nov. 26, 1985) (finding that Internal Revenue Code is not an agency record); FOIA Update, Vol. XI, No. 3, at 7-8 n.32 (discussing "displacement-type" decision in SDC Dev. Corp., 542 F.2d at 1120).

⁶⁸ Compare Burka, 87 F.3d at 515 (finding data tapes created and possessed by contractor to be agency records because of extensive supervision exercised by agency, which evidenced "constructive control"), Hercules, Inc. v. Marsh, 839 F.2d 1027, 1029 (4th Cir. 1988) (holding that army ammunition plant telephone directory prepared by contractor at government expense, bearing "property of the U.S." legend, is an agency record), In Def. of Animals v. NIH, 543 F.

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On a related note, certain research data generated through federal grants are considered agency records and subject to the FOIA.⁶⁹ The Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, partly overruling longstanding Supreme Court precedent of Forsham v. Harris,⁷⁰ required OMB to revise its Circular A-110 (the regulatory publication by which OMB sets the rules governing grants from all federal agencies to institutions of higher education, hospitals, and nonprofit institutions) so that "all data produced under an award will be made available to the public through the procedures established under the Freedom of Information Act."⁷¹ The revised version of Circular A-110 requires agencies to respond to FOIA requests for certain grantee research findings by obtaining the requested data from the grantee and processing it for release to the requester.⁷² (In accordance with OMB's statutory authority over such matters, questions

⁶⁸(...continued)

Supp. 2d 83, 100-01 (D.D.C. 2008) (finding agency had control over chimpanzee clinical records located at contractor-operated facility where agency owned facility, chimpanzees, and chimpanzee clinical files, and contract provided for agency access to clinical records created and maintained on-site), Los Alamos Study Group v. DOE, No. 97-1412, slip op. at 4 (D.N.M. July 22, 1998) (determining that records created by contractor are agency records within meaning of FOIA because government contract "establishes [agency] intent to retain control over the records and to use or dispose of them as they see fit" and agency regulation "reinforces the conclusion that [agency] intends to exercise control over the material"), and Chi. Tribune Co. v. HHS, No. 95-C-3917, 1997 WL 1137641, at *15-16 (N.D. Ill. Mar. 28, 1997) (finding that notes and audit analysis file created by independent contractor are agency records because they were created on behalf of (and at request of) agency and agency "effectively controls" them), with Tax Analysts v. DOJ, 913 F. Supp. 599, 607 (D.D.C. 1996) (finding that electronic legal research database contracted by agency is not an agency record because licensing provisions specifically precluded agency control), aff'd, 107 F.3d 923 (D.C. Cir. 1997) (unpublished table decision), and Rush Franklin Publ'g, Inc. v. NASA, No. 90-CV-2855, slip op. at 10 (E.D.N.Y. Apr. 13, 1993) (finding that computer tape maintained by contractor is not an agency record in absence of agency control). See generally Sangre de Cristo Animal Prot., Inc. v. DOE, No. 96-1059, slip op. at 3-6 (D.N.M. Mar. 10, 1998) (holding that records that agency neither possessed nor controlled and that were created by entity under contract with agency, although not agency records, were accessible under agency regulation, 10 C.F.R. § 1004.3 (currently 2009), that specifically provided for public availability of contractor records).

⁶⁹ See Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-495 (1998); see also FOIA Update, Vol. XIX, No. 4, at 2 (describing legislative provision).

⁷⁰ 445 U.S. 169.

⁷¹ See Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, 112 Stat. at 2681-495.

⁷² See OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," 64 Fed. Reg. 54,926 (Oct. 8, 1999); see also FOIA Update, Vol. XIX, No. 4, at 2 (continued...)

concerning the processing of FOIA requests for grantee research data should be directed to OMB's Office of Federal Financial Management at (202) 395-3993.)

Agencies should be mindful that agency records do not lose their "agency record" status when physically maintained by a government contractor for the purposes of records management.⁷³ The OPEN Government Act of 2007 clarified existing law on this point by amending the definition of "agency records" to expressly provide that such records remain subject to the FOIA.⁷⁴

Unlike "agency records," which are subject to the FOIA, "congressional records" are not.⁷⁵ "Congressional records" may include records received by an agency from Congress,⁷⁶ or records generated by an agency in response to a confidential congressional inquiry.⁷⁷ Ascertaining whether records in an agency's possession are "agency records" or "congressional records" depends upon whether Congress manifested an intent to exert control over those

⁷²(...continued)

(discussing grantee records subject to FOIA under Circular A-110's definition of "research data").

⁷³ OPEN Government Act of 2007, Pub. L. No. 110-175, § 9, 121 Stat. 2524, 2529 (to be codified at 5 U.S.C. § 552(f)(2)(B)); see also *FOIA Post*, "Treatment of Agency Records Maintained for an Agency by a Government Contractor for Purposes of Records Management" (posted 9/09/08).

⁷⁴ OPEN Government Act § 9; see also *FOIA Post*, "Treatment of Agency Records Maintained for an Agency by a Government Contractor for Purposes of Records Management" (posted 9/09/08).

⁷⁵ See, e.g., United We Stand Am. v. IRS, 359 F.3d 595, 597 (D.C. Cir. 2004) (observing that "[t]he Freedom of Information Act does not cover congressional documents").

⁷⁶ See, e.g., Goland v. CIA, 607 F.2d 339, 347 (D.C. Cir. 1978) (holding that agency was acting merely "as a 'trustee' for Congress" in retaining copy of hearing transcript over which Congress "plainly" manifested intent to control by denominating it as "'secret'"); Hall v. CIA, No. 98-1319, slip op. at 15 (D.D.C. Aug. 10, 2000) (finding that Senate committee "unequivocally" stated its intent in writing to retain control over committee documents that it entrusted to National Archives).

⁷⁷ See Holy Spirit Ass'n v. CIA, 636 F.2d 838, 842-43 (D.C. Cir. 1980) (recognizing that agency-created records can become "congressional records"), vacated in part on other grounds, 455 U.S. 997 (1982); Judicial Watch, Inc. v. Clinton, 880 F. Supp. at 12 ("Even documents created by the agencies themselves may elude FOIA's reach if prepared on request of Congress with confidentiality restrictions."), aff'd, 76 F.3d 1232 (D.C. Cir. 1996).

records⁷⁸ and on the particular contours of that reservation of control.⁷⁹ Congress's intent to exert control over particular records must be evident from the circumstances surrounding their creation or transmittal,⁸⁰ rather than accomplished on a "post hoc" basis "long after the original creation [or] transfer of the requested documents."⁸¹ Absent evidence of such intent, the records may not be found to be "congressional records" and, accordingly, will be within the reach of the FOIA.⁸²

In a similar vein, "agency records" are distinguishable from "personal records" -- records that might be physically maintained by agency employees at the agency but that are not subject to the FOIA.⁸³ In determining whether a record is a "personal record," an agency

⁷⁸ See, e.g., Paisley v. CIA, 712 F.2d 686, 693 (D.C. Cir. 1983) (noting that if "Congress has manifested its own intent to retain control [of records in agency's possession], then the agency -- by definition -- cannot lawfully 'control' the documents . . . and hence they are not 'agency records'"), vacated in part on other grounds, 724 F.2d 201 (D.C. Cir. 1984) (per curiam).

⁷⁹ See United We Stand Am., 359 F.3d at 604 (concluding that only certain portions of agency-created response to confidential congressional inquiry were "congressional records" not subject to FOIA, "because Congress manifested its intent [to exert control] with respect to at most only a part" of those records).

⁸⁰ See United We Stand Am., 359 F.3d at 600 (holding that "under all of the circumstances surrounding the [agency's] creation and possession of the documents," there were "sufficient indicia of congressional intent to control" certain portions of those documents); see also Paisley, 712 F.2d at 694 ("[W]e find that neither the circumstances surrounding the creation of the documents nor the conditions under which they were transferred to the agencies manifests a clear congressional intent to maintain control."); Holy Spirit Ass'n, 636 F.2d at 842 ("Nothing here either in the circumstances of the documents' creation or in the conditions under which they were sent to the [agency] indicates Congress' intent to retain control over the records."); Goland, 607 F.2d at 348 (holding that a congressional hearing transcript maintained by an agency was "not an 'agency record' but a Congressional document to which FOIA does not apply . . . because we believe that on all the facts of the case Congress' intent to retain control of the document is clear").

⁸¹ United We Stand Am., 359 F.3d at 602; see Holy Spirit Ass'n, 636 F.2d at 843 (concluding that Congress's "post hoc" assertion of control, which came about "as a result of . . . the FOIA request and this litigation long after the actual transfer" of requested records, was "insufficient evidence of Congress' intent to retain control over th[o]se records").

⁸² See, e.g., Paisley, 712 F.2d at 692-93 ("In the absence of any manifest indications that Congress intended to exert control over documents in an agency's possession, the court will conclude that such documents are not congressional records.").

⁸³ See, e.g., Consumer Fed'n of Am., 455 F.3d at 288-93 (holding that calendar of official was personal record where it was created and used for personal convenience); Bureau of Nat'l Affairs, Inc. v. DOJ, 742 F.2d 1484, 1489-96 (D.C. Cir. 1984) (holding that officials' uncirculated appointment calendars and telephone message slips were personal records); Spannaus v. DOJ, 942 F. Supp. 656, 658 (D.D.C. 1996) (finding that "'personal' files" of attorney no longer

(continued...)

should examine "the totality of the circumstances surrounding the creation, maintenance, and use" of the record.⁸⁴ Factors relevant to this inquiry include, among others, (1) the purpose for which the document was created; (2) the degree of integration of the record into the agency's filing system; and (3) the extent to which the record's author or other employees used the record to conduct agency business.⁸⁵ Courts have sometimes rejected agency declarations

⁸³(...continued)

employed with agency were "beyond the reach of FOIA" if they were not turned over to agency at end of employment); Forman v. Chapotan, No. 88-1151, 1988 WL 524934, at *6 (W.D. Okla. Dec. 12, 1988) (rejecting contention that materials distributed to agency officials at privately sponsored seminar are agency records), aff'd, No. 89-6035 (10th Cir. Oct. 31, 1989).

⁸⁴ Bureau of Nat'l Affairs, 742 F.2d at 1492; see also Consumer Fed'n of Am., 455 F.3d at 287-88 (considering "[record] creation, location/possession, control, and use" -- the "principal factors" identified in Bureau of Nat'l Affairs -- and deciding that "use [of the records] is the decisive factor here" (emphasis added)); FOIA Update, Vol. V, No. 4, at 3-4 ("OIP Guidance: 'Agency Records' vs. 'Personal Records'").

⁸⁵ See, e.g., Consumer Fed'n of Am., 455 F.3d at 288-93 (holding that calendars of five officials were agency records where calendars were electronically distributed to staff and relied upon for business use, but that calendar of sixth official was personal record where it was created and used for his convenience and distributed only to his secretarial staff); Gallant v. NLRB, 26 F.3d 168, 171-72 (D.C. Cir. 1994) (ruling that letters written on agency time on agency equipment by board member seeking renomination, which had been reviewed by other agency employees but not integrated into agency record system and over which author had not relinquished control, are not agency records); Bureau of Nat'l Affairs, 742 F.2d at 1489-96 (holding that officials' uncirculated appointment calendars and telephone message slips were personal records, used for personal convenience, whereas official's daily agendas were agency records as they were created for distribution to top agency staff to facilitate scheduling of agency business); Fortson v. Harvey, 407 F. Supp. 2d 13, 16 (D.D.C. 2005) (finding that Army officer's notes of investigation were personal records because notes were used only to refresh officer's memory and were neither integrated into agency files nor relied on by other agency employees), appeal dismissed, No. 05-5193, 2005 WL 3789054, at *1 (D.C. Cir. Oct. 31, 2005); Bloomberg, L.P. v. SEC, 357 F. Supp. 2d 156, 163-67 (D.D.C. 2004) (concluding that computer calendar, telephone logs, and message slips of SEC Chairman, and meeting notes of Chairman's chief of staff, were personal records where they were created for personal use of Chairman or chief of staff, were not incorporated into SEC files, and were not under SEC control, even though some records were maintained by SEC personnel and were automatically "backed-up" onto SEC computer server at regular intervals); Inner City Press/Cmtty. on the Move v. Bd. of Governors of the Fed. Reserve Sys., No. 98-4608, 1998 WL 690371, at *6 (S.D.N.Y. Sept. 30, 1998) (ruling that handwritten notes neither shared with other agency employees nor placed in agency files were not "agency records" even though they may have furthered their author's performance of his agency duties), aff'd, 182 F.3d 900 (2d Cir. 1999) (unpublished table decision); Clarkson v. Greenspan, No. 97-2035, slip op. at 14 (D.D.C. June 30, 1998) (holding that notes taken by Federal Reserve Banks' employees are "personal" because they were maintained by authors for their own use, were not intended to be shared with other employees, and were not made part of Banks' filing systems), summary affirmance granted, No. 98-5349, 1999 WL 229017 (D.C. Cir. Mar. 2, 1999); Judicial Watch, Inc. v. Clinton,

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that do not give sufficient detail regarding the agency's evaluation of such factors and the bases for its "personal record" determinations.⁸⁶

FOIA Requesters

A FOIA request may be made by "any person,"⁸⁷ a broad term that, with the exceptions noted below, includes "individual[s], partnership[s], corporation[s], association[s], or public or private organization[s] other than an agency."⁸⁸ Although the FOIA does not itself define the term "person," it does specifically incorporate the definition of "agency" as defined in the

⁸⁵(...continued)

880 F. Supp. at 11 (concluding that "telephone logs, calendar markings, [and] personal staff notes" not incorporated into agency recordkeeping system are not agency records); Dow Jones & Co. v. GSA, 714 F. Supp. 35, 39 (D.D.C. 1989) (determining that agency head's recusal list, shared only with personal secretary and chief of staff, is not agency record); AFGE v. U.S. Dep't of Commerce, 632 F. Supp. 1272, 1277 (D.D.C. 1986) (finding that employee logs created voluntarily to facilitate work are not agency records even though they contained substantive information), aff'd, 907 F.2d 203 (D.C. Cir. 1990); see also FOIA Update, Vol. V, No. 4, at 3-4 ("OIP Guidance: 'Agency Records' vs. 'Personal Records'") (recognizing ten criteria "that should be evaluated by agencies in making all 'agency record/personal record' determinations").

⁸⁶ See Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 481 (2d Cir. 1999) (rejecting as insufficient agency affidavit concerning "personal" records and remanding case for further development through affidavits by records' authors explaining their intended use of records in question); Ethyl Corp. v. EPA, 25 F.3d 1241, 1247-48 (4th Cir. 1994) (finding agency did not demonstrate adequate search where, inter alia, "employees were not properly instructed on how to distinguish personal records from agency records" because agency official provided guidance to employees on only four out of ten criteria appropriate to the analysis); Kempker-Cloyd v. DOJ, No. 5:97-253, 1999 U.S. Dist. LEXIS 4813, at *12, *24 (W.D. Mich. Mar. 12, 1999) (finding that agency's "initial search efforts . . . were incomplete and untimely," in part because FOIA office did not actually review documents that field employee asserted were personal records in order to determine whether assertion was correct).

⁸⁷ 5 U.S.C. § 552(a)(3)(A) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (establishing agency obligation to make records available to "any person").

⁸⁸ Administrative Procedure Act, 5 U.S.C. § 551(2) (2006) (defining "person"); see also Arevalo-Franco v. INS, 889 F.2d 589, 591 (5th Cir. 1989) (holding that meaning of "person" under FOIA is not restricted to American citizens); Stone v. Exp.-Imp. Bank, 552 F.2d 132, 136-37 (5th Cir. 1977) (holding that Bank for Foreign Trade, agency of Soviet Union, was a "person" under FOIA's Exemption 4 and declaring that Administrative Procedure Act definition of "person" does not suggest "intention to limit [itself] . . . to American individuals and 'public or private' organization[s]"); O'Rourke v. DOJ, 684 F. Supp. 716, 718 (D.D.C. 1988) (concluding that requester's status as an alien did not exclude him from access to documents under the FOIA as he falls within statute's "any person"); cf. Judicial Watch v. DOJ, 102 F. Supp. 2d 6, 10 (D.D.C. 2000) (holding that because two related organizations "are separate corporations, . . . each is entitled to request documents under FOIA in its own right").

Administrative Procedure Act,⁸⁹ and that statute in turn defines the term "person," which has been relied on in the FOIA context.⁹⁰

An attorney or other representative may make a request on behalf of "any person."⁹¹ The Court of Appeals for the District of Columbia Circuit has held that if a FOIA requester dies while his or her FOIA claim is in litigation, under some circumstances the FOIA claim may survive.⁹² Further, individual members of Congress possess the same rights of access as those

⁸⁹ See 5 U.S.C. § 552(f) (incorporating definition of "agency" from Administrative Procedure Act, 5 U.S.C. § 551(1), and providing further definition of term under FOIA).

⁹⁰ See Administrative Procedure Act, 5 U.S.C. § 551(2) (providing that a "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency"); see, e.g., SAE Prods., Inc. v. FBI, 589 F. Supp. 2d 76, 80 (D.D.C. 2008) (stating that "[a] 'person,' as defined under FOIA, includes a corporation" and citing Administrative Procedure Act, 5 U.S.C. § 551(2)).

⁹¹ See, e.g., Constangy, Brooks & Smith v. NLRB, 851 F.2d 839, 840 n.2 (6th Cir. 1988) (recognizing standing of attorney to request documents on behalf of client). See generally Burka v. HHS, 142 F.3d 1286, 1290 (D.C. Cir. 1998) (holding that when attorney makes request in his own name without disclosing that he is acting on behalf of a client, he may not later seek attorney fees for his legal work); McDonnell v. United States, 4 F.3d 1227, 1237-38 (3d Cir. 1993) (holding that person whose name does not appear on request does not have standing); Brown v. EPA, 384 F. Supp. 2d 271, 276-78 (D.D.C. 2005) (finding that plaintiff has standing where request stated that attorney was making request on behalf of client, and where "other correspondence . . . confirm[ed]" that all parties understood attorney to be acting on behalf of client); Mahtesian v. OPM, 388 F. Supp. 2d 1047, 1050 (N.D. Cal. 2005) (finding that a lawyer's "reference to an anonymous client in a FOIA request, can not [sic], alone, confer standing on that client"); Hall v. CIA, No. 04-00814, 2005 WL 850379, at *4 (D.D.C. Apr. 13, 2005) (finding that requester organization was party to request where request letter stated that organization was "joining" request, even though organization's attorney did not sign letter); Three Forks Ranch Corp. v. Bureau of Land Mgmt., 358 F. Supp. 2d 1, 3 (D.D.C. 2005) (finding that corporation lacked standing to pursue FOIA action where its attorney did not indicate specifically that he was making FOIA request "on behalf of" corporation); Scaife v. IRS, No. 02-1805, 2003 WL 23112791, at *2-3 (D.D.C. Nov. 20, 2003) (finding that powers-of-attorney submitted with FOIA request were insufficient to vest requester with right to receive requested records); Archibald v. Roche, No. 01-1492, slip op. at 1-2 (D.D.C. Mar. 29, 2002) (concluding that request "appears to [have been] filed on behalf of the attorney" who signed request, rather than on behalf of client, because "nowhere in [request] does [attorney] ever state that he [was] filing this request on behalf of" client); Dale v. IRS, 238 F. Supp. 2d 99, 107 (D.D.C. 2002) ("A party's counsel is not the 'requester' for purposes of a fee waiver."); MAXXAM, Inc. v. FDIC, No. 98-0989, 1999 WL 33912624, at *2 (D.D.C. Jan. 29, 1999) (finding that corporate plaintiff whose name did not appear on FOIA request made by its attorney "has not administratively asserted a right to receive [requested records] in the first place" (quoting McDonnell, 4 F.3d at 1237)).

⁹² See Sinito v. DOJ, 176 F.3d 512, 513 (D.C. Cir. 1999) (holding that FOIA claim can survive death of original requester and remanding case for determination regarding who could

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guaranteed to "any person."⁹³

As mentioned, the FOIA specifically incorporates the definition of "agency" as defined in the Administrative Procedure Act,⁹⁴ and that statute expressly excludes federal agencies from the definition of "person,"⁹⁵ which thus precludes federal agencies from being FOIA requesters.⁹⁶ States and state agencies may, however, make FOIA requests.⁹⁷

There are, however, three narrow exceptions to this broad "any person" standard. First, courts have denied relief under the FOIA to fugitives from justice if the requested records relate to the requester's fugitive status.⁹⁸

⁹²(...continued)

properly be substituted for decedent); see also D'Aleo v. Dep't of the Navy, No. 89-2347, 1991 U.S. Dist. LEXIS 3884, at *4 (D.D.C. Mar. 21, 1991) (allowing decedent's executrix to be substituted as plaintiff). But see Hayles v. DOJ, No. H-79-1599, slip op. at 3 (S.D. Tex. Nov. 2, 1982) (dismissing case upon death of plaintiff because no timely motion for substitution was filed).

⁹³ See FOIA Update, Vol. V, No. 1, at 3-4 (distinguishing between individual members of Congress and Congress as an institutional entity, which exercises its authority through its committee chairs); cf. Congressional Oversight Manual, T.J. Halstead, Frederick M. Kaiser, Walter J. Oleszek, Morton Rosenberg, Todd B. Tatelman, Congressional Research Service, Report RL30240, Sec. III.G., at CRS-56 ("Role of Minority-Party Members in the Investigative Process") (May 1, 2007) (discussing, inter alia, minority-party avenues of information access); Application of Privacy Act Congressional-Disclosure Exception to Disclosures to Ranking Minority Members, Op. Off. Legal Counsel (Dec. 5, 2001), available at http://www.usdoj.gov/olc/2001/privacy_act_opinion.pdf (discussing congressional access under Privacy Act).

⁹⁴ 5 U.S.C. § 552(f) (incorporating definition of "agency" from Administrative Procedure Act, 5 U.S.C. § 551(1), and providing further definition of term under FOIA).

⁹⁵ See Administrative Procedure Act, 5 U.S.C. § 551(2) (excluding federal agencies from definition of "person").

⁹⁶ See SAE Prods., Inc., 589 F. Supp. 2d at 80 (citing Administrative Procedure Act, 5 U.S.C. § 551(2), for definition of "person" under FOIA); cf. Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill, 443 U.S. 340, 360 (1979) (stating, in context of FOIA's Exemption 4, that "person" is someone outside the federal government and citing 5 U.S.C. § 551(2)).

⁹⁷ See, e.g., Texas v. ICC, 935 F.2d 728, 729 (5th Cir. 1991); Massachusetts v. HHS, 727 F. Supp. 35, 35 (D. Mass. 1989).

⁹⁸ See Maydak v. U.S. Dep't of Educ., 150 F. App'x 136, 138 (3d Cir. 2005) (affirming district court's dismissal with prejudice as "there was enough of a connection between Maydak's fugitive status and his FOIA case"); Maydak v. United States, No. 02-5168, slip op. at 1 (D.C. Cir. Dec. 11, 2003) (refusing to dismiss because "[t]here is no substantial connection between [requester's] alleged fugitive status and his current [FOIA] action," which was filed four years before requester became a fugitive) (citing Daccarett-Ghia v. IRS, 70 F.3d 621, 626 & n.4 (D.C.

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Second, the Intelligence Authorization Act for Fiscal Year 2003⁹⁹ amended the FOIA to preclude agencies of the intelligence community¹⁰⁰ from disclosing records in response to FOIA requests made by any foreign government or international governmental organization, either directly or through a representative.¹⁰¹

Finally, courts have held that a requester who has waived by plea agreement his or her FOIA rights is precluded from making a FOIA request concerning any waived subject.¹⁰²

⁹⁸(...continued)

Cir. 1995)); Doyle v. DOJ, 668 F.2d 1365, 1365-66 (D.C. Cir. 1981) (holding that fugitive is not entitled to enforcement of FOIA's access provisions because he cannot expect judicial aid in obtaining government records related to sentence that he was evading); Meddah v. Reno, No. 98-1444, slip op. at 2 (E.D. Pa. Dec. 3, 1998) (dismissing escapee's FOIA claim because escapee "request[ed] documents which were used to determine that he should be detained"); Javelin Int'l, Ltd. v. DOJ, 2 Gov't Disclosure Serv. (P-H) ¶ 82,141, at 82,479 (D.D.C. Dec. 9, 1981) (dismissing plaintiff corporation's FOIA claim because it was acting as agent on behalf of fugitive from justice); see also Daccarett-Ghia v. IRS, 70 F.3d 621, 626 & n.4 (D.C. Cir. 1995) (limiting applicability of "fugitive disentitlement doctrine" generally, but explaining that "holding in this case does not disturb that aspect of Doyle" in which court "recognize[d] one universally applied constraint on fugitive disentitlement doctrine" -- namely, that "[d]ismissal was appropriate in part because fugitive's [FOIA] suit sought records that were 'not devoid of a relationship' to criminal charges pending against him") (non-FOIA case). But cf. O'Rourke v. DOJ, 684 F. Supp. 716, 718 (D.D.C. 1988) (holding that convicted criminal, fugitive from his home country and undergoing U.S. deportation proceedings, qualified as "any person" for purpose of making FOIA request); Doherty, 596 F. Supp. at 424-29 (same).

⁹⁹ Pub. L. No. 107-306, 116 Stat. 2383 (2002).

¹⁰⁰ See 50 U.S.C. § 401a(4) (2006) (provision of National Security Act of 1947, as amended, that specifies federal agencies and agency subparts deemed to be "elements of the intelligence community").

¹⁰¹ See Intelligence Authorization Act for Fiscal Year 2003 § 312 (codified at 5 U.S.C. § 552(a)(3)(E)); see also *FOIA Post*, "FOIA Amended by Intelligence Authorization Act" (posted 12/23/02) (advising that "for any FOIA request that by its nature appears as if it might have been made by or on behalf of a non-U.S. governmental entity, a covered agency may inquire into the particular circumstances of the requester in order to properly implement this new FOIA provision").

¹⁰² See Caston v. EOUSA, 572 F. Supp. 2d 125, 129 (D.D.C. 2008) (granting agency's motion to dismiss because "use of a FOIA waiver in a valid and binding plea agreement is an enforceable provision" that bars plaintiff's FOIA claim for records regarding his criminal case (quoting Patterson v. FBI, No. 08-186, 2008 WL 2597656, at*2 (E.D. Va. June 27, 2008))).

In keeping with the broad "any person" standard, FOIA requesters generally do not have to justify or explain their reasons for making requests.¹⁰³ The Supreme Court has observed that a FOIA requester's identity generally "has no bearing on the merits of his or her FOIA request."¹⁰⁴ Moreover, the Supreme Court has held that a requester's basic access rights are neither increased nor decreased based upon the requester's particular interest in the records sought.¹⁰⁵ Although requesters have occasionally invoked the FOIA successfully as

¹⁰³ See, e.g., NARA v. Favish, 541 U.S. 157, 172 (2004) ("[A]s a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information.").

¹⁰⁴ DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771 (1989); see Favish, 541 U.S. at 170 ("As a general rule, withholding information under FOIA cannot be predicated on the identity of the requester."); see also Lynch v. Dep't of the Treasury, No. 98-56368, 2000 WL 123236, at *4 (9th Cir. Jan. 28, 2000) (upholding district court's decision to not consider identity of requester in determining whether records were properly withheld under Exemption 7(A)); Parsons v. Freedom of Info. Act Officer, No. 96-4128, 1997 WL 461320, at *1 (6th Cir. Aug. 12, 1997) ("[T]he identity of the requestor is irrelevant to the determination of whether an exemption applies."); United Techs. v. FAA, 102 F.3d 688, 692 (2d Cir. 1996) (rejecting plaintiff's argument that Exemption 4 should be applied "on a requester-specific basis," because "[u]nder that rule, the Government would be required in every FOIA case to conduct an inquiry regarding the identity of the requester and the circumstances surrounding its request," and "[t]he FOIA was not intended to be applied on such an individualized basis"); Swan v. SEC, 96 F.3d 498, 499 (D.C. Cir. 1996) ("Whether [a particular exemption] protects against disclosure to 'any person' is a judgment to be made without regard to the particular requester's identity."); Durns v. BOP, 804 F.2d 701, 706 (D.C. Cir. 1986) ("Congress granted the scholar and the scoundrel equal rights of access to agency records."), cert. granted, judgment vacated on other grounds & remanded, 486 U.S. 1029 (1988); FOIA Update, Vol. VI, No. 3, at 5 ("It is also well established that a FOIA requester cannot rely upon his status as a private party litigant -- in either civil or criminal litigation -- to claim an entitlement to greater FOIA access than would be available to the average requester."); cf. Leach v. RTC, 860 F. Supp. 868, 871, 878-79 & n.13 (D.D.C. 1994) (recognizing, in dicta, that individual members of Congress are granted no greater access to agency records by virtue of their position than are other FOIA requesters), appeal dismissed per stipulation, No. 94-5279 (D.C. Cir. Dec. 22, 1994).

¹⁰⁵ See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975) (recognizing that a requester's "rights under the Act are neither increased nor decreased by reason of the fact that [he or she] claims an interest in the [requested records] greater than that shared by the average member of the public"); see also Reporters Comm., 489 U.S. at 771 ("As we have repeatedly stated, Congress 'clearly intended' the FOIA 'to give any member of the public as much right to disclosure as one with a special interest [in a particular document].'" (quoting Sears, 421 U.S. at 149)); EPA v. Mink, 410 U.S. 73, 86 (1973) (declaring that FOIA "is largely indifferent to the intensity of a particular requester's need"); cf. Parsons, 1997 WL 461320, at *1 (rejecting plaintiff's argument that his "legitimate need for the documents superior to that of the general public or the press" warranted disclosure of exempt information); North v. Walsh, 881 F.2d 1088, 1096 (D.C. Cir. 1989) ("In sum, [FOIA requester's] need or intended use for the documents is irrelevant.").

a substitute for, or a supplement to, document discovery in civil¹⁰⁶ and criminal¹⁰⁷ litigation, there are several Supreme Court admonitions for restraint¹⁰⁸ and multiple other decisions where courts have declared that "while documents obtained through FOIA requests may ultimately prove helpful in litigation by permitting a citizen to more precisely target his discovery requests, FOIA is not intended to be a substitute for discovery."¹⁰⁹

¹⁰⁶ See, e.g., Jackson v. First Fed. Sav., 709 F. Supp. 887, 889 (E.D. Ark. 1989) (declaring that "there is no rule that the parties to a lawsuit may only gather evidence through the formal discover devices" and "it is ordinarily unnecessary for the party seeking the material to take steps to compel what will be given freely"); see also In re F&H Barge Corp., 46 F. Supp. 2d 453, 454-55 (E.D. Va. 1998) (noting that "courts have allowed private litigants to obtain documents in discovery via the FOIA"); FOIA Update, Vol. III, No. 1, at 10 (acknowledging that "[u]nder present law there is no statutory prohibition to the use of FOIA as a discovery tool").

¹⁰⁷ See, e.g., North, 881 F.2d at 1096 (rejecting defendant's argument that because plaintiff was using FOIA as an "adjunct discovery device" for his criminal case Criminal Rule 16 materiality and relevance requirements should apply to his FOIA request, and holding that discovery limitations do not apply "when FOIA requests are presented in a discrete civil action" because plaintiff's "need or intended use for the documents is irrelevant to his FOIA action"); Bright v. Attorney Gen. John Ashcroft, 259 F. Supp. 2d 502, 503 & n.1 (E.D. La. 2003) (concluding that Brady v. Maryland "demands" that information withheld under Exemption 7(D) of FOIA be released to plaintiff).

¹⁰⁸ See United States v. Weber Aircraft Corp., 465 U.S. 792, 801-02 (1984); Baldrige v. Shapiro, 455 U.S. 345, 360 n.14 (1982); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978); Sears, 421 U.S. at 143 n.10; Renegotiation Bd. v. Bannerkraft Clothing Co., 415 U.S. 1, 24 (1974).

¹⁰⁹ Comer v. IRS, No. 97-76329, 2000 WL 1566279, at *2 (E.D. Mich. Aug. 17, 2000); see, e.g., United States v. U.S. Dist. Court, Cent. Dist. of Cal., 717 F.2d 478, 480 (9th Cir. 1983) (holding that FOIA does not expand scope of criminal discovery permitted under Rule 16 of Federal Rules of Criminal Procedure); Martinez v. EEOC, No. 04-0391, 2004 WL 2359895, at *6 (W.D. Tex. Oct. 19, 2004) (concluding that requester "may not use the FOIA to circumvent the discovery process and thereby frustrate the investigative procedures of the EEOC"); Cantres v. FBI, No. 01-1115, slip op. at 5 (D. Minn. June 21, 2002) (magistrate's recommendation) (avouching that "[a] FOIA request is not a substitute for discovery in a habeas case," nor was FOIA "designed to supplement the rules of civil discovery"), adopted, No. 01-1115, slip op. (D. Minn. July 16, 2002); Env'tl. Crimes Project v. EPA, 928 F. Supp. 1, 2 (D.D.C. 1995) (ordering stay of FOIA case "pending the resolution of the discovery disputes" in parties' related lawsuit in order to foreclose requester's attempt to "end run" or interfere with discovery); United States v. Agunbiade, No. 90-CR-610, 1995 WL 351058, at *7 (E.D.N.Y. May 10, 1995) (stating that FOIA requester "cannot employ the statute as a means to enlarge his right to discovery" in his criminal case); Johnson v. DOJ, 758 F. Supp. 2, 5 (D.D.C. 1991) ("Resort to Brady v. Maryland as grounds for waiving confidentiality is . . . outside the proper role of FOIA."); Stimac v. DOJ, 620 F. Supp. 212, 213 (D.D.C. 1985) ("Brady v. Maryland . . . provides no authority for releasing material under FOIA."); cf. Jones v. FBI, 41 F.3d 238, 250 (6th Cir. 1994) ("FOIA's scheme of exemptions does not curtail a plaintiff's right to discovery in related non-FOIA litigation; but neither does that right entitle a FOIA plaintiff to circumvent the rules limiting release of

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The requester's reason for making a FOIA request may, however, be considered in the context of certain procedural decisions made during the course of processing a request; this is the case, for example, when the agency is deciding whether to grant expedited processing, or to waive fees, or when a court is deciding whether to award attorney fees and costs to a successful FOIA plaintiff.¹¹⁰

Proper FOIA Requests

The FOIA specifies two requirements for an access request: It must "reasonably describe" the records sought and it must be made in accordance with the agency's published FOIA regulations.¹¹¹ Ordinarily, "a person need not title a request for government records a 'FOIA request,'"¹¹² and so agencies should use sound judgment when determining the nature of an access request.¹¹³ For example, a first-party access request that cites only the Privacy Act of 1974¹¹⁴ should be processed under both that statute and under the FOIA.¹¹⁵

The legislative history of the 1974 FOIA amendments indicates that a description of a requested record is sufficient if it enables a professional agency employee familiar with the

¹⁰⁹(...continued)

documents under FOIA."); Injex Indus. v. NLRB, 699 F. Supp. 1417, 1419 (N.D. Cal. 1986) (holding that FOIA cannot be used to circumvent nonreviewable decision to impound requested documents); Morrison-Knudsen Co. v. U.S. Dep't of the Army, 595 F. Supp. 352, 356 (D.D.C. 1984) ("[T]he use of FOIA to unsettle well established procedures governed by a comprehensive regulatory scheme must be . . . viewed not only 'with caution' but with concern."), aff'd, 762 F.2d 138 (D.C. Cir. 1985) (unpublished table decision).

¹¹⁰ See 5 U.S.C. § 552 (a)(4)(A), (a)(6)(E) (taking into account "purpose" and "need" in fee waiver and expedited processing determinations); see, e.g., Davy v. CIA, 550 F.3d 1155 (D.C. Cir. 2008) (evaluating requester's interests in requested records as criteria in determining entitlement to attorney fees and costs).

¹¹¹ 5 U.S.C. § 552(a)(3)(A) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

¹¹² Newman v. Legal Servs. Corp., 628 F. Supp. 535, 543 (D.D.C. 1986). But see Blackwell v. EEOC, No. 2:98-38, 1999 WL 1940005, at *2 (E.D.N.C. Feb. 12, 1999) (finding that request was not properly made because plaintiff failed to follow agency regulation requiring that request be denominated explicitly as request for information under FOIA).

¹¹³ See FOIA Update, Vol. VII, No. 1, at 6 (advising that "agencies are expected to honor a requester's obvious intent").

¹¹⁴ 5 U.S.C. § 552a (2006).

¹¹⁵ See FOIA Update, Vol. VII, No. 1, at 6 (advising that it is "good policy for agencies to treat all first-party access requests as FOIA requests" regardless of whether FOIA is cited by requester).

subject area to locate the record with a "reasonable amount of effort."¹¹⁶ Courts have explained that "[t]he rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters,¹¹⁷ or to allow requesters to conduct "fishing expeditions" through agency files.¹¹⁸ Accordingly, one FOIA request was held invalid because it required an agency's FOIA staff to either have "clairvoyant capabilities" to discern the requester's needs or to spend "countless numbers of personnel hours seeking needles in

¹¹⁶ H.R. Rep. No. 93-876, at 6 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6271; see, e.g., Truitt v. Dep't of State, 897 F.2d 540, 544-45 (D.C. Cir. 1990) (discussing legislative history of 1974 FOIA amendments as related to requirements for describing requested records); Gaunce v. Burnette, 849 F.2d 1475, 1475 (9th Cir. 1988) (affirming lower court's grant of summary judgment, and stating that request did not reasonably describe records sought, where it sought "every scrap of paper wherever located within the agency" related to requester's aviation activities (citing Marks v. DOJ, 578 F.2d 261, 263 (9th Cir. 1978))); Goland v. CIA, 607 F.2d 339, 353 (D.C. Cir. 1978); Marks v. DOJ, 578 F.2d 261, 263 (9th Cir. 1978) (declaring that "broad, sweeping requests lacking specificity are not permissible"); Mason v. Callaway, 554 F.2d 129, 131 (4th Cir. 1977) (affirming lower court finding that request did not reasonably describe records sought since it was broad and lacked specificity); Stuler v. IRS, 216 F. App'x 240, 242 (3d Cir. 2007) (per curiam) (affirming district court's grant of summary judgment, where requester failed to comply with agency regulations requiring "reasonably described" requests); Ferri v. DOJ, 573 F. Supp. 852, 859 (W.D. Pa. 1983) (granting summary judgment where plaintiff failed to provide sufficient information to allow agency to retrieve requested information "with a reasonable amount of effort" (citing Marks, 578 F.2d at 263)).

¹¹⁷ Assassination Archives & Research Ctr. v. CIA, 720 F. Supp. 217, 219 (D.D.C. 1989), aff'd in pertinent part, No. 89-5414, 1990 WL 123924 (D.C. Cir. Aug. 13, 1990) (per curiam); Nurse v. Sec'y of the Air Force, 231 F. Supp. 2d 323, 329 (D.D.C. 2002) (quoting Assassination Archives & Research Ctr., 720 F. Supp. at 219); see Frank v. DOJ, 941 F. Supp. 4, 5 (D.D.C. 1996) (stating that agency is not required to "dig out all the information that might exist, in whatever form or place it might be found, and to create a document that answers plaintiff's questions"); Blakey v. DOJ, 549 F. Supp. 362, 366-67 (D.D.C. 1982) ("The FOIA was not intended to compel agencies to become ad hoc investigators for requesters whose requests are not compatible with their own information retrieval systems."), aff'd, 720 F.2d 215 (D.C. Cir. 1983) (unpublished table decision); see also Trenerry v. Dep't of the Treasury, No. 92-5053, 1993 WL 26813, at *3 (10th Cir. Feb. 5, 1993) (holding that agency not required to provide personal services such as legal research); Satterlee v. IRS, No. 05-3181, 2006 WL 3160963, at *3 (W.D. Mo. Oct. 30, 2006) (finding that request was improper where it would require agency to "conduct legal research" and answer questions "disguised as . . . FOIA request"); Lamb v. IRS, 871 F. Supp. 301, 304 (E.D. Mich. 1994) (finding requests outside scope of FOIA when they require legal research, are unspecific, or seek answers to interrogatories).

¹¹⁸ Immanuel v. Sec'y of the Treasury, No. 94-884, 1995 WL 464141, at *1 (D. Md. Apr. 4, 1995), aff'd, 81 F.3d 150 (4th Cir. 1996) (unpublished table decision); see also Dale v. IRS, 238 F. Supp. 2d 99, 104-05 (D.D.C. 2002) (concluding that request seeking "any and all documents . . . that refer or relate in any way" to requester failed to reasonably describe records sought and "amounted to an all-encompassing fishing expedition of files at [agency's] offices across the country, at taxpayer expense"); Freeman v. DOJ, No. 90-2754, slip op. at 3 (D.D.C. Oct. 16, 1991) ("The FOIA does not require that the government go fishing in the ocean for fresh water fish.").

bureaucratic haystacks."¹¹⁹

Nevertheless, although a FOIA request might be very broad or burdensome in magnitude, this does not necessarily entitle an agency to deny that request on the basis that it does not "reasonably describe" the records sought.¹²⁰ Rather, the key to determining

¹¹⁹ Devine v. Marsh, 2 Gov't Disclosure Serv. (P-H) ¶ 82,022, at 82,186 (E.D. Va. Aug. 27, 1981); see also Goldgar v. Office of Admin., 26 F.3d 32, 35 (5th Cir. 1994) (holding that agency not required to produce information sought by requester -- "the identity of the government agency that is reading his mind" -- that does not exist in record form); Keys v. DHS, No. 08-0726, 2009 WL 614755, at *5 (D.D.C. Mar. 10, 2009) (stating that requester failed to reasonably describe records sought by not responding to agency's notice that he must specify which field offices he wanted agency to search); Satterlee, 2006 WL 3160963, at 3 (finding that requester did not reasonably describe records sought where his request asked IRS to "prove that it has jurisdiction over him"); Segal v. Whitmyre, No. 04-809795, 2005 WL 1406171, at *2 (S.D. Fla. Apr. 6, 2005) (finding that court lacks jurisdiction under FOIA because request "failed to assert exactly what records/documents" requester sought, but instead asked for "proof/documentation" that requester was not entitled to IRS tax hearing), aff'd on other grounds sub nom. Segal v. Comm'r, 177 F. App'x 29 (11th Cir. 2006); Benneville v. DOJ, No. 98-6137, slip op. at 10 (D. Or. June 11, 2003) (rejecting plaintiff's contention that agency should have provided him with information on all environmental groups, rather than just single group specifically named in request letter, because "the government should not be expected to determine [unnamed groups'] identit[ies] and determine if they should be involved in the search"); Nurse, 231 F. Supp. 2d at 330 (declaring that agency was not required to have "clairvoyant capabilities" in order to determine nature of request); Malak v. Tenet, No. 01-3996, 2001 WL 664451, at *1 (N.D. Ill. June 12, 2001) (concluding that request's "discursive narrative doesn't even begin to approach the necessary job to permit performance of [agency's] FOIA responsibilities"); Judicial Watch v. Exp.-Imp. Bank, 108 F. Supp. 2d 19, 27-28 (D.D.C. 2000) (ruling that request did not reasonably describe records sought because plaintiff "fail[ed] to state its request with sufficient particularity, [and] it also declined [agency's] repeated attempts to clarify the request"); Keenan v. DOJ, No. 94-1909, slip op. at 1 (D.D.C. Nov. 12, 1996) ("Plaintiff can not [sic] place a request for one search and then, when nothing is found, convert that request into a different search."); Graphics of Key W. v. United States, No. 93-718, 1996 WL 167861, at *7 (D. Nev. Feb. 5, 1996) (finding plaintiff's request letters to be "more arguments than clear requests for information"); Kubany v. Bd. of Governors of the Fed. Reserve Sys., No. 93-1428, slip op. at 6-8 (D.D.C. July 19, 1994) (holding that request relying on exhibits containing "multiple, unexplained references to hundreds of accounts, and various flowcharts, and schematics" is "entirely unreasonable"); Massachusetts v. HHS, 727 F. Supp. 35, 36 n.2 (D. Mass. 1989) (noting that, although agency responded to request, request was overbroad since requester asked for all records "relating to" a particular subject, "thus unfairly plac[ing] the onus of non-production on the recipient of the request and not . . . upon the person who drafted such a sloppy request"). But cf. Doolittle v. DOJ, 142 F. Supp. 2d 281, 285 (N.D.N.Y. 2001) (concluding that if description of records sought is otherwise reasonable, agency cannot refuse to search for records simply because requester did not identify them by date on which they were created).

¹²⁰ See Ruotolo v. DOJ, 53 F.3d 4, 9-10 (2d Cir. 1995) (finding that although request would require 803 files to be searched by "begin[ing] with the most current . . . and work[ing] (continued...)

whether a request is or is not "reasonably described" is the ability of agency staff to reasonably ascertain exactly which records are being requested and to locate them.¹²¹ In addition to the "reasonably described" inquiry, courts have held that agencies are not required to conduct wide-ranging, "unreasonably burdensome" searches for records.¹²² (For a discussion of "unreasonably burdensome" searches, see Procedural Requirements, Searching for Responsive Records, below). Courts have also required agencies to clarify the scope of the request with the requester, particularly when doing so is required by the agency's regulations.¹²³

¹²⁰(...continued)

backward in time," it was "reasonably described" and not "unreasonably burdensome"); Pub. Citizen Health Research Group v. FDA, No. 94-0018, slip op. at 1-2 (D.D.C. Feb. 9, 1996) (rejecting agency's assertion that request was not "reasonably described" and criticizing agency for not consulting with requester to attempt to narrow request that agency claimed would require "unduly burdensome" search); see also FOIA Update, Vol. IV, No. 3, at 5 ("The sheer size or burdensomeness of a FOIA request, in and of itself, does not entitle an agency to deny that request on the ground that it does not 'reasonably describe' records within the meaning of 5 U.S.C. § 552(a)(3)(A).").

¹²¹ See Yeager v. DEA, 678 F.2d 315, 322, 326 (D.C. Cir. 1982) (holding request encompassing over 1,000,000 computerized records to be valid because "[t]he linchpin inquiry is whether the agency is able to determine 'precisely what records [are] being requested'" (quoting legislative history)); Marks, 578 F.2d at 263 (declaring that "reasonable description relates not only to subject matter, but . . . also relates to place of search" and ruling that FBI was not required to search all field offices pursuant to request for all records "under [my] name" because such "broad, sweeping requests" do not "reasonably describe" records sought); Weewee v. IRS, No. 99-475, 2001 WL 283801, at *12 (D. Ariz. Feb. 13, 2001) (finding that request for records related to each occurrence of specific actions related to requester's tax return "does not appear to be too broad" given that agency already had processed request that was "identically worded").

¹²² See, e.g., Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 892 (D.C. Cir. 1995) (agreeing that search requiring review of twenty-three years of unindexed files would be unreasonably burdensome, but disagreeing that search through chronologically indexed agency files for dated memorandum would be burdensome); AFGE v. U.S. Dept of Commerce, 907 F.2d 203, 209 (D.C. Cir. 1990) (holding that "while [plaintiff's requests] might identify the documents requested with sufficient precision to enable the agency to identify them . . . it is clear that these requests are so broad as to impose an unreasonable burden upon the agency," because agency would have "to locate, review, redact, and arrange for [the] inspection [of] a vast quantity of material").

¹²³ See, e.g., Ruotolo, 53 F.3d at 10 (stating that agency failed to perform its "duty" to assist requester in reformulating request); Stockton E. Water Dist. v. United States, No. 08-0563, 2008 WL 5397499, at *2 (E.D. Cal. Dec. 19, 2008) (noting that if defendants believed request did not sufficiently describe records sought, they were required to contact plaintiff to clarify what records were sought); Pub. Citizen Health Research Group, No. 94-0018, slip op. at 2-3 (D.D.C. Feb. 9, 1996) (criticizing agency for failing to seek narrowing of request as required by agency regulations, and ordering parties to "seek to agree" on search breadth).

Even if the request "is not a model of clarity," an agency should carefully consider the nature of each request and give a reasonable interpretation to its terms and overall content.¹²⁴ Likewise, an agency "must be careful not to read [a] request so strictly that the requester is denied information the agency well knows exists in its files, albeit in a different form from that anticipated by the requester."¹²⁵ Courts have, nevertheless, upheld agency decisions to limit the scope of a request when the agency acted reasonably in interpreting what the request sought.¹²⁶

¹²⁴ LaCedra v. EOUSA, 317 F.3d 345, 347-48 (D.C. Cir. 2003) (concluding that agency failed to "liberally construe" request for "all documents pertaining to [plaintiff's] case" when it limited that request's scope to only those records specifically and individually listed in request letter, because "drafter of a FOIA request might reasonably seek all of a certain set of documents while nonetheless evincing a heightened interest in a specific subset thereof" (citing Nation Magazine, 71 F.3d at 890)); see, e.g., Miller v. Casey, 730 F.2d 773, 777 (D.C. Cir. 1984) (emphasizing that agency is required to read FOIA request as drafted, "not as either [an] agency official or [requester] might wish it was drafted"); Keys v. DHS, 570 F. Supp. 2d 59, 68-69 (D.D.C. 2008) (finding withholding improper where agency to which records were referred nonetheless still required requester to file additional request for public records even though such records were responsive to original request and were part of referred documents); Lawyers' Comm. for Civil Rights v. Dep't of the Treasury, 534 F. Supp. 2d 1126, 1135-36 (N.D. Cal. 2008) (ordering disclosure of records responsive to requests for "[t]he number and nature of complaints" because requests must be "interpreted liberally and . . . an agency cannot withhold a record that is reasonably within the scope of the request on the grounds that the record has not been specifically named by the requester"); Lawyer's Comm. for Civil Rights v. Dep't of the Treasury, No. 07-2590, 2008 WL 4482855, at *6 (N.D. Cal. Sept. 30, 2008) (finding that requester's "inartfully written" requests when "liberally construed" seek subject records); Martinez v. SSA, No. 07-01156, 2008 WL 486027, at *3 (D. Colo. Feb. 18, 2008) (finding that "request for aggregate data was encompassed within the Plaintiffs' FOIA request, even if the word 'aggregate' does not appear in it"); Landes v. Yost, No. 89-6338, 1990 WL 45054, at *3 (E.D. Pa. Apr. 12, 1990) (finding that request was "reasonably descriptive" when it relied on agency's own outdated identification code), aff'd, 922 F.2d 832 (3d Cir. 1990) (unpublished table decision); FOIA Update, Vol. XVI, No. 3, at 3 (advising agencies on interpretation of terms of FOIA requests); cf. Morley v. CIA, 508 F.3d 1108, 1116-19 (D.C. Cir. 2007) (concluding that request met criteria of exception to rule that CIA "[o]perational files are exempt from FOIA disclosure" and requiring agency to search such files upon remand since it had not initially done so). See generally Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) (directing agencies to respond to FOIA requests "in a spirit of cooperation").

¹²⁵ Hemenway v. Hughes, 601 F. Supp. 1002, 1005 (D.D.C. 1985); see also Allen v. BOP, No. 00-342, slip op. at 7-9 (D.D.C. Mar. 1, 2001) (concluding that agency took "an extremely constricted view" of plaintiff's FOIA request for all "records or transcripts" of intercepted phone calls by failing to construe audiotape recordings of those calls as being within request's scope), aff'd, 89 F. App'x 276 (D.C. Cir. 2004); Horsehead Indus. v. EPA, No. 94-1299, slip op. at 4 n.2 (D.D.C. Jan. 3, 1997) (ruling that "[b]y construing the FOIA request narrowly, [agency] seeks to avoid disclosing information").

¹²⁶ See, e.g., McLaughlin v. DOJ, 598 F. Supp. 2d 62, 66 (D.D.C. 2009) (concluding "[n]o
(continued...)

When determining the scope of a FOIA request, courts have generally held that agencies are not required to answer questions posed as FOIA requests,¹²⁷ nor are they

¹²⁶(...continued)

reasonable fact finder could imply agency bad faith" from practice of generally treating requests as requests for non-public records and requiring submission of additional request for responsive public records); Adamowicz v. IRS, 552 F. Supp. 2d 355, 362 (S.D.N.Y. 2008) (finding agency's interpretation of request reasonable when agency determined that request seeking records pertaining to tax audit did not include records pertaining to appeal of tax audit); Moghan v. DHS, No. 06-2045, 2007 WL 2007502, at *3 (D.D.C. July 10, 2007) (stating that agency reasonably determined that scope of request for investigative file did not include employment file); Judicial Watch, Inc. v. DOD, No. 05-00390, 2006 WL 1793297, at *3 (D.D.C. June 28, 2006) (concluding that agency need not construe request for names of corporations related to particular subject to be request for all records related to that subject); Nat'l Ass'n of Criminal Def. Lawyers v. DOJ, No. 04-0697, 2006 WL 666938, at *2 (D.D.C. Mar. 15, 2006) (concluding that agency "reasonably" read request as seeking "any reports or studies" and that requester's attempt to narrow request resulted in request that is "substantially different" from original request).

¹²⁷ See, e.g., Zemansky v. EPA, 767 F.2d 569, 574 (9th Cir. 1985); DiViaio v. Kelley, 571 F.2d 538, 542-43 (10th Cir. 1978); Amnesty Int'l v. CIA, No. 07-5435, 2008 WL 2519908, at *12-13 (S.D.N.Y. June 19, 2008) (rejecting claim that agency has duty to compile list of persons it deems subjects of "secret detention" and search for records related to them in order to respond to request for "secret detention" records because, in essence, request seeks answer to question); Francis v. FBI, No. 06-0968, 2008 WL 1767032, at *5-6 (E.D. Cal. Apr. 16, 2008) (magistrate's recommendation) (finding absence of proper FOIA request where requester asked agency to identify person in photograph); Ivey v. U.S. Office of Special Counsel, No. 05-0176, 2005 U.S. Dist. LEXIS 18874, at *8 (D.D.C. Aug. 31, 2005) (finding that agency is not required to answer questions in response to request seeking reasons for closure of agency investigation); Stuler v. DOJ No. 03-1525, 2004 WL 1304040, at *3 (W.D. Pa. June 30, 2004) (concluding that FOIA does not give requester "opportunity to relitigate his criminal case," and that agency was not obligated to answer requester's questions), aff'd, 216 F. App'x at 242 (per curiam); Barber v. Office of Info. & Privacy, No. 02-1748, slip op. at 4 (D.D.C. Sept. 4, 2003) (holding that agency "had no duty to conduct research or to answer questions" that addressed "authentic[ity]" of federal jurisdiction over the location of his criminal prosecution"), aff'd per curiam, No. 03-5266 (D.C. Cir. Feb. 20, 2004); Gillin v. Dept't of the Army, No. 92-325, slip op. at 10 (D.N.H. May 28, 1993) ("FOIA creates only a right of access to records, not a right to require an agency to disclose its collective reasoning behind agency actions, nor does FOIA provide a mechanism to challenge the wisdom of substantive agency decisions."), aff'd, 21 F.3d 419 (1st Cir. 1994) (unpublished table decision); Patton v. U.S. R.R. Ret. Bd., No. ST-C-91-04, slip op. at 3 (W.D.N.C. Apr. 26, 1991) (stating that FOIA "provides a means for access to existing documents and is not a way to interrogate an agency"), aff'd, 940 F.2d 652 (4th Cir. 1991) (unpublished table decision). But see Ferri v. Bell, 645 F.2d 1213, 1220 (3d Cir. 1981) (declaring that request "inartfully presented in the form of questions" could not be dismissed, partly because agency conceded that it could provide requester with records containing information he sought); Lawyers' Comm. for Civil Rights, 534 F. Supp. 2d at 1135-36 (ordering disclosure of records responsive to requests for "[t]he number and nature of complaints" because requests must be "interpreted liberally and . . . an agency cannot withhold a record (continued...)

required to respond to requests by creating records,¹²⁸ such as by modifying exempt information in order to make it disclosable.¹²⁹ Moreover, courts have found that agencies are

¹²⁷(...continued)

that is reasonably within the scope of the request on the grounds that the record has not been specifically named by the requester"); FOIA Update, Vol. V, No. 1, at 5 (advising that "while agencies do not have to create or compile new records in response to FOIA requests (whether formulated in question form or not), they should make good faith efforts to assist requesters in honing any requests for readily accessible records which are 'inartfully presented in the form of questions'" (quoting Ferri, 645 F.2d at 1220)).

¹²⁸ See, e.g., LaRoche v. SEC, 289 F. App'x 231, 231 (9th Cir. 2008) (explaining that agency was not required to create new documents to satisfy FOIA request when it could not readily reproduce records sought in searchable electronic format requested); Poll v. U.S. Office of Special Counsel, No. 99-4021, 2000 WL 14422, at *5 n.2 (10th Cir. Jan. 10, 2000) (recognizing that FOIA does not require agency "to create documents or opinions in response to an individual's request for information" (quoting Hudgins v. IRS, 620 F. Supp. 19, 21 (D.D.C. 1985))); Sorrells v. United States, No. 97-5586, 1998 WL 58080, at *1 (6th Cir. Feb. 6, 1998) (advising that agency is not required to compile document that "contain[s] a full, legible signature"); Krohn v. DOJ, 628 F.2d 195, 197-98 (D.C. Cir. 1980) (finding that agency "cannot be compelled to create the [intermediary records] necessary to produce" information sought); Schoenman v. FBI, No. 04-2202, 2009 WL 763065, at *17-18 (D.D.C. Mar. 19, 2009) (rejecting plaintiff's request for search slips, created by agency after date-of-search cut-off date, holding that "FOIA 'does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created or retained'" (quoting Schoenman v. FBI, 573 F. Supp. 2d 119, 140 (D.D.C. 2008))); Moore v. Bush, 601 F. Supp. 2d 6, 15 (D.D.C. 2009) (finding that agency properly refused to issue various statements regarding brain wave technology because FOIA does not require creation of records); West v. Spellings, 539 F. Supp. 2d 55, 61 (D.D.C. 2008) (recognizing that Department of Education had no duty to create list of uninvestigated complaints to satisfy request); Ctr. for Pub. Integrity v. FCC, 505 F. Supp. 2d 106, 114 (D.D.C. 2007) (concluding that plaintiff's suggestion that agency delete some data and replace it with data suggested by plaintiff amounts to creation of new records, something not required under FOIA); Stuler v. IRS, No. 05-1717, 2006 WL 891073, at *3 (W.D. Pa. Mar. 31, 2006) (stating that agency "is not required to create documents that don't exist"); Jones v. Runyon, 32 F. Supp. 2d 873, 876 (N.D. W. Va. 1998) (concluding that "because the FOIA does not obligate the [agency] to create records," it "acted properly by providing access to those documents already created"), aff'd, 173 F.3d 850 (4th Cir. 1999) (unpublished table decision); Bartlett v. DOJ, 867 F. Supp. 314, 316 (E.D. Pa. 1994) (ruling that agency is not required to create handwriting analysis). But cf. Martinez, 2008 WL 486027, at *2-3 (requiring agency to produce aggregate data); Schladetsch v. HUD, No. 99-0175, 2000 WL 33372125, at *3 (D.D.C. Apr. 4, 2000) ("Because [agency] has conceded that it possesses in its databases the discrete pieces of information which [plaintiff] seeks, extracting and compiling that data does not amount to the creation of a new record."), appeal dismissed voluntarily, No. 00-5220 (D.C. Cir. Oct. 12, 2000); Int'l Diatomite Producers Ass'n v. SSA, No. 92-1634, 1993 WL 137286, at *5 (N.D. Cal. Apr. 28, 1993) (giving agency choice of compiling responsive list or redacting existing lists containing responsive information), appeal dismissed, No. 93-16723 (9th Cir. Nov. 1, 1993).

¹²⁹ See FlightSafety Servs. Corp. v. Dep't of Labor, 326 F.3d 607, 613 (5th Cir. 2003) (per (continued...))

not required to add explanatory materials to any records disclosed in response to a FOIA request.¹³⁰ Agencies are also not typically obligated to seek the return of records over which they retain no "control"¹³¹ (even records that were wrongfully removed from their

¹²⁹(...continued)

curiam) (recognizing that plaintiff's demand that agency "simply insert new information in the place of the redacted information requires the creation of new agency records, a task that the FOIA does not require the government to perform"); Students Against Genocide v. Dep't of State, 257 F.3d 828, 837 (D.C. Cir. 2001) (rejecting plaintiff's argument that "even if the agencies do not want to disclose the photographs in their present state, they should produce new photographs at a different resolution in order to mask the [classified] capabilities of the reconnaissance systems that took them"). But see Jones v. OSHA, No. 94-3225, 1995 WL 435320, at *4 (W.D. Mo. June 6, 1995) (stating that agency must "retype," not withhold in full, documents required to be released by its own regulation, in order to delete FOIA-exempt information).

¹³⁰ See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 162 (1975) (holding that agency is not required to create explanatory materials); Jackman v. DOJ, No. 05-1889, 2006 WL 2598054, at *2 (D.D.C. Sept. 11, 2006) (stating that "questions about the authenticity and correctness of the released records are beyond the scope of the court's FOIA jurisdiction"); Citizens Progressive Alliance v. U.S. Bureau of Indian Affairs, 241 F. Supp. 2d 1342, 1365 (D.N.M. 2002) ("Defendants may be required to disclose material pursuant to FOIA, but Defendants are not required to . . . explain any records produced."); Tax Analysts v. IRS, No. 94-923, 1998 WL 419755, at *2 (D.D.C. May 1, 1998) (declaring that "an agency need not add explanatory material to a document to make it more understandable in light of the redactions"); Gabel v. Comm'r, 879 F. Supp. 1037, 1039 (N.D. Cal. 1994) (noting that FOIA does not require agency "to revamp documents or generate exegeses so as to make them comprehensible to a particular requestor"); cf. Essential Info., Inc. v. USIA, 134 F.3d 1165, 1172 (D.C. Cir. 1998) (Tatel, J., dissenting) (observing that "FOIA contains no . . . translation requirement" regarding disclosure of records in a specific language). But cf. McDonnell v. United States, 4 F.3d 1227, 1261 n.21 (3d Cir. 1993) (suggesting, in dictum, that agency might be compelled to create translation of any disclosable encoded information).

¹³¹ See Bonaparte v. DOJ, No. 07-0749, 2008 WL 2569379, at *1 (D.D.C. June 27, 2008) (finding search adequate where it revealed records had been transferred to component of NARA, stating that requester could request records from NARA); Anderson v. DOJ, 518 F. Supp. 2d 1, 10 (D.D.C. 2007) (stating agency not required to "retain or retrieve documents which previously had been in its possession"); Steinberg v. DOJ, 801 F. Supp. 800, 802 (D.D.C. 1992) (holding that agency is not obligated to retrieve law enforcement records transferred for use in criminal prosecutions to Commonwealth of Virginia); cf. Citizens for Responsibility & Ethics in Washington v. DHS, 592 F. Supp. 2d 111, 117-19 (D.D.C. 2009) (finding search inadequate where agency did not search class of records not "currently retained" by agency but still under agency control (citing "control" finding from Citizens for Responsibility & Ethics in Washington v. DHS, 527 F. Supp. 2d 76, 98 (D.D.C. 2007))). But see Pena v. BOP, No. 06-2480, 2007 WL 1434869, at *3 (E.D.N.Y. May 14, 2007) (finding, in case involving search that was initially done pursuant to subpoena during which NARA sent transferred records back to BOP and which BOP could not subsequently locate, that search would be deemed adequate "only if the BOP is unable to procure additional copies . . . [and that] if BOP can obtain [them]

(continued...)

possession),¹³² to re-create records properly disposed of,¹³³ or to seek the delivery of records held by private entities.¹³⁴ Courts have long held that agencies are not required to make

¹³¹(...continued)

by making a request to the National Archives . . . it is obligated to do so").

¹³² See Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 150-55 (1980); cf. Spannaus v. DOJ, 942 F. Supp. 656, 658 (D.D.C. 1996) (finding that "personal files" of attorney no longer employed with agency were "beyond the reach of FOIA" if they were not turned over to agency at end of employment).

¹³³ See, e.g., Jones v. FBI, 41 F.3d 238, 249 (6th Cir. 1994); see also Robert v. HHS, 78 F. App'x 146, 147 (2d Cir. 2003) (finding no improper withholding of records that were destroyed in accordance with agency's record-retention schedule prior to agency's receipt of FOIA request); Anderson, 518 F. Supp. 2d at 9-10 (recognizing that "[a]n agency does not violate the FOIA for its failure to locate records destroyed in accordance with an agency's normal retention policy"); Laughlin v. Comm'r, 103 F. Supp. 2d 1219, 1224-25 (S.D. Cal. 1999) (refusing to order agency to re-create properly discarded document); Jones, 32 F. Supp. 2d at 875-76 (finding that agency did not improperly withhold requested report that was discarded in accordance with agency policies and practices); Rothschild v. DOE, 6 F. Supp. 2d 38, 40 (D.D.C. 1998) (agreeing that because agency "is under no duty to disclose documents not in its possession," agency did not violate FOIA by failing to provide discarded drafts of responsive documents); Green v. NARA, 992 F. Supp. 811, 817 (E.D. Va. 1998) (finding that agency met its FOIA obligation when it provided reasonable access to records sought by plaintiff prior to disposal of records and noting that "FOIA . . . does not obligate agencies to retain all records [in its possession], nor does it establish specified procedures designed to guide disposal determinations"); cf. Folstad v. Bd. of Governors of the Fed. Reserve Sys., No. 1:99-124, 1999 U.S. Dist. LEXIS 17852, at *5 (W.D. Mich. Nov. 16, 1999) (recognizing that "[e]ven if the agency failed to keep documents that it should have kept, that failure would create neither responsibility under the FOIA to reconstruct those documents nor liability for the lapse"), aff'd, 234 F.3d 1268 (6th Cir. 2000) (unpublished table decision); FOIA Update, Vol. XVIII, No. 1, at 5-6 (advising that FOIA does not govern agency records disposition practices). But cf. Schrecker v. DOJ, 254 F.3d 162, 165 (D.C. Cir. 2001) (holding that absent proof that requested records were destroyed, agency cannot refuse to search for such records simply because they were type of records not required to be retained); Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 328 (D.C. Cir. 1999) (rejecting agency's claim that it failed to locate requested records because they were type routinely destroyed, and declaring that "generalized claims of destruction or non-preservation cannot sustain summary judgment"); Kensington Research & Recovery v. HUD, No. 08-1250, 2009 WL 1313185, at *3-4, 8 (N.D. Ill. May 8, 2009) (finding that recreation of a specific form "that previously existed does not constitute creation of a new record" where recreation would take "a few strokes on a keyboard" and where requested information still exists in different formats in agency databases, but permitting agency withholding under an exemption).

¹³⁴ See Folstad, 1999 U.S. Dist. LEXIS 17852, at *8 (finding that if agency "is no longer in possession of the documents, nothing in the FOIA requires the agency to obtain those documents from the private [banking] institution"); Conservation Law Found. v. Dept of the Air Force, No. 85-4377, 1986 U.S. Dist. LEXIS 24515, at *10-12 (D. Mass. June 6, 1986)

(continued...)

automatic releases of records as they are created.¹³⁵ Finally, agencies are not required to provide FOIA requesters with records that fall within subsection (a)(2), the FOIA's proactive disclosure provision,¹³⁶ and which are already made available to the public, typically on the agency's website.¹³⁷ (For a discussion of proactive disclosures, see Proactive Disclosures, Subsection (a)(2): Making Records Available for Public Inspection, above.)

¹³⁴(...continued)

(concluding that computer program generated and held by federal contractor not required to be turned over to agency). But see Cal-Almond, Inc. v. USDA, No. 89-574, slip op. at 3-4 (E.D. Cal. Mar. 17, 1993) (ordering agency to reacquire records that mistakenly were returned to submitter upon closing of administrative appeal), appeal dismissed per stipulation, No. 93-16727 (9th Cir. Oct. 26, 1994).

¹³⁵ See Tuchinsky v. Selective Serv. Sys., 418 F.2d 155, 158 (7th Cir. 1969) (holding that no automatic release is required of material related to occupational deferments until request is in hand; "otherwise, [agency] would be required to 'run [a] loose-leaf service' for every draft counselor in the country"); Mandel Grunfeld & Herrick v. U.S. Customs Serv., 709 F.2d 41, 43 (11th Cir. 1983) (determining that plaintiff not entitled to automatic mailing of materials as they are updated); Howard v. Sec'y of the Air Force, No. SA-89-CA-1008, slip op. at 6 (W.D. Tex. Oct. 2, 1991) (concluding that plaintiff's request for records on continuing basis would "create an enormous burden, both in time and taxpayers' money"); Lybarger v. Cardwell, 438 F. Supp. 1075, 1077 (D. Mass. 1977) (holding that "open-ended procedure" advanced by requester whereby records are automatically disclosed is not required by FOIA and "will not be forced" upon agency); see also Tax Analysts, 1998 WL 419755, at *4 (recognizing that court could not order relief concerning documents not yet created and "for which a request for release has not even been made and for which administrative remedies have not been exhausted").

¹³⁶ See 5 U.S.C. § 552(a)(3) (generally excluding subsection (a)(1) and (a)(2) records, which must be proactively disclosed to the public, from the FOIA's provision governing individual requests).

¹³⁷ See Schwarz v. U.S. Patent & Trademark Office, No. 95-5349, 1996 U.S. App. LEXIS 4609, at *2-3 (D.C. Cir. Feb. 22, 1996) (per curiam); Crews v. Internal Revenue, No. 99-8388, 2000 WL 900800, at *6 (C.D. Cal. Apr. 26, 2000) (holding that "documents that are publicly available either in the [agency's FOIA] reading room or on the internet" are "not subject to production via FOIA requests"); cf. Perales v. DEA, 21 F. App'x 473, 474-75 (7th Cir. 2001) (recognizing that under subsection (a)(3), agencies are not required to disclose in response to FOIA requests records already made available under subsection (a)(1) through publication in Federal Register); Antonelli v. BOP, 591 F. Supp. 2d 15, 25 (D.D.C. 2008) (stating that FBI not obligated to produce addresses of field offices because such information is "[publicly] accessible via its website or the Federal Register"); Jefferson v. BOP, 578 F. Supp. 2d 55, 58-59 (D.D.C. 2008) (stating that BOP notice published in Federal Register, which plaintiff seeks, "is maintained by the Federal Register and is not a document maintained by the BOP"). But see FOIA Update, Vol. XVIII, No. 1, at 3 (advising that Congress made clear that "frequently requested" records, which are required to be disclosed proactively, would stand as exception to general rule and be subject to regular FOIA requests as well); FOIA Update, Vol. XVI, No. 1, at 2 (reminding that "an agency cannot convert a subsection (a)(3) record into a subsection (a)(2) record . . . just by voluntarily placing it into its reading room").

When processing records not written in English, agencies should translate the responsive records in order to make disclosure determinations and in order to defend such determinations should litigation arise.¹³⁸

In addition to reasonably describing the records sought, a proper FOIA request must be made in accordance with an agency's regulations.¹³⁹ All agencies must promulgate regulations informing the public of "the time, place, fees (if any), and procedures to be followed" for making requests.¹⁴⁰ Agencies must also promulgate regulations providing the schedule of fees to be charged for search, review, and duplication, establishing procedures for the waiver of fees, and providing criteria for expedited processing.¹⁴¹ Agencies may promulgate regulations regarding aggregation of requests and multi-track processing.¹⁴²

Significantly, courts have held that the requirements of the FOIA do not begin to apply until an agency receives a proper FOIA request -- one that reasonably describes the records sought and complies with published agency regulations.¹⁴³

¹³⁸ See Lawyers' Comm. for Civil Rights v. Dep't of the Treasury, No. 07-2590, 2009 WL 1299821, at *9 (N.D. Cal. May 11, 2009) (concluding that agency failed to demonstrate applicability of FOIA exemption to documents because it "did not bother to translate [them] into English for the court . . . so the court is unable to make a determination as to those [documents]"); see also *FOIA Post*, "The Limits of Agency Translation Obligations Under the FOIA" (posted 12/1/04) (discussing agency translation obligations in determining responsiveness of records, determining applicability of exemptions, and providing records in response to FOIA requests).

¹³⁹ 5 U.S.C. § 552(a)(3)(A); see, e.g., *Ivey v. Snow*, No. 05-1095, 2006 WL 2051339, at *4 (D.D.C. 2006) (granting summary judgment to agency because plaintiff failed to exhaust administrative remedies when requests failed to comply with agency regulations); *Wicks v. Coffrey*, No. 01-3664, 2002 WL 1000975, at *2 (E.D. La. May 14, 2002) ("The first step in exhausting administrative remedies under the FOIA is filing a proper FOIA request.").

¹⁴⁰ 5 U.S.C. § 552(a)(3)(A), (a)(6)(A).

¹⁴¹ See id. § 552(a)(4)(A), (a)(6)(E).

¹⁴² See id. § 552(a)(6)(B)(iv), (a)(6)(D).

¹⁴³ See id. § 552(a)(3)(A), (a)(6)(A); *Borden v. FBI*, No. 94-1029, 1994 WL 283729, at *1 (1st Cir. June 28, 1994) (per curiam) (affirming dismissal of case because request not proper where it failed to comply with agency regulations and did not reasonably describe records sought); *Willis v. DOJ*, 581 F. Supp. 2d 57, 68 (D.D.C. 2008) (declaring "[i]t is axiomatic that an agency has no obligation to respond to a request that it did not receive"); *Antonelli v. ATF*, No. 04-1180, 2006 WL 141732, at *2 (D.D.C. Mar. 17, 2006) (granting agency's motion for summary judgment because requester failed to comply with agency regulation requiring sufficient description of records sought in order that agency "with a reasonable amount of effort . . . [could] initiate a search" from among more than 100 systems of records); *Hutchins v. DOJ*, No. 00-2349, 2005 WL 1334941, at *1-2 (D.D.C. June 6, 2005) (finding that where agency does not receive request, it has no duty to search for or produce records, nor to respond); *Carbe v. ATF*, (continued...)

Moreover, courts have found that a requester's failure to comply with certain procedural requirements may constitute a failure to exhaust administrative remedies, which precludes judicial review. This has occurred, for example, when a requester fails to reasonably describe the records sought or to comply with an agency's procedural regulations concerning, for example, properly submitting requests,¹⁴⁴ complying with fee and fee waiver requirements,¹⁴⁵

¹⁴³(...continued)

No. 03-1658, 2004 WL 2051359, at *8 (D.D.C. Aug. 12, 2004) (stating that agency "has no reason to search or produce records . . . and . . . has no basis to respond" if it does not receive FOIA request, even where requester claims to have submitted one); Wicks, 2002 WL 1000975, at *2 (dismissing case where requester "failed to comply with the published regulations governing proper FOIA requests").

¹⁴⁴ See Keys, 2009 WL 614755, at *5 (finding failure to exhaust where, inter alia, requester failed to reasonably describe records sought by not responding to agency's notice that he must specify which field offices he wanted agency to search); Banks v. Lappin, 539 F. Supp. 2d 228, 235 (D.D.C. 2008) (finding failure to exhaust and stating that "[t]he mailing of a FOIA request to a federal government agency does not constitute its receipt by the agency" even if mailed via prison mailbox); Banks v. DOJ, 538 F. Supp. 2d 228, 234 (D.D.C. Mar. 16, 2008) (finding that requester failed to exhaust administrative remedies when he failed to demonstrate that agencies received requests); Thomas v. FAA, No. 05-2391, 2007 WL 2020096, at *3-4 (D.D.C. July 12, 2007) (ruling that plaintiff has not exhausted administrative remedies where agency has not received FOIA request); Harris v. Freedom of Info. Unit, DEA, No. 06-00176, 2006 WL 3342598 (N.D. Tex. Nov. 17, 2006) (finding that plaintiff failed to exhaust administrative remedies where request did not comply with agency's regulations); Stanley v. DOD, No. 93-4247, slip op. at 10 (S.D. Ill. July 28, 1998) (holding that request was not proper where it was addressed to Air Force medical center where no FOIA Officer was located); Smith v. Reno, No. 93-1316, 1996 WL 224994, at *3 (N.D. Cal. Apr. 23, 1996) (stating that "[t]he National Records Administration is not an HUD information center," and holding that by directing FOIA request to wrong agency plaintiff failed to exhaust administrative remedies). See generally OPEN Government Act § 6 (requiring agencies to route misdirected FOIA requests to proper component within agency provided requests were received by a component of the agency that is authorized by agency regulations to receive requests).

¹⁴⁵ See Pietrangelo v. Dep't of the Army, 155 F. App'x 526, 526 (2d Cir. 2005) (affirming district court decision that found that requester could not seek judicial review when he failed to meet fee-related exhaustion requirements); Pollack v. DOJ, 49 F.3d 115, 119 (4th Cir. 1995) (concluding that plaintiff's refusal to pay anticipated fees constitutes failure to exhaust administrative remedies); County of Santa Cruz v. Ctrs. for Medicare and Medicaid Servs., No. 07-2889, 2009 WL 816633, at *1 (dismissing FOIA claims where requester failed to exhaust by not fully paying search fees); Banks, 538 F. Supp. 2d at 237 (finding that requester failed to exhaust administrative remedies by failing to pay assessed fees); Kumar v. DOJ, No. 06-714, 2007 WL 537723, at *3 (D.D.C. Feb. 16, 2007) (holding that failure to pay fees under FOIA constitutes failure to exhaust administrative remedies); Kemmerly v. U.S. Dep't of Interior, No. 06-2386, 2006 WL 2990122, at *2 (E.D. La. Oct. 17, 2006) (stating that "administrative exhaustion does not occur until the required fees are paid or an appeal is taken from the refusal to waive fees" (citing Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 66 (D.C. Cir. 1990))); cf. Pub. Citizen, Inc. v. Dep't of Educ., 292 F. Supp. 2d 1, 4-5 & n.4 (D.D.C. 2003)

(continued...)

providing proof of identity,¹⁴⁶ and properly submitting administrative appeals.¹⁴⁷

¹⁴⁵(...continued)

(concluding that because agency "failed to [respond] to plaintiff's fee waiver request when it was required by statute to do so," and then "proceed[ed] with a search without notifying plaintiff of the cost of that search," agency could not subsequently in litigation demand payment of fees from plaintiff, which "had no reason to assume it would be required to pay fees . . . in view of [agency's] silence in the face of plaintiff's specific fee waiver request").

¹⁴⁶ See Borden, 1994 WL 283729, at *1 (per curiam) (affirming dismissal of case because requester failed to comply with agency's published regulations regarding identity verification); Schied v. Daughtrey, No. 08-14944, 2009 WL 818095, at *9 (E.D. Mich. Mar. 25, 2009) (dismissing claim where requester failed to present identification information); Banks, 538 F. Supp. 2d at 234 (finding that requester failed to exhaust administrative remedies when he did not verify his identity as required by agency regulation); Pusa v. FBI, No. 99-04603, slip op. at 5 (C.D. Cal. Aug. 3, 1999) (holding that plaintiff who failed to submit third party's privacy waiver "has failed to exhaust administrative remedies under the FOIA by failing to comply with the agency's published procedures for obtaining third-party information"); Schwarz v. FBI, 31 F. Supp. 2d 540, 542 (N.D. W. Va. 1998) (recognizing that first-party requester's failure to follow agency regulations requiring her to submit fingerprints for positive identification constituted failure to exhaust administrative remedies), aff'd, 166 F.3d 334 (4th Cir. 1998) (unpublished table decision); cf. Estate of Fortunato v. IRS, No. 06-6011, 2007 WL 4838567, at *5 (D.N.J. Nov. 30, 2007) (finding agency not required to disclose certain responsive documents because they were "outside the scope of a Power of Attorney ("POA") executed by Plaintiff" and ordering disclosure only after plaintiff "cured defect by submitting an amended POA"). But cf. Summers v. DOJ, 999 F.2d 570, 572-73 (D.C. Cir. 1993) (holding that 28 U.S.C. § 1746 (2006) -- which requires that unsworn declarations be treated with "like force and effect" as sworn declarations -- can be used in place of notarized-signature requirement of agency regulation for verification of FOIA privacy waivers); Martin v. DOJ, No. 96-2866, slip op. at 7-8 (D.D.C. Dec. 16, 1999) (ruling that requester who seeks law enforcement information about living third party and fails to provide subject's written authorization permitting disclosure of records has not failed to exhaust administrative remedies because agency regulations stated only that such authorization "will help the processing of [the] request"), rev'd & remanded in part on other grounds, No. 00-5389 (D.C. Cir. Apr. 23, 2002).

¹⁴⁷ See, e.g., Lumarse v. HHS, No. 98-55880, 1999 WL 644355, at *5 (9th Cir. Aug. 24, 1999) (affirming dismissal of plaintiff's FOIA claim for failure to exhaust administrative remedies because plaintiff "does not allege that it [administratively] appealed the denials of its FOIA requests"); RNR Enters. v. SEC, 122 F.3d 93, 98 (2d Cir. 1997) (ruling plaintiff had not exhausted his administrative remedies when he failed to appeal agency denial even though he was advised of his right to appeal and denial was issued during requisite time period); Willis, 581 F. Supp. 2d at 69 (dismissing claims as to requests for which plaintiff never filed administrative appeal); Ctr. for Biological Diversity v. Gutierrez, 451 F. Supp. 2d 57, 65-67 (D.D.C. Aug. 10, 2006) (concluding that requester failed to exhaust administrative remedies when electronically submitted appeal was received twelve minutes after expiration of agency's regulatory appeal deadline); Thorn v. United States, No. 04-1185, 2005 WL 3276285, at *2-3 (D.D.C. Aug. 11, 2005) (finding failure to exhaust because requester's letter to Attorney General is not proper administrative appeal under agency regulations); Thomas v. IRS, No. 03-

(continued...)

(For a further discussion of exhaustion of administrative remedies, see Procedural Requirements, Administrative Appeals; and Litigation Considerations, Exhaustion of Administrative Remedies, below.)

Time Limits

When an agency receives a proper FOIA request,¹⁴⁸ it has twenty working days in which to make a determination on the request.¹⁴⁹ An agency is not necessarily required to release the records within that statutory time limit, but it must make its determination within that time and access to releasable records should, at a minimum, be granted promptly thereafter.¹⁵⁰

¹⁴⁷(...continued)

2080, 2004 WL 3185316, at *3 (M.D. Pa. Nov. 2, 2004) (finding that plaintiff's letters were not appeals where "neither document contains the word appeal, or any reference to a prior request or proceeding," meaning that plaintiff failed to exhaust administrative remedies), reconsideration denied, 95 A.F.T.R. 2d 2005-559 (M.D. Pa. Nov. 16, 2004), motion to vacate denied, 95 A.F.T.R. 2d 2005-562 (M.D. Pa. Dec. 16, 2004), aff'd, 153 F. App'x 89 (3d Cir. 2005); Comer v. IRS, No. 97-76329, 1999 WL 1022210, at *3-4 (E.D. Mich. Sept. 30, 1999) (finding that although plaintiff previously appealed agency's failure to promptly respond to his request, "[u]pon receiving the documents and the bill, and prior to filing suit, plaintiff was [again] obliged to administratively appeal whatever dissatisfactions he may have had with that result"). But cf. Wilbur v. CIA, 355 F.3d 675, 677 (D.C. Cir. 2004) (noting that "the policies underlying the exhaustion requirement have been served" when agency "accepted" and then adjudicated an administrative appeal received four years after regulatory deadline for its submission had passed); Jennings v. FBI, No. 03-1651, slip op. at 10-11 (D.D.C. May 6, 2004) (rejecting agency's failure-to-exhaust argument where, inter alia, requester produced appeal letter, even though agency attested that it did not receive that letter); N.Y. Times Co. v. U.S. Dep't of Labor, 340 F. Supp. 2d 394, 397-400 (S.D.N.Y. 2004) (rejecting agency's argument that requester failed to exhaust when agency never made "final determination" on appeal, where requester appealed initial denial and sued following agency's response on appeal that request was burdensome and inviting requester to narrow request).

¹⁴⁸ See Willis v. DOJ, 581 F. Supp. 2d 57, 68 (D.D.C. 2008) (concluding that "[i]t is axiomatic that an agency has no obligation to respond to a request that it did not receive"); Dunnington v. DOD, No. 06-0925, 2007 WL 60902, at *2 (D.D.C. Jan. 8, 2007) (finding failure to state claim where plaintiff presented no evidence he submitted FOIA request to agency); Schoenman v. FBI, No. 04-2202, 2006 WL 1126813, at *13 (D.D.C. Mar. 31, 2006) (stating that an agency's FOIA obligations do not commence with "averred mailing of a FOIA request," and dismissing counts where plaintiff did not establish that agency received request).

¹⁴⁹ 5 U.S.C. § 552(a)(6)(A)(i) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; FOIA Update, Vol. XIII, No. 3, at 5 (advising that merely acknowledging request within statutory time period is insufficient).

¹⁵⁰ See 5 U.S.C. § 552(a)(6)(C)(i) (requiring that records be made available "promptly"); S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv., No. 06-2845, 2008 WL 2523819, at *15 (E.D. Cal. June 20, 2008) (supporting practice of releasing documents "on a rolling basis" (continued...))

The OPEN Government Act of 2007 amended the time period provision by setting forth statutory rules regarding when the time period commences and when and how often it can be "tolled" (i.e., stopped).¹⁵¹

The FOIA now provides that the twenty-day time period begins on the date the request is first received by the appropriate agency component (or office), but no later than ten days after the request is first received by any component within the agency that is designated by the agency's regulations to receive FOIA requests.¹⁵² Accordingly, if a requester mistakenly sends a FOIA request to an agency component that is designated to receive FOIA requests, but is not itself the proper component within the agency to process that request, that receiving component is now obligated to "route" the "misdirected" request to the appropriate component within that agency within ten days of receiving the request.¹⁵³ If the initial receiving component fails to route such a request to the proper component within ten days, the proper component's twenty-day time period to make a request determination begins to run nevertheless (provided that the request is otherwise a proper FOIA request).¹⁵⁴ This routing requirement applies exclusively to components within an agency; it does not obligate components of an agency to route requests to components of a different agency.¹⁵⁵

The OPEN Government Act also provides limitations on when and how often an agency is allowed to toll the twenty-day time period (i.e., stop the clock), allowing tolling under two circumstances only: (1) one time to obtain information from the requester; and (2) as "necessary" to clarify fee-related issues with the requester.¹⁵⁶ The one-time tolling permitted to seek information is limited to situations where the agency is awaiting information that it has "reasonably requested" from the requester.¹⁵⁷ While an agency may only toll once while seeking information from the requester, an agency is not prohibited from contacting a

¹⁵⁰(...continued)

if necessary, as this respects statute's "prompt release" requirement). But see *Manos v. U.S. Dep't of the Air Force*, No. C-92-3986, 1993 U.S. Dist. LEXIS 1501, at *14-15 (N.D. Cal. Feb. 10, 1993) (ruling that even mailing response within statutory time limit was insufficient and that requester must actually receive response within time limit).

¹⁵¹ OPEN Government Act § 6 (to be codified at 5 U.S.C. § 552(a)(6)(A)).

¹⁵² Id.

¹⁵³ See id.; see also *FOIA Post*, "OIP Guidance: New Requirement to Route Misdirected FOIA Requests" (posted 11/18/08).

¹⁵⁴ See OPEN Government Act § 6; see also *FOIA Post*, "OIP Guidance: New Requirement to Route Misdirected FOIA Requests" (posted 11/18/08).

¹⁵⁵ See OPEN Government Act § 6; see also *FOIA Post*, "OIP Guidance: New Requirement to Route Misdirected FOIA Requests" (posted 11/18/08).

¹⁵⁶ OPEN Government Act § 6.

¹⁵⁷ Id.

requester as many times as needed to facilitate processing the request.¹⁵⁸

An agency may also toll the time period "if necessary" to clarify with the requester issues pertaining to fee assessment.¹⁵⁹ Unlike the first circumstance, provided that tolling is necessary to clarify fee assessment issues, there is no statutory limit on the number of times an agency may toll for that purpose.¹⁶⁰ In either circumstance, the agency's receipt of the requester's response ends the tolling period and the response time clock resumes.¹⁶¹

In "unusual circumstances," an agency can extend the twenty-day time limit for processing a FOIA request if it tells the requester in writing why it needs the extension and when it will make a determination on the request.¹⁶² The FOIA defines "unusual circumstances" as (1) the need to search for and collect records from separate offices; (2) the need to search for, collect, and examine a voluminous amount of records "demanded in a single request"; and (3) the need to consult with another agency or two or more agency components.¹⁶³ If the required extension exceeds ten days, the agency must allow the requester an opportunity to modify his or her request, or to arrange for an alternative time

¹⁵⁸ Id.; see also *FOIA Post*, "OIP Guidance: New Limitations on Tolling the FOIA's Response Time" (posted 11/18/08) (advising that if contacting requester for non-fee related information more than one time will facilitate processing of request, agency is free to do so, but clock will continue to run in that event).

¹⁵⁹ OPEN Government Act § 6; see also *FOIA Post*, "OIP Guidance: New Limitations on Tolling the FOIA's Response Time" (posted 11/18/08).

¹⁶⁰ OPEN Government Act § 6; see also *FOIA Post*, "OIP Guidance: New Limitations on Tolling the FOIA's Response Time" (posted 11/18/08) (noting that fee issues may arise sequentially during processing of request and cannot always be resolved at one given point in time).

¹⁶¹ OPEN Government Act § 6.

¹⁶² 5 U.S.C. § 552(a)(6)(B)(i); see Pub. Citizen, Inc. v. Dep't of Educ., No. 01-2351, slip op. at 17-23 (D.D.C. June 17, 2002) (ruling that because agency has discretion whether to invoke extension, agency is not obliged to send such notice unless it invokes extension).

¹⁶³ 5 U.S.C. § 552(a)(6)(B)(iii); see also Al-Fayed v. CIA, No. 00-2092, slip op. at 5 (D.D.C. Jan. 16, 2001) (recognizing that circumstances "such as an agency's effort to reduce the number of pending requests, the amount of classified material, the size and complexity of other requests processed by the agency, the resources being devoted to the declassification of classified material of public interest, and the number of requests for records by courts or administrative tribunals are relevant to the Courts' determination as to whether [unusual] circumstances exist"), aff'd, 254 F.3d 300 (D.C. Cir. 2001); Sierra Club v. U.S. Dep't of Interior, 384 F. Supp. 2d 1, 31 (D.D.C. 2004) (finding that "onerous request" and requester's "refusal to reasonably modify it or to arrange an alternative timeframe for release of documents certainly constituted 'unusual circumstances' that relieved the [agency] of the normal timeliness for release of documents under FOIA").

frame for completion of the agency's processing.¹⁶⁴ As a result of the OPEN Government Act, each agency is required to make available its FOIA Public Liaison to aid the requester in this regard and to "assist in the resolution of any disputes."¹⁶⁵

In many instances, however, agencies cannot meet these time limits due to a high volume of requests, resource limitations, or other reasons.¹⁶⁶ Many agencies therefore have adopted the court-sanctioned practice of generally handling backlogged FOIA requests on a "first-in, first-out" basis.¹⁶⁷ The FOIA expressly authorizes agencies to promulgate regulations providing for "multitrack processing" of their FOIA requests -- which allows agencies to process requests on a first-in, first-out basis within each track, and also permits them to respond to relatively simple requests more quickly than requests involving complex and/or voluminous records.¹⁶⁸ (For a further discussion of these points, see *Litigation Considerations, "Open America" Stays of Proceedings*, below.)

An agency's failure to comply with the time limits for either an initial request or an administrative appeal may be treated as a "constructive exhaustion" of administrative

¹⁶⁴ 5 U.S.C. § 552(a)(6)(B)(ii); cf. *Al-Fayed*, No. 00-2092, slip op. at 6 (D.D.C. Jan. 16, 2001) (observing that Act "places the onus of modification [of a request's scope] squarely upon the requester, and does not indicate that an equal burden rests with the agency to 'negotiate' an agreeable 'deadline'").

¹⁶⁵ OPEN Government Act § 6.

¹⁶⁶ See, e.g., *Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605, 616 (D.C. Cir. 1976) (recognizing agencies' failure to comply with statutory time limits when "deluged" with unanticipated volume of requests and working with resources "inadequate" to respond to such requests within time limits); *Tri-Valley Cares v. DOE*, No. 03-3926, 2004 WL 2043034, at *20 (N.D. Cal. Sept. 10, 2004) (recognizing that because requested FOIA response required "review from [DHS]," delay was not indication of bad faith), *aff'd in pertinent part & rev'd on other grounds*, 203 F. App'x 105, 107 (9th Cir. Oct. 16, 2006) (unpublished disposition); *Zuckerman v. FBI*, No. 94-6315, slip op. at 8 (D.N.J. Dec. 6, 1995) (noting effects of resource limitations on complying with statutory time limits).

¹⁶⁷ See *Open Am.*, 547 F.2d at 614-16 (citing 5 U.S.C. § 552(a)(6)(C)); cf. *Al-Fayed*, No. 00-2092, slip op. at 9 n.5 (D.D.C. Jan. 16, 2001) (noting that "even if the [agency] did not adhere strictly to first-in, first-out processing, there is little support that *Open America* requires such a system" so long as agency's processing system is fair overall); *Summers v. CIA*, No. 98-1682, slip op. at 4 (D.D.C. July 26, 1999) (recognizing that agency need not adhere strictly to "first-in, first-out process[ing]" so long as "it is proceeding in a manner designed to be fair and expeditious").

¹⁶⁸ 5 U.S.C. § 552(a)(6)(D); see, e.g., DOJ FOIA Regulations, 28 C.F.R. § 16.5(b) (2008); see also *FOIA Update*, Vol. XVIII, No. 1, at 6 (discussing multitrack processing for agencies with decentralized FOIA operations); cf. *FOIA Post*, "2008 Guidelines for Agency Preparation of Annual FOIA Reports" (posted 5/22/2008) (reflecting reporting of multitrack-processing and data related to requests for expedited processing).

remedies.¹⁶⁹ A requester may immediately thereafter seek judicial review if he or she wishes to do so.¹⁷⁰ However, the Court of Appeals for the District of Columbia Circuit has interpreted this rule of constructive exhaustion to require the requester, once the agency responds to the FOIA request after the statutory time limit but before the requester has filed suit, to administratively appeal the denial before proceeding to court.¹⁷¹ (For a discussion of this aspect of FOIA litigation, see *Litigation Considerations, Exhaustion of Administrative Remedies*, below.)

An agency sued for not responding to a FOIA request may receive additional time to process that request if it shows that its failure to meet the statutory time limits is the result of "exceptional circumstances" and that it has exercised "due diligence" in processing the

¹⁶⁹ See 5 U.S.C. § 552(a)(6)(C); Wildlands CPR v. U.S. Forest Serv., 558 F. Supp. 2d 1096, 1102-03 (D. Mont. 2008) (finding constructive exhaustion where agency did not timely adjudicate administrative appeal); Thomas v. FAA, No. 05-2391, 2007 WL 2020096, at *3-4 (D.D.C. July 12, 2007) (stating that agency's failure to respond to FOIA request within twenty days constitutes constructive exhaustion of administrative remedies). But cf. Judicial Watch v. U.S. Naval Observatory, 160 F. Supp. 2d 111, 113 (D.D.C. 2001) (concluding that agency's "failure to timely respond to [a] request for expedited processing is not equivalent to constructive exhaustion of administrative remedies as to the request for documents").

¹⁷⁰ See, e.g., Spannaus v. DOJ, 824 F.2d 52, 58 (D.C. Cir. 1987); Wilson v. United States, No. 08-5022, 2009 WL 387086, at *4 (D.S.D. Feb. 11, 2009) (finding exhaustion where agency failed to meet twenty-day response deadline); Walsh v. VA, No. 03-C-0225, slip op. at 3-4 (E.D. Wis. Feb. 10, 2004) ("The failure of an agency to comply with the [FOIA's] statutory time limits . . . constitutes constructive exhaustion of administrative remedies, thereby permitting the requestor to seek relief in court.").

¹⁷¹ See Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 61-65 (D.C. Cir. 1990); accord Taylor v. Appleton, 30 F.3d 1365, 1369-70 (11th Cir. 1994) (stating that once party has waited for belated response from agency, actual exhaustion must occur before court has jurisdiction to review challenges); McDonnell v. United States, 4 F.3d 1227, 1240 (3d Cir. 1993) (upholding dismissal of claim as proper when plaintiff filed suit before filing appeal of denial received after exhaustion of statutory response period); see also Lowry v. SSA, No. 00-1616, 2001 U.S. Dist. LEXIS 23474, at *11-15 (D. Or. Aug. 29, 2001) (holding that requester had not constructively exhausted administrative remedies when he filed suit on day after agency mailed its denial letter, despite fact that he did not receive letter until several days thereafter); Bryce v. OPIC, No. A-96-595, slip op. at 12 (W.D. Tex. Sept. 28, 1998) (recognizing that although agency's failure to respond within statutory time limit constitutes constructive exhaustion, "if the agency responds with a determination prior to the requester filing suit, then the requirement to exhaust administrative review is revived"), appeal dismissed voluntarily, No. 99-50893 (5th Cir. Oct. 11, 1999); FOIA Update, Vol. XII, No. 2, at 3-4 ("OIP Guidance: Procedural Rules Under the D.C. Circuit's Oglesby Decision"). But see Mieras v. U.S. Forest Serv., No. 93-CV-74552, slip op. at 3 (E.D. Mich. Feb. 14, 1995) (declaring that plaintiff had not exhausted administrative remedies as he failed to file administrative appeal after agency response, even though he initiated lawsuit before agency response was made).

request.¹⁷² Among other things, the need to process an extremely large volume of requests may constitute "exceptional circumstances," and the commitment of large amounts of resources to process requests on a first-come, first-served basis may be considered "due diligence."¹⁷³ A "predictable agency workload" of FOIA requests does not, however, qualify as "exceptional circumstances" . . . unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.¹⁷⁴ Nevertheless, a FOIA requester's refusal "to reasonably modify the scope of a request or arrange for an alternative time frame for

¹⁷² See 5 U.S.C. § 552(a)(6)(C).

¹⁷³ See Open Am., 547 F.2d at 615-16; see also Gilmore v. NSA, No. 94-16165, 1995 WL 792079, at *1 (9th Cir. Dec. 11, 1995) (stating that even with a staff increase and "first-in/first-out" procedure, it was "unlikely that [agency] could process requests more quickly given that it must undertake a painstaking review of voluminous sensitive documents before disclosing requested information"); Elec. Frontier Found. v. DOJ, 563 F. Supp. 2d 188, 194-95 (D.D.C. 2008) (holding that increased workload coupled with depleted workforce constituted exceptional circumstances, and new software, new facility, backlog reduction, and progress in processing plaintiff's request demonstrated due diligence); CareToLive v. FDA, No. 08-005, 2008 WL 2201973, at *4-7 (S.D. Ohio May 22, 2008) (finding exceptional circumstances and due diligence given high volume of requests, litigation demands, congressional requests and other tasks, despite increase in staff size, as well as reduction in backlog and "first-in/first-out" system); Edmonds v. FBI, No. 02-1294, 2002 WL 32539613, at *2 (D.D.C. Dec. 3, 2002) (finding that 1,300 incoming requests per month, litigation, administrative appeals and diversion of staff to other projects, while reducing backlog and making progress with plaintiff's request constituted exceptional circumstances and due diligence). But see Bloomberg, L.P. v. FDA, 500 F. Supp. 2d 371, 374-76 (S.D.N.Y. 2007) (rejecting claim of exceptional circumstances since there was "constant stream of new FOIA requests" and finding that agency's "pattern of unresponsiveness [to plaintiff], delays, and indecision" suggested lack of due diligence despite showing of "first-in," "first-out" and multitrack processing); Matlack, Inc. v. EPA, 868 F. Supp. 627, 633 (D. Del. 1994) (deciding that agency's response that it has a "large docket of Freedom of Information Act appeals and [is] working as quickly as possible to resolve them," without more, is simply insufficient to demonstrate "exceptional circumstances").

¹⁷⁴ 5 U.S.C. § 552(a)(6)(C)(ii); see, e.g., Fiduccia v. DOJ, 185 F.3d 1035, 1042 (9th Cir. 1999) (finding no exceptional circumstances when only "a slight upward creep in the caseload" caused backlog that agency claimed resulted from employee cutbacks and rejection of its budget requests); Gov't Accountability Project v. HHS, 568 F. Supp. 2d 55, 60-64 (D.D.C. 2008) (finding no exceptional circumstances because neither volume nor complexity of requests increased "unexpectedly" and staff size increased over time, and finding that backlog reduction might merely be result of decrease in incoming requests); Donham v. DOE, 192 F. Supp. 2d 877, 882-83 (S.D. Ill. 2002) (emphasizing that high volume of requests and inadequate resources do not evidence "exceptional circumstances" unless such circumstances are "not predictable," and finding, moreover, that agency had not reduced its backlog); see also FOIA Post, "Department of Justice Issues New Annual FOIA Report Guidance" (posted 5/22/08) (emphasizing importance of meaningful backlog reduction and requirement to report backlogged requests and appeals and yearly comparison figures).

processing the request," may be used as evidence of "exceptional circumstances."¹⁷⁵ (For a discussion of the litigation aspects of the FOIA's "exceptional circumstances" provision, see Litigation Considerations, "Open America" Stays of Proceedings, below.)

Finally, an agency's failure to comply with the statutory time limits may preclude the agency's ability to assess fees.¹⁷⁶ The OPEN Government Act provides that "[a]n agency shall not assess search fees (or in the case of a requester described under clause (ii)(II) [i.e., a requester who is an educational or noncommercial scientific institution or a representative of the news media], duplication fees¹⁷⁷) . . . if the agency fails to comply with any time limit under paragraph (6) [of the FOIA], if no unusual or exceptional circumstances (as those terms are defined [under the FOIA]) apply to the processing of the request."¹⁷⁸ In other words, unless unusual or exceptional circumstances exist, as described above, an agency is prohibited from assessing search fees (or duplication fees if the requester is an educational or noncommercial scientific institution or a representative of the news media) if the agency fails to comply with the FOIA's time limits.¹⁷⁹ Conversely, for those requests for which unusual or exceptional circumstances do exist, agencies may assess appropriate fees.¹⁸⁰

Expedited Processing

Agency regulations must provide for the expedited processing of FOIA requests for requesters who demonstrate "compelling need," or for any other case deemed appropriate under agency regulations.¹⁸¹ Under the FOIA, a requester can show "compelling need" in one

¹⁷⁵ 5 U.S.C. § 552(a)(6)(C)(iii); see also H.R. Rep. No. 104-795, at 24-25 (1996) (elaborating on circumstances); see, e.g., Peltier v. FBI, No. 02-4328, slip op. at 8-10 (D. Minn. Aug. 15, 2003) (finding exceptional circumstances due in large part to requester's "45,000 page large queue request").

¹⁷⁶ See OPEN Government Act § 6 (to be codified at 5 U.S.C. § 552(a)(4)(A)(viii)); see also *FOIA Post*, "OIP Guidance: New Limitations on Assessing Fees" (posted 11/18/08).

¹⁷⁷ 5 U.S.C. § 552(a)(4)(A)(ii)(II) (providing that only duplication fees may be charged to requester who qualifies as educational or noncommercial scientific institution, or as representative of the news media).

¹⁷⁸ OPEN Government Act § 6 (to be codified at 5 U.S.C. § 552(a)(4)(A)(viii)).

¹⁷⁹ OPEN Government Act § 6 (to be codified at 5 U.S.C. § 552(a)(4)(A)(viii)); see also *FOIA Post*, "OIP Guidance: New Limitations on Assessing Fees" (posted 11/18/08).

¹⁸⁰ OPEN Government Act § 6 (to be codified at 5 U.S.C. § 552(a)(4)(A)(viii)); see also *FOIA Post*, "OIP Guidance: New Limitations on Assessing Fees" (posted 11/18/08).

¹⁸¹ 5 U.S.C. § 552(a)(6)(E) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also, e.g., Fiduccia v. DOJ, 185 F.3d 1035, 1041 (9th Cir. 1999) (rejecting argument that "requesters who sue agencies under the FOIA should have their requests handled before requesters who do not file lawsuits"); Judicial Watch, Inc. v. Rossotti, No. 01-2672, 2002 WL 31962775, at *2 n.8 (D. Md. Dec. 16, 2002) (denying plaintiff's request for expedited processing because its allegations "that it was the victim of ongoing criminal

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of two ways: (1) by establishing that his or her failure to obtain the records quickly "could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;"¹⁸² or, (2) if the requester is a "person primarily engaged in disseminating information,"¹⁸³ by demonstrating that an "urgency to inform the public concerning actual or alleged Federal Government activity" exists.¹⁸⁴ At their discretion, agencies may grant

¹⁸¹(...continued)

activity" and that "it would be unable to vindicate its rights without the requested documents . . . do[] not meet the statutory definition of 'compelling need'", aff'd sub nom. Judicial Watch, Inc. v. United States, 84 F. App'x 335 (4th Cir. 2004).

¹⁸² 5 U.S.C. § 552(a)(6)(E)(v)(I).

¹⁸³ Id. § 552(a)(6)(E)(v)(II); see also, e.g., Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (concluding that "plaintiff is primarily engaged in disseminating information . . . regarding civil rights"), appeal dismissed, No. 06-5055 (D.C. Cir. Apr. 28, 2006); Tripp v. DOD, 193 F. Supp. 2d 229, 241 (D.D.C. 2002) ("To be sure, plaintiff has been the object of media attention and has at times provided information to the media, but there is no evidence . . . that she is 'primarily' engaged in such efforts.").

¹⁸⁴ 5 U.S.C. § 552(a)(6)(E)(v)(II); see, e.g., DOJ FOIA Regulations, 28 C.F.R. § 16.5(d)(ii) (2008); see also Al-Fayed v. CIA, 254 F.3d 300, 310 (D.C. Cir. 2001) (holding that to determine if "urgency to inform" exists, a court must consider whether request concerns "matter of current exigency to the American public," whether consequences of delaying response would "compromise a significant recognized interest," whether request concerns "federal government activity," and "credibility of [the] requester"); Bloomberg, L.P. v. FDA, 500 F. Supp. 2d 371, 377-78 (S.D.N.Y. 2008) (stating that information may "concern" government activity even if agency records did not originate within agency, and that urgency of public's need is not lessened by public's alleged inability to understand certain raw data contained in records); Long v. DHS, 436 F. Supp. 2d 38, 43 (D.D.C. 2006) (finding that requester failed to link need for records to "imminent action" that would affect usefulness of records); ACLU v. DOD, No. 06-1698, 2006 WL 1469418, at *7-8 (N.D. Cal. May 25, 2006) (finding that requesters established "public's need to know" as well as "urgency of the news" related to Pentagon intelligence program, and stating that "extensive media interest usually is a fact supporting not negating urgency"); IEEE Spectrum v. DOJ, No. 05-0865, slip op. at 2 (D.D.C. Feb. 16, 2006) (finding that requester failed to establish "current exigency" when it merely demonstrated its own desire to publish the requested information, "a self-serving assertion that carries very little weight"); Leadership Conference on Civil Rights, 404 F. Supp. 2d at 260 (finding that "[p]laintiff's FOIA requests could have a vital impact on development of the substantive record" related to issue of re-authorization of provisions of Voting Rights Act); Elec. Privacy Info. Ctr. v. DOD, 355 F. Supp. 2d 98, 101 (D.D.C. 2004) (finding that, by demonstrating public interest in only general topic rather than specific subject of its requests, requester failed to demonstrate "urgency to inform"); Tripp, 193 F. Supp. 2d at 241 (holding that plaintiff's "job application to the Marshall Center and the resulting alleged Privacy Act violations by DOD are not the subject of any breaking news story"); FOIA Update, Vol. XIX, No. 4, at 2 (discussing Nazi War Crimes Disclosure Act, 5 U.S.C. § 552 note (2006), which does not directly amend the FOIA, but which does "impact[] directly on the FOIA [in that it provides] that any person who was persecuted by the Nazi government of Germany or its allies 'shall be deemed to have a compelling need'

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expedited treatment under additional circumstances as well.¹⁸⁵

In this regard, agencies should keep in mind the distinction between the general public interest that can exist in the overall subject matter of a FOIA request (e.g., some matter of significant, perhaps even controversial, agency activity) and the public interest that might or might not be served by disclosure of the actual records sought or responsive to that particular FOIA request.¹⁸⁶ For example, the District Court for the District of Columbia, in Electronic Privacy Information Center v. DOD,¹⁸⁷ employed such an analysis when deciding whether a public interest organization was entitled to expedited processing, on a "media urgency" basis, of its FOIA request for records relating to the general subject of "data mining."¹⁸⁸ The court upheld the agency's denial of expedited processing and found that the requester had "failed to present the agency with evidence that there is a 'substantial interest' in the 'particular aspect' of [its] FOIA request."¹⁸⁹ In other words, the court said, "[t]he fact that [the requester] has provided evidence that there is some media interest in data mining as an umbrella issue does not satisfy the requirement that [it] demonstrate interest in the specific subject of [its] FOIA request."¹⁹⁰

¹⁸⁴(...continued)

under 'section 552(a)(6)(E) of title 5, United States Code'" in making requests for access to classified Nazi war-criminal records (quoting 5 U.S.C. § 552 note, § 4)).

¹⁸⁵ See 5 U.S.C. § 552(a)(6)(E)(i)(II); see also, e.g., DOJ FOIA Regulations, 28 C.F.R. § 16.5(d)(1)(iii), (iv) (providing that requests will be granted expedited processing if they involve "[t]he loss of substantial due process rights" or "a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence"); Dep't of State Regulation, 22 C.F.R. § 171.12(b)(1) (2008) (providing for expedited processing if "[f]ailure to obtain requested information on an expedited basis could reasonably be expected to . . . harm substantial humanitarian interests").

¹⁸⁶ See *FOIA Post*, "FOIA Counselor Q&A" (posted 1/24/06).

¹⁸⁷ 355 F. Supp. 2d 98 (D.D.C. 2004).

¹⁸⁸ *Id.* at 102.

¹⁸⁹ *Id.*; see also ACLU of N. Cal. v. DOJ, No. 04-4447, 2005 WL 588354, at *13 (N.D. Cal. Mar. 11, 2005) (likewise ruling in "expedited processing" context that "it was not sufficient for the plaintiffs to show [public] interest in only the general subject area of the request").

¹⁹⁰ 355 F. Supp. 2d at 102 (emphasis added); see also *FOIA Post*, "FOIA Counselor Q&A" (posted 1/24/06) (advising on "the meaning of an 'umbrella issue' under the FOIA," and noting that "[t]he term 'umbrella issue' is . . . one that has been used by agencies and courts alike to make important distinctions when considering public interest issues" in FOIA decisionmaking).

Agencies must determine whether to grant a request for expedited access within ten calendar days of its receipt.¹⁹¹ This is an important obligation that agencies must heed because failure to timely inform requesters as to expedited processing determinations can result in judicial review without prior administrative appeal activity.¹⁹²

An agency that grants expedited processing for a request must process it "as soon as practicable."¹⁹³ Although there is no set period of time designated to process expedited requests,¹⁹⁴ some courts have held that an agency's failure to process such a request within the twenty-day non-expedited time limit raises a rebuttable presumption that the agency has failed to process the request "as soon as practicable."¹⁹⁵

Searching for Responsive Records

As a general rule, an agency must undertake a search that is "reasonably calculated to uncover all relevant documents."¹⁹⁶ The adequacy of an agency's search is judged by a test

¹⁹¹ 5 U.S.C. § 552(a)(6)(E)(ii)(I); see, e.g., DOJ FOIA Regulations, 28 C.F.R. § 16.5(d)(4).

¹⁹² 5 U.S.C. § 552(a)(6)(E)(iii); see ACLU v. DOJ, 321 F. Supp. 2d 24, 29 (D.D.C. 2004) (stating that requester's failure to appeal an agency's decision denying expedited processing "does not preclude judicial review of the decision").

¹⁹³ 5 U.S.C. § 552(a)(6)(E)(iii).

¹⁹⁴ See Elec. Privacy Info. Ctr. v. DOJ, 416 F. Supp. 2d 30, 39 (D.D.C. 2006) ("The legislative history of the amendments makes clear that, although Congress opted not to impose a specific deadline on agencies processing expedited requests, its intent was to 'give the request priority for processing more quickly than otherwise would occur.'" (quoting S. Rep. No. 104-272, at 17 (1996))); Gerstein v. CIA, No. 06-4643, 2006 WL 3462658, at *8 (N.D. Cal. Nov. 29, 2006) (noting that "FOIA does not set forth a specific deadline by which expedited processing . . . must be concluded," but rather provides that requests granted expedited processing shall be processed "as soon as practicable"); ACLU v. DOD, 339 F. Supp. 2d 501, 503-04 (S.D.N.Y. 2004) ("While it would appear that expedited processing would necessarily require compliance in fewer than 20 days, Congress provided that the executive was to 'process as soon as practicable' any expedited request." (citing § 552(a)(6)(E)(iii)).

¹⁹⁵ See, e.g., Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence, 542 F. Supp. 2d 1181, 1186 (N.D. Cal. 2008) (finding that agency processing expedited request "presumptively" failed to meet its expedited processing obligations when it failed to meet the standard twenty-day deadline (citing Elec. Privacy Info. Ctr. v. DOJ, 416 F. Supp. 2d at 37-39)); Elec. Privacy Info. Ctr. v. DOJ, 416 F. Supp. 2d at 37-39 (discussing presumption and stating that agencies can rebut it by presenting "credible evidence" that twenty-day time limit is "truly not practicable").

¹⁹⁶ Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983); see, e.g., Radcliffe v. IRS, No. 08-1513, 2009 WL 1459449, at *1-2 (2d Cir. May 27, 2009) (concluding that "the search and the declarations were adequate, if barely so" after initial concern that declarations failed to fully explain why search was reasonably calculated to uncover all documents within scope of

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of "reasonableness," which will vary from case to case.¹⁹⁷ Although not always dispositive, courts have found searches to be reasonable when, among other things, they are based on a reasonable interpretation of the scope of the request and the records sought,¹⁹⁸ and have

¹⁹⁶(...continued)

request); Anderson v. DOJ, No. 07-2284, 2009 WL 1209472, at *1 (2d Cir. May 4, 2009) (finding search reasonable and adequate where agency conducted two searches, both failing to identify responsive records, and described in detail how it conducted searches and operation of database used to do so); Miccosukee Tribe of Indians of Fla. v. United States, 516 F.3d 1235, 1247-48 (11th Cir. 2008) (reiterating that agency is obligated to show search was reasonably calculated to uncover all relevant documents, but rejecting assertion that this requires agency to provide testimony from each person involved in search, and declining to establish "what inference [as to search adequacy], if any, can be . . . drawn from the late production . . . of FOIA documents"); Lee v. U.S. Attorney, 289 F. App'x 377, 380-81 (11th Cir. 2008) (concluding that agency's search was reasonably calculated to uncover requested records and explaining that "FOIA does not require an agency to exhaust all files which conceivably could contain relevant information" (emphasis added) (quoting Ray v. DOJ, 908 F.2d 1549, 1558-59 (11th Cir. 1990), rev'd on other grounds, 502 U.S. 164 (1991))); Jennings v. DOJ, 230 F. App'x 1, 1 (D.C. Cir. 2007) (holding that agency performed adequate search and recognizing that "the adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search" (quoting Iturralde v. Comptroller of Currency, 315 F.3d 311, 315 (D.C. Cir. 2003))); Williams v. DOJ, 177 F. App'x 231, 233 (3d Cir. 2006) (recognizing that an agency "has a duty to conduct a reasonable search for responsive records" (citing Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990))); Johnston v. DOJ, No. 97-2173, 1998 WL 518529, at *1 (8th Cir. Aug. 10, 1998) (concluding that agency demonstrated that it conducted search reasonably calculated to uncover all responsive documents); Campbell v. DOJ, 164 F.3d 20, 27 (D.C. Cir. 1998) (noting that an agency must search "using methods which can be reasonably expected to produce the information requested" (quoting Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990))); Miller v. U.S. Dep't of State, 779 F.2d 1378, 1383 (8th Cir. 1985) (recognizing that search must be "reasonably calculated to uncover all relevant documents" (quoting Weisberg, 705 F.2d at 1351)); Allen v. U.S. Secret Serv., 335 F. Supp. 2d 95, 99 (D.D.C. 2004) (concluding that agency's search of its "comprehensive [Master Central Index] system is a search method that could be 'reasonably expected to produce the information requested'" (citing Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990))); cf. Comer v. IRS, No. 97-76329, 2000 WL 1566279, at *2 (E.D. Mich. Aug. 17, 2000) ("[T]he government is not required to expend the same efforts under FOIA that it would in response to a litigation-specific document request.").

¹⁹⁷ See Zemansky v. EPA, 767 F.2d 569, 571-73 (9th Cir. 1985) (observing that the reasonableness of an agency search depends upon the facts of each case (citing Weisberg, 705 F.2d at 1351)).

¹⁹⁸ See, e.g., Larson v. Dep't of State, 565 F.3d 857, 869 (D.C. Cir. 2009) (affirming district court's grant of summary judgment where scope of requester's 2002 request "suggested" that requester sought similar records as those requested in 1995, not records pertaining to agency's decisions on the 1995 request); Rein v. U. S. Patent & Trademark Office, 553 F.3d 353, 363 (4th Cir. 2009) (ruling that agency's "decision to use the searches conducted in response to [prior, similar] requests as the starting point for responding to [current] requests was not

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¹⁹⁸(...continued)

inherently unreasonable and appears to be a practical and common-sense approach[] [since] [t]he requests sought similar information related to the same subject matter"); Ledesma v. U.S. Marshals Serv., No. 05-5150, 2006 U.S. App. LEXIS 11218, at *2 (D.C. Cir. Apr. 19, 2006) (finding that search was adequate where requester did not "specifically mention" cellblock video and agency did not conduct search for video); Hayden v. DOJ, No. 03-5078, 2003 WL 22305071, at *1 (D.C. Cir. Oct. 6, 2003) (per curiam) (rejecting plaintiff's argument that agency should have searched for records about him in case file of another individual who was mentioned during his criminal trial, because "[b]ased on [plaintiff's] FOIA requests, the [agency] reasonably limited the scope of its search to [his own] criminal case file"); Citizens Against UFO Secrecy v. DOD, 21 F. App'x 774, 776 (9th Cir. 2001) (rejecting plaintiff's contention that search using additional terms not found within request was inadequate because agency's use of "extra terms [made] it more likely that responsive documents [would] be located"); Coal. on Political Assassinations v. DOD, 12 F. App'x 13, 13-14 (D.C. Cir. 2001) (finding that agency conducted reasonable search pursuant to "limited request" and "specific code words" later provided by requester); Halpern v. FBI, 181 F.3d 279, 289 (2d Cir. 1999) (holding cross-referenced files to be beyond scope of request because once agency "had requested clarification [about requester's interest in receiving such records], it could then in good faith ignore the cross-referenced files until it received an affirmative response" from requester); Voinche v. FBI, No. 96-5304, 1997 WL 411685, at *1 (D.C. Cir. June 19, 1997) (ruling that agency was not obliged to "search for records beyond the scope of the request"); Kowalczyk v. DOJ, 73 F.3d 386, 389 (D.C. Cir. 1996) (finding search limited to headquarters' files reasonable because plaintiff sent request there and description of records sought did not alert agency that he sought records from field office); Maynard v. CIA, 986 F.2d 547, 560 (1st Cir. 1993) (finding that agency's search was properly limited to scope of FOIA request, with no requirement that secondary references or variant spellings be checked); Meeropol v. Meese, 790 F.2d 942, 956 (D.C. Cir. 1986) ("[A] search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request."); Marks v. DOJ, 578 F.2d 261, 263 (9th Cir. 1978) (ruling that FBI not required to search all field offices pursuant to request for all records "under [my] name" because such "broad, sweeping requests" do not "reasonably describe" records sought); Harrison v. BOP, No. 07-1543, 2009 WL 1163909, at *6 (D.D.C. May 1, 2009) (declaring "frivolous" plaintiff's argument that search was inadequate where agency did not identify names of those who conducted FOIA search, explaining "[plaintiff] is not entitled to [this] personal identifying information"); Amnesty Int'l v. CIA, No. 07-5435, 2008 WL 2519908, at *13 (S.D.N.Y. June 19, 2008) (rejecting claim that search was too narrow, stating that where agency had no doubt about what request sought, agency not obligated to "search anew based upon a subsequent clarification," as to do so would allow requester additional requests with same priority as original (quoting Kowalczyk, 73 F.3d at 388); Kidder v. FBI, 517 F. Supp. 2d 17, 23-24 (D.D.C. 2007) (holding that "based on plaintiff's clear request [that did not reference aliases], agency is under no obligation to search . . . any names other than [name stated in request]"); Gilchrist v. DOJ, No. 05-1540, 2006 U.S. Dist. LEXIS 78706, at *10 (D.D.C. Oct. 30, 2006) (stating that it is "not unreasonable" for agency to limit search to record specifically requested where requester sought only one record); Hamilton Sec. Group v. HUD, 106 F. Supp. 2d 23, 27 (D.D.C. 2000) ("Given the exchange of correspondence between counsel and the agency relating to the scope of the request, there is no basis for plaintiff's claim that defendant should have understood that the request for a [single, specific record] was meant to include additional [records]."), aff'd per curiam, No. 00-

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disfavored searches that are based on unreasonable interpretations of the scope of the request, or which exclude files where records might have been located.¹⁹⁹ Thus the

¹⁹⁸(...continued)

5331, 2001 WL 238162 (D.C. Cir. Feb. 23, 2001); Murphy v. IRS, 79 F. Supp. 2d 1180, 1185-86 (D. Haw. 1999) (holding that agency "conducted a reasonable search in light of the fact that Plaintiff gave no indication as to what types of files could possibly contain documents responsive to this request or where they might be located"); Greenberg v. Dep't of Treasury, 10 F. Supp. 2d 3, 13 (D.D.C. 1998) (excusing agency's inability to locate materials "as written" in request because agency records systems "are not indexed in a manner such that responsive records could have been located"); Rothschild v. DOE, 6 F. Supp. 2d 38, 39 (D.D.C. 1998) (declaring that agency is not required to search for records that "do not mention or specifically discuss" subject of request).

¹⁹⁹ See, e.g., Miccosukee, 516 F.3d at 1252-55 (stating that agency's "self-imposed limitations on its search were unreasonable and inaccurately depicted what the Tribe really sought" where agency excluded from its search all publicly available documents when Tribe merely desired no voluminous publicly available records it already had); Negley v. FBI, 169 F. App'x 591, 595 (D.C. Cir. 2006) (reversing and remanding because agency did not "clarify whether . . . [pertinent] file references are synonymous, and more important, whether it actually searched" particular file requested); Truitt v. Dep't of State, 897 F.2d 540, 544-46 (D.C. Cir. 1990) (stating that when request was "reasonably clear as to the materials desired," agency failed to conduct adequate search as it did not include file likely to contain responsive records); Info. Network for Responsible Mining v. Bureau of Land Mgmt., No. 06-02269, 2009 WL 1162551, at *4-5 (D. Colo. Apr. 28, 2009) (concluding that agency's search was not reasonable where agency searched project file of one employee despite fact that request identified twenty-four employees in four offices likely to have responsive records, and agency located only six responsive documents in project file); Banks v. DOJ, 538 F. Supp. 2d 228, 238 (D.D.C. Mar. 16, 2008) (finding that agency failed to demonstrate an adequate search when affidavits lacked search specificity and merely stated that "responsible person(s)" conducted "thorough and sufficient" searches); Wheeler v. EOUSA, No. 05-1133, 2008 WL 178451, at *8-9 (D.D.C. Jan. 17, 2008) (finding search unreasonable since agency did not search requester's co-defendant's files where request was for records related to criminal case, not just requester, and where requester also notified agency of this search deficiency); Jefferson v. BOP, No. 05-00848, 2006 WL 3208666, at *6 (D.D.C. Nov. 7, 2006) (finding search not reasonable when agency searched only its Central Records System database, where breadth of request warranted search of "I" drive database); Jackson v. U.S. Attorney's Office, Dist. of N.J., 362 F. Supp. 2d 39, 42 (D.D.C. 2005) (concluding that agency's search was inadequate where, inter alia, it sought records pertaining to requester instead of records pertaining to investigation that requester wanted initiated); Kennedy v. DOJ, No. 03-CV-6077, 2004 WL 2284691, at *4 (W.D.N.Y. Oct. 8, 2004) (finding search inadequate where agency did not search field office when request specifically mentioned that field office); Wilderness Soc'y v. U.S. Bureau of Land Mgmt., No. 01-2210, 2003 WL 255971, at *5 (D.D.C. Jan. 15, 2003) (concluding that agency's search was inadequate because "responsive documents [possibly maintained] in the locations searched may not have been produced as a result of the [agency's] narrow interpretation of plaintiffs' request"); Davidson v. EPA, 121 F. Supp. 2d 38, 39 (D.D.C. 2000) ("Because plaintiff is searching for a specific [record], defendant must, at minimum, explain its procedure for issuing and retaining [such records] and by what reasonable methods it used to locate the one

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reasonableness of an agency's search can depend on whether the agency properly determined where responsive records were likely to be found, and searched those locations,²⁰⁰ or whether

¹⁹⁹(...continued)

requested by plaintiff."); Summers v. DOJ, 934 F. Supp. 458, 461 (D.D.C. 1996) (notwithstanding fact that plaintiff's request specifically sought access to former FBI Director J. Edgar Hoover's "commitment calendars," finding agency's search inadequate because agency did not use additional search terms such as "appointment" or "diary"); Canning v. DOJ, 919 F. Supp. 451, 460-61 (D.D.C. 1994) (indicating that when agency was aware that subject of request used two names, it should have conducted search under both names); cf. Morley v. CIA, 508 F.3d 1108, 1116-19 (D.C. Cir. 2007) (concluding that because request met criteria of exception to rule that CIA "[o]perational files are exempt from FOIA disclosure," agency would be required to search such files upon remand).

²⁰⁰ See, e.g., Jones-Edwards v. NSA, 196 F. App'x 36, 38 (2d Cir. 2006) (stating that an "agency is not obliged to conduct a search of records outside its possession or control"); Lechliter v. Rumsfeld, 182 F. App'x 113, 115 (3d Cir. 2006) (stating that an agency "has a duty to conduct a reasonable search for responsive records," and concluding that agency fulfilled that duty when it searched two offices that it "determined to be the only ones likely to possess responsive documents" (citing Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990))); Gilliland v. BOP, No. 03-5251, 2004 WL 885222, at *1 (D.C. Cir. Apr. 23, 2004) (rejecting requester's claim that agency "should have contacted the federal officials connected with [the] allegedly missing documents," because his FOIA requests "did not specify these officials or otherwise indicate that they might have responsive records"); Rugiero v. DOJ, 257 F.3d 534, 547-48 (6th Cir. 2001) (rejecting plaintiff's contention that "agent [who] testified against him at trial" must have records about him because agency established that employee who testified had no such records); Antonelli v. U.S. Parole Comm'n, No. 07-1932, 2009 WL 1497186, at *4 (D.D.C. May 29, 2009) (rejecting plaintiff's challenge to agency's search based on claim that additional records exist in files of other DOJ components, because "an agency component is obligated to produce only those records in its custody and control at the time of the FOIA request"); James Madison Project v. CIA, 605 F. Supp. 2d 99, 108 (D.D.C. 2009) (concluding that "search method could reasonably be expected to produce the information requested" because all agency regulations requested were maintained in one records system and agency searched that system for responsive records); Brehm v. DOD, 593 F. Supp. 2d 49, 50 (D.D.C. 2009) (finding search was adequate where agency searched two systems likely to have responsive records and where agency also declared other systems were unlikely to have responsive records); Callaway v. Dep't of Treasury, 577 F. Supp. 2d 1, 1-3 (D.D.C. 2008) (concluding, pursuant to agency's renewed motion for summary judgment, that search for proffer statement was not inadequate since not limited to documents titled "proffer statement," as previously believed, but rather included examination of document content); Bonaparte v. DOJ, No. 07-0749, 2008 WL 2569379, at *1 (D.D.C. June 27, 2008) (finding search adequate when it revealed that records had been transferred to component of NARA, and stating that requester could request records from NARA); Jackson v. U.S. Dep't of Labor, No. 06-02157, 2008 WL 539925, at *5 n.2 (E.D. Cal. Feb. 25, 2008) (magistrate's recommendation) (finding that agency "is not required to pursue any records that may exist and be in possession of a retired employee"), adopted, No. 06-2157, 2008 WL 4463897 (E.D. Cal. Oct. 2, 2008); Dockery v. Gonzales, 524 F. Supp. 2d 49, 53-54 (D.D.C. 2007) (holding that U.S. Attorney's Office was not obligated to search court files, but rather only those records in its custody and control at time of request);

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the agency improperly limited its search to certain record systems or otherwise failed to

²⁰⁰(...continued)

Pena v. Customs & Border Patrol, No. 06-2482, 2007 WL 1434871, at *2 (E.D.N.Y. May 14, 2007) (stating that "[i]ndeed, the [agency] is not required to procure documents not already in its possession" where it had no records and had referred request to other agency); Anderson v. DOJ, 518 F. Supp. 2d 1, 10 (D.D.C. 2007) (stating that an agency is not required to "retain or retrieve documents which previously had been in its possession"); Knight v. NASA, No. 04-2054, 2006 WL 3780901, at *5 (E.D. Cal. Dec. 21, 2006) (stating that "there is no requirement that an agency search all possible sources in response to a FOIA request when it believes all responsive documents are likely to be located in one place"); Askew v. United States, No. 05-00200, 2006 WL 3307469, at *10 (E.D. Ky. Nov. 13, 2006) (rejecting plaintiff's contention that FOIA requires an agency to search another agency's files); Pac. Fisheries, Inc. v. IRS, No. 04-2436, 2006 WL 1635706, at *2-3 (W.D. Wash. June 1, 2006) (finding that agency's search was adequate when agency sent search queries to people "likely to have responsive documents," but did not ask people if they knew of others who might have responsive documents), aff'd in part, rev'd in part & remanded on other grounds, 539 F.3d 1143 (9th Cir. 2008); Williams v. U.S. Attorney's Office, No. 03-674, 2006 WL 717474, at *5 (N.D. Okla. Mar. 16, 2006) (stating that search obligations under FOIA require agency to search "its own records," not "records of third parties"); Sakamoto v. EPA, 443 F. Supp. 2d 1182, 1198 (N.D. Cal. 2006) (finding agency's search within one region to be adequate when agency "reasonably concluded" that responsive documents would "most likely" be there); Antonelli v. ATF, No. 04-1180, 2006 WL 367893, at *7 (D.D.C. Feb. 16, 2006) (concluding that FBI's search of Central Records System was reasonable and that FBI was not obliged under FOIA to search its computer hard drives for preliminary work product when requester did not specifically request search of FBI's "I" drives); Blanton v. DOJ, 182 F. Supp. 2d 81, 85 (D.D.C. 2002) ("[T]he FOIA does not impose an obligation on defendant to contact former employees to determine whether they know of the whereabouts of records that might be responsive to a FOIA request."), aff'd on other grounds, 64 F. App'x 787 (D.C. Cir. 2003); Blanton v. DOJ, 63 F. Supp. 2d 35, 41 (D.D.C. 1999) (noting that even though agency did not search individual informant files for references to requester, any responsive information in such files would have been identified by agency's "cross-reference" search using requester's name); Hall v. DOJ, 63 F. Supp. 2d 14, 17-18 (D.D.C. 1999) (finding that agency need not search for records concerning subject's husband even though such records may have also included references to subject); Vigneau v. O'Brien, No. 99-37ML, slip op. at 5 (D.R.I. Aug. 3, 1999) (magistrate's recommendation) (finding search adequate when agency employee who plaintiff alleged wrote requested records provided affidavit stating that no such records ever existed); Iacoe v. IRS, No. 98-C-0466, 1999 WL 675322, at *4 (E.D. Wis. July 23, 1999) (recognizing that agency "diligently searched for the records requested in those places where [agency] expected they could be located"); Nation Magazine v. U.S. Customs Serv., No. 94-00808, slip op. at 8, 13-14 (D.D.C. Feb. 14, 1997) (stating that reasonable search did not require agency to search individual's personnel file in effort to locate substantive document drafted by him); cf. Chilingirian v. U.S. Attorney Executive Office, 71 F. App'x 571, 572 (6th Cir. 2003) ("The record shows that defendants went beyond the requirements of a reasonable search by contacting the attorneys who might know of the existence of the [requested] records, even though they were no longer employed by defendants."); Atkin v. IRS, No. 04-0080, 2005 WL 1155127, at *3 (N.D. Ohio Mar. 30, 2005) (stating that "additional efforts to contact a former employee are irrelevant under the appropriate standard of reasonable effort" (citing Chilingirian, 71 F. App'x at 571, 572)).

explain how and why the particular search at issue was conducted.²⁰¹ Although an

²⁰¹ See, e.g., Morley, 508 F.3d at 1119-20 (holding that because agency "retained copies of the records transferred to NARA and concedes that some transferred records are likely to be responsive, it was obligated to search those records in response to [request]"); Jefferson v. DOJ, 168 F. App'x 448, 450 (D.C. Cir. 2005) (reversing district court's finding of reasonable search when agency "offered no plausible justification" for searching only its investigative database and agency "essentially acknowledged" that responsive files might exist in separate database); Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 328 (D.C. Cir. 1999) (finding that because requester provided agency with name of agency employee who possessed requested records during requester's criminal trial, "[w]hen all other sources fail to provide leads to the missing records, agency personnel should be contacted if there is a close nexus, as here, between the person and the particular record"); Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990) (holding that agency may not limit search to one record system if others are likely to contain responsive records); Islamic Shura Council of S. Cal. v. FBI, No. 07-01088, slip op. at 6-7 (C.D. Cal. Apr. 20, 2009) (ordering search of electronic surveillance indices and cross-reference search where agency had initially searched only Central Records System); Schoenman v. FBI, No. 04-2202, 2009 WL 763065, at *15-16 (D.D.C. Mar. 19, 2009) (finding that agency declaration failed to demonstrate adequate search where, although it provided description of agency's general procedure for processing requests and even indicated search terms used and number of responsive documents located, it failed to describe the methodology used by the individual agency directorates in conducting their searches); Citizens for Responsibility & Ethics in Washington v. DHS, 592 F. Supp. 2d 111, 117-19 (D.D.C. 2009) (granting summary judgment to requester and ordering agency to search for class of records not "currently retained" by agency but still under agency control (citing "control" finding from Citizens for Responsibility & Ethics in Washington v. DHS, 527 F. Supp. 2d 76, 98 (D.D.C. 2007))); Afshari v. HHS, No. 05-0826, 2006 WL 1193525, at *1 (D.D.C. May 2, 2006) (finding that agency affidavits failed to demonstrate adequate search where they contained no indication of contacting appropriate agency personnel in effort to find missing records); Friends of Blackwater v. U.S. Dep't of the Interior, 391 F. Supp. 2d 115, 121 (D.D.C. 2005) (finding that agency's search was inadequate where its declaration did not describe specific search terms used, where agency had evidence that documents existed that originated in leadership office, and where agency did not forward request to leadership office in accordance with agency's regulations requiring such forwarding); Wilderness Soc'y v. U.S. Dep't of the Interior, 344 F. Supp. 2d 1, 21 (D.D.C. 2004) (concluding that agency's search was inadequate when agency failed to search Office of Solicitor in response to request for lawsuit and settlement records); Hardy v. DOD, No. 99-523, 2001 WL 34354945, at *5 (D. Ariz. Aug. 27, 2001) (requiring agency "to locate the presumably few witnesses who were responsible for operating the closed circuit television system, the robots, and any other video sources" that might have created requested tapes); Comer v. IRS, No. 97-76329, 1999 WL 1022210, at *1 (E.D. Mich. Sept. 30, 1999) (rejecting agency's assertion that it conducted a reasonable search when plaintiff "listed a small number of specific persons who might have knowledge of [requested documents] and specific places where they might be found" and agency did not indicate that it searched there); Bennett v. DEA, 55 F. Supp. 2d 36, 39-40 (D.D.C. 1999) (holding search inadequate when agency failed to search investigatory files for cases in which subject of request acted as informant, even though agency did not track informant activity by case name, number, or judicial district), appeal dismissed voluntarily, No. 99-5300 (D.C. Cir. Dec. 23, 1999); cf. Davis v. DOJ, 460 F.3d 92, 105 (D.C. Cir. 2006) (remanding case "to provide the

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agency generally "is not obligated to look beyond the four corners of the request for leads to the location of responsive documents,"²⁰² a search may be held unreasonable if the agency fails to locate records that it has reason to know might well exist.²⁰³ Courts generally find,

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agency an opportunity to evaluate [search] alternatives" including nonagency internet search tools); Pena v. BOP, No. 06-2480, 2007 WL 1434869, at *3 (E.D.N.Y. May 14, 2007) (finding, in case involving search that was initially done pursuant to subpoena during which NARA sent transferred records back to BOP and which BOP could not subsequently locate, that search will be deemed adequate "only if the BOP is unable to procure additional copies . . . [and that] if BOP can obtain [them] by making a request to the National Archives . . . it is obligated to do so"); People for the Am. Way Found. v. DOJ, 451 F. Supp. 2d 6, 15 (D.D.C. 2006) (ordering an agency to search a nonagency database because that database is "simply a tool to aid in identifying responsive records from [agency's] database of case files"); Peltier v. FBI, No. 02-4328, 2005 WL 1009595, at *2 (D. Minn. Apr. 26, 2005) (finding it "inexcusable" that agency withheld trial transcripts without first placing "a quick phone call to the Clerk's office" to determine whether documents were publicly available); Doolittle v. DOJ, 142 F. Supp. 2d 281, 285 (N.D.N.Y. 2001) (concluding that as long as description of records sought is otherwise reasonable, agency cannot refuse to search for records simply because requester did not also identify them by date on which they were created).

²⁰² Kowalczyk, 73 F.3d at 389 (stating that "agency is not required to speculate about potential leads"); see, e.g., Rein, 553 F.3d at 363-65 (rejecting argument that searches were inadequate merely because "responsive documents refer to other documents that were not produced" and agency did not pursue "leads" appearing in uncovered documents, explaining that search need only be "reasonably calculated to uncover all relevant documents" based upon request); Williams v. Ashcroft, 30 F. App'x 5, 6 (D.C. Cir. 2002) (deciding that agency need not look for records not sought in initial FOIA request); Sheridan v. Dep't of the Navy, 9 F. App'x 55, 56 (2d Cir. 2001) (finding that agency was "not obliged to look beyond the four corners of the request for leads to the location of responsive documents" (quoting Kowalczyk)).

²⁰³ See, e.g., Juda v. U.S. Customs Serv., No. 99-5333, 2000 WL 1093326, at *1 (D.C. Cir. June 19, 2000) (per curiam) (concluding that agency improperly limited its search where it not only "fail[ed] to pursue clear leads to other existing records, but . . . [also] identified at least one other record system . . . likely to produce the information [plaintiff] requests"); Campbell, 164 F.3d at 27 (concluding that search limited to agency's central records system was unreasonable because during search agency "discovered information suggesting the existence of documents that it could not locate without expanding the scope of its search"); El Badrawi v. DHS, 583 F. Supp. 2d 285, 302-03 (D. Conn. 2008) (finding search inadequate where agency did not search U.S. embassy in Beirut, but was aware that embassy likely had records, and where agency's other searches located records originating in embassy that suggested existence of additional embassy records); NYC Apparel FZE v. U.S. Customs & Border Prot., 04-2105, 2006 WL 167833, at *7 (D.D.C. Jan. 23, 2006) (concluding that agency must conduct a new search or "submit a supplemental declaration describing in substantially greater detail the procedure by which the FOIA processor" responded to request); Natural Res. Def. Council, Inc. v. DOD, 388 F. Supp. 2d 1086, 1100-03 (C.D. Cal. 2005) (ordering new search where agency searched only one office and did not forward request to another office that agency knew to be lead office in subject area); Trentadue v. FBI, No. 04-772, slip op. at 5-6 (D. Utah May 5, 2005)

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however, that an agency's inability to locate every single responsive record does not undermine an otherwise reasonable search.²⁰⁴ Additionally, courts have held that the FOIA

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(ordering additional search in part because agency conducted computer search only, even though agency previously limited ability of field offices to upload documents into computer database); Wolf v. CIA, 357 F. Supp. 2d 112, 119 (D.D.C. 2004) (ordering agency to conduct additional search of broader scope because agency failed to do so even though first search indicated that responsive records could be in another file), aff'd in part, rev'd in part & remanded on other grounds, 473 F.3d 370 (D.C. Cir. 2007); Ctr. for Nat'l Sec. Studies v. DOJ, 215 F. Supp. 2d 94, 110 (D.D.C. 2002) (holding that discovery of a document that "clearly indicates the existence of [other] relevant documents" creates an "obligation" for agency to conduct a further search for those additional documents), aff'd in part, rev'd in part & remanded on other grounds, 331 F.3d 918 (D.C. Cir. 2003); Tarullo v. DOD, 170 F. Supp. 2d 271, 275 (D. Conn. 2001) (declaring agency's search inadequate because "[w]hile hypothetical assertions as to the existence of unproduced responsive documents are insufficient to create a dispute of material fact as to the reasonableness of the search, plaintiff here has [himself provided copy of agency record] which appears to be responsive to the request"); Loomis v. DOE, No. 96-149, 1999 WL 33541935, at *5 (N.D.N.Y. Mar. 9, 1999) (determining search inadequate in light of agency's admission that additional responsive records may exist in location not searched), aff'd, 199 F.3d 1322 (2d Cir. 1999) (unpublished table decision); Kronberg v. DOJ, 875 F. Supp. 861, 870-71 (D.D.C. 1995) (holding that search was inadequate when agency did not find records required to be maintained and plaintiff produced documents obtained by other FOIA requesters demonstrating that agency possessed files which may contain records sought); cf. Grace v. Dep't of the Navy, No. 99-4306, 2001 WL 940908, at *5 (N.D. Cal. Aug. 13, 2001) (concluding that although agency apparently had misplaced records requested under FOIA, "[d]efendants have discharged their burden [by] making a good faith attempt to locate the missing files"), aff'd, 43 F. App'x 76 (9th Cir. 2002).

²⁰⁴ See Hoff v. DOJ, No. 07-4499, slip op. at 4 (6th Cir. July 23, 2008) (unpublished disposition) (finding search adequate even though agency did not locate certain records at initial request stage because, inter alia, records "were kept in a general administrative file, rather than a file bearing [requester's] name, and they were not indexed by her name"); Piper v. DOJ, 222 F. App'x 1, 1 (D.C. Cir. Feb. 23, 2007) (unpublished disposition) (affirming district court's conclusion that alleged record destruction prior to FOIA request has no bearing on whether agency search was adequate), cert. denied, 128 S. Ct. 66 (2007); Iturralde v. Comptroller of the Currency, 315 F.3d 311, 315 (D.C. Cir. 2003) ("[I]t is long settled that the failure of an agency to turn up one specific document in its search does not alone render a search inadequate After all, particular documents may have been accidentally lost or destroyed, or a reasonable and thorough search may have missed them."); Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 489 (2d Cir. 1999) (declaring that fact that "some documents were not discovered until a second, more exhaustive, search was conducted does not warrant overturning the district court's ruling" that agency conducted a reasonable search); Campbell, 164 F.3d at 28 n.6 (holding that "the inadvertent omission of three documents does not render a search inadequate when the search produced hundreds of pages that had been buried in archives for decades"); Schwarz v. FBI, No. 98-4036, 1998 WL 667643, at *2 (10th Cir. Nov. 5, 1998) (concluding that "the fact that the [agency's] search failed to turn up three documents is not sufficient to contradict the reasonableness of the FBI's search without evidence of bad

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does not require agencies to conduct "unreasonably burdensome" searches for records.²⁰⁵

²⁰⁴(...continued)

faith"); Citizens Comm'n on Human Rights v. FDA, 45 F.3d 1325, 1328 (9th Cir. 1995) (determining that search was adequate when agency spent 140 hours reviewing relevant files, notwithstanding fact that agency was unable to locate 137 of 1000 volumes of records); Ethyl Corp. v. EPA, 25 F.3d 1241, 1246 (4th Cir. 1994) (reasoning that adequacy of search is not determined by "whether every single potentially responsive document has been unearthed"); Manchester v. FBI, No. 96-0137, 2005 WL 3275802, at *3 (D.D.C. Aug. 9, 2005) (concluding that a "speculative allegation as to the existence of [a record] does not cast doubt on the adequacy of" the search); Campaign for Responsible Transplantation v. FDA, 219 F. Supp. 2d 106, 111 (D.D.C. 2002) (upholding adequacy of agency's search by declaring that agency's belated production of fifty-five additional documents that it located using information contained in plaintiff's summary judgment motion "is a proverbial 'drop in the bucket'" relative to 27,000 documents that agency already had provided to plaintiff); cf. Corbeil v. DOJ, No. 04-2265, 2005 WL 3275910, at *3 (D.D.C. Sept. 26, 2005) (declaring that "an agency's prompt report of the discovery of additional responsive materials may be viewed as evidence of its good faith efforts to comply with its obligations under the FOIA"); W. Ctr. for Journalism v. IRS, 116 F. Supp. 2d 1, 10 (D.D.C. 2000) (concluding that agency conducted reasonable search and acted in good faith by locating and releasing additional responsive records mistakenly omitted from its initial response, because "it is unreasonable to expect even the most exhaustive search to uncover every responsive file; what is expected of a law-abiding agency is that the agency admit and correct error when error is revealed"), aff'd, 22 F. App'x 14 (D.C. Cir. 2001). But see Oglesby v. U.S. Dep't of the Army, 79 F.3d 1172, 1185 (D.C. Cir. 1996) (acknowledging plaintiff's assertion that search was inadequate because of previous FOIA requester's claim that agency provided her with "well over a thousand documents," and holding that claim raises enough doubt to preclude summary judgment in absence of agency affidavit further describing its search); Hiken v. DOD, 521 F. Supp. 2d 1047, 1054 (N.D. Cal. 2007) (explaining that while search results are not focus of reasonableness inquiry, they are not entirely irrelevant, particularly where scope of request is broad and agency fails to produce any responsive documents); Accuracy in Media v. FBI, No. 97-2107, slip op. at 12 (D.D.C. Mar. 31, 1999) (directing agency to conduct further search for two unaccounted-for documents referenced in documents located by agency's otherwise reasonable search).

²⁰⁵ See Solar Sources, Inc. v. United States, 142 F.3d 1033, 1039 (7th Cir. 1998) (refusing to order agency to identify and segregate nonexempt documents from millions of pages of files in light of government's estimate that doing so would take eight work-years); Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 892 (D.C. Cir. 1995) (agreeing that search that would require review of twenty-three years of unindexed files would be unreasonably burdensome, but disagreeing that search through chronologically indexed agency files for dated memorandum would be burdensome); Van Strum v. EPA, No. 91-35404, 1992 WL 197660, at *1 (9th Cir. Aug. 17, 1992) (accepting agency justification in denying or seeking clarification of overly broad requests which would place inordinate search burden on agency resources) (unpublished table decision); Wolf v. CIA, 569 F. Supp. 2d 1, 9 (D.D.C. 2008) (holding that search of microfilm files requiring frame-by-frame reel review that would take estimated 3675 hours and \$147,000 constitutes unreasonably burdensome search); Schrecker v. DOJ, 217 F. Supp. 2d 29, 35 (D.D.C. 2002) (finding "that to require an agency to hand search through millions of documents is not reasonable and therefore not necessary," as agency already had

(continued...)

With regard to electronic database searches, the FOIA requires agencies to make "reasonable efforts" to search for requested records in electronic form or format "except when such efforts would significantly interfere with the operation of the agency's automated information system."²⁰⁶ The statute expressly defines the term "search" as "to review, manually

²⁰⁵(...continued)

searched "the most likely place responsive documents would be located"), aff'd, 349 F.3d 657 (D.C. Cir. 2003); Burns v. DOJ, No. 99-3173, slip op. at 2 (D.D.C. Feb. 5, 2001) (concluding that "given the capacity of the reels and the absence of any index," a request for specific telephone conversations recorded on reel-to-reel tapes was "unreasonably burdensome" because "it would take an inordinate [amount of] time to listen to the reels in order to locate any requested conversations that might exist"); Blackman v. DOJ, No. 00-3004, slip op. at 5 (D.D.C. July 5, 2001) (declaring request that would require a manual search through 37 million pages to be "unreasonable in light of the resources needed" to process it), appeal dismissed for lack of prosecution, No. 01-5431 (D.C. Cir. Jan. 2, 2003); O'Harvey v. Office of Workers' Comp. Programs, No. 95-0187, slip op. at 3 (E.D. Wash. Dec. 29, 1997) (finding request to be unreasonably burdensome because search would require agency "to review all of the case files maintained by the agency" and "would entail review of millions of pages of hard copies"), aff'd sub nom. O'Harvey v. Comp. Programs Workers, 188 F.3d 514 (9th Cir. 1999) (unpublished table decision); Spannaus v. DOJ, No. 92-372, slip op. at 6 (D.D.C. June 20, 1995) (finding that agency is not required to determine all persons having ties to associations targeted in bankruptcy proceedings "and then search any and all civil or criminal files relating to those persons"), summary affirmance granted in pertinent part, No. 95-5267, 1996 WL 523814 (D.C. Cir. Aug. 16, 1996); cf. Stewart v. U.S. Dept of the Interior, 554 F.3d 1236, 1243-44 (10th Cir. Feb. 2, 2009) (affirming fee waiver denial because search of 610 computer backup tapes "would be unduly burdensome given the speculative nature" of request, but also stating that requester could proceed if it paid for search); Peyton v. Reno, No. 98-1457, 1999 WL 674491, at *1-2 (D.D.C. July 19, 1999) (finding that request for all records indexed under subject's name reasonably described records sought because agency failed to demonstrate that name search would be unduly burdensome).

²⁰⁶ 5 U.S.C. § 552(a)(3)(C); see Sun-Sentinel Co. v. DHS, 431 F. Supp. 2d 1258, 1276 (S.D. Fla. 2006) (stating that subsection (a)(3)(C) "addresses problems with searching for records as opposed to producing records," and deciding that evidentiary hearing is needed to determine whether agency's claim of significant interference relates to agency's "inability . . . to search for these records or to produce these records"); Baker & Hostetler LLP v. U.S. Dept of Commerce, No. 02-2522, slip op. at 10-11 (D.D.C. Mar. 31, 2004) (finding database restoration would "significantly interfere with the operation of the agency's automated information system" where it would render servers unusable for other functions, and where database restoration attempts could fail due to absence of certain backup tapes), aff'd in pertinent part, 473 F.3d 312 (D.C. Cir. 2006); Albino v. USPS, No. 01-C-563-C, 2002 WL 32345674, at *7 (W.D. Wis. May 20, 2002) (declaring a search for responsive e-mail messages spanning five years to be inadequate because agency "did not enlist the help of information technology personnel . . . [who] . . . would have access to e-mail message archives" possibly containing requested records); Schladetsch v. HUD, No. 99-0175, 2000 WL 33372125, at *5 (D.D.C. Apr. 4, 2000) (rejecting as insufficient agency affidavit that failed to show how creation and use of computer program to perform electronic database search for responsive information would require "unreasonable efforts" or would "substantially interfere" with agency's computer system),

(continued...)

or by automated means, agency records for the purpose of locating those records which are responsive to a request."²⁰⁷

A search for records has been found unnecessary when it was supported by an agency attestation that a person familiar with the records maintained by the agency had determined

²⁰⁶(...continued)

appeal dismissed voluntarily, No. 00-5220 (D.C. Cir. Oct. 12, 2000); see also FOIA Update, Vol. XVII, No. 4, at 2 (discussing electronic search requirements); cf. Hoffman v. DOJ, No. 98-1733-A, slip op. at 10-11 (W.D. Okla. Dec. 15, 1999) (finding that agency is not required to conduct physical search of records "if other computer-assisted search procedures available to [the] agency are more efficient and serve the same practical purpose of reviewing hard copies of documents"). But see Pub. Citizen, Inc. v. Dep't of Educ., 292 F. Supp. 2d 1, 8 (D.D.C. 2003) ("While a computerized search may well be far more efficient and less costly than a manual search . . . it is apparent [under the facts of this particular case] that only the more cumbersome procedure is likely to turn up the requested information.").

²⁰⁷ 5 U.S.C. § 552(a)(3)(D); see Amnesty Int'l, 2008 WL 2519908, at *14-15 (noting that electronic searches "designed to return documents containing [for example] the phrase 'CIA detainees' but not 'CIA detainee' or 'detainee of the CIA'" are unreasonable); Dayton Newspapers, Inc. v. Dep't of the Air Force, 35 F. Supp. 2d 1033, 1035 (S.D. Ohio 1998) (preliminary ruling without entry of judgment) (concluding that an estimated fifty-one hours required to "assemble" requested information from an agency database "is a small price to pay" in light of FOIA's presumption favoring disclosure); Thompson Publ'g Group, Inc. v. Health Care Fin. Admin., No. 92-2431, 1994 WL 116141, at *1 (D.D.C. Mar. 15, 1994) (finding that relatively simple computer searches and computer queries are reasonable for data that do not exist "in a single computer 'document' or 'file'"); Int'l Diatomite Producers Ass'n v. SSA, No. 92-1634, 1993 WL 137286, at *5 (N.D. Cal. Apr. 28, 1993) (ordering agency to respond to request for specific information, portions of which were maintained in four separate computerized listings, by either compiling new list or redacting existing lists), appeal dismissed, No. 93-16723 (9th Cir. Nov. 1, 1993); see also Jennings v. FBI, No. 03-1651, slip op. at 8-9 (D.D.C. May 6, 2004) (finding that agency's search was adequate even when "faulty computer mechanism" rendered identifiable tape recordings of telephone conversations irretrievable); Burns, No. 99-3173, slip op. at 2 (D.D.C. Feb. 5, 2001) (concluding that an agency need not search through reel-to-reel audiotapes containing requested recorded conversations, because "the equipment on which these reels could be played has broken and [has been] replaced with other, incompatible equipment," and agency is "not required to obtain new equipment to process [p]laintiff's FOIA request"); Schladetsch, 2000 WL 33372125, at *5 ("The programming necessary to conduct the [electronic database] search is a search tool and not the creation of a new record."); Lepelletier v. FDIC, No. 96-1363, transcript at 8 (D.D.C. Mar. 3, 2000) (refusing to require agency to undertake "an enormous effort that may not even work to try to convert [obsolete] computer files that nobody knows how to read now to provide information that [plaintiff] would like to have"), appeal dismissed as moot, 23 F. App'x 4 (D.C. Cir. 2001); FOIA Post, "FOIA Counselor Q&A" (posted 1/24/06) (advising that agencies have no obligation to search through "electronic databases [i.e., 'distributed data'] to which [they] have no more than 'read only'" access); FOIA Update, Vol. XVIII, No. 1, at 6 (advising that search provisions of Electronic FOIA amendments do not involve record "creation").

that no responsive records were, in fact, maintained.²⁰⁸ A search has been required in the absence of such a showing.²⁰⁹

Courts have held that agencies responding to FOIA requests need not process and disclose non-responsive records or non-responsive portions of otherwise responsive records.²¹⁰ While the scope of a FOIA request is most commonly thought of in terms of the subject matter of the records sought, the scope of a request is also defined by when the requested records were created.²¹¹ The temporal scope of a FOIA request is typically established through the agency's use of a "cut-off" date -- i.e., records created after that date are treated as not responsive to the request.²¹² The Court of Appeals for the District of Columbia Circuit has declared that a cut-off date that is based on the date of the search "results in a much fuller search and disclosure" than a less inclusive "cut-off" date, such as one based on the date of the

²⁰⁸ See American-Arab Anti-Discrimination Comm. v. DHS, 516 F. Supp. 2d 83, 87-88 (D.D.C. 2007) (finding sufficient agency's statement that it "does not maintain [requested] information" and ruling search "unnecessary" since affiant spoke to several ICE agents and as "Deputy Assistant Secretary for Operations, . . . [was] presumed able to familiarize himself with what statistics ICE does and does not maintain").

²⁰⁹ See Robert v. DOJ, No. 05-2543, 2008 WL 2039433, at *6-7 (E.D.N.Y. May 9, 2008) (ruling that agency's "conclusory statement that it does not maintain such documents" did not satisfy duty to search where unclear whether affiants had sufficient knowledge of agency practices and procedures to make such assertion); Defenders of Wildlife v. USDA, 311 F. Supp. 2d 44, 55 (D.D.C. 2004) (stating that an agency's "bare assertion that the Deputy Under Secretary saw the FOIA request and that he stated that he had no responsive documents is inadequate because it does not indicate that he performed any search at all").

²¹⁰ See Ctr. for Biological Diversity v. OMB, No. 07-04997, 2009 WL 1246690, at *5 (N.D. Cal. May 5, 2009) (finding that agency "is not required to produce information that is not responsive to a FOIA request"); Cal. ex rel. Brown v. NHTSA, No. 06-2654, 2007 WL 1342514, at *2 (N.D. Cal. May 8, 2007) (declining to order agency to disclose non-responsive information redacted from documents, and stating that "[a]n agency has no obligation to produce information that is not responsive to a FOIA request"); see also FOIA Post, "FOIA Counselor Q&A" (posted 1/24/06) (addressing document "scoping" in context of e-mail); cf. Islamic Shura Council of S. Cal., No. 07-01088, slip op. at 3-5 (C.D. Cal. Apr. 20, 2009) (requiring in camera review where agency withheld and redacted large amount of information as "outside the scope" of request but did not provide evidence explaining propriety of such action).

²¹¹ See Church of Scientology v. IRS, 816 F. Supp. 1138, 1148 (W.D. Tex. 1993) (observing that "there has to be a temporal deadline for documents that satisfy [a FOIA] request"), appeal dismissed by stipulation, No. 93-8431 (5th Cir. Oct. 21, 1993); see also FOIA Post, "Use of 'Cut-Off' Dates for FOIA Searches" (posted 5/6/04) (explaining that "[t]he scope of a FOIA request has both substantive and temporal aspects").

²¹² See Defenders of Wildlife v. U.S. Dep't of the Interior, 314 F. Supp. 2d 1, 12 n.10 (D.D.C. 2004) (recognizing that records created after date-of-search "cut-off" date specifically established by agency regulation "are not covered by [plaintiff's] request"); FOIA Update, Vol. IV, No. 4, at 14 (advising that records that "post-date" agency's "cut-off" date are not included within temporal scope of request).

request or its receipt by the agency.²¹³ While courts have found that an agency may choose not to use a "date-of-search cut-off" if "specific circumstances" warrant,²¹⁴ it may be required to articulate a "compelling justification" for doing so if challenged in court.²¹⁵ Finally, regardless of which type of "cut-off" date an agency adopts, it is obliged to inform FOIA requesters of that date.²¹⁶

²¹³ McGehee v. CIA, 697 F.2d 1095, 1104 (D.C. Cir. 1983), vacated on other grounds on panel reh'g & reh'g en banc denied, 711 F.2d 1076 (D.C. Cir. 1983); see Pub. Citizen v. Dep't of State, 276 F.3d 634, 644 (D.C. Cir. 2002) (favoring "date-of-search cut-off" because its use "might . . . result[] in the retrieval of more [responsive] documents" than would a cut-off based on date of request); Van Strum, 1992 WL 197660, at *2 (agreeing that date-of-search "cut-off" date is "the most reasonable date for setting the temporal cut-off in this case"); Nielsen v. Bureau of Land Mgmt., 252 F.R.D. 499, 516 (D. Minn. 2008) (finding search not reasonable to extent agency employed date-of-request "cut-off" date); Edmonds Inst. v. U.S. Dep't of the Interior, 383 F. Supp. 2d 105, 110-11 (D.D.C. 2005) (rejecting requester's call for use of date-of-release "cut-off" date in favor of date-of-search "cut-off" date, in accordance with agency's regulations).

²¹⁴ Pub. Citizen, 276 F.3d at 643; see, e.g., Jefferson v. BOP, 578 F. Supp. 2d 55, 60 (D.D.C. 2008) (recognizing that proper inquiry is "whether the cut-off date used was reasonable in light of the specific request" and concluding that date-of-request "cut-off" was reasonable because request sought records that had been created before request was made and that pertained to past events); Blazy v. Tenet, 979 F. Supp. 10, 17 (D.D.C. 1997) concluding that it was "reasonable under the circumstances" for agency to apply date-of-request "cut-off" to request that sought records concerning events that already had occurred (and records that already had been created) by time request was made), summary affirmance granted, No. 97-5330, 1998 WL 315583 (D.C. Cir. May 12, 1998); FOIA Post, "Use of 'Cut-Off' Dates for FOIA Searches" (posted 5/6/04) (describing circumstances under which use of different "cut-off" dates may be reasonable). But see Or. Natural Desert Ass'n v. Gutierrez, 419 F. Supp. 2d 1284, 1288 (D. Or. 2006) (concluding that agency's date-of-request "cut-off" date regulation "is not reasonable on its face and violates FOIA").

²¹⁵ Pub. Citizen, 276 F.3d at 644; cf. McGehee, 697 F.2d at 1103-04 (rejecting agency's argument that use of date-of-search cut-off would be "unduly burdensome, expensive, or productive of 'administrative chaos'" as lacking any "detailed substantiation"); In Def. of Animals v. NIH, 543 F. Supp. 2d 83, 98-99 (D.D.C. 2008) (finding search inadequate because agency failed to demonstrate reasonableness of date-of-search cut-off date that preceded final disclosure by eleven months, and ordering it to employ cut-off date no earlier than date of court's decision).

²¹⁶ See, e.g., Pub. Citizen, 276 F.3d at 634 (noting that Department of State provided notice of its "cut-off" date policy in letters sent to all requesters acknowledging receipt of their requests); In Def. of Animals, 543 F. Supp. 2d at 99 (finding search inadequate because, inter alia, agency failed to inform plaintiff of date-of-search cut-off date); Dayton Newspaper, Inc. v. VA, 510 F. Supp. 2d 441, 450-51 (S.D. Ohio 2007) (determining that date of 1995 final response was appropriate cut-off date "[i]n the absence of a record demonstrating the VA's cut-off date," because "at that point, Plaintiffs were put on notice that the VA was no longer searching for records"); Judicial Watch, Inc. v. DOE, 310 F. Supp. 2d 271, 305 (D.D.C. 2004) ("Because the [agency] imposed the . . . cut-off date without informing [requester] of its

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"Reasonably Segregable" Obligation

The FOIA requires that "any reasonably segregable portion of a record" must be released after appropriate application of the Act's nine exemptions.²¹⁷ The Attorney General, in his FOIA Guidelines, has directed agencies to make partial disclosures whenever full release is not possible.²¹⁸ The statutory standard requires agencies to release any portion of a record that is nonexempt and that is "reasonably segregable" from the exempt portion.²¹⁹ The Court of Appeals for the District of Columbia Circuit has recently emphasized that segregability should not be determined based on an evaluation of whether nonexempt portions of documents would be "helpful" to the requester if segregated and released.²²⁰ At

²¹⁶(...continued)

intention to do so, the court must conclude that [agency's] search was inadequate.", aff'd in part, rev'd in part & remanded on other grounds, 412 F.3d 125 (D.C. Cir. 2005); DOJ FOIA Regulations, 28 C.F.R. § 16.4(a) (2008) (providing constructive notice of cut-off date); cf. McGehee, 697 F.2d at 1105 (expressing doubt that agency could establish that "it may 'reasonably' use any 'cut-off' date without so informing the requester").

²¹⁷ 5 U.S.C. § 552(b) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (sentence immediately following exemptions); see Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, at 1, (Mar. 19, 2009), available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf> ("Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information.").

²¹⁸ Attorney General Holder's FOIA Guidelines, at 1, available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf> (noting statutory requirement that agencies "take reasonable steps to segregate and release nonexempt information" and encouraging disclosure of portions of records that "may be covered [by a statutory exemption] only in a technical sense unrelated to the actual impact of disclosure"); see also *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (discussing Attorney General's directive on partial disclosure, and noting that "[w]hether a release involves boxes of material, or only a few pages, it is important for agencies to remember that the increased transparency resulting from even a partial disclosure of records is worthwhile").

²¹⁹ 5 U.S.C. § 552(b) (sentence immediately following exemptions) (requiring disclosure of "reasonably segregable" nonexempt portions); see, e.g., Local 3, Int'l Bhd. of Elec. Workers v. NLRB, 845 F.2d 1177, 1180 (2d Cir. 1988) (quoting "reasonably segregable" provision of 5 U.S.C. § 552(b) and emphasizing word reasonably).

²²⁰ See *Stolt-Nielsen Transp. Group, Ltd. v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008) (rejecting agency's assertion that "the redacted documents without names and dates would provide no meaningful information," and declaring that information need not be "helpful to the requestee [to require that] the government must disclose it"); see also *Mead Data Cent., Inc. v. U.S. Dept't of the Air Force*, 566 F.2d 242, 261 n.55 (D.C. Cir. 1977) (stating that while "information content" is a legitimate consideration, it "does not mean that a court should approve an agency withholding because of the court's low estimate of the value to the

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the same time, the D.C. Circuit has also held that when nonexempt information is "inextricably intertwined" with exempt information, reasonable segregation is not possible.²²¹ That analysis is frequently impacted by the volume of material at issue and, as the D.C. Circuit has found, segregation is not reasonable when it would produce "an essentially meaningless set of words and phrases," such as "disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content."²²²

²²⁰(...continued)

requester of the information withheld"); *Schoenman v. FBI*, No. 04-2202, 2009 WL 763065, at *26 (D.D.C. Mar. 19, 2009) (upholding agency's segregation efforts and noting that they were not based upon an "impermissible determination that the substantive content of the [nonexempt] information, although reasonably segregable, 'provides no meaningful information'" (quoting *Stolt-Nielsen Transp. Group, Ltd.*, 534 F.3d at 734)). But see *Thomas v. DOJ*, 260 F. App'x 677, 679 (5th Cir. 2007) (affirming denial of request for release of portions of audiotape transcripts reflecting requester's side of conversation while redacting third party's words because, given requester's interest in the third party's portion, release of solely requester's words would be "of little informational value" to requester (quoting *FlightSafety Servs. v. Dep't of Labor*, 326 F.3d 607, 613 (5th Cir. 2003))); *Lead Indus. Ass'n v. OSHA*, 610 F.2d 70, 86 (2d Cir. 1979) (noting "banalit[y]" and "uselessness" of information district court ordered to be segregated and disclosed, and reversing such order).

²²¹ *Mead Data Cent., Inc.*, 566 F.2d at 260 (noting rule that "non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions"); see, e.g., *James Madison Project v. CIA*, 607 F. Supp. 2d 109, 131 (D.D.C. 2009) (approving agency's determination that it could not reasonably segregate certain nonexempt material because it was "so inextricably intertwined" with exempt material consisting of classified information and information concerning intelligence sources and methods); *Schoenman*, 2009 WL 763065, at *26 (approving agency's determination "that the 'fragmented' and 'isolated' occurrences of non-exempt material . . . are so 'inextricably intertwined with the exempt information' that the non-exempt material could not be reasonably segregated"); see also *L.A. Times Commc'ns LLC v. U.S. Dep't of Labor*, 483 F. Supp. 2d 975, 986-7 (C.D. Cal. 2007) (finding that agency met its segregability obligation where Exemption 6 protected information pertaining to civilian contractors "currently residing in Iraq or Afghanistan," and agency databases contained no information to distinguish which contractors (or families) still resided in those countries and which ones resided elsewhere); *Swope v. DOJ*, 439 F. Supp. 2d 1, 7 (D.D.C. 2006) (concluding that nonexempt portions of recorded telephone calls are inextricably intertwined with exempt portions because agency "lacks the technical capability" to segregate information that is digitally recorded).

²²² *Mead Data Cent., Inc.*, 566 F.2d at 261 & n.55; see also *FlightSafety Servs. Corp. v. Dep't of Labor*, 326 F.3d 607, 613 (5th Cir. 2003) (per curiam) (concluding that documents contained no reasonably segregable information because, inter alia, "any disclosable information is so inextricably intertwined with the exempt, confidential information that producing it would require substantial agency resources and produce a document of little informational value"); *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998) (finding that because agency would require eight work-years to identify all nonexempt documents in millions of pages of files, very small percentage of documents that could be released were not "reasonably segregable"); *Doherty v. DOJ*, 775 F.2d 49, 53 (2d Cir. 1985) ("The fact that there
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Courts require agencies to demonstrate that they have disclosed all reasonably segregable, nonexempt information,²²³ even if the requester has not raised the issue at the

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may be some nonexempt matter in documents which are predominantly exempt does not require the district court to undertake the burdensome task of analyzing approximately 300 pages of documents, line-by-line."); *Yeager v. DEA*, 678 F.2d 315, 322 n.16 (D.C. Cir. 1982) (noting that it was appropriate to consider factors of "intelligibility" and "burden" imposed by segregation of nonexempt material); *Lead Indus. Ass'n*, 610 F.2d at 86 (holding that information is not reasonably segregable "if the proportion of nonexempt factual material is relatively small and is so interspersed with exempt material that separation by the agency and policing . . . by the courts would impose an inordinate burden"); *Durrani v. DOJ*, 607 F. Supp. 2d 77, 88 (D.D.C. 2009) (declaring that to justify withholdings, agencies must show that "exempt and nonexempt information are 'inextricably intertwined,' such that excision of exempt information would impose significant costs on the agency and produce an edited document with little informational value" (citing *Mays v. DEA*, 234 F.3d 1324, 1327 (D.C. Cir. 2000) (quoting *Neufeld v. IRS*, 646 F.2d 661, 666 (D.C. Cir. 1981))); *Schoenman*, 2009 WL 763065, at *26 (finding agency withholdings proper because, inter alia, "it makes little sense to require [agency] to spend time and resources redacting entire documents in order to provide Plaintiff with his name, dates he has already been provided, and the basic letterhead . . . of the document") (citing *Mead Data Cent., Inc.*, 566 F.2d at 261 n.55); *Arizechi v. IRS*, No. 06-5292, 2008 WL 539058, at *5 (D.N.J. Feb. 25, 2008) (unpublished disposition) (stating that, regarding summonses, segregability requirement is "futile" because "[r]edaction of names and addresses of the witnesses and releasing a blank summons would serve no purpose and is not required"); *Wilson v. DEA*, 414 F. Supp. 2d 5, 15 (D.D.C. 2006) (finding without explanation that agency "fulfilled its segregability obligation" even when it withheld in full one document rather than "undergo the time and expense of redacting all the information on that page except the [requester's] name"); *Rugiero v. DOJ*, 234 F. Supp. 2d 697, 707-09 (E.D. Mich. 2002) (concluding that "[i]n this case, the burden of segregation does not outweigh the significant value of the information to Plaintiff because it does not appear that the Government would have to expend a large amount of additional time and resources to provide Plaintiff with the segregable information" from 364 pages); *Warren v. SSA*, No. 98-0116, 2000 WL 1209383, at *5 (W.D.N.Y. Aug. 22, 2000) (refusing to order segregation of standard forms containing personal information because "if the [agency] were to redact the requested documents in a manner that would remove all exempted . . . information, the resulting materials would be little more than templates"), *aff'd in pertinent part*, 10 F. App'x 20 (2d Cir. 2001); *Eagle Horse v. FBI*, No. 92-2357, slip op. at 5-6 (D.D.C. July 28, 1995) (finding disclosure of polygraph examination -- after protecting sensitive structure, pattern, and sequence of questions -- was not feasible without reducing product to "unintelligible gibberish"); *Journal of Commerce v. U.S. Dep't of the Treasury*, No. 86-1075, 1988 U.S. Dist. LEXIS 17610, at *21 (D.D.C. Mar. 30, 1988) (finding that segregation was "neither useful, feasible nor desirable" when it would compel agency "to pour [sic] through [literally millions of pages of documents] to segregate nonexempt material [and] would impose an immense administrative burden . . . that would in the end produce little in the way of useful nonexempt material").

²²³ See, e.g., *Stolt-Nielsen Transp. Group, Ltd.*, 534 F.3d at 734 (finding agency official's declaration that paralegal reviewed pages line-by-line to assure himself that he was withholding only exempt information to be insufficient for court to accept agency's

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segregability determinations); Trans-Pac. Policing Agreement v. U.S. Customs Serv., 177 F.3d 1022, 1027-28 (D.C. Cir. 1999) (remanding case to district court for determination of releasability of "four or six digits" of ten-digit numbers withheld in full); Davin v. DOJ, 60 F.3d 1043, 1052 (3d Cir. 1995) ("The statements regarding segregability are wholly conclusory, providing no information that would enable [plaintiff] to evaluate the FBI's decisions to withhold."); Patterson v. IRS, 56 F.3d 832, 840 (7th Cir. 1995) (finding that an agency is not entitled to withhold an entire document if only "portions" contain exempt information); Schiller v. NLRB, 964 F.2d 1205, 1209-10 (D.C. Cir. 1992) (noting that agency's affidavit referred to withholding of "documents, not information," and remanding for specific finding as to segregability); Wightman v. ATF, 755 F.2d 979, 983 (1st Cir. 1985) (holding that detailed "process of segregation" is not unreasonable for request involving thirty-six document pages); Bristol-Myers Co. v. FTC, 424 F.2d 935, 938 (D.C. Cir. 1970) (stating that "statutory scheme does not permit a bare claim of confidentiality to immunize agency [records] from scrutiny" in their entirety); In Def. of Animals v. NIH, 543 F. Supp. 2d 83, 107-08 (D.D.C. 2008) (ordering agency to segregate and release subject matter of invoices and equipment purchase-related e-mails even where sub-contractor and vendor names and estimated costs might be properly withheld under Exemptions 4 and 5); United Am. Fin., Inc. v. Potter, 531 F. Supp. 2d 29, 44-45 (D.D.C. 2008) (rejecting agency's conclusory statement that all reasonably segregable material was released because it failed to explain why factual information in an e-mail reporting or summarizing a telephone call, which was otherwise properly exempt under deliberative process privilege, was not reasonably segregable); Geronimo v. EOUSA, No. 05-1057, 2006 WL 1992625, at *7 (D.D.C. July 14, 2006) (concluding that "categorical treatment" of document withheld in full under Exemption 7(C) "raises doubt as to whether . . . document was properly reviewed for segregability"); ACLU v. FBI, 429 F. Supp. 2d 179, 193 (D.D.C. 2006) (finding that agency did not establish that factual portions of e-mail messages were inextricably intertwined with material exempt as deliberative); Manchester v. FBI, No. 96-0137, 2005 WL 3275802, at *4 (D.D.C. Aug. 9, 2005) (finding that agency's declarations describing "extensive efforts" and its declarations' coded attachments show that agency met segregability obligations); Jones v. DEA, No. 04-1690, 2005 WL 1902880, at *4 (D.D.C. July 13, 2005) (concluding that court could not make finding regarding segregability where record was not clear as to what exemptions agency was invoking); Mokhiber v. U.S. Dep't of the Treasury, 335 F. Supp. 2d 65, 70 (D.D.C. 2004) (granting plaintiff's motion for summary judgment when agency declarations failed to show that agency "even attempted" to meet segregability obligations); Neely v. FBI, No. 7:97-0786, Order at 1 (W.D. Va. Jan. 25, 1999) (finding that agency applied exemptions "in a wholesale fashion" and without adequate explanation), vacated & remanded on other grounds, 208 F.3d 461 (4th Cir. 2000); Carlton v. Dep't of the Interior, No. 97-2105, slip op. at 12 (D.D.C. Sept. 3, 1998) (requiring defendant agencies to provide further explanation of exemptions applied because agencies made "only a general statement that the withheld documents do not contain segregable portions"), appeal dismissed voluntarily, No. 98-5518 (D.C. Cir. Nov. 18, 1998); Church of Scientology v. IRS, 816 F. Supp. 1138, 1162 (W.D. Tex. 1993) ("The burden is on the agency to prove the document cannot be segregated for partial release."); cf. Elec. Frontier Found. v. DOJ, No. 07-00403, slip op. at 17 (D.D.C. Aug. 14, 2007) (concluding that although agency declarations never explicitly used term "segregability," statements "[c]onsidered as a whole," demonstrate agency's segregability analysis), reconsideration denied, 532 F. Supp. 2d 22 (D.D.C. 2008); Anderson v. CIA, 63 F. Supp. 2d 28, 30 (D.D.C. 1999) (declining, "especially in the highly classified

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administrative level, or before the court, and appellate courts will address the issue where lower courts have failed to do so, either by remanding the case or by making their own determination.²²⁴

²²³(...continued)

context of this case," to "infer from the absence of the word 'segregable' [in the agency's affidavit] that segregability was possible"); see also FOIA Update, Vol. XIV, No. 3, at 11-12 ("OIP Guidance: The 'Reasonable Segregation' Obligation").

²²⁴ See, e.g., Missouri Coal. for the Env't Found. v. U.S. Army Corps of Eng'rs, 542 F.3d 1204, 1211-13 (8th Cir. 2008) (declining to affirm application of exemption to all documents in their entirety and remanding case for segregability analysis because district court made no segregability findings); Stolt-Nielsen Transp. Group, Ltd., 534 F.3d at 734 (remanding for failure to make specific findings of segregability regarding withheld documents and stating that "[w]hile . . . we could conduct a further review in this court under our de novo standard, in the interest of efficiency" we "leave it to the district court to determine on remand whether more detailed affidavits are appropriate or whether an alternative such as in camera review" is best (quoting Krikorian v. Dep't of State, 984 F.2d 461, 467 (D.C. Cir. 1993))); Juarez v. DOJ, 518 F.3d 54, 60-61 (D.C. Cir. 2008) (relying on affidavits to conduct segregability analysis itself, stating "we need not prolong the case further by remanding it . . . [a]s we have the same record before us as did the district court," and concluding that nothing was improperly withheld); Miccosukee Tribe of Indians of Fla. v. United States, 516 F.3d 1235, 1264-65 (11th Cir. 2008) (rejecting claim that court was obligated "to enunciate specific findings of segregability for each . . . withheld document[]," stating that "[i]n this Circuit, exacting requirements have not been placed on the district court's articulation of its reasons for sustaining a claim of exemption," and holding that in camera review, Vaughn Index, and affidavits provided adequate basis to determine propriety of Exemption 5 withholdings); Morley v. CIA, 508 F.3d 1108, 1123 (D.C. Cir. 2007) (recognizing district court's affirmative duty to consider segregability issue sua sponte and remanding for segregability determination); Trentadue v. Integrity Comm., 501 F.3d 1215, 1230-31 (10th Cir. 2007) (finding that district court "erred in refusing to conduct a severability analysis"); Abdelfattah v. DHS, 488 F.3d 178, 186-87 (3d Cir. 2007) (remanding case for segregability findings because agency failed to explain why material was not segregable and "what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document" (quoting Mead Data Cent., Inc., 566 F.2d at 261)); Trans-Pac. Policing Agreement, 177 F.3d at 1028 (indicating that district court had affirmative duty to consider reasonable segregability even though requester never sought segregability finding administratively or before district court); Isley v. EOUSA, No. 98-5098, 1999 WL 1021934, at *7 (D.C. Cir. Oct. 21, 1999) (remanding case to district court for segregability finding even though neither party raised segregability issue in district court); Becker v. IRS, 34 F.3d 398, 406 (7th Cir. 1994) (noting that district court's failure to make a segregability determination did not necessitate remand because it "did not simply rely on [agency] affidavits describing the documents, but conducted an in camera review"); cf. Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1117 (D.C. Cir. 2007) (affirming district court's initial segregability findings, and adding that district court must make new segregability findings if on remand additional disclosure is ordered). But see Nicolaus v. FBI, 24 F. App'x 807, 808 (9th Cir. 2001) (concluding that plaintiff's "argument that the district court failed to make adequate factual findings concerning the segregability of documents is waived for failure to present it in his opening brief").

When agencies demonstrate that the withheld records are exempt in their entirety, courts have upheld the determination that no segregation is possible.²²⁵

Finally, when an agency completes its segregability analysis and determines that portions of the responsive documents can be disclosed as nonexempt and other portions are appropriately withheld as exempt, the resulting partial record disclosure must satisfy enhanced statutory document marking obligations.²²⁶ Agencies have long been required to mark partially-disclosed records so that the amount, and location, of deleted information is apparent, unless such markings would harm a protected interest.²²⁷ Pursuant to the OPEN Government Act of 2007, agencies must now also include in such portion markings the exemption under which the information was deleted.²²⁸

Referrals and Consultations

When an agency locates records responsive to a FOIA request, it should determine whether any of those records, or information contained in those records, originated with

²²⁵ See, e.g., Judicial Watch, Inc. v. DOJ, 432 F.3d 366, 371-72 (D.C. Cir. 2005) (holding that because Exemption 5 protects from disclosure attorney work-product documents in full, including factual portions, such portions are not subject to segregability); Students Against Genocide v. Dep't of State, 257 F.3d 828, 837 (D.C. Cir. 2001) (declaring that an agency is not obligated to segregate and release images from classified photographs by "produc[ing] new photographs at a different resolution in order to mask the [classified] capabilities of the reconnaissance systems that took them"); Makky v. Chertoff, 489 F. Supp. 2d 421, 441 n.23 (D.N.J. 2007) (noting that "[t]he Court is not in a position to second-guess agency decisions relating to the segregability of non-exempt information when the information implicates national security concerns"); Nat'l Sec. Archive Fund, Inc. v. CIA, 402 F. Supp. 2d 211, 221-22 (D.D.C. 2005) (concluding that agency's declaration "[t]aken in its entirety" shows that 2004 National Intelligence Estimate (NIE) on Iraq is summarization of classified material, and that NIE contains no "segregable portions that might sensibly be released"); Aftergood v. CIA, No. 02-1146, slip op. at 4 n.1 (D.D.C. Feb. 6, 2004) ("Because the plaintiff seeks the disclosure of a single [budget] number, the court concludes that it would be impossible to segregate information from this request."), motion to alter or amend judgment denied, 2004 U.S. Dist. LEXIS 27035, at *8 (D.D.C. Sept. 29, 2004); Schrecker v. DOJ, 74 F. Supp. 2d 26, 32 (D.D.C. 1999) (finding that confidential informant "source codes and symbols are assigned in such a specific manner that no portion of the code is reasonably segregable"), rev'd & remanded in part on other grounds, 254 F.3d 162 (D.C. Cir. 2001).

²²⁶ See OPEN Government Act of 2007, Pub. L. No. 110-175, § 12, 121 Stat. 2524, 2530-31 (to be codified at 5 U.S.C. § 552(b)) (paragraph immediately following exemptions).

²²⁷ 5 U.S.C. § 552(b) (paragraph immediately following exemptions); see also FOIA Update, Vol. XVIII, No. 1, at 6 (discussing use of "electronic markings to show the locations of electronic record deletions").

²²⁸ OPEN Government Act § 12; see FOIA Post, "OIP Guidance: Segregating and Marking Documents for Release In Accordance With the OPEN Government Act" (posted 10/23/08).

another agency or agency component.²²⁹ As a matter of sound administrative practice, an agency should consult with any other agency or other agency component whose information appears in the responsive records, especially if that other agency or component is better able to determine whether the information is exempt from disclosure.²³⁰ If the response to the consultation is delayed, the agency or component in receipt of the FOIA request should notify the requester that a supplemental response will follow when the consultation is completed.²³¹

If an agency or component locates entire records originating with another agency or component, it should refer those records to their originator for its direct response to the requester.²³² The referring agency or component ordinarily should advise the requester of the

²²⁹ See 5 U.S.C. § 552(a)(6)(B)(iii)(III) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

²³⁰ See FOIA Update, Vol. XII, No. 3, at 3-4 ("OIP Guidance: Referral and Consultation Procedures"); see, e.g., DOJ FOIA Regulations, 28 C.F.R. § 16.4(c)(1) (2008).

²³¹ See FOIA Update, Vol. XII, No. 3, at 3-4; see also FOIA Update, Vol. XIV, No. 3, at 6-8 (DOJ memorandum setting forth White House consultation process in which agency retains responsibility for responding to requester regarding any White House-originated records or White House-originated information located within scope of FOIA request that agency has received).

²³² See FOIA Update, Vol. XII, No. 3, at 3-4; FOIA Update, Vol. IV, No. 3, at 5; see also, e.g., Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1118 (D.C. Cir. 2007) (stating that agencies may refer records so long as referrals do not "lead to improper withholding"); El Badrawi v. DHS, 583 F. Supp. 2d 285, 310 (D. Conn. 2008) (granting summary judgment on "propriety and reasonableness of . . . referrals of certain records . . . to [those] . . . records' originating agencies"); Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 770 (E.D. Pa. 2008) (finding referral process "not exceptionally lengthy" in light of nature of documents involved and "necessity of coordination among . . . various agencies"); Or. Natural Desert Ass'n v. Gutierrez, 409 F. Supp. 2d 1237, 1250 (D. Or. 2006) (concluding that agency's referral regulation "does not significantly impair the ability to get records" and that that regulation is "reasonable"); Snyder v. CIA, 230 F. Supp. 2d 17, 26 (D.D.C. 2002) (concluding that delayed response to plaintiff's request, which was caused by agency's referral of records to another agency, did not constitute improper withholding of referred records); Boyd v. U.S. Marshals Serv., No. 99-2712, slip op. at 5-6 (D.D.C. Mar. 30, 2001) (approving agency's referral of records to originating agencies, because that referral "was done in accordance with agency regulation . . . and does not appear to have impaired plaintiff's ability to gain access to these records"), appeal dismissed for lack of jurisdiction, No. 01-5306, 2001 WL 1488181 (D.C. Cir. Oct. 10, 2001); Rzeslawski v. DOJ, No. 97-1156, slip op. at 6 (D.D.C. July 23, 1998) (observing that an agency's "referral procedure is generally faster than attempting to make an independent determination regarding disclosure" and that "by placing the request in the hands of the originating agency, discretionary disclosure is more likely"), aff'd, No. 00-5029, 2000 WL 621299 (D.C. Cir. Apr. 4, 2000); Stone v. Def. Investigative Serv., No. 91-2013, 1992 WL 52560, at *1 (D.D.C. Feb. 24, 1992) (recognizing that agencies may refer responsive records to originating agencies in responding to FOIA requests), aff'd, 978 F.2d 744 (D.C. Cir. 1992) (unpublished table decision). But cf. Keys v. DHS, 570 F. Supp. 2d 59, 70 (D.D.C. 2008) (stating that referral

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referral and of the name of the agency FOIA office to which it was made.²³³ In exceptional circumstances, to avoid compromising sensitive law enforcement or national security interests, a referring agency should not identify the agency to which the referral was made.²³⁴ This should be done, for example, when identifying the agency to which the referral was made would reveal the existence of an investigation by that agency which is not yet publicly known.²³⁵ In such circumstances, in order to avoid revealing the sensitive fact of that other agency's involvement, the referring agency should itself respond to the requester after coordinating with the agency where the records originated.²³⁶

All agencies should remember, however, that even after they make such record referrals in response to FOIA requests, they retain the responsibility of defending any agency action taken on those records if the matter proceeds to litigation.²³⁷ Additionally, agencies receiving

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was improper where agency referred records to incorrect agency and did not take steps to ensure that referred records were acted upon, and where second agency did not return incorrectly-referred records for nearly one year); Maydak v. DOJ, 254 F. Supp. 2d 23, 40 (D.D.C. 2003) (noting that agency's referral of records requested under the FOIA to an entity that is not subject to the FOIA -- a United States Probation Office -- "raises a genuine legal issue about the propriety" of agency's action).

²³³ See FOIA Update, Vol. XII, No. 3, at 3-4 (advising agencies, with exception for records pertaining to sensitive law enforcement or national security matters, to inform requester of identity of other agencies to which it referred records).

²³⁴ See FOIA Update, Vol. XII, No. 3, at 3-4 (advising agencies not to inform requester of identity of other agencies to which it referred records when doing so "would itself disclose a sensitive, exempt fact"); FOIA Update, Vol. XII, No. 2, at 6 ("FOIA Counselor: Questions & Answers") (warning agencies not to notify requesters of identities of other agencies to which record referrals are made in cases in which doing so would reveal sensitive, abstract fact about record's existence).

²³⁵ See FOIA Update, Vol. XII, No. 2, at 6.

²³⁶ See id. (stating that in exceptional circumstances, agency in receipt of referral should contact referring agency to coordinate response).

²³⁷ See, e.g., Peralta v. U.S. Attorney's Office, 136 F.3d 169, 175 (D.C. Cir. 1998) (remanding case for further consideration of whether referral of FBI documents to FBI resulted in "improper withholding" of documents), on remand, 69 F. Supp. 2d 21, 29 (D.D.C. 1999) (holding that EOUSA's referral of documents to FBI was not improper); Williams v. FBI, No. 92-5176, 1993 WL 157679, at *1 (D.C. Cir. May 7, 1993) (illustrating that in litigation referring agency is nevertheless required to justify withholding of record that was referred to another agency); Schoenman v. FBI, 604 F. Supp. 2d 174, 203-04 (D.D.C. 2009) (requiring agency to submit a "comprehensive" Vaughn Index that will include "a complete accounting of all referrals made and indicate whether all documents so referred have been processed and released to Plaintiff"); Keys, 570 F. Supp. 2d at 68-69 (stating that withholding was improper where neither referring agency nor referee agency explained nature of pages withheld on referral,

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referrals should handle them on a "first-in, first-out" basis among their other FOIA requests, according to the date of the request's initial receipt at the referring agency, so that FOIA requesters are not placed at an unfair timing disadvantage through agency referral practices.²³⁸

If an agency or component determines that it does not maintain any record responsive to a particular FOIA request, it generally is under no obligation to "forward" the request (which is distinct from "referring " records) to any other agency or component where such records might be located.²³⁹ An agency must, however, undertake the step of "forwarding" a request if it has obligated itself to do so by creating such a required practice through its own FOIA regulations.²⁴⁰ Finally, as a matter of administrative discretion, the agency may choose to advise the requester of the name and address of such other agency that is likely to maintain records responsive to the requester's FOIA request.²⁴¹

²³⁷(...continued)

and where referring agency did not explain why referee agency required requester to submit additional request for responsive public records); Duncan v. DEA, No. 06-1032, 2007 WL 1576316 (D.D.C. May 30, 2007) (stating that when documents are referred "the court must determine whether the referrals resulted in the improper withholding of documents"); Hronek v. DEA, 16 F. Supp. 2d 1260, 1272 (D. Or. 1998) (noting that with respect to records referred to nonparty agencies "the ultimate responsibility for a full response lies with the [referring] agencies"), aff'd, 7 F. App'x 591 (9th Cir. 2001); see also FOIA Update, Vol. XV, No. 3, at 6 (advising on proper litigation practice for defending referrals of records to other agencies); cf. Goldstein v. Office of Indep. Counsel, No. 87-2028, 1999 WL 570862, at *14 (D.D.C. July 29, 1999) (magistrate's recommendation) (requiring referring agency to ask agency receiving referral to provide court with its position concerning releasability of records referred); Grove v. DOJ, 802 F. Supp. 506, 518 (D.D.C. 1992) (declaring that agency may not use "consultation" as its reason for a deletion, without asserting a valid exemption").

²³⁸ See FOIA Update, Vol. XV, No. 3, at 6 (observing that a requester should "receive her rightful place in line as of the date upon which her request was received," and advising likewise regarding "consultation" practices (citing Freeman v. DOJ, 822 F. Supp. 1064, 1067 (S.D.N.Y. 1993))); cf. Williams v. United States, 932 F. Supp. 354, 357 & n.7 (D.D.C. 1996) (urging agency to set up an "express lane" for referred records so as to not "tie up other agencies by taking an inordinate period of time to review referred records [and] unnecessarily inhibit[ing] the smooth functioning of the [other] agencies' well oiled FOIA processing systems").

²³⁹ See Hardy v. DOD, No. 99-523, 2001 WL 34354945, at *10 (D. Ariz. Aug. 27, 2001) (holding that an agency was not obligated to forward to OPM a FOIA request for personnel records that agency did not maintain itself).

²⁴⁰ See Friends of Blackwater v. U.S. Dep't of the Interior, 391 F. Supp. 2d 115, 122 (D.D.C. 2005).

²⁴¹ See Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) (directing agencies to respond to FOIA requests "in a spirit of cooperation"). But cf. FOIA Update, Vol.

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Agencies should note that "forwarding" requests in this context is distinguishable from agency components' duty to "route" "misdirected" requests to the proper FOIA component within their own agency. As discussed above, the OPEN Government Act requires agency components to route misdirected requests within the agency within ten days of receipt, provided such requests are originally received by a component of the agency designated by the agency's regulations to receive FOIA requests.²⁴² (See Procedural Requirements, Time Limits, above, for a discussion of the requirement to route misdirected requests.) Finally, agencies should ensure that their referral and consultation procedures and practices do not subject requesters to "unnecessary bureaucratic hurdles."²⁴³

Responding to FOIA Requests

The FOIA provides that each agency "shall make [disclosable] records promptly available" upon request.²⁴⁴ The FOIA does not provide for limited disclosure; rather, it "speaks in terms of disclosure and nondisclosure [and] ordinarily does not recognize degrees of disclosure, such as permitting viewing, but not copying, of documents."²⁴⁵ Agencies may, nonetheless, require requesters to pay any fees owed before releasing the processed records to them because to do otherwise "would effectively be bankrolling search and review, and duplicating expenses because there would never be any assurance whatsoever that payment

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XII, No. 2, at 6 (advising that in undertaking such requester communications agencies must take care not to compromise special secrecy interests and concerns held by law enforcement and intelligence agencies).

²⁴² OPEN Government Act of 2007, Pub. L. No. 110-175, § 6, 121 Stat. 2524, 2526 (to be codified at 5 U.S.C. § 552(a)(6)(A)); see also *FOIA Post*, "OIP Guidance: New Requirement to Route Misdirected FOIA Requests" (posted 11/18/08).

²⁴³ Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009), available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf> (stating that "[u]nnecessary bureaucratic hurdles have no place in the 'new era of open Government'").

²⁴⁴ 5 U.S.C. § 552(a)(3)(A) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

²⁴⁵ Julian v. DOJ, 806 F.2d 1411, 1419 n.7 (9th Cir. 1986), aff'd, 486 U.S. 1 (1988); see NARA v. Favish, 541 U.S. 157, 172 (recognizing that information disclosed under FOIA "belongs to citizens to do with as they choose"), reh'g denied, 541 U.S. 1057 (2004); Berry v. DOJ, 733 F.2d 1343, 1355 n.19 (9th Cir. 1984); see also Seawell, Dalton, Hughes & Timms v. Exp.-Imp. Bank, No. 84-241-N, slip op. at 2 (E.D. Va. July 27, 1984) (stating that there is no "middle ground between disclosure and nondisclosure"). But see Antonelli v. ATF, No. 04-1180, 2006 WL 3147675, at *2 (D.D.C. Nov. 1, 2006) (finding that agency satisfied FOIA's requirements by making available for viewing inmate requester's presentence report); Chamberlain v. DOJ, 957 F. Supp. 292, 296 (D.D.C. 1997) (holding that FBI's offer to make "visicorder charts" available to requester for review at FBI Headquarters met FOIA requirements due to exceptional fact that charts could be damaged if photocopied), summary affirmance granted, 124 F.3d 1309 (D.C. Cir. 1997) (unpublished table decision).

would ever be made once the requesters had the documents in their hands.¹²⁴⁶

Because the FOIA does not provide for limited disclosure, the Supreme Court has opined that there is also "no mechanism under [the statute] for a protective order allowing only the requester to see [the information] or for proscribing its general dissemination."¹²⁴⁷ In short, "once there is disclosure, the information belongs to the general public."¹²⁴⁸

The FOIA requires agencies to "provide the [requested] record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format" and to also "make reasonable efforts to maintain its records in forms or formats that are reproducible" for such purposes.²⁴⁹ These statutory provisions require agencies to not only honor a requester's choice of format among existing formats of a record (assuming there is no exceptional difficulty in its reproduction)²⁵⁰ but to also make "reasonable efforts" to disclose

²⁴⁶ Strout v. U.S. Parole Comm'n, 842 F. Supp. 948, 951 (E.D. Mich. 1994), aff'd, 40 F.3d 136 (6th Cir. 1994); see also Taylor v. U.S. Dep't of the Treasury, No. A-96-CA-933, 1996 WL 858481, at *2 (W.D. Tex. Dec. 17, 1996) (recognizing that agency may require payment before sending processed records); Trueblood v. U.S. Dep't of the Treasury, 943 F. Supp. 64, 68 (D.D.C. 1996) (same); Putnam v. DOJ, 880 F. Supp. 40, 42 (D.D.C. 1995) (allowing agency to require payment of current and outstanding fees before releasing records); Crooker v. ATF, 882 F. Supp. 1158, 1162 (D. Mass. 1995) (finding no obligation to provide records until current and past-due fees are paid); cf. FOIA Post, "NTIS: An Available Means of Record Disclosure" (posted 8/30/02; supplemented 9/23/02) (advising that records that agency chooses to distribute through National Technical Information Service will be subject to that entity's statutorily based fee schedule, which "supersedes" FOIA's fee provisions pursuant to 5 U.S.C. § 552(a)(4)(A)(vi)).

²⁴⁷ Favish, 541 U.S. at 174; see Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1082, 1088-89 (9th Cir. 1997) (rejecting plaintiff's offer to receive requested documents under a confidentiality agreement due to rule that "FOIA does not permit selective disclosure of information to only certain parties, and that once the information is disclosed to [plaintiff], it must be made available to all members of the public who request it"); Swan v. SEC, 96 F.3d 498, 500 (D.C. Cir. 1996) ("Once records are released, nothing in the FOIA prevents the requester from disclosing the information to anyone else. The statute contains no provisions requiring confidentiality agreements or similar conditions."); Schiffer v. FBI, 78 F.3d 1405, 1410 (9th Cir. 1996) (reversing district court's conditional disclosure order, which is "not authorized by FOIA"); cf. Arieff v. U.S. Dep't of the Navy, 712 F.2d 1462, 1469 (D.C. Cir. 1983) (refusing to grant protective order that would allow plaintiff's counsel and medical expert to review exempt information).

²⁴⁸ Favish, 541 U.S. at 174; see also FOIA Post, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) ("The well-known maxim under the FOIA that 'release to one is release to all' was firmly reinforced in the Favish decision.").

²⁴⁹ 5 U.S.C. § 552(a)(3)(B); see also FOIA Update, Vol. XVII, No. 4, at 2 (discussing statutory provisions); cf. DOJ "Electronic Record" Report, reprinted in abridged form in FOIA Update, Vol. XI, No. 3, at 3-6 (discussing "choice of format" issues regarding "electronic records").

²⁵⁰ See, e.g., Chamberlain, 957 F. Supp. at 296 ("The substantial expense of reproducing the
(continued...)

a record in a format not in existence, when so requested, if the record is "readily reproducible" in that new format.²⁵¹

When an agency denies a request in full or in part, the FOIA requires that it provide the requester with certain information about the action taken on the request. An agency should "make a reasonable effort" to estimate the amount of information withheld and should inform the requester of that amount, unless doing so would harm an interest protected by an applied exemption.²⁵² For any records released in part, the records must show (1) the amount of information withheld; (2) the location of the withholding within the record; and (3) the

²⁵⁰(...continued)

visicorder charts, as well as the possibility that the visicorder charts might be damaged if photocopied, make the Government's proposed form of disclosure [i.e., inspection] even more compelling.").

²⁵¹ See LaRoche v. SEC, 289 F. App'x 231, 231 (9th Cir. 2008) (affirming summary judgment in favor of agency because records sought were not readily reproducible in searchable electronic format plaintiff requested); Sample v. BOP, 466 F.3d 1086, 1087, 1089 (D.C. Cir. 2006) (finding that statutory language "unambiguously requires" agency to disclose records in requested electronic format even though agency's regulations prohibit an inmate from possessing such electronically formatted material, without making any finding with respect to inmate "access or possession" of such records, as those questions were "not before the court"); TPS, Inc. v. DOD, 330 F.3d 1191, 1195 (9th Cir. 2003) (stating, in light of particular agency regulation, that the FOIA "requires that the agency satisfy a FOIA request [for the production of records in a certain format] when it has the capability to readily reproduce documents in the requested format"); Jackson v. U.S. Dep't of Labor, No. 06-02157, 2008 WL 539925, at *4, (E.D. Cal. Feb. 25, 2008) (magistrate's recommendation) (finding that "because [agency] has not developed a system to provide public online access, the records requested are not readily reproducible in that format"), adopted, No. 06-2157, 2008 WL 4463897, *1 (E.D. Cal. Oct. 2, 2008); see also FOIA Update, Vol. XIX, No. 1, at 6 (encouraging agencies to consider providing records in multiple forms as matter of administrative discretion if requested to do so); FOIA Update, Vol. XVIII, No. 1, at 5 (discussing agency obligations to produce records in requested forms or formats (citing H.R. Rep. No. 104-795, at 18, 21 (1996) (noting that amendments overrule Dismukes v. Dep't of the Interior, 603 F. Supp. 760, 761-63 (D.D.C. 1984), which previously allowed agency to choose format of disclosure if it chose "reasonably"))); cf. Snyder v. DOD, No. 03-4992, 2007 WL 951293, at *4-5 (N.D. Cal. Mar. 27, 2007) (ordering agency to produce file that was available on agency website, but corrupted or incomplete when viewed, and to produce re-formatted version of another file that it previously disclosed, but was also corrupted, explaining that "[a]bsent exceptional circumstances, release of information is required unless it falls under one of nine statutory exemptions" and that "the prospect of compliance expenses is not one of those exceptions"); Landmark Legal Found. v. EPA, 272 F. Supp. 2d 59, 63 (D.D.C. 2003) (concluding that agency had not violated the FOIA's "readily reproducible" provision by failing to retain electronic copies of e-mails that were retained in paper form only, because "the agency may keep its files in a manner that best suits its needs").

²⁵² See 5 U.S.C. § 552(a)(6)(F); see also FOIA Update, Vol. XVIII, No. 2, at 2 (discussing alternative methods of satisfying obligation to estimate volume of deleted or withheld information, including "forms of measurement" to be used).

exemption being asserted, unless doing so would harm an interest protected by an applied exemption.²⁵³ (For a further discussion of the FOIA's portion-marking requirements, see Procedural Requirements, "Reasonably Segregable" Obligation, above.) The agency response must also include specific administrative information about the agency's action.²⁵⁴ While "[t]here is no requirement that administrative responses to FOIA requests contain the same documentation necessary in litigation,"²⁵⁵ a decision to deny an initial request must inform the requester of the reasons for denial, the right to appeal, and the name and title of each person responsible for the denial.²⁵⁶ Agencies must also include administrative appeal rights notifications in any responses to requesters where they are advising that no records responsive to the request could be located.²⁵⁷

²⁵³ See 5 U.S.C. § 552(b) (paragraph immediately following exemptions).

²⁵⁴ See 5 U.S.C. § 552(a)(6)(A)(i) (requiring agencies to notify requesters of disclosure determinations, reasons for such determinations, and administrative appeal rights); *id.* § 552(a)(6)(C)(i) (requiring agencies to notify requesters of name and title of person making determination regarding denials of requests for records).

²⁵⁵ Crooker v. CIA, No. 83-1426, 1984 U.S. Dist. LEXIS 23177, at *3-4 (D.D.C. Sept. 28, 1984); see Sakamoto v. EPA, 443 F. Supp. 2d 1182, 1189 (N.D. Cal. 2006) (granting summary judgment because, inter alia, "[i]nitial agency responses to FOIA requests are not required to contain a Vaughn index"); Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 11 (D.D.C. 1995) (finding that agencies need not provide Vaughn Index until ordered by court after plaintiff has exhausted administrative process); Schaake v. IRS, No. 91-958, 1991 U.S. Dist. LEXIS 9418, at *9-10 (S.D. Ill. June 3, 1991) (ruling that court "lacks jurisdiction" to require agency to provide Vaughn Index at either initial request or administrative appeal stages); SafeCard Servs. v. SEC, No. 84-3073, 1986 U.S. Dist. LEXIS 26467, at *5 (D.D.C. Apr. 21, 1986) (noting that requester has no right to Vaughn Index during administrative process), *aff'd on other grounds*, 926 F.2d 1197 (D.C. Cir. 1991); see also FOIA Update, Vol. VII, No. 3, at 6.

²⁵⁶ See 5 U.S.C. § 552(a)(6)(A)(i), (a)(6)(C)(I); Stanley v. DOD, No. 93-4247, slip op. at 14-15 (S.D. Ill. July 28, 1998) (finding constructive exhaustion when agency failed to provide requester with notice of administrative appeal rights regarding disputed fee estimate); Mayock v. INS, 714 F. Supp. 1558, 1567 (N.D. Cal. 1989) (denying plaintiff's request for Vaughn Index at administrative level, but suggesting that agency regulations then in effect required "more information than just the number of pages withheld and an unexplained citation to the exemptions"), *rev'd & remanded on other grounds sub nom.* Mayock v. Nelson, 938 F.2d 1006 (9th Cir. 1991); Hudgins v. IRS, 620 F. Supp. 19, 20-21 (D.D.C. 1985) (suggesting that statement of appeal rights should be provided even when agency interprets request as not reasonably describing records), *aff'd*, 808 F.2d 137 (D.C. Cir. 1987); *cf.* Kay v. FCC, 884 F. Supp. 1, 2-3 (D.D.C. 1995) (upholding notification that appeals were to be filed with general counsel even though Commission took final action on them).

²⁵⁷ See Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 67 (D.C. Cir. 1990) (holding that an agency's "no record" response constitutes an "adverse determination" and therefore requires notification of appeal rights under 5 U.S.C. § 552(a)(6)(A)(i)); Dinsio v. FBI, 445 F. Supp. 2d 305, 311 (W.D.N.Y. 2006) (finding constructive exhaustion when agency response did not include notice of administrative appeal rights); see also FOIA Update, Vol. XII, No. 2, at 5 ("OIP (continued...)

Agencies should also, as a matter of administrative discretion, include any other helpful information when responding to requesters, including, when appropriate, the agency's interpretation of the request.²⁵⁸ Moreover, the OPEN Government Act requires agencies to provide requesters with individualized tracking numbers for requests that will take longer than ten days to process, and to maintain a telephone line or Internet service to provide requesters with request status information, such as the date the agency "originally received" the request and the "estimated date" of completion.²⁵⁹ Furthermore, because agencies are obligated to provide requesters with the "best copy available" of a record,²⁶⁰ they should also address any problems with the photocopy quality of disclosed records.²⁶¹

Finally, the President has instructed agencies to "use modern technology" to make information available to the public, both in response to requests and through proactive disclosures.²⁶² In addition to meeting their proactive disclosure obligations under the FOIA,²⁶³

²⁵⁷(...continued)

Guidance: Procedural Rules Under the D.C. Circuit's Oglesby Decision) (superseding FOIA Update, Vol. V, No. 3, at 2). But see Dorn v. IRS, No. 03-539, 2005 WL 1126653, at *3 (M.D. Fla. May 12, 2005) (stating that agency's response was not "adverse," even though response stated that requested records "did not exist, must be requested from another office, or could not be created").

²⁵⁸ See FOIA Update, Vol. XVI, No. 3, at 3-5 ("OIP Guidance: Determining the Scope of a FOIA Request") (emphasizing importance of communication with requester); see, e.g., Astley v. Lawson, No. 89-2806, 1991 WL 7162, at *2 (D.D.C. Jan. 11, 1991) (suggesting that agency "might have been more helpful" to requester by "explaining why the information he sought would not be provided").

²⁵⁹ OPEN Government Act of 2007, Pub. L. No. 110-175, § 7, 121 Stat. 2524, 2527 (to be codified at 5 U.S.C. § 552(a)(7)); see also FOIA Post, "OIP Guidance: Assigning Tracking Numbers and Providing Status Information for Requests" (posted 11/18/08).

²⁶⁰ See McDonnell v. United States, 4 F.3d 1227, 1262 n.21 (3d Cir. 1993) ("Of course, we anticipate that [plaintiff] will receive the best possible reproduction of the documents to which he is entitled."); Giles v. DOJ, No. 00-1497, slip op. at 5 (D.D.C. June 4, 2001) (accepting that agency provided plaintiff with "best copies available" even though plaintiff asserted that they were "unreadable"); see also FOIA Update, Vol. XVI, No. 3, at 5 (advising agencies that "before providing a FOIA requester with a photocopy of a record that is a poor copy or is not entirely legible," they should "make reasonable efforts to check for any better copy of a record that could be used to make a better photocopy for the requester").

²⁶¹ See FOIA Update, Vol. XVI, No. 3, at 5 (advising of procedures to be used in cases involving poor photocopies of records); cf. FOIA Post, "The Limits of Agency Translation Obligations Under the FOIA" (posted 12/1/04) (distinguishing "legibility" from "translatability" of disclosed records).

²⁶² See Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) [hereinafter President Obama's FOIA Memorandum]; accord Attorney General Holder's FOIA Guidelines, (continued...)

agencies should identify and post records in which they anticipate interest and should make improvements to their websites accordingly.²⁶⁴ (For a discussion of proactive disclosures, see Proactive Disclosures, Disclosing Records Proactively to Achieve Transparency, above.)

Administrative Appeals

Under the FOIA's administrative appeal provision, a requester has the right to administratively appeal any adverse determination an agency makes on his or her FOIA request.²⁶⁵ Under DOJ regulations, for example, adverse determinations include denials of records in full or in part; "no records" responses; denials of requests for fee waivers; and denials of requests for expedited processing.²⁶⁶

The administrative appeal process is important to agencies and requesters for two reasons. First, the administrative appeal process provides an agency with an opportunity to review its initial action taken in response to a request to determine whether corrective steps are necessary.²⁶⁷ Second, although failure to file an administrative appeal is not an absolute bar to judicial review, the Court of Appeals for the District of Columbia Circuit has held that exhaustion of the administrative appeal process is "generally required before filing suit in federal court."²⁶⁸

²⁶²(...continued)

available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>; *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

²⁶³ See 5 U.S.C. § 552(a)(2).

²⁶⁴ See President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683 (directing all agencies to "take affirmative steps to make information public" and to "use modern technology to inform citizens about what is known and done by their Government"); accord Attorney General Holder's FOIA Guidelines, at 3, available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf> (stating that "agencies should readily and systematically post information online in advance of any public request" because doing so "reduces the need for individualized requests and may help reduce existing backlogs"); *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (recognizing proactive disclosure as a "key area where agencies can make real improvements in increasing transparency").

²⁶⁵ See 5 U.S.C. § 552(a)(6)(A) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

²⁶⁶ See DOJ FOIA Regulations, 28 C.F.R. § 16.6(c) (2008).

²⁶⁷ See Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 61 (D.C. Cir. 1990) (recognizing that exhaustion of the administrative appeal process "allows the top managers of an agency to correct mistakes made at lower levels and thereby obviates unnecessary judicial review" (citing McKart v. United States, 395 U.S. 185, 194 (1969) (non-FOIA case))).

²⁶⁸ Hidalgo v. FBI, 344 F.3d 1256, 1258 (D.C. Cir. 2003) (quoting Oglesby, 920 F.2d at 61);
(continued...)

Courts have found that a requester must submit an administrative appeal pursuant to an agency's regulations, including regulations governing deadlines and procedures for submission.²⁶⁹ Although the FOIA has a "constructive exhaustion" provision,²⁷⁰ once an agency responds to a request, courts have found that the requester is obligated at that time to submit an administrative appeal even if the agency's response was untimely.²⁷¹

The FOIA requires an agency to make a determination on an administrative appeal

²⁶⁸(...continued)

see, e.g., Williams v. VA, 510 F. Supp. 2d 912, 921 (M.D. Fla. 2007) (finding that "Plaintiff's failure to administratively appeal the VA's decision on all but three of his requests precludes Plaintiff from obtaining any relief on all but three of his FOIA requests"); Bigwood v. USAID, 484 F. Supp. 2d 68, 71-72 (D.D.C. 2007) (reviewing agency response that plaintiff administratively appealed, and not other agency responses apparently not appealed); Callan v. IRS, No. 06-1024, 2007 WL 552219, at *3 (D. Ariz. Feb. 20, 2007) (unpublished disposition) (dismissing claim for failure to exhaust as plaintiff did not file administrative appeal). But see Keys v. DHS, 570 F. Supp. 2d 59, 69 n.2 (D.D.C. 2008) (considering plaintiff's claims in absence of administrative appeal of agency's action on records referred to it because a year's time after notification of withholding was "ample time [for agency to] correct its error"); Fischer v. FBI, No. 07-2037, 2008 WL 2248711, at *1-2 (D.D.C. May 29, 2008) (unpublished disposition) (considering merits of case, despite requester's failure to appeal agency action taken on remand, in light of agency's reversal and remand ten years after its initial administrative affirmance).

²⁶⁹ See, e.g., Imamoto v. SSA, No. 08-00137, 2008 WL 5179104, at *5 (D. Haw. Dec. 9, 2008) (concluding that third party agency forwarding requester's letter to SSA is not valid administrative appeal of SSA's action); Sindram v. Fox, No. 07-0222, 2008 WL 2996047, at *5 (E.D. Pa. Aug. 5, 2008) (giving plaintiff thirty days to produce evidence that he exhausted administrative remedies in light of agency having no record of receiving administrative appeal); Fisher v. DOJ, No. 07-2273, 2008 U.S. Dist. LEXIS 38925 (D.N.J. May 9, 2008) (declining to exercise jurisdiction because plaintiff's appeal was received after sixty-day deadline established by agency regulation and rejecting prison mailbox rule where "statutory or regulatory schemes . . . require[] actual receipt by a specific date" (quoting Longenette v. Krusing, 322 F.3d 758, 764 (3d Cir. 2003))).

²⁷⁰ See 5 U.S.C. § 552(a)(6)(C).

²⁷¹ See Oglesby, 920 F.2d at 61; see also Rease v. Harvey, 238 F. App'x 492, 495 (11th Cir. 2007) (unpublished disposition) (declaring that "requester still must exhaust his administrative remedies" even when agency response is untimely); Ivey v. Paulson, 227 F. App'x 1, 1 (D.C. Cir. 2007) (unpublished disposition) (affirming district court's dismissal for failure to exhaust because agency made response prior to requester filing suit, thereby reimposing requirement that requester submit administrative appeal); Arizechi v. IRS, No. 06-5292, 2008 WL 539058, at *5 (D.N.J. Feb. 25, 2008) (unpublished disposition) (finding that "[a]n administrative appeal is mandatory if the agency cures its failure to respond with the statutory period by responding to the FOIA request before suit is filed").

within twenty working days after its receipt.²⁷² An administrative appeal decision upholding an adverse determination must inform the requester of the provisions for judicial review of that determination in the federal courts.²⁷³ (For discussions of the various aspects of judicial review of agency action under the FOIA, see Litigation Considerations, below.)

²⁷² See 5 U.S.C. § 552(a)(6)(A)(ii); see also Wildlands CPR v. U.S. Forest Serv., 558 F. Supp. 2d 1096, 1102-03 (D. Mont. 2008) (finding constructive exhaustion where agency did not timely adjudicate administrative appeal); Soghomonian v. United States, 82 F. Supp. 2d 1134, 1138 (E.D. Cal. 1999) (holding that twenty-day time period for responding to administrative appeal begins when agency receives appeal, not when requester mails it).

²⁷³ See 5 U.S.C. § 552(a)(6)(A)(ii).