Litigation Considerations Part 1

The discussion below will follow a rough chronology of a portion of a typical FOIA lawsuit – from the threshold question of whether jurisdictional prerequisites have been met, to discovery. Part 2 of Litigation Considerations contains a discussion of summary judgment through considerations on appeal.

Jurisdiction

The United States district courts are vested with exclusive original jurisdiction over FOIA cases by section (a)(4)(B) of the Act, which provides in pertinent part:

> On complaint, the district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.[1]

Consequently, courts other than United States district courts, such as those with specialized or limited jurisdiction, have consistently held that they lack jurisdiction to

[1] 5 U.S.C. § 552(a)(4)(B) (2018).

hear FOIA claims.[2] Additionally, section (a)(4)(B) of the Act requires a requester to file a FOIA complaint in a separate civil action in order to confer jurisdiction.[3]

Section (a)(4)(B) has been held to govern judicial review under all three of the FOIA's access provisions, although as discussed below, this provision has been found by the Court of Appeals for the District of Columbia Circuit to limit the relief that can be afforded under the FOIA (see Litigation Considerations, Relief, below).[4] The FOIA's

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[2] See, e.g., Frazier v. United States, 683 F. App'x 938, 940 (Fed. Cir. 2017) (agreeing with Court of Federal Claims that it "does not have jurisdiction over claimed violations of the . . . FOIA because [that] statute[] do[es] not contain money-mandating provisions"); Henry v. McDonough, No. 20-8753, 2021 WL 2307216, at *1 (Vet. App. June 7, 2021) (finding "[b]ecause Congress determined that district courts should handle cases arising under FOIA, this Court lacks jurisdiction"); In re Lucabaugh, 262 B.R. 900, 905 (E.D. Pa. 2000) (finding FOIA claims insufficient to confer jurisdiction on bankruptcy court). But cf. U.S. Ass'n of Imps. of Textiles & Apparel v. United States, 366 F. Supp. 2d 1280, 1282 n.2 (Ct. Int'l Trade 2005) (concluding that the Court of International Trade has jurisdiction under 28 U.S.C. § 1581(i) to consider claims implicating FOIA's affirmative publication provisions, 5 U.S.C. § 552(a)(1)-(2)).

[3] See United States v. Whitfield, No. 18-5718, 2019 U.S. App. LEXIS 578, at *6 (6th Cir. Jan. 8, 2019) ("Based on the plain language of § 552(a)(4)(B) and the foregoing persuasive authority, we find that a party must file a complaint in a separate civil action [rather than in plaintiff's closed criminal case] in order to challenge an adverse FOIA determination."); United States v. Banks, 313 F. App'x 457, 458 (3d Cir. 2009) (finding that district court "did not err in denying [plaintiff's] motion, filed in post-conviction proceedings, seeking to challenge the allegedly improper withholding of agency records" because FOIA provides district courts with jurisdiction only after civil complaint is filed); Upsher-Smith Lab'ys, Inc. v. Fifth Third Bank, No. 16-556, 2017 WL 7369881, at *3 (D. Minn. Oct. 18, 2017) (rejecting attempt to challenge agency's FOIA response in motion to compel and finding that "[b]y its plain terms, the [FOIA] statute envisions that federal courts will hear challenges to FOIA decisions in distinct lawsuits"); United States v. Barnett, No. 09-67, 2014 U.S. Dist. LEXIS 63616, at *1-2 (E.D. Ky. May 8, 2014) (finding defendant "improperly demands relief regarding his FOIA requests in this criminal case" and "if appropriate, he may seek relief only by filing a civil complaint in the appropriate district court"); United States v. Gholikhan, No. 05-60238, 2011 WL 13268354, at *3 (S.D. Fla. Apr. 14, 2011) (rejecting motion asking district court "to adjudicate a FOIA dispute as part of her already-concluded criminal litigation . . . [b]ecause no case or controversy is currently before the [c]ourt in the criminal matter[] and because the FOIA dispute has not been brought before the [c]ourt 'on complaint' filed in a separate action").

[4] See Am. Mail Line, Ltd. v. Gulick, 411 F.2d 696, 701 (D.C. Cir. 1969) ("The only viable interpretation of this paragraph is that the judicial process is available to compel the disclosure of agency records not made available under paragraphs (1) and (2) [the affirmative disclosure sections of FOIA] as well as the agency records referred to in paragraph (3)."); accord Kennecott Utah Copper Corp. v. U.S. Dep't of the Interior, 88 F.3d 1191, 1202 (D.C. Cir. 1996) (finding that FOIA's "remedial provision, § 552(a)(4), governs

statutory language, as the Supreme Court ruled in Kissinger v. Reporters Committee for Freedom of the Press, makes federal jurisdiction dependent upon a showing that an agency has (1) "improperly," (2) "withheld," (3) "agency records."[5] As a consequence, courts have found that a plaintiff who does not allege any improper withholding of agency records fails to state a claim over which a court has subject matter jurisdiction within the meaning of Rule 12(b)(1) of the Federal Rules of Civil Procedure[6] or, alternatively, fails to state a claim upon which relief could be granted under Rule 12(b)(6).[7] Regardless of the exact legal basis used, however, if an agency has not improperly withheld records, courts have dismissed the FOIA suit.[8] Additionally, if a requester files suit before the expiration

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judicial review of all three types of documents," but also finding that relief afforded under FOIA is limited to "production" of agency documents to individual complainant). But see N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals, 987 F.3d 207, 223 (2d Cir. 2021) (holding that "FOIA grants district courts the authority . . . [to order an agency] to make records available for public inspection in an electronic reading room").

[5] 445 U.S. 136, 150 (1980).

[6] See, e.g., Earle v. Holder, No. 11-5280, 2012 WL 1450574, at *1 (D.C. Cir. Apr. 20, 2012) (per curiam) (affirming district court's holding that "appellant failed to state a claim under FOIA because he did not allege that agency records were withheld"); Segal v. Whitmyre, No. 04-80795, 2005 WL 1406171, at *3 (S.D. Fla. Apr. 6, 2005) (finding lack of jurisdiction over FOIA claim because plaintiff failed to allege improper withholding of agency records); Ellis v. IRS, No. 02-1976, 2003 WL 23334515, at *4 (D. Colo. Dec. 29, 2003) (dismissing claim for lack of subject matter jurisdiction because all documents were released prior to lawsuit); Armstead v. Gray, No. 03-1350, 2003 WL 21730737, at *1-2 (N.D. Tex. July 23, 2003) (finding no basis for jurisdiction under FOIA when plaintiff alleged only that agency employees "improperly accessed" plaintiff's records); Tota v. United States, No. 99-0445E, 2000 WL 1160477, at *2 (W.D.N.Y. July 31, 2000) (dismissing claim for lack of subject matter jurisdiction because the "[p]laintiff has not provided any evidence that the FBI improperly withheld any agency records").

[7] See, e.g., Statton v. Fla. Fed. Jud. Nominating Comm'n, 959 F.3d 1061, 1065 (11th Cir. 2020) (holding that requester "has not stated a claim on which relief can be granted" because Commission is not subject to FOIA); Risenhoover v. Stanfield, 767 F. App'x 12, 13 (D.C. Cir. 2019) (affirming dismissal for failure to state claim upon which relief can be granted where appellant "failed to identify the FOIA request at issue" or "the records which appellant believes to have been improperly withheld"); Citizens for Resp. & Ethics in Wash. v. DOJ, 922 F.3d 480, 483, 487 (D.C. Cir. 2019) (affirming dismissal under 12(b)(6) for failure to state a claim upon which relief can be granted because appellant failed to "allege factual matter supporting a plausible claim that OLC 'improperly' withheld its formal written opinions"); Carroll v. SSA, No. 11-3005, 2012 WL 1454858, at *2 (D. Md. Apr. 24, 2012) (dismissing for failure to state claim because plaintiff's complaint did not describe records sought nor provide details "of the refusal to turn over the requested information").

[8] See, e.g., Kissinger, 445 U.S. at 139 ("When an agency has demonstrated that it has not 'withheld' requested records in violation of the standards established by Congress, the

of the statutory deadline to respond to the request, courts have dismissed the suit, even if the agency still has failed to respond to the request after the deadline has expired because "the Court will only consider those facts and circumstances that existed at the time of the filing of the complaint, and not subsequent events."[9]

If an agency does not have possession or control of the requested records, courts have held that there was no improper withholding.[10] At the same time, however, an

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federal courts have no authority to order the production of such records under the FOIA."); Bloom v. SSA, 72 F. App'x 733, 735 (10th Cir. 2003) (finding that once documents were released, "there existed no 'case or controversy' sufficient to confer subject matter jurisdiction on the federal court") (citation omitted); Caracciolo v. U.S. Merit Sys. Prot. Bd., No. 07-3487, 2008 WL 2622826, at *2 (S.D.N.Y. July 3, 2008) (dismissing plaintiff's complaint because agency demonstrated that it did not withhold any records responsive to plaintiff's FOIA request); Hoff v. DOJ, No. 07-094, 2007 WL 4165162, at *3 (S.D. Ohio Nov. 19, 2007) (granting motion to dismiss for lack of subject matter jurisdiction because agency established that it possessed no responsive records and plaintiff provided no evidence that agency maintained any responsive records); Harris v. DOJ, No. 06-1806, 2007 WL 3015246, at *4-5 (N.D. Tex. Oct. 12, 2007) (determining court lacks subject matter jurisdiction because "Plaintiff has failed to point to evidence in the record which controverts Defendant's evidence that it did not improperly withhold any agency records"); cf. Richardson v. Bd. of Governors of Fed. Rrsv. Sys., 248 F. Supp. 3d 91, 103 (D.D.C. 2017) (holding no jurisdiction under FOIA based on plaintiff's claim that his "'personal privacy interests are protected by two provisions of FOIA, exemptions 6 and 7(C),'" where plaintiff had filed no FOIA request).

[9] Jud. Watch, Inc. v. FBI, No. 01-1216, slip op. at 8 (D.D.C. July 26, 2002) (citing Jud. Watch, Inc. v. DOJ, No. 97-2089, slip op. at 11 (D.D.C. July 14, 1998) (citing, in turn, Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830 (1989) ("The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed."))); see also Rush v. FBI, No. 09-0955, 2009 WL 1438241, at *1 (D.D.C. May 21, 2009) (dismissing complaint because it was filed before defendant's deadline to respond to FOIA request); Said v. Gonzales, No. 06-986, 2007 WL 2789344, at *6 (W.D. Wa. Sept. 24, 2007) (dismissing FOIA claims because complaint was filed prematurely); cf. Dorn v. Comm'r, No. 03-539, 2005 WL 1126653, at *3-4 (M.D. Fla. May 12, 2005) (dismissing lawsuit where complaint was filed prematurely, even though agency ultimately responded after twenty-day period). But cf. Jud. Watch, Inc. v. DOE, 191 F. Supp. 2d 138, 139 (D.D.C. 2002) (permitting premature complaint to be cured by "supplemental" complaint filing).

[10] See DOJ v. Tax Analysts, 492 U.S. 136, 145 (1989) (finding that agency must be in control of records requested when FOIA request made and "[b]y control [the court] mean[s] that the materials have come into the agency's possession in the legitimate conduct of its official duties"); DeBrew v. Atwood, 792 F.3d 118, 123 (D.C. Cir. 2015) (finding FOIA's disclosure requirements not violated "because the agency is not obligated, nor is it able, to disclose a record it does not have"); Lechliter v. Rumsfeld, 182 F. App'x 113, 116 (3d Cir. 2006) (finding no improper withholding where agency destroyed documents for reason that "'is not itself suspect'" (citing SafeCard Servs. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991)));

agency's failure to consider those records that came into its possession or were created after receipt of a FOIA request, but prior to the start of the search for records, may be considered an improper withholding.[11] (For further discussion of "cut-off" dates, see Procedural Requirements, Searching for Responsive Records.) When there is a dispute as to whether the requested materials are agency records, the D.C. Circuit has held that the issue "goes to the merits of the dispute—the 'court's authority to impose certain remedies'—rather than the court's jurisdictional power to hear the case."[12]

Zaldivar v. VA, No. 14-01493, 2015 WL 6468207, at *5 (D. Ariz. Oct. 27, 2015) ("When an agency does not possess a record or document, it cannot be claimed that the document was improperly withheld."); Cambrel v. Fulwood, No. 09-1930, 2011 WL 4738153, at *4 (M.D. Pa. Oct. 6, 2011) (noting that courts "can not mandate the production of documents the agencies do not have in their custody or control at the time of the FOIA request"); Folstad v. Bd. of Governors of the Fed. Rsrv. Sys., No. 99-124, 1999 U.S. Dist. LEXIS 17852, at *5 (W.D. Mich. Nov. 16, 1999) (declaring that FOIA "does not independently impose a retention obligation on the agency" and that "[e]ven if the agency failed to keep documents that it should have kept, that failure would create neither responsibility under FOIA to reconstruct those documents nor liability for the lapse"), aff'd, 234 F.3d 1268 (6th Cir. 2000) (unpublished table decision). But see Cal-Almond, Inc. v. USDA, No. 89-574, slip op. at 2-3 (E.D. Cal. Mar. 12, 1993) (ruling that when agency returned requested records to submitter four days after denying requester's administrative appeal, in violation of its own records-retention requirements, agency must seek return of records from submitter for disclosure to requester), appeal dismissed per stipulation, No. 93-16727 (9th Cir. Oct. 26, 1994).

[11] See Pub. Citizen v. Dep't of State, 276 F.3d 634, 643-44 (D.C. Cir. 2002) (refusing to approve agency's "date-of-request cut-off" policy for identifying responsive records and pointing out that it effectively results in withholding of potentially large number of relevant agency records).

[12] Cause of Action v. OMB, 10 F.4th 849, 854 (D.C. Cir. 2021) (quoting United States v. Phillips Morris USA, Inc., 840 F.3d 844, 850 (D.C. Cir. 2016)).

The FOIA provides jurisdiction over records held by federal agencies and does not extend to other entities[13] or to individuals.[14] (For further discussions of the terms "agency" and "agency records," see Procedural Requirements, Entities Subject to the FOIA; and Procedural Requirements, "Agency Records.")

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[13] See, e.g., Whitaker v. Dep't of Com., 970 F.3d 200, 200 (2d Cir. 2020) (affirming district court's finding that the First Responder Network Authority is exempt from FOIA); Statton v. Fla. Fed. Jud. Nominating Comm'n, 959 F.3d 1061, 1065 (11th Cir. 2020) (affirming district court's determination that the Florida Federal Judicial Nominating Commission is not agency subject to FOIA); Taitz v. Ruemmler, No. 11-5306, 2012 WL 1922284, at *1 (D.C. Cir. May 25, 2012) (holding that FOIA does not apply to White House Counsel's Office); Citizens for Resp. & Ethics in Wash. v. Off. of Admin., 566 F.3d 219, 224 (D.C. Cir. 2009) (holding that Office of Administration "lacks substantial independent authority" and so is not "agency" subject to FOIA); Megibow v. Clerk of U.S. Tax Ct., 432 F.3d 387, 388 (2d Cir. 2005) (ruling that United States Tax Court is not subject to FOIA); Blankenship v. Claus, 149 F. App'x 897, 898 (11th Cir. 2005) (affirming dismissal of FOIA claim brought against state authority); Wright v. Curry, 122 F. App'x 724, 725 (5th Cir. 2004) (emphasizing that FOIA "applies to federal agencies, not state agencies"); United States v. Alcorn, 6 F. App'x 315, 316-17 (6th Cir. 2001) (affirming dismissal of FOIA claim against district court "because the federal courts are specifically excluded from FOIA's definition of 'agency'"); Mabie v. U.S. Marshal Serv., No. 18-1276, 2018 WL 4401752, at *1 (S.D. Ill. Sept. 14, 2018) (finding no jurisdiction over withholdings by city jail and police department and that "state or local governments are not subject to the FOIA just because they receive grants or other funds from the federal government or work with the federal government"); Isiwele v. HHS, 85 F. Supp. 3d 337, 353 (D.D.C. 2015) (stating that "the FOIA does not apply to the Administrative Office of the United States Courts because it is an arm of the judicial branch, which is not subject to the FOIA"); Elec. Priv. Info. Ctr. v. NSA, 795 F. Supp. 2d 85, 91 (D.D.C. 2011) (observing that D.C. Circuit has "unambiguously held that the [National Security Council] is not an agency subject to the FOIA"); Hossein v. City of Southfield, No. 11-12947, 2011 U.S. Dist. LEXIS 129481, at *1 (E.D. Mich. Nov. 9, 2011) (holding that FOIA does not apply to State agencies and courts); Cruz v. Superior Ct. Judges, No. 04-1103, 2006 WL 547930, at *1 (D. Conn. Mar. 1, 2006) (holding that municipal police department is not subject to FOIA); cf. Sierra Club v. TVA, 905 F. Supp. 2d 356, 362 (D.D.C. 2012) (finding that venue and personal jurisdiction are separate and that "§ 552(a)(4)(B) does not give the Court personal jurisdiction over [the Tennessee Valley Authority (a wholly owned government corporation)]").

[14] See, e.g., Drake v. Obama, 664 F.3d 774, 785 (9th Cir. 2011) (finding that FOIA does not apply to any defendants as they are individuals, not agencies); McDonnell v. Clinton, 132 F.3d 1481, 1481 (D.C. Cir. 1997) (unpublished table decision) (dismissing FOIA claim brought solely against the President); Ortez v. Wash. Cnty., 88 F.3d 804, 811 (9th Cir. 1996) (dismissing FOIA claims against county and county officials); Voigt v. Muffenbier, No. 11-00089, 2012 WL 90486, at *2 (D.N.D. Jan. 11, 2012) (finding that FOIA does not create private cause of action against individuals); Allnutt v. DOJ, 99 F. Supp. 2d 673, 678 (D. Md. 2000) (ruling that trustees of bankruptcy estates are "private" and thus are not subject to FOIA), aff'd sub. nom. Allnutt v. Handler, 8 F. App'x 225 (4th Cir. 2001).

Whether an agency has "improperly" withheld records usually turns on whether one or more exemptions apply to the documents at issue.[15] If the agency can establish that no responsive records exist or that all potentially responsive records have been destroyed or transferred, then courts have found that there is no "improper" withholding.[16] The same is true if all responsive records have been released in full to the requester.[17]

Where a request seeks records that are subject to the twelve-year restricted period under the Presidential Records Act, judicial review of any withholding determination by NARA is precluded.[18]

In a decision involving a somewhat related issue, the Court of Appeals for the Eighth Circuit upheld the removal of a state FOIA case to a federal court because the records at issue actually belonged to the United States Attorney's Office, which had

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[15] See Tax Analysts, 492 U.S. at 151 (generalizing that "agency records which do not fall within one of the exemptions are 'improperly' withheld" (citing 5 U.S.C. § 552(b))); Abraham & Rose, P.L.C. v. United States, 138 F.3d 1075, 1078 (6th Cir. 1998) (indicating that agency denying FOIA request bears burden of establishing that requested information falls within exemption and remanding case for consideration of appropriate exemptions).

[16] See, e.g., Perales v. DEA, 21 F. App'x 473, 474 (7th Cir. 2001) (affirming dismissal because information requested does not exist); Coal. on Pol. Assassinations v. DOD, 12 F. App'x 13, 14 (D.C. Cir. 2001) (granting summary judgment in favor of agency finding no improper withholding where potentially responsive records have either been destroyed or transferred to NARA prior to FOIA request being filed); Jones v. FBI, 41 F.3d 238, 249 (6th Cir. 1994) (finding no improper withholding when records were destroyed prior to FOIA request); Burr v. Huff, No. 04-53, 2004 WL 253345, at *2 (W.D. Wis. Feb. 6, 2004) ("If no documents exist, nothing can be withheld, and jurisdiction cannot be established."), aff'd, 112 F. App'x 537, 537-38 (7th Cir. 2004); cf. Hardway v. CIA, 384 F. Supp. 3d 67, 76 (D.D.C. 2019) (holding that "FOIA does not permit plaintiffs to demand 'proof' that particular records they requested were destroyed, or otherwise dictate how defendants carry out searches for responsive records").

[17] See, e.g., Gabel v. Comm'r, No. 94-16245, 1995 WL 267203, at *2 (9th Cir. May 5, 1995) (finding no improper withholding because "it was uncontested" that agency provided complete response to request); Ferranti v. Gilfillan, No. 04-339, 2005 WL 1366446, at *2 (D. Conn. May 31, 2005) (dismissing suit for lack of jurisdiction after agency fully released all requested records); Reg'l Mgmt. Corp. v. Legal Servs. Corp., 10 F. Supp. 2d 565, 573-74 (D.S.C. 1998) (concluding that "no case or controversy exists" because agency produced all requested documents), aff'd in part & remanded in part on other grounds, 186 F.3d 457 (4th Cir. 1999); cf. Martinez v. BOP, 444 F.3d 620, 625 (D.C. Cir. 2006) (holding that agency fulfilled its FOIA obligations by affording prisoner-plaintiff "meaningful opportunity to review" his presentence reports and to take notes on them).

[18] See 44 U.S.C. § 2204(b)(3); see also Smith v. NARA, 415 F. Supp. 3d 85, 91 (D.D.C. 2019) (holding "[d]uring the twelve-year restricted period, the Archivist's determination . . . is not subject to judicial review").

intervened to protect its interests.[19] The Eighth Circuit explained that not only does the federal removal statute, 28 U.S.C. § 1442(a)(1),[20] establish an independent basis for federal court jurisdiction, but the FOIA itself raises a "colorable defense" to the state action.[21]

Standing

Plaintiffs seeking to invoke federal jurisdiction must establish standing by demonstrating "(1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, and (3) likely to be redressed by a favorable judicial decision."[22] In an action under the FOIA, an individual must show that they made a request for records that was improperly denied.[23]

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[19] See United States v. Todd, 245 F.3d 691, 693 (8th Cir. 2001) (finding "colorable defense" based on FOIA, which justified removal); see also, e.g., Brady-Lunny v. Massey, 185 F. Supp. 2d 928, 930, 932 (C.D. Ill. 2002) (indicating that United States removed state FOIA case pursuant to "federal question doctrine," and ultimately finding that information at issue was exempt under FOIA and therefore should not be disclosed).

[20] (2019).

[21] Todd, 245 F.3d at 693.

[22] Spokeo, Inc. v. Robins, 578 U.S. 330, 332 (2016).

[23] See Pub. Citizen v. DOJ, 491 U.S. 440, 449 (1989) (analogizing in non-FOIA case that all that is required to establish standing under FOIA is for requesters to show "that they sought and were denied specific agency records"); United States v. Richardson, 418 U.S. 166, 204 (1974) (Stewart, J., dissenting) ("[T]he Freedom of Information Act creates a private cause of action for the benefit of persons who have requested certain records from a public agency and whose request has been denied."); Prisology, Inc. v. BOP, 852 F.3d 1114, 1117-18 (D.C. Cir. 2017) (holding that plaintiff lacked standing because they failed to allege an injury in fact through the denial of a FOIA request (citing Summer v. Earth Island Inst., 555 U.S. 488, 497 (2009))); Zivotofsky ex rel. Ari Z. v. Sec'y of State, 444 F.3d 614, 617-18 (D.C. Cir. 2006) (analogizing FOIA standing requirements in non-FOIA case stating that "[a] requester is injured-in-fact for standing purposes because he did not get what the statute entitled him to receive"); McDonnell v. United States, 4 F.3d 1227, 1238 (3d Cir. 1993) ("The filing of a request, and its denial, is the factor that distinguishes the harm suffered by the plaintiff in an FOIA case from the harm incurred by the general public arising from deprivation of the potential benefits accruing from the information sought."); Halperin v. CIA, 629 F.2d 144, 152 (D.C. Cir. 1980) (finding that plaintiff lacked standing because he did not allege an injury which was not common to all members of public); Slaughter v. NSA, No. 15-5047, 2015 WL 7180511, at *2 (E.D. Pa. Nov. 16, 2015) ("In effect, the agency's adverse decision to a FOIA request satisfies the injury-in-fact requirement of standing for the requester."); Sierra Club v. EPA, 75 F. Supp. 3d 1125, 1138 (N.D. Cal. 2014) (finding that "any person who submits a FOIA request has standing to bring a FOIA challenge in federal court if the request is denied in whole or part" (citing Richardson, 418 U.S. at 204)); Three Forks Ranch

As a general rule, only the person who submitted a FOIA request at the administrative level can be the proper party plaintiff in any subsequent court action based on that request.[24] Courts have denied standing to clients where "an attorney makes a [FOIA] request for documents that are of interest to her client, but does not indicate that the request is being made on the client's behalf."[25] Similarly, a plaintiff has been found

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Corp. v. Bureau of Land Mgmt., 358 F. Supp. 2d 1, 2 (D.D.C. 2005) ("Any person who submitted a request for existing documents that the petitioned agency denied has standing to bring a FOIA challenge."). But cf. Animal Legal Def. Fund v. USDA, 935 F.3d 858, 869 (9th Cir. 2019) (finding defendant had standing to bring FOIA subsection (a)(2) claim because agency's failure to make frequently requested records available in virtual reading room "harmed [Defendant] in real-world ways" and "their injuries are different from the injuries sustained by other Americans who never regularly visited these online reading rooms").

[24] See Wingate v. DHS, No. 11-223, 2012 WL 1964114, at *1-3 (M.D. Fla. May 31, 2012) (concluding that plaintiffs lack standing where they "were not mentioned by name in the FOIA requests or related correspondence" with the agency); Abuhouran v. Dep't of State, 843 F. Supp. 2d 73, 77 (D.D.C. 2012) (dismissing amended complaint brought by plaintiff's sister for lack of standing where "she was not a party to the underlying FOIA request"); Fieger v. FEC, 690 F. Supp. 2d 644, 649-51 (E.D. Mich. 2010) (holding "[a] plaintiff who has neither made a request for information on his own nor explicitly through counsel cannot show an injury in fact," and noting that requester "cannot [later attempt to] confer standing that did not exist when lawsuit commenced"); Cherry v. FCC, No. 09-680, 2009 WL 4668405, at *3 (M.D. Fla. Dec. 3, 2009) (accepting finding of magistrate that plaintiff "lacks standing to bring the FOIA Complaint because the relevant FOIA requests did not disclose [them] as an interested party"); SAE Prods., Inc. v. FBI, 589 F. Supp. 2d 76, 79-82 (D.D.C. 2008) (dismissing FOIA claim on basis that plaintiff lacked standing to pursue judicial review because individual who made FOIA requests did not clearly indicate that he was doing so on behalf of plaintiff corporation); United States v. Trenk, No. 06-1004, 2006 WL 3359725, at *9 (D.N.J. Nov. 20, 2006) (concluding that plaintiff lacks standing to bring FOIA action because "[h]is name does not appear on the document requests, and he is not the client for which the requests were made"). But cf. A Better Way for BPA v. DOE Bonneville Power Admin., 890 F.3d 1183, 1184 (9th Cir. 2018) (finding that "the submitted form's unambiguous reference to [plaintiff]" in the Organization field and defendant's acknowledgment of plaintiff in confirming correspondence "make clear that plaintiff was the requester and consequently has standing to sue").

[25] Smallwood v. DOJ, 266 F. Supp. 3d 217, 218 (D.D.C. 2017); see also Snarr v. BOP, 19-1421, 2020 WL 3639708, at *4 (D.D.C. 2020) (finding plaintiff lacked standing where requests submitted by plaintiff's attorney did not mention plaintiff); Slaughter, 2015 WL 7180511, at *1 (dismissing plaintiff for lack of standing where plaintiff's attorney submitted request in his own name without explaining that requests were submitted on plaintiff's behalf); Haskell Co. v. DOJ, No. 05-1110, 2006 WL 627156, at *2 (D.D.C. Mar. 13, 2006) (dismissing case because plaintiff had no standing to sue agency on FOIA request submitted solely by its law firm); Three Forks Ranch Corp., 358 F. Supp. 2d at 2 (holding that "a FOIA request made by an attorney must clearly indicate that it is being made 'on behalf of' the

to lack standing where she attempted to initiate a lawsuit under the FOIA for claims arising from a FOIA request made by someone else who had attempted to assign their right to litigate to the plaintiff.[26] Courts have allowed assignments of requester's statutory rights in certain limited circumstances, such as the death of the original requester after a lawsuit has been initiated[27] or where the employee of the requester who sent in the request changes employment.[28] Additionally, in situations where an agency has treated an unnamed party to the original request as a requester, at least one court has found that the agency may be precluded from arguing that that unnamed party lacks standing.[29]

Finally, it should be noted that cases brought by submitters of information or other interested parties seeking to prevent agency disclosure are brought under the

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corporation to give that corporation standing to bring a FOIA challenge"); Mahtesian v. OPM, 388 F. Supp. 2d 1047, 1050 (N.D. Cal. 2005) (finding that attorney's reference to anonymous client in FOIA request does not confer standing on that client). But cf. Ameen v. U.S. Dep't of State, No. 21-1399, 2021 WL 4148532, at *5 (D.D.C. Sept. 13, 2021) (finding plaintiff had standing even though request did not explicitly indicate it was submitted on client's behalf where "the requests (1) indicated that counsel was requesting the documents . . . for use in the representation of plaintiff" in his extradition case, and "(2) contained release forms signed by plaintiff 'authoriz[ing] and request[ing]' the release of records to counsel").

[26] See Feinman v. FBI, 680 F. Supp. 2d 169, 176 (D.D.C. 2010) (finding that "institutional regularity at the administrative level weighs against permitting pre-litigation assignments of FOIA rights" and concluding that plaintiff lacks standing because there is no indication "(1) that the requester is unable to pursue her own litigation or (2) that the original requester shares the same interests and purposes as the plaintiff-assignee").

[27] See Sinito v. DOJ, 176 F.3d 512, 516 (D.C. Cir 1999) (finding FOIA lawsuits may survive death of requester and substitution can be made if successor can "adequately represent the interests of the deceased party" as outlined under Fed. R. Civ. Pro. 25).

[28] See Nat. Sec. Couns. v. CIA, 898 F. Supp. 2d 233, 257-59 (D.D.C. 2012) (holding that assignment of FOIA rights permissible "when the sole reason for the assignment is to keep a request with the person or persons who have assumed stewardship of that request").

[29] See Sierra Club v. EPA, 75 F. Supp. 3d 1125, 1138-40 (N.D. Cal. 2014) (holding that "[a]lthough Sierra Club was not named in the initial request, . . . the correspondence between the EPA and Plaintiffs, and the EPA's subsequent actions in this case, sufficiently identify Sierra Club as an interested party to the initial FOIA request" and therefore, Sierra Club "meet[s] the standing requirements"); Olsen v. Dep't of Transp. Fed. Transit Admin., No. 02-00673, 2002 WL 31738794, at *2 n.2 (N.D. Cal. Dec. 2, 2002) (declining to find lack of standing when plaintiff was not identified by his attorney in initial request, because agency's administrative appeal response itself acknowledged plaintiff's identity).

Administrative Procedure Act (APA), and therefore, such plaintiffs may have standing despite having never filed a FOIA request.[30] (For further discussion see Reverse FOIA.)

Venue and Removal

The venue provision of the FOIA provides requesters with a broad choice of forums in which to bring suit. Specifically, the requester can bring their action in the district where the requester resides, the district where the requester has their principal place of business, the district where the records are located, or the District of Columbia.[31] When a requester sues in a jurisdiction other than the District of Columbia, however, the requester is obliged to allege the nexus giving rise to proper venue in that other jurisdiction.[32] Largely due to the statutory designation of the District of Columbia as an

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[30] See, e.g., Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2357, 2362 (2019) (finding intervenor Food Marketing Institute satisfied criteria for Article III standing by showing that "disclosure likely would cause [the Institute] *some* financial injury" which was redressable because "[a] reversal . . . would ensure exactly the relief the Institute requests"); Ivanhoe Citrus Ass'n v. Handley, 612 F. Supp. 1560, 1564 (D.D.C. 1985) (finding plaintiffs challenging release of grower list "have alleged a sufficient stake in the outcome of this litigation to confer standing").

[31] See 5 U.S.C. § 552(a)(4)(B) (2018).

[32] See Rosiere v. United States, 693 F. App'x 556, 557 (9th Cir. 2017) (affirming district court's determination that District of Hawaii is not proper venue because requester resides in Nevada and records are located in Colorado, New Jersey, and Washington, D.C.); Friends of the River v. U.S. Army Corps of Eng'rs, No. 16-05052, 2016 WL 6873467, at *3 (N.D. Cal. Nov. 22, 2016) (granting transfer request because "the responsive documents are, in fact, *entirely* located in [another] district" and "there is no reasonable expectation that relevant agency records would be maintained . . . in this District"); Alldredge v. NSA, No. 15-3638, 2015 U.S. Dist. LEXIS 149073, at *3 (N.D. Cal. Nov. 2, 2015) (dismissing plaintiff's complaint because "[p]laintiff is incarcerated in the Eastern District of California and there is no indication that the records are located in this district"); Fleming v. Medicare Freedom of Info. Grp., No. 15-594, 2015 WL 4365283, at *1, 3 (D. Minn. July 13, 2015) (rejecting plaintiff's argument "that even if the records are not physically located here, they are accessible electronically and therefore present in this district for purposes of FOIA" and also finding that "a prisoner's place of incarceration is not considered her residence for venue purposes"); Bosman v. United States, No. 12-1320, 2012 WL 1747972, at *2-3 (N.D. Cal. May 15, 2012) (discussing difference between "domicile" and "residence," and finding that FOIA "look[s] only to 'residence'" for venue purposes); Brehm v. DOJ Off. of Info. & Priv., 591 F. Supp. 2d 772, 773 (E.D. Pa. 2008) (dismissing complaint as plaintiff neither resides nor has principal place of business in court's district and disputed records are also not located in court's district); O'Neill v. DOJ, No. 05-0306, 2007 WL 983143, at *7 (E.D. Wis. Mar. 26, 2007) (concluding that venue is proper because one of disputed documents is located in court's district and because agency withdrew venue argument with respect to three other disputed documents); Gaylor v. DOJ, No. 05-414, 2006 WL 1644681, at *1 (D.N.H. June 14, 2006) (finding venue lacking in New Hampshire, where plaintiff, who

appropriate forum for any FOIA action,[33] the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit have, over the years, decided a great many of the leading cases under the FOIA.[34]

The judicial doctrine of forum non conveniens, as codified in 28 U.S.C. § 1404(a),[35] can permit the transfer of a FOIA case to a different judicial district even if the plaintiff's chosen venue is proper.[36] The courts have invoked this doctrine to transfer FOIA cases under a variety of circumstances.[37] Similarly, when the requested records are the subject

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claimed to be resident of Texas, was incarcerated and was general partner in company that was no longer in good standing in New Hampshire); Schwarz v. IRS, 998 F. Supp. 201, 203 (N.D.N.Y. 1998) (finding venue improper where agency maintains regional office unless substantial part of activity complained of also occurred there).

[33] See 5 U.S.C. § 552(a)(4)(B). See generally Akutowicz v. United States, 859 F.2d 1122, 1126 (2d Cir. 1988) (finding District of Columbia sole appropriate forum when requester resides and works outside United States and records requested are located in District of Columbia); Arevalo-Franco v. INS, 889 F.2d 589, 590-91 (5th Cir. 1989) (ruling that aliens should be treated same as United States citizens for venue purposes and therefore that resident alien may bring FOIA suit in district where he in fact resides).

[34] See, e.g., Gaylor, 2006 WL 1644681, at *1 (transferring suit to District Court for District of Columbia, because of its "special expertise in FOIA matters"); Matlack, Inc. v. EPA, 868 F. Supp. 627, 630 (D. Del. 1994) ("The United States Court of Appeals for the District of Columbia Circuit has long been on the leading edge of interpreting the parameters of what a federal agency must disclose and may withhold consistent with the terms of FOIA.").

[35] (2019).

[36] See generally Ross v. Reno, No. 95-1088, 1996 WL 612457, at *3-4 (E.D.N.Y. Aug. 13, 1996) (discussing factors in favor of and in opposition to transfer of case to neighboring jurisdiction).

[37] See, e.g., Ohio State Univ. Moritz Coll. of L. Civ. Clinic v. U.S. Customs & Border Prot., No. 14-2329, 2015 WL 1928736, at *2 (S.D. Ohio Apr. 28, 2015) (granting defendant's motion to transfer because "[t]wo of the three parties to this litigation, as well as the documents responsive to Plaintiffs' FOIA request, are located in the Northern District of Ohio" and "*in camera* review is a distinct possibility" and not allowing the transfer "could create unnecessary practical issues"); Our Child.'s Earth Found. v. EPA, No. 08-01461, 2008 WL 3181583, at *7 (N.D. Cal. Aug. 4, 2008) (granting defendants' motion for transfer of venue to District of Hawaii because "instant case could have been filed as a crossclaim" in existing lawsuit in Hawaii); Carpenter v. DOJ, No. 05-172, 2005 WL 1290678, at *2 (D. Conn. Apr. 28, 2005) (transferring FOIA suit to district in which plaintiff's criminal case was pending, because request sought records from that proceeding); Cecola v. FBI, No. 94-4866, 1995 WL 645620, at *3 (N.D. Ill. Nov. 1, 1995) (transferring remainder of case to district where remaining records and government's declarant are located, where plaintiff operates business, and where activities described in requested records presumably took place);

of pending FOIA litigation in another judicial district, the related doctrine of "federal comity" can permit a court to defer to the jurisdiction of the other court in order to avoid unnecessarily burdening the federal judiciary and delivering conflicting FOIA judgments.[38]

Southmountain Coal Co. v. Mine Safety & Health Admin., No. 94-0110, slip op. at 2-3 (D.D.C. Mar. 10, 1994) (justifying transfer of suit to district where corporate requester resides and has principal place of business and where criminal case on which request is based is pending, on grounds that "a single court [handling] both FOIA and criminal discovery would obviate the possibility of contradictory rulings, and would prevent the use of FOIA as a mere substitute for criminal discovery"); cf. Env't. Crimes Project v. EPA, 928 F. Supp. 1, 1-2 (D.D.C. 1995) (finding that "[t]he interest of justice clearly favors transfer of this case," but absent "precise" information as to location of records sought, declining to order transfer in view of "substantial weight due to plaintiff's choice of forum"). But see Haswell v. Nat'l R.R. Passenger Corp., No. 05-723, 2006 WL 839067, at *2-4 (D. Ariz. Mar. 28, 2006) (denying government's request to transfer venue to District of Columbia, because plaintiff was resident of Arizona, even though agency and all responsive records were located in Washington, D.C.; reasoning that "case [likely] will be decided on summary judgment" based upon declarations).

[38] See, e.g., McHale v. FBI, No. 99-1628, slip op. at 8-9 (D.D.C. Nov. 7, 2000) (applying "first-filed" rule to dismiss case when similar litigation was already pending in another jurisdiction); Hunsberger v. DOJ, No. 93-1945, slip op. at 1 (D.D.C. Mar. 16, 1994) (dismissing case because identical complaint pending in Eastern District of Pennsylvania); Beck v. DOJ, No. 88-3433, 1991 WL 519827, at *5 (D.D.C. Jan. 31, 1991) (dismissing on grounds of federal comity all claims pertaining to documents at issue in the Western District of Texas); cf. City of Chi. v. U.S. Dep't of the Treasury, No. 01-3835, 2001 WL 1173331, at *3 (N.D. Ill. Oct. 4, 2001) (finding "comity" inapposite when related case seeking much of same information at issue is before court of appeals); Env't. Crimes Project, 928 F. Supp. at 2 (denying government's transfer motion but ordering stay of proceedings pending resolution of numerous discovery disputes in related cases in other jurisdiction).

Statute of Limitations

A FOIA plaintiff ordinarily must file suit before expiration of the applicable statute of limitations.[39] In Spannaus v. DOJ,[40] the Court of Appeals for the District of Columbia Circuit applied the general federal statute of limitations, which is found at 28 U.S.C. § 2401(a),[41] to FOIA actions.[42] Section 2401(a) provides, in pertinent part, that "every action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."[43] In Spannaus, the D.C. Circuit held that the FOIA cause of action accrued – and, therefore, that the statute of limitations began to run – once the plaintiff had "constructively" exhausted his administrative remedies (see the discussion of Litigation Considerations, Exhaustion of Administrative Remedies, below) and not when all administrative appeals had been finally adjudicated.[44]

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[39] See, e.g., Reep v. DOJ, No. 18-5132, 2018 WL 6721099, at *1 (D.C. Cir. Dec. 18, 2018) (holding that six-year statute of limitations precludes inclusion of FOIA requests administratively exhausted in 2010); Wilbur v. CIA, 273 F. Supp. 2d 119, 123 (D.D.C. 2003) (dismissing case, in part, on basis of plaintiff's failure to file complaint within six year statute of limitations even though plaintiff was pro se). But see Manfredonia v. SEC, No. 08-1678, 2008 WL 2917079, at *2 (E.D.N.Y. July 24, 2008) (acknowledging that plaintiff may have failed to meet FOIA's six-year statute of limitations but holding that "in light of plaintiff's pro se status and the liberal construction that is due his pleadings, the sua sponte dismissal of his FOIA claims is not appropriate").

[40] 824 F.2d 52 (D.C. Cir. 1987).

[41] (2009).

[42] Spannaus, 824 F.2d at 55-56 (holding that "§ 2401(a) applies to all civil actions whether legal, equitable, or mixed"); see also, e.g., Zaldivar v. VA, 695 F. App'x 319, 320 (9th Cir. 2017) (affirming district court's determination that plaintiff's claim was barred by six year statute of limitations); Jackson v. FBI, No. 02-3957, 2007 WL 2492069, at *8 (N.D. Ill. Aug. 28, 2007) (dismissing FOIA claims as time-barred because complaint was filed ten years after right of action accrued); Harris v. Freedom of Info. Unit, DEA, No. 06-0176, 2006 WL 3342598, at *6 (N.D. Tex. Nov. 17, 2006) (holding that plaintiff's suit is barred by six-year statute of limitations and further concluding that plaintiff is not entitled to equitable tolling); Madden v. Runyon, 899 F. Supp. 217, 226 (E.D. Pa. 1995) (finding that even assuming plaintiff exhausted his administrative remedies, statute of limitations would have expired four years prior to commencement of suit); Peck v. CIA, 787 F. Supp. 63, 66 (S.D.N.Y. 1992) (refusing to waive the statute of limitations because to do so would be "a waiver of sovereign immunity," which "cannot be relaxed based on equitable considerations," but noting that "there is nothing in the statute that prevents plaintiff from refiling an identical request . . . and thereby restarting the process").

[43] 28 U.S.C. § 2401(a) (2018).

[44] 824 F.2d at 57-59; see also, e.g., Agolli v. OIG, 125 F. Supp. 3d 274, 281-82 (D.D.C. 2015) (agreeing "with Defendant's calculation that the date of accrual was ["20 business days after

However, the District Court for the District of Columbia has held that a time-barred FOIA cause of action can be cured by filing a new FOIA request "so long as the new claims replace the time-barred claims."[45] In addition, the D.C. Circuit determined that the statute of limitations provision in section 2401(a) is not a jurisdictional requirement and may be waived by a court for equitable reasons.[46]

The National Archives and Records Administration has issued General Records Schedule 4.2,[47] which sets a general record-retention period for case files and supporting documentation relating to FOIA requests involving either a grant or denial of information at six years after final action by an agency or three years after final adjudication by the courts, whichever is later.[48]

. . . the date Plaintiff filed her last administrative appeal regarding her FOIA request"]" and rejecting plaintiff's argument "that the statute of limitations only begins to run from the date of Plaintiff's last correspondence with the agency"); Rosenfeld v. DOJ, No. 07-03240, 2008 WL 3925633, at *10 (N.D. Cal. Aug. 22, 2008) (explaining that "'[c]onstructive exhaustion occurs when the time limits by which an agency must reply to a FOIA claimant's request or appeal . . . expire'" (quoting Aftergood v. CIA, 225 F. Supp. 2d 27, 27 (D.D.C. 2002))); Peck, 787 F. Supp. at 65-66 (noting that once constructive exhaustion period has run, statute of limitations is not tolled while request for information is pending before agency); see also Kenney v. DOJ, 700 F. Supp. 2d 111, 116 (D.D.C. 2010) (finding requester's failure to pay fees does not toll the statute of limitations because "the requirement that a requester pay fees before he may be deemed to have exhausted his administrative remedies is for the agency's protection, not the requester's"); cf. Zaldivar v. VA, No. 14-01493, 2015 WL 6468207, at *7 (D. Ariz. Oct. 27, 2015) (finding "continuing violation" doctrine did not rescue time-barred claim because requester "would know by the expiration of the applicable response date whether he had the documents he sought").

[45] Aftergood, 225 F. Supp. 2d at 31; see also Rosenfeld, 2008 WL 3925633, at *10 (holding that plaintiff's first FOIA request is time-barred but noting that "ruling has little effect because defendants do not contest the validity of the substantially similar newly filed FOIA request").

[46] Jackson v. Modly, 949 F.3d 763, 777-78 (D.C. Cir. 2020) (holding that § 2401(a) does not speak in jurisdictional terms and only details litigants' filing obligations without restricting court authority); accord Chance v. Zinke, 898 F.3d 1025, 1033 (10th Cir. 2018) (concluding that § 2401(a) is not jurisdictional and evaluating whether equitable tolling was warranted); Herr v. U.S. Forest Serv., 803 F.3d 809, 818 (6th Cir. 2015) (holding that statute of limitations governing civil actions against the United States "does not limit a federal court's subject-matter jurisdiction").

[47] Nat'l Archives & Records Admin., General Records Schedule, Schedule 4.2 (2017).

[48] Id.; see also Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 28 n.51 (Dec. 1987) (advising agencies to maintain any "excluded" records for purposes of possible further review (citing FOIA Update, Vol. V, No. 4, at 4 (advising same regarding "personal" records))).

Pleadings

An agency has thirty days from the date of service to answer a FOIA complaint,[49] not the typical sixty days provided by Federal Rule of Civil Procedure 12(a)(2). Courts are not required to automatically accord expedited treatment to a FOIA lawsuit; however, as with other civil actions, they may do so "if good cause therefore is shown."[50]

Only federal agencies are proper party defendants in FOIA litigation.[51] Consequently, neither the agency head nor other federal employees are proper parties to

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[49] See 5 U.S.C. § 552(a)(4)(C) (2018).

[50] Federal Courts Improvement Act, 28 U.S.C. § 1657 (2018).

[51] See 5 U.S.C. § 552(a)(4)(B) (granting district courts "jurisdiction to enjoin the agency from withholding agency records improperly withheld from complainant") (emphasis added); 5 U.S.C. § 552(f)(1) (defining term "agency"); see also Taitz v. Ruemeller, No. 11-5306, 2012 WL 1922284, at *1 (D.C. Cir. May 25, 2012) (per curiam) (affirming district court's decision that White House Chief Counsel's Office is not agency subject to FOIA); Earle v. Holder, No. 11-5280, 2012 WL 1450574, at *1 (D.C. Cir. Apr. 19, 2012) (per curiam) (affirming district court's dismissal of claims against District of Columbia employees); Wells v. State Att'y Gen. of La., 469 F. App'x 308, 309 (5th Cir. 2012) (per curiam) (affirming decision of district court to dismiss FOIA claim brought against state entity); Citizens for Resp. & Ethics in Wash. v. Off. of Admin., 566 F.3d 219, 220-26 (D.C. Cir. 2009) (concluding that Office of Administration within Executive Office of the President is not agency subject to FOIA, "because it . . . lacks substantial independent authority"); Dunleavy v. New Jersey, 251 F. App'x 80, 83 (3d Cir. 2007) (upholding district court's decision to dismiss FOIA claim against state agency); Megibow v. Clerk of U.S. Tax Ct., 432 F.3d 387, 387 (2d Cir. 2005) (concluding that United States Tax Court is not subject to FOIA); Pennyfeather v. Tessler, 431 F.3d 54, 56 (2d Cir. 2005) (holding that FOIA does not provide for private right of action against municipal or state agencies or officials); Henderson v. Sony Pictures Entm't, 135 F. App'x 934, 935 (9th Cir. 2005) (affirming that private company is not agency and, accordingly, not subject to FOIA); United States v. Casas, 376 F.3d 20, 22 (1st Cir. 2004) (stating that judicial branch is not subject to FOIA); United We Stand Am., Inc. v. IRS, 359 F.3d 595, 597 (D.C. Cir. 2004) ("Because Congress is not an agency, congressional documents are not subject to FOIA's disclosure requirement."); Elec. Priv. Info. Ctr. v. NSA, 795 F. Supp. 2d 85, 91 (D.D.C. 2011) (finding that "[t]his Circuit has unambiguously held that the [National Security Council] is not an agency subject to FOIA"); Godaire v. Napolitano, No. 10-1266, 2010 U.S. Dist. LEXIS 122237, at *1-3 (D. Conn. Nov. 17, 2010) (dismissing plaintiff's FOIA claims against individuals, state entities, and private businesses because "FOIA applies only to federal agencies"); Thornton-Bey v. Admin. Off. of U.S. Courts, No. 09-0958, 2009 WL 1451571, at *1 (D.D.C. May 21, 2009) (concluding that Administrative Office of U.S. Courts is part of judicial branch and thus not an agency for purposes of FOIA); Banks v. Lappin, 539 F. Supp. 2d 228, 234 (D.D.C. 2008) (dismissing plaintiff's FOIA claims against Offices of the President and Vice President and Congress for lack of subject matter jurisdiction because they are not "agencies").

a FOIA suit,[52] nor is "the United States."[53] (For a further discussion of which entities are subject to the FOIA, see Procedural Requirements, Entities Subject to the FOIA.) In some instances when FOIA plaintiffs name an office or component of an agency as a defendant, courts will substitute the appropriate agency as the proper party.[54] However, in other situations, courts have allowed agency components to be sued in their own capacity.[55]

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[52] See, e.g., Risenhoover v. Stanfield, 767 F. App'x 12, 13 (D.C. Cir. 2019) (affirming district court's dismissal because complaint only "named several government officials as defendants" and FOIA "provides a cause of action only against an 'agency,' not individuals"); Pondexter v. Sec'y HUD, 788 F. App'x 93, 96 (3d Cir. 2019) (per curiam) (affirming dismissal because "FOIA claims may not be brought against the individual defendants"); Offor v. EEOC, 687 F. App'x 13, 15 n.1 (2d Cir. 2017) (per curiam) (finding that "[t]he district court correctly determined that [the requester] was unable to assert claims against [a named official] individually because FOIA imposes a responsibility on the agency, not individual federal officials, to produce documents"); Drake v. Obama, 664 F.3d 774, 786 (9th Cir. 2011) (affirming district court's dismissal of FOIA claims against defendants because "they are all individuals, not agencies"); Thompson v. Walbran, 990 F.2d 403, 405 (8th Cir. 1993) (per curiam) (dismissing suit brought against prosecutor, because plaintiff "sued the wrong party"); Petrus v. Bowen, 833 F.2d 581, 582 (5th Cir. 1987) ("Neither the Freedom of Information Act nor the Privacy Act creates a cause of action for a suit against an individual employee of a federal agency.").

[53] See United States v. Whitfield, No. 18-5718, 2019 U.S. App. LEXIS 578, at *8 (6th Cir. Jan. 8, 2019) (FOIA applies only to federal agencies . . . and the United States . . . is not a federal agency"); Batton v. Evers, 598 F.3d 169, 172 n.1 (5th Cir. 2010) (noting that neither United States nor individuals are proper parties to FOIA actions); Sanders v. United States, No. 96-5372, 1997 WL 529073, at *1 (D.C. Cir. July 3, 1997) (dismissing complaint because "United States" is not agency subject to FOIA); United States v. Trenk, No. 06-1004, 2006 WL 3359725, at *8 (D.N.J. Nov. 20, 2006) ("The United States is not a proper party in a FOIA action."); Huertas v. United States, No. 04-3361, 2005 WL 1719143, at *7 (D.N.J. July 21, 2005) (granting defendants' motion for summary judgment because United States and individual defendants were only defendants named).

[54] See, e.g., Schmidt v. Shah, No. 08-2185, 2010 U.S. Dist. LEXIS 25539, at *2-3 n.2 (D.D.C. Mar. 18, 2010) (substituting "USAID as the real party in interest" where plaintiff brought FOIA action against USAID Administrator in their official capacity); Williams v. Comm'r of IRS, 723 F. Supp. 2d 925, 929 (M.D. La. 2010) (granting plaintiff leave to amend complaint to name agency as proper party defendant); Richardson v. DOJ, 730 F. Supp. 2d 225, 229 n.1 (D.D.C. 2010) (considering DOJ proper party defendant where two of its component offices were named).

[55] Peralta v. U.S. Att'ys Off., 136 F.3d 169, 173 (D.C. Cir. 1998) (dictum) (suggesting that "the FBI is subject to FOIA in its own name"); Jean-Pierre v. BOP, 880 F. Supp. 2d 95, 101 (D.D.C. 2012) (determining that "[a]lthough a small number of decisions hold that only the DOJ, and not its subcomponents, may be sued under FOIA, . . . the weight of authority is that subcomponents of federal executive departments may, at least in some cases, be properly named as FOIA defendants"); Brown v. FBI, 793 F. Supp. 2d 368, 385 (D.D.C. 2011) (denying FBI's motion to dismiss and concluding that substitution of DOJ is

Although the D.C. Circuit has held that an agency in possession of records originating with another agency "cannot simply refuse to act on the ground that the documents originated elsewhere,"[56] it has also ruled that an "agency may acquit itself through a referral, provided the referral does not lead to improper withholding."[57]

Lastly, courts have rejected attempts by FOIA plaintiffs to amend their complaints when amendment is unduly delayed,[58] the complaint as amended still would fail to state

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unnecessary because "no court has found that FOIA does not apply to the FBI" and it "'has litigated numerous FOIA cases in its own name'"); Nielsen v. U.S. Bureau of Land Mgmt., 252 F.R.D. 499, 509 (D. Minn. 2008) (concluding that Bureau of Land Management, a constituent office of Department of the Interior, "is an agency for purposes of FOIA"); Cnty. of Santa Cruz v. Ctrs. for Medicare & Medicaid Servs., No. 07-2889, 2009 WL 816633, at *1 (N.D. Cal. Mar. 26, 2009) (refusing to dismiss Centers for Medicare and Medicaid Services, part of HHS, as defendant in FOIA action because it "failed to demonstrate [that] it is not an 'establishment in the executive branch of the government'" (citing 5 U.S.C. § 552(f)(1))).

[56] McGehee v. CIA, 697 F.2d 1095, 1110 (D.C. Cir. 1983).

[57] Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1118 (D.C. Cir. 2007) (rejecting plaintiff's argument that referrals are barred outright because, while consultations are per se acceptable, other reasonable procedures including referrals are not precluded); Chaplin v. Stewart, 763 F. Supp. 2d 1, 4 (D.D.C. 2011) (concluding that fact that certain documents maintained by agency may have originated with another agency "does not relieve [defendant] of its statutory obligations to search its files for responsive records and to either release them to plaintiff or to refer them to [other agency] for processing"); see also OIP Guidance: Referrals, Consultations, and Coordination (2011) (advising agencies of responsibilities with respect to referrals, consults, and coordinations).

[58] See, e.g., Brown v. FBI, 744 F. Supp. 2d 120, 123 (D.D.C. 2010) (denying pro se plaintiff leave to amend where he provided "no explanation why he waited more than two years to try to amend" and where proposed amendment would "prejudice defendants by expanding the scope of the litigation – after the litigation concluded – beyond its initial character as solely a FOIA action"); James v. U.S. Customs & Border Prot., 549 F. Supp. 2d 1, 12-13 (D.D.C. 2008) (refusing to allow plaintiff to amend his complaint to include new defendants because he waited "nearly two years" and sought leave only after receiving defendant's renewed motion for summary judgment); Sakamoto v. EPA, 443 F. Supp. 2d 1182, 1200 (N.D. Cal. 2006) (denying motion to amend complaint because "[t]he parties' summary judgment motions have been fully briefed and argued, and allowing amendment would unduly prolong these proceedings").

a justiciable claim,[59] or the proposed amendments would dramatically alter the scope and nature of the FOIA litigation.[60]

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[59] See, e.g., Pickering-George v. Alcohol & Tobacco Tax & Trade Bureau, 399 F. App'x 602, 603 (D.C. Cir. 2010) (per curiam) (concluding that district court "did not abuse its discretion in denying as futile appellant's motion to amend the complaint"); Dunleavy v. N.J., 251 F. App'x 80, 84 (3d Cir. 2007) (holding that district court did not abuse its discretion by disallowing plaintiff to amend his complaint because the "amended complaint could not withstand a renewed motion to dismiss"); Tereschchuk v. BOP, 851 F. Supp. 2d 157, 162 (D.D.C. 2012) (finding amendment of complaint "is futile" where plaintiff failed to exhaust his administrative remedies with respect to two requests for which he did not pay fees or request fee waiver); Union Leader Corp. v. DHS, No. 12-18, 2012 U.S. Dist. LEXIS 39730, at *5-8 (D.N.H. Mar. 23, 2012) (denying plaintiff's motion to amend complaint on grounds that it would be "futile" where agency had not issued decision on request and twenty-day statutory time period had not run); Stanko v. BOP, 842 F. Supp. 2d 132, 140-41 (D.D.C. Feb. 3, 2012) (denying plaintiff leave to amend where proposed Privacy Act and First Amendment claims would be futile and where there was an eighteen-month delay in raising these claims); Brown, 793 F. Supp. 2d at 391 (denying as futile plaintiff's motion for leave to amend complaint to add new FOIA claims where he "has not placed information into the record showing that [any of the] agenc[ies] denied his request or that he appealed their denial"); Pohl v. EPA, No. 09-1480, 2010 WL 2607476, at *5 (W.D. Pa. June 25, 2010) (dismissing one of plaintiff's proposed amendments as futile because that claim "rests on an alleged violation of FOIA" by private hospital and private citizen); McDermott v. Potter, No. 09-0776, 2009 WL 2971585, at *1 (W.D. Wa. Sept. 11, 2009) (denying leave to amend as "futile" where plaintiff failed to submit proper FOIA request); cf. Feinman v. FBI, 269 F.R.D. 44, 51-53 (D.D.C. 2010) (granting plaintiff leave to add claim that FBI violated FOIA via particular policy and rejecting defendant's argument that such amendment was "futile because it does not state a valid claim for equitable relief").

[60] See, e.g., Cause of Action v. DOJ, 282 F. Supp. 3d 66, 76 (D.D.C. 2017) (refusing to grant leave to amend because doing so "would unduly prejudice the [defendant] by expanding this litigation from a simple FOIA claim . . . into a more complex case"); Brown, 744 F. Supp. 2d at 123 (denying pro se plaintiff leave to amend where proposed amendment would "prejudice defendants by expanding the scope of the litigation – after the litigation concluded – beyond its initial character as solely a FOIA action"); Wolf v. CIA, 569 F. Supp. 2d 1, 25 (D.D.C. 2008) (denying plaintiff's motion to amend complaint to include additional FOIA and APA claims, because "the proposed amendments bear no relationship to [the] original case and would result in a 'radical' change to the 'scope and nature' of this litigation") (citation omitted); Reynolds v. United States, No. 06-0843, 2007 WL 3071179, at *2-3 (S.D.N.Y. Oct. 19, 2007) (denying plaintiff's request to amend complaint where his new claims had "no relation to the claims [he] originally asserted" and where he sought to add additional defendants at advanced stage in the case); Caton v. Norton, No. 04-439, 2005 WL 1009544, at *4 (D.N.H. May 2, 2005) (denying motion to amend complaint where plaintiff sought to add claims barred by doctrines of sovereign immunity and exhaustion of administrative remedies); Szymanski v. DEA, No. 93-1314, 1993 WL 433592, at *2 (D.D.C. Oct. 6, 1993) ("This Court will not permit a F.O.I.A. complaint, properly filed, to become the narrow edge of a wedge which forces open the court house door to unrelated claims against unrelated parties."). But see Eison v. Kallstrom, 75 F. Supp. 2d 113, 117 (S.D.N.Y. 1999)

Relief

The FOIA statute imposes limitations on the types of relief a court may grant in a FOIA lawsuit.[61] Specifically, the Court of Appeals for the District of Columbia Circuit has held that the statutory language of the FOIA limits relief to the disclosure of improperly withheld records to a particular requester.[62]

However, courts have differed on whether the appropriate remedy for non-disclosure of records required to be made available for public inspection under subsection

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(allowing plaintiff to amend original complaint to allege improper withholding of records, where original complaint had asked for injunction against "pattern and practice" of delayed agency responses, which court deemed "now moot").

[61] See 5 U.S.C. § 552(a)(4)(B) (2018) (providing jurisdiction "to enjoin the agency from withholding agency records and to order production of any agency records improperly withheld"); see also id. § 552(a)(4)(E)(i) ("The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case . . . in which the complainant has substantially prevailed.").

[62] See Kennecott Utah Copper Corp. v. U.S. Dep't of the Interior, 88 F.3d 1191, 1203 (D.C. Cir. 1996) (holding that remedial provision of FOIA limits relief to ordering disclosure of documents to FOIA complainant); see also Carson v. U.S. Off. of Special Couns., No. 08-317, 2009 WL 1616763, at *5 (E.D. Tenn. June 9, 2009) (holding that "court's jurisdiction under the FOIA extends only to claims arising from the improper withholding of agency records" and court lacked authority to order agency to create new documents that plaintiff believed agency was required to create); Dietz v. O'Neill, No. 00-3440, 2001 U.S. Dist. LEXIS 3222, at *2 (D. Md. Feb. 15, 2001) (rejecting plaintiff's request for declaration that he owes no tax and finding that the court's remedial power "would be limited to compelling the disclosure of improperly withheld documents"), aff'd per curiam, 15 F. App'x 42 (4th Cir. 2001); Green v. NARA, 992 F. Supp. 811, 817 (E.D. Va. 1998) (concluding that unless agency records have been improperly withheld, "'a district court lacks jurisdiction to devise remedies to force an agency to comply with FOIA's disclosure requirements'" (quoting DOJ v. Tax Analysts, 492 U.S. 136, 142 (1989))); cf. S. Env't L. Ctr. v. Council on Env't Quality, 446 F. Supp. 3d 107, 115 (W.D. Va. 2020) (finding that FOIA "do[es] not permit the court to enjoin an agency from closing a notice and comment period . . . , even if that agency has likely violated the FOIA by failing to produce documents . . . that are directly relevant to the proposed rulemaking at issue"); Bayala v. DHS, 246 F. Supp. 3d 16, 21 (D.D.C. 2017) (rejecting plaintiff's request "that the Court order [defendant] to 're-write' its initial response letter more fulsomely"); Navigators Ins. Co. v. DOJ, 155 F. Supp. 3d 157, 167-68 (D. Conn. 2016) ("Plaintiffs cite no authority for the proposition that an agency's violation of FOIA's deadlines entitles the requester to automatic disclosure of the requested documents without any analysis of the agency's claimed exemptions.").

(a)(2) is the production of those records solely to an individual or posting them online.[63] (For a further discussion of the proactive disclosure provisions of the FOIA, see Proactive Disclosures.) Additionally, the Court of Appeals for the Fourth Circuit has found that where a plaintiff seeks a court order requiring an agency to make records publicly available on an on-going basis as the records are created, the FOIA does not entitle requesters to "prospective relief . . . as to documents *not yet in existence*."[64]

Further, courts have declined to order disclosure of information to a FOIA requester with a special restriction, either explicit or implicit, that the requester not further disseminate the information received.[65] As the Supreme Court explained: "There

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[63] Compare Citizens for Resp. & Ethics in Wash. v. DOJ, 846 F.3d 1235, 1243 (D.C. Cir. 2017) (holding that FOIA does not authorize courts to order publication of information, even information required to be made available for public inspection under subsection (a)(2), and instead authorizes courts to order "production" of information only to FOIA plaintiff), and Campaign for Accountability v. DOJ, 278 F. Supp. 3d 303, 316-17 (D.D.C. 2017) (holding that while "[the] Court cannot order OLC to 'make available for public inspection and copying' all documents that are subject to the reading-room provision, . . . [the] Court *is* authorized to order that OLC produce any documents that it has improperly withheld in violation of the reading-room provision *to [plaintiff]*"), with N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals, 987 F.3d 207, 209 (2d Cir. 2021) (finding that FOIA "authorizes courts to enforce FOIA's affirmative disclosure obligations by ordering that documents be made available to the public"), and Animal Legal Def. Fund v. USDA, 935 F.3d 858, 875-76 (9th Cir. 2019) (finding that FOIA authorizes district courts to address required agency § 552(a)(2) posting because "[t]he injuries complained of here *are* injuries sustained by individuals[;] [o]rdering an agency to . . . post [records] in reading rooms would provide relief to plaintiffs, like those here, injured by the agency's failure to make those records so available").

[64] Humane Soc'y of the U.S. v. U.S. Fish & Wildlife Serv., 838 F. App'x 721, 731-32 (4th Cir. 2020) (explaining that court was "not holding that [requesters] can never receive injunctive relief pursuant to Section 552(a)(4)(B)," but where agency posting of existing documents rendered that portion of requested relief moot, and all that remained is prospective relief regarding documents not yet created, it fails to see how FOIA provides any entitlement to relief).

[65] See, e.g., Chin v. U.S. Dep't of the Air Force, No. 99-3127, 2000 WL 960515, at *2 (5th Cir. June 15, 2000) (per curiam) (refusing to allow disclosure of exempt information under protective order); Raher v. BOP, 749 F. Supp. 2d 1148, 1163 (D. Or. 2010) (stating that release of records subject to protective order would place agency "in the untenable position of having to enforce any violation . . . and claw back any unwarranted disclosure"); Schiffer v. FBI, 78 F.3d 1405, 1411 (9th Cir. 1996) (overruling district court's order limiting access to persons other than plaintiff because "such action is not authorized by FOIA"); cf. Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1082, 1088 (9th Cir. 1997) (rejecting, as irrelevant, plaintiff's offer to agree not to further disclose requested information because "FOIA does not permit selective disclosure of information only to certain parties, and . . .

is no mechanism under FOIA for a protective order allowing only the requester to see whether the information bears out his theory, or for proscribing its general dissemination."[66]

The D.C. Circuit has held that the FOIA does not provide a jurisdictional vehicle for a court to consider Bivens-type constitutional tort claims against FOIA officers[67] or to relitigate criminal matters.[68] The D.C. Circuit has also found that the FOIA cannot be used to prevent disclosure of information when no FOIA request is pending and "an agency discloses information pursuant to other statutory provisions or regulations."[69] Some courts have suggested, however, that the Administrative Procedure Act may be

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once the information is disclosed to [this requester], it must also be made available to all members of the public who request it").

[66] NARA v. Favish, 541 U.S. 157, 174 (2004).

[67] See, e.g., Cooper v. Stewart, No. 11-5061, 2011 WL 6758484, at *1 (D.C. Cir. Dec. 15, 2011) (per curiam) (determining that "'all agency decisions' regarding the classification of information under FOIA are reviewable only under FOIA and are 'not subject to judicial second-guessing in tort' through an [Federal Tort Claims Act] claim" (quoting Crumption v. Stone, 59 F.3d 1400, 1406 (D.C. Cir. 1995))); Johnson v. EOUSA, 310 F.3d 771, 777 (D.C. Cir. 2002) (explaining that "FOIA precludes the creation of a Bivens remedy"); see also Isasi v. Off. of the Att'y Gen., 594 F. Supp. 2d 12, 14 (D.D.C. 2009) (dismissing claim against individual defendant because "a Bivens action is not viable as a remedy for FOIA violations, and the FOIA does not permit claims against individual federal officers"); Thomas v. FAA, No. 05-2391, 2007 WL 219988, at *3 (D.D.C. Jan. 25, 2007) (noting that plaintiffs "cannot obtain a Bivens remedy for an alleged violation of FOIA").

[68] See, e.g., Williams & Connolly v. SEC, 662 F.3d 1240, 1245 (D.C. Cir. 2011) (holding that "FOIA is neither a substitute for criminal discovery [] nor an appropriate means to vindicate discovery abuses); see also Sanders v. Obama, 729 F. Supp. 2d 148, 158 (D.D.C. 2010) (finding no remedial powers under FOIA for courts to "determine the authenticity of the produced documents or to make findings of fact and law as to whether probable cause existed" in previous criminal trial), aff'd sub nom. Sanders v. DOJ, No. 10-5273, 2011 WL 1769099 (D.C. Cir. April 21, 2011); Richardson v. DOJ, 730 F. Supp. 2d 225, 234 (D.D.C. 2010) (noting that "'a *Brady* violation is a matter appropriately addressed to the court that sentenced [plaintiff], not through a FOIA action'" (quoting Covington v. McLeod, 646 F. Supp. 2d 66, 71 (D.D.C. 2009))); Mingo v. DOJ, No. 08-2197, 2009 WL 2618129, at *2 (D.D.C. Aug. 24, 2010) (maintaining that government's statutory obligation to disclose records under FOIA is separate from its constitutional obligation established by Brady v. Maryland, 373 U.S. 83 (1963), to disclose exculpatory information to criminal defendants).

[69] Doe, 1 v. FEC, 920 F.3d 866, 872 (D.C. Cir. 2019) (finding "if an agency discloses information pursuant to other statutory provisions or regulations, the agency cannot possibly violate FOIA").

available in situations where the FOIA does not provide the court power to impose the requested declaratory and/or injunctive relief.[70]

Courts have ruled that once a determination is made that information has been properly withheld pursuant to a FOIA exemption, the court has no inherent, equitable power to order disclosure.[71] In the converse situation, courts have held that they cannot order records to be protected if they do not fall within the FOIA's exemptions.[72] Although ordinarily there can be no relief provided when an agency establishes that it has released the responsive records in full to the requester, the D.C. Circuit has held that a court may grant equitable relief if it finds in an exceptional case that the agency maintains an unlawful FOIA "policy or practice" threatening to impair the requester's ability to obtain records in the future, if the policy or practice is capable of repetition and likely to evade judicial review.[73] (For further discussion see Litigation

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[70] See Nat'l Sec. Couns. v. CIA, 898 F. Supp. 2d 233, 265 (D.D.C. 2012) (finding relief may be available under Administrative Procedure Act to enforce compliance with FOIA, but such relief is precluded when court has power under FOIA to provide requested declaratory and injunctive remedies); Pa. Dep't of Pub. Welfare v. United States, No. 99-175, 2001 U.S. Dist. LEXIS 3492, at *28 (W.D. Pa. Feb. 7, 2001) (deciding that Administrative Procedure Act confers jurisdiction to order publication of index under FOIA's subsection (a)(2) even though FOIA itself does not); Pub. Citizen v. Lew, No. 97-2891, slip op. at 4 (D.D.C. July 14, 1998) (refusing to dismiss claim alleging noncompliance with FOIA requirement to publish descriptions of "major information systems" compiled under Paperwork Reduction Act, because even in the absence of an express judicial review provision in the FOIA, the Administrative Procedure Act provides a "strong presumption that Congress intend[ed] judicial review of administrative action").

[71] See Spurlock v. FBI, 69 F.3d 1010, 1016-18 (9th Cir. 1995) (concluding that when court finds records exempt under FOIA, it has no "inherent" authority to order disclosure of agency information just because it might conflict with depositions or other public statements of informant); see also ACLU v. DOJ, 681 F.3d 61, 71 (2d Cir. 2012) (finding district court's ruling improper where it had directed agency to release material "by substituting a purportedly neutral phrase composed by the court" for the properly exempt material, ruling that such an order "exceeded the court's authority under FOIA").

[72] See Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1082, 1087 (9th Cir. 1997) ("We conclude that a district court lacks inherent power, equitable or otherwise, to exempt materials that FOIA itself does not exempt."); see also Abraham & Rose, P.L.C. v. United States, 138 F.3d 1075, 1077 (6th Cir. 1998) ("Basing a denial of a FOIA request on a factor unrelated to any of the[] nine exemptions clearly contravenes [the FOIA]."). But see Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 20 (1973) (suggesting, in dicta, that FOIA does not "limit the inherent powers of an equity court"); Campos v. INS, 32 F. Supp. 2d 1337, 1345-46 (S.D. Fla. 1998) (same).

[73] See Payne Enters., Inc. v. United States, 837 F.2d 486, 490-92 (D.C. Cir. 1988) (finding repeated, unacceptably long agency delays in providing nonexempt information sufficient to grant equitable relief where such delays are likely to recur absent judicial intervention); see

Considerations, "Policy or Practice" Claims, below.) However, the D.C. Circuit has distinguished equitable relief from a declaratory judgment, holding that a declaratory judgment would constitute an advisory opinion that courts lack the jurisdiction to issue.[74] Some lower courts in other jurisdictions have, nonetheless, issued such judgments.[75] Relief in the form of monetary damages is not available for violations of the FOIA because the FOIA only authorizes injunctive relief.[76]

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also, e.g., Nightingale v. USCIS, 507 F. Supp. 3d 1193, 1207, 1212 (N.D. Cal. 2020) (granting injunctive relief where court found "evidence is clear that [Defendants] have a pattern of unreasonable delay" but declining to enjoin agency "to provide notice to all persons in removal proceedings of their right to request their A-File through FOIA" as such relief is not "necessary to effectuate the congressional purpose behind the [FOIA] statute"); Gavin v. SEC, No. 04-4552, 2005 WL 2739293, at *6 (D. Minn. Oct. 24, 2005) (rejecting request to enjoin SEC from using "Glomar" response, because "future harm is merely speculative in nature, and injunctive relief is [therefore] inappropriate").

[74] Payne Enters., Inc., 837 F.2d at 491 (distinguishing between issuance of "[a] declaration that an agency's initial refusal to disclose requested information was unlawful, after the agency made that information available, [which] would constitute an advisory opinion in contravention of Article III of the Constitution[,]" and grant of equitable relief, following full disclosure, where an agency maintains an otherwise-unreviewable "policy or practice [that] will impair . . . lawful access to information in the future") (emphasis omitted); see also Comptel v. FCC, 945 F. Supp. 2d 48, 61 (D.D.C. 2013) (same).

[75] See, e.g., Navigators Ins. Co. v. DOJ, 155 F. Supp. 3d 157, 168 (D. Conn. 2016) (noting that courts have granted declaratory judgments where agencies have engaged in pattern or practice of delayed disclosure "and it is possible the violations will recur with respect to the same requesters"); Our Child.'s Earth Found. v. Nat. Marine Fisheries Serv., No. 14-4365, 2015 WL 6331268, at *9 (N.D. Cal. Oct. 21, 2015) (granting declaratory relief primarily due to agency's "pattern-and-practice of failure to meet FOIA deadlines"); Or. Nat. Desert Ass'n v. Gutierrez, 409 F. Supp. 2d 1237, 1248 (D. Or. 2006) (issuing, after the agency's disclosure of all requested records, declaratory judgment that its failure "to make a timely determination[] result[ed] in an improper withholding under [FOIA]"); Beacon J. Publ'g Co. v. Gonzalez, No. 05-1396, 2005 WL 8177623, at *1 (N.D. Ohio Nov. 16, 2005) (pronouncing agency's initial withholding as "contrary to the FOIA" following agency's disclosure of the requested photographs).

[76] See Sullivan v. U.S. Forest Serv., No. 18-5558, 2019 U.S. App. LEXIS 233, at *8 (6th Cir. Jan. 3, 2019) (affirming district court's dismissal "because FOIA does not authorize an action for damages, and [plaintiff] sought only monetary relief"); Pondexter v. Sec'y HUD, 788 F. App'x 93, 96 (3d Cir. 2019) (per curiam) (affirming dismissal because plaintiff "sought only money damages, which are not available under FOIA"); Hajro v. USCIS, 811 F.3d 1086, 1100 n.9 (9th Cir. 2016) ("'FOIA claims are not within the subject matter jurisdiction of the Court of Federal Claims because FOIA does not mandate money damages.'" (quoting Clark v. United States, 116 F. App'x 278, 279 (Fed. Cir. 2004))); Cornucopia Inst. v. USDA, 560 F.3d 673, 675 n.1 (7th Cir. 2009) ("Plaintiffs are not entitled to monetary damages for violations of FOIA because 5 U.S.C. § 552(a)(4)(B) authorizes only injunctive relief."); Eltayib v. U.S. Coast Guard, 53 F. App'x 127, 127 (D.C. Cir. 2002) (per

Preliminary Injunctions

On occasion, FOIA plaintiffs have attempted to expedite judicial consideration of their suits by seeking a preliminary injunction to "enjoin" the agency from continuing to withhold the requested records.[77] When such extraordinary relief is sought, the Supreme Court has held that a plaintiff must show: 1) "that he is likely to succeed on the merits," 2) "that he is likely to suffer irreparable harm in the absence of preliminary relief," 3) "that the balance of equities tips in his favor," and 4) "that an injunction is in the public interest."[78] Courts have expressed concern that preliminary injunctions risk disclosing

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curiam) (holding that FOIA "does not authorize the collection of damages"); Thompson v. Walbran, 990 F.2d 403, 405 (8th Cir. 1993) (per curiam) (finding plaintiff is not entitled to recover monetary damages).

[77] See Aronson v. HUD, 869 F.2d 646, 648 (1st Cir. 1989) (reversing district court's issuance of preliminary injunction that required agency to disclose information); Animal Legal Def. Fund v. USDA, No 17-00949, 2017 WL 2352009, at *1 (N.D. Cal. May 31, 2017) (denying request for preliminary injunction because plaintiffs failed to "demonstrate that the law and facts clearly favor the relief they have requested" and "they are not likely to succeed on their FOIA claim"); Pinnacle Armor, Inc. v. United States, No. 07-1655, 2008 WL 108969, at *9 (E.D. Cal. Jan. 7, 2008) (denying injunctive relief and noting that "[p]laintiff has not provided any authority for the proposition that the claim for the Freedom of Information Act documents supports a claim for an injunction"); Carlson v. USPS, No. 02-05471, 2005 WL 756573, at *8 (N.D. Cal. Mar. 31, 2005) (denying request for injunction sought to compel "timely" response to FOIA request); Dorsett v. DOJ, 307 F. Supp. 2d 28, 42-43 (D.D.C. 2004) (describing plaintiff's motion for injunction to prevent agency from "not taking any action honoring or denying" FOIA request, but dismissing it because court has no jurisdiction to make "advisory findings" regarding agency conduct towards FOIA requesters); Wiedenhoeft v. United States, 189 F. Supp. 2d 295, 296-97 (D. Md. 2002) (refusing to issue temporary restraining order to force "immediate compliance" with plaintiff's FOIA requests by moving them "to the head of the queue forthwith").

[78] Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); see, e.g., N.Y. Times Co. v. Def. Health Agency, No. 21-566, 2021 WL 1614817, at *4 (D.D.C. Apr. 25, 2021) (denying motion for preliminary injunction for failure to show "any irreparable harm to plaintiff absent such relief" and finding that "the balance of equities and the public interest do not favor preliminary injunctive relief" because of "the likely massive volume of responsive data, with the concomitant heavy processing burden on defendants and resulting disruption of the ordinary FOIA processing on similarly-situated FOIA requesters"); Brennan Ctr. for Just. at NYU Sch. of L. v. Dep't of Com., 498 F. Supp. 3d 87, 97, 101-03 (D.D.C. 2020) (holding that plaintiff had "established a likelihood of success" and showed "that it will suffer irreparable harm" and that the burden on the defendant "is outweighed by the [plaintiff's] pressing need for the information and the public interest in being informed on the matter"); Pinson v. DOJ, No. 18-486, 2018 WL 5464706, at *6 (D.D.C. Oct. 29, 2018) (denying plaintiff's motion for preliminary injunction based on harm suffered in past because plaintiff has not demonstrated irreparable harm in future); see also Mayo v. U.S.

the very information that is the subject of the litigation and can interfere with the orderly briefing of the case.[79]

The FOIA contemplates expedited processing of requests in cases of "compelling need" and in other situations that are determined by agency regulation to warrant such processing.[80] (For further discussion of expedited processing, see Procedural Requirements, Expedited Processing.) Courts regularly exercise their authority to enforce the statute's requirement that expedited requests be processed "as soon as practicable" by imposing processing deadlines.[81]

Gov't Printing Off., 839 F. Supp. 697, 700 (N.D. Cal. 1992) (observing that fact that FOIA expressly authorizes injunctive relief does not divest district court of obligation to "exercise its sound discretion" by relying on traditional legal standards in granting such relief (citing Weinberger v. Romero Barcelo, 456 U.S. 305, 312 (1982))), aff'd, 9 F.3d 1450 (9th Cir. 1993).

[79] See Aronson, 869 F.2d at 648 ("To issue the preliminary injunction discloses the names, permanently injuring the interest HUD seeks to protect[.]"); see also Long v. DHS, 436 F. Supp. 2d 38, 44 (D.D.C. 2006) (refusing to issue preliminary injunction to compel production of records, because "[t]he government has not yet had a chance to review its files, prepare and file a dispositive motion, and provide the Court the information necessary to make a decision on any material that might be subject to an exemption"); Hunt v. U.S. Marine Corps, No. 94-2317, slip op. at 5 (D.D.C. Oct. 28, 1994) (denying temporary restraining order in part on basis of strong "public interest in an 'orderly, fair and efficient administration of the FOIA'" (quoting Nation Mag. v. Dep't of State, 805 F. Supp. 68, 74 (D.D.C. 1992)).

[80] 5 U.S.C. § 552(a)(6)(E)(i)(I)-(II) (2018); see, e.g., Dep't of State FOIA Regulations, 22 C.F.R. § 171.11(f)(3) (2023) (providing for expedited processing if "[f]ailure to release the information would impair substantial due process rights or harm substantial humanitarian interests").

[81] 5 U.S.C. § 552(a)(6)(E)(iii) (2018); see also Brennan Ctr. for Just. at NYU Sch. of L., 498 F. Supp. 3d at 92 (granting preliminary injunction in part and ordering agencies to process plaintiff's requests and produce Vaughn indices by specified date); Elec. Frontier Found. v. Off. of the Dir. of Nat'l Intel., 542 F. Supp. 2d 1181, 1187 (N.D. Cal. 2008) (granting preliminary injunction and ordering defendants to timely process and produce requested documents to plaintiff within seventeen days of court order); Elec. Priv. Info. Ctr. v. DOJ, 416 F. Supp. 2d 30, 42 (D.D.C. 2006) (granting preliminary injunction and requiring agency to complete processing within 20 days because agency "has neither satisfied the time restraints applicable to standard FOIA requests nor established that such compliance was not practicable")); Gerstein v. CIA, No. 06-4643, 2006 WL 3462659, at *4-5 (N.D. Cal. Nov. 29, 2006) (granting plaintiff's motion for preliminary injunction and ordering agencies to process plaintiff's FOIA requests within thirty days).

Mootness and Other Grounds for Dismissal

If during the course of a FOIA lawsuit it is determined that all documents responsive to the underlying FOIA request have been released in full to the requester, courts generally dismiss the suit as moot because there is no justiciable case or controversy.[82] However, in instances where an agency has released documents, but other related issues remain unresolved, courts frequently will not dismiss the action.[83]

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[82] See, e.g., Freeman v. Fine, 820 F. App'x 836, 839 (11th Cir. 2020) (per curiam) (affirming dismissal of requester's FOIA claim as moot because requester received documents requested); Am. Ctr. for L. & Just. v. DOJ, No. 18-5309, 2019 U.S. App. LEXIS 31234, at *1 (D.C. Cir. Oct. 18, 2019) (per curiam) (dismissing appeal as moot "[b]ecause appellee has now released [the] records to appellant"); Payne v. VA, 753 F. App'x 843, 845 (11th Cir. 2018) (per curiam) (affirming dismissal on mootness grounds as there was no dispute in record that agency "produced everything it had"); Williams & Connolly v. SEC, 662 F.3d 1240, 1243-44 (D.C. Cir. 2011) (affirming judgment of district court that controversy is moot with respect to eleven sets of documents that were released to plaintiff by another agency); Cornucopia Inst. v. USDA, 560 F.3d 673, 675-76 (7th Cir. 2009) (concluding that agency's production of documents, completeness of which was uncontested, mooted plaintiff's claims); The N.Y. Times Co. v. FBI, 822 F. Supp. 2d 426, 431 (S.D.N.Y. 2011) (granting defendant's motion to dismiss for lack of subject matter jurisdiction where FBI provided an unredacted copy of requested report); cf. Civ. Beat L. Ctr. for Pub. Int. v. CDC, 929 F.3d 1079, 1086 (9th Cir. 2019) (finding one of requester's claims, that agency improperly withheld one category of information, moot after agency produced versions of documents revealing all requested information in that category); Feinman v. FBI, 598 F. App'x 15, 15-16 (D.C. Cir. 2015) (finding plaintiff's request for search moot where FBI subsequently searched and located no responsive records); Haji v. ATF, No. 03-8479, 2004 WL 1783625, at *2-3 (S.D.N.Y. Aug. 10, 2004) (holding that plaintiff's request is moot because requested files, if ever in existence, were destroyed at World Trade Center during attacks of September 11, 2001).

[83] See, e.g., Biear v. Att'y Gen. U.S., 905 F.3d 151, 158 (3d Cir. 2018) (finding that, although agency produced records, district court erred in dismissing requester's claim as moot because issues concerning validity of exemption claims remained and only became "ripe for consideration when the action had already commenced in the District Court"); Cause of Action v. FTC, 799 F.3d 1108, 1114 (D.C. Cir. 2015) (holding that plaintiff's fee waiver claim was not moot "[b]ecause the FTC has not produced without charge all the non-exempt documents [plaintiff] sought"); Marin Inst. for the Prevention of Drug & Other Alcohol Probs. v. HHS, 229 F.3d 1158, 1158 (9th Cir. 2000) (unpublished disposition) (finding no mootness when release of document at issue was "surreptitious[ ]" and not necessarily the document plaintiff had requested); Mertes v. IRS, No. 19-1218, 2021 WL 242798, at *6 (E.D. Cal. Jan. 25, 2021) ("Because, under the facts of this case, the Form 706 and the Form 709 are essentially a single document, the case is not moot through the production of the 'four corners' of the Form 709."); Jud. Watch, Inc. v. U.S. Air Force, No. 11-932, 2012 WL 1190297, at *2 (D.D.C. Apr. 10, 2012) (concluding that defendant's production of document in one format does not moot plaintiff's claim for metadata underlying another document format); cf. Newport Aeronautical Sales v. Dep't of the Air Force, 684 F.3d 160, 163-64 (D.C.

The mootness doctrine can also arise in the fee context where an agency's decision to waive fees at issue in the litigation renders moot a FOIA plaintiff's claims concerning fee waivers or requests for a preferred fee status.[84]

In cases where a FOIA plaintiff's complaint only alleged an unreasonable delay in responding to a FOIA request and the agency subsequently responded by processing the requested records, courts have dismissed the FOIA lawsuit as moot.[85] However, the Court

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Cir. 2012) (concluding that release of unredacted copies of requested records pursuant to DOD directive rather than FOIA did not moot plaintiff's claim alleging continuing injury due to agency's "pattern of denying FOIA requests for [that type] of data" and "requiring [plaintiff] to seek the data under restrictive terms" of directive); Yonemoto v. VA, 686 F.3d 681, 689-92 (9th Cir. 2012) (determining that plaintiff's FOIA claim with respect to certain emails is not moot where VA offered those records to plaintiff in unredacted form in his capacity as agency employee, but placed restrictions on his ability to distribute them); Furrow v. BOP, 420 F. App'x 607, 609-10 (7th Cir. 2011) (vacating district court's decision dismissing action on mootness grounds where agency permitted plaintiff to inspect some records but "has not provided everything [plaintiff] wants, and [plaintiff] disputes the validity of the exemptions the BOP claims"); Anderson v. HHS, 907 F.2d 936, 941 (10th Cir. 1990) (declaring that although plaintiff had already obtained all responsive documents in private civil litigation, albeit subject to protective order, plaintiff's FOIA litigation to obtain documents free from any such restriction remained viable).

[84] See, e.g., Hall v. CIA, 437 F.3d 94, 99 (D.C. Cir. 2006) (finding that agency's release of documents without seeking payment mooted plaintiff's "arguments that the district court's denial of a fee waiver was substantively incorrect"); Inst. for Pol'y Stud. v. CIA, 885 F. Supp. 2d 120, 153 (D.D.C. 2012) (denying as moot plaintiff's request for declaratory relief where defendant initially denied fee waiver but ultimately waived fees as matter of administrative discretion because "the fact that plaintiff might at some point in the future file another FOIA claim and that defendant might then refuse to waive fees is no more than speculative"); cf. Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Educ., 593 F Supp. 2d 261, 268-69 (D.D.C. 2009) (concluding that plaintiff's fee waiver request is moot with respect to set of documents that were included as part of defendant's search in another case involving same parties).

[85] See, e.g., Yonemoto, 686 F.3d at 689 (noting that "the production of all nonexempt material, 'however belatedly, moots FOIA claims'" (quoting Papa v. United States, 281 F.3d 1004, 1013 (9th Cir. 2002))); Voinche v. FBI, 999 F.2d 962, 963 (5th Cir. 1993) (dismissing case as moot because only issue in case was "tardiness" of agency response, which was made moot by agency disclosure determination); Atkins v. DOJ, 1991 WL 185084, at *1 (D.C. Cir. Sept. 18, 1991) (unpublished table decision) ("The question whether DEA complied with the [FOIA's] time limitation in responding to [plaintiff's] request is moot because DEA has now responded to this request."); Tijerina v. Walters, 821 F.2d 789, 799 (D.C. Cir. 1987) ("'[H]owever fitful or delayed the release of information[,] . . . if we are convinced appellees have, however belatedly, released all nonexempt material, we have no further judicial function to perform under the FOIA.'" (quoting Perry v. Block, 684 F.2d 121, 125 (D.C. Cir.

of Appeals for the District of Columbia Circuit, in Payne Enterprises v. United States,[86] held that when records are routinely withheld at the initial processing level, but consistently released after an administrative appeal and this situation results in continuing injury to the requester, a lawsuit challenging that practice is ripe for adjudication and is not subject to dismissal on the basis of mootness.[87] Moreover, "voluntary cessation" of the practice may not moot the claim unless the agency can demonstrate that "'there is no reasonable expectation that the wrong will be repeated.'"[88] (For further discussion, see Litigation Considerations, "Policy or Practice" Claims, below.)

1982))); Bonilla v. DOJ, No. 11-20450, 2012 WL 204202, at *2 (S.D. Fla. Jan. 24, 2012) (granting defendant's motion to dismiss where agency released all non-exempt documents and plaintiff's complaint only asserted claims alleging untimely disclosure of requested records); Davidson v. BOP, No. 11-309, 2012 WL 5421161, at *3 (E.D. Ky. Nov. 6, 2012) (holding that in light of response by agency, plaintiff's claim was moot because even though "more than two years [had] passed since [plaintiff] first submitted his FOIA request[,]" plaintiff's complaint only sought response to his FOIA request); Meyer v. Comm'r of IRS, No. 10-767, 2010 WL 4157173, at *6 (D. Minn. Sept. 27, 2010) (dismissing any claim "based on the timeliness of the IRS's response" as moot in light of agency's response to plaintiff's request); United Transp. Union Loc. 418 v. Boardman, No. 07-4100, 2008 WL 2600176, at *8 (N.D. Iowa June 24, 2008) (dismissing plaintiff's FOIA claim as moot because agency ultimately responded to request and "no exception to the mootness doctrine applies").

[86] 837 F.2d 486 (D.C. Cir. 1988).

[87] Id. at 491; see also Hajro v. USCIS, 811 F.3d 1086, 1101 (9th Cir. 2016) (finding that "a pattern or practice claim is not necessarily mooted by an agency's production of documents"); Tipograph v. DOJ, 146 F. Supp. 3d 169, 174 (D.D.C. 2015) (finding that "[b]ecause [plaintiff] alleges that a policy or practice of the FBI will impact her lawful access to information in the future, her claim for prospective declaratory and injunctive relief is not moot simply because the FBI has now provided her with the records to which she is entitled"); cf. Gilmore v. DOE, 33 F. Supp. 2d 1184, 1189 (N.D. Cal. 1998) (allowing discovery on "pattern and practice" claim of agency delay in processing FOIA requests, despite having held that DOE properly withheld records).

[88] Payne Enters. Inc., 837 F.2d at 492 (quoting Cnty. of L. A. v. Davis, 440 U.S. 625, 631 (1979)); see also Porup v. CIA, 997 F.3d 1224, 1233 (D.C. Cir. 2021) (finding agency's voluntary cessation of challenged practice rendered dispute moot where "Declaration . . . and Agency's counsel's firm representations provide[d] [court] with sufficient assurance that the Agency's new policy [had] displaced the practice contested by [requester]"); Humane Soc'y of U.S. v. U.S. Fish & Wildlife Serv., 838 F. App'x 721, 731 (4th Cir. 2020) (finding "voluntary cessation" mooted claim where agency posted documents online as required under (a)(2) of the FOIA and averred "that it would not remove those documents"); Ctr. for Sustainable Econ. v. Dep't of the Treasury, No. 09-00848, slip op. at 6-7 (D.N.M. May 5, 2010) (finding that action challenging defendant's past practice regarding fee waiver requests is moot where defendant conceded error and took corrective action to avoid repetition); cf. People for the Ethical Treatment of Animals v. USDA, 918 F.3d 151, 159 (D.C. Cir. 2019) (remanding certain claims for clarification on agency's "future

FOIA lawsuits have also been dismissed when the plaintiff fails to prosecute the suit,[89] records are publicly available under a separate statutory scheme upon payment of fees,[90] or the claims presented are not ripe.[91] Additionally, a FOIA plaintiff's status as a

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plans to post inspection reports," and finding that if on remand "the agency makes clear that it commits to timely posting on an ongoing basis, such a declaration will moot [requester's] non-redactions claims").

[89] See, e.g., Antonelli v. EOUSA, 25 F.3d 1053 (7th Cir. 1994) (unpublished table decision) (affirming district court's dismissal of complaint when, seven months after plaintiff's complaint was found defective for lack of specificity, plaintiff had failed to amend) (unpublished disposition); Comer v. FBI, No. 09-2455, 2010 U.S. Dist. LEXIS 111558, at *2-3 (D.D.C. Oct. 20, 2010) (dismissing pro se plaintiff's FOIA action because he "failed to respond to the court's show cause order and failed to prosecute [the] case. . . ."); cf. Castro v. ATF, No. 11-2197, 2012 WL 1556248, at *1 (D.D.C. May 2, 2012) (granting defendant's motion for summary judgment as conceded where plaintiff failed to respond to agency's motion and was advised by court of consequences of failure to do so).

[90] See Kleinerman v. Pat. & Trademark Off., No. 82-295, 1983 WL 658, at *1 (D. Mass. Apr. 25, 1983) (dismissing FOIA action because Patent and Trademark Act, and its corresponding regulations, gave plaintiff independent right of access provided he paid for records).

[91] See, e.g., United States v. Gates, 915 F.3d 561, 563 (8th Cir. 2019) (per curiam) (finding requester's challenge of FOIA waiver found in plea agreement not ripe because requester "has not requested any records from the government pursuant to FOIA"); Petit-Frere v. U.S. Att'ys Off., 664 F. Supp. 2d 69, 72 (D.D.C. 2009) (holding that lawsuit is not ripe for adjudication because, while "exhaustion of administrative remedies is not jurisdictional," "as a prudential matter" lawsuit should be considered "premature and not ripe for adjudication" in part because not doing so would deprive court of "an adequate record for judicial review"); Jones v. DOJ, 653 F. Supp. 2d 46, 49-50 (D.D.C. 2009) (concluding that issues presented are not ripe where plaintiff has failed to pay assessed fees or to administratively appeal fee determination); O'Neill v. DOJ, No. 05-0306, 2008 WL 819013, at *14 (E.D. Wis. Mar. 25, 2008) (finding that claim was not ripe where plaintiff could not establish that agency had policy whereby it failed to search for records or refused to contact agency personnel with connection to responsive records); Long v. DOJ, 450 F. Supp. 2d 42, 85 (D.D.C. 2006) (finding that question of plaintiff's fee status with respect to future requests was not ripe for adjudication); Odle v. DOJ, No. 05-2711, 2005 WL 2333833, at *2 (N.D. Cal. Sept. 22, 2005) (holding that because defendants no longer assert "Glomar" defense, plaintiff's claim regarding defendants' use of that defense became moot and that plaintiff's contention that defendants were unlawfully withholding documents was not ripe for adjudication as defendants were in midst of reviewing and processing requested documents); Doe v. Veneman, 230 F. Supp. 2d 739, 746 (W.D. Tex. 2002) (dismissing claims regarding "other pending FOIA requests" as "too broad for the Court to effectively review because such requests are numerous, request a variety of information, and are still pending with administrative agencies").

fugitive may warrant dismissal under the "fugitive disentitlement doctrine."[92] (For a further discussion of fugitives and their FOIA requests, see Procedural Requirements, FOIA Requesters.) Notably, dismissal is not necessarily appropriate when a plaintiff dies, as a FOIA claim may be continued by a properly substituted party.[93]

A FOIA lawsuit may also be dismissed under the doctrine of res judicata, sometimes also referred to as "claim preclusion."[94] Res judicata precludes relitigation of an action when it is brought by a plaintiff against the same agency, for the same documents, and where the withholdings have been previously adjudicated.[95] However,

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[92] Compare Maydak v. Dep't of Educ., 150 F. App'x 136, 138 (3d Cir. 2005) (affirming district court's dismissal of plaintiff's FOIA suit under "fugitive disentitlement doctrine" because "there was enough of a connection between Maydak's fugitive status and his FOIA case to justify application of the doctrine" (citing Ortega-Rodriguez v. United States, 507 U.S. 234, 246 (1993))), with Lazaridis v. DOJ, 713 F. Supp. 2d 64, 69 (D.D.C. May 26, 2010) (denying agency's motion to dismiss based on fugitive disentitlement doctrine where "DOJ has not established the requisite connection between [plaintiff's] fugitive status and these proceedings").

[93] See Sinito v. DOJ, 176 F.3d 512, 515-16 (D.C. Cir. 1999) (finding that FOIA cause of action survives death of original requester but restricting substitution of parties to successor or representative of deceased, pursuant to Fed. R. Civ. P. 25); D'Aleo v. Dep't of the Navy, No. 89-2347, 1991 U.S. Dist. LEXIS 3884, at *2-4 (D.D.C. Mar. 27, 1991) (appointing deceased plaintiff's sister, who was executrix of his estate, as new plaintiff).

[94] See New Hampshire v. Maine, 532 U.S. 742, 748 (2001) (defining claim preclusion as "the effect of a prior judgment in foreclosing successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit") (non-FOIA case).

[95] See Schwarz v. Nat'l Inst. of Corr., 161 F.3d 18, 18 (10th Cir. 1998) (unpublished table decision) (affirming dismissal of FOIA claim in accordance with doctrine of res judicata because, despite plaintiff's argument to the contrary, prior action involved same parties and same claims); Wrenn v. Shalala, No. 95-5198, 1995 WL 225234, at *1 (D.C. Cir. Mar. 8, 1995) (per curiam) (affirming dismissal of requests that were subject of plaintiff's previous litigation but reversing dismissal on "claims that were not and could not have been litigated in that prior action"); Hanner v. Stone, 1 F.3d 1240, 1240 (6th Cir. 1993) (unpublished table decision) (holding that under doctrine of res judicata, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in a prior action"); NTEU v. IRS, 765 F.2d 1174, 1177 (D.C. Cir. 1985) (refusing to consider successive FOIA suits for documents that were "identical except for the year involved"); Pickering-George v. DEA Registration Unit, No. 09-2184, 2009 WL 4031223, at *1 (D.D.C. Nov. 19, 2009) (holding that plaintiff's claim is barred by doctrine of res judicata where court previously ruled against him for failure to exhaust administrative remedies in claim based on same facts); Kemp v. Grippen, No. 06-0076, 2007 WL 870123, at *6-8 (E.D. Wis. Mar. 20, 2007) (holding that plaintiff's FOIA and Privacy Act lawsuit was barred by res judicata because previous case involved same claims and same parties); Lane v. DOJ, No. 02-06555, 2006 WL 1455459, at *6 (E.D.N.Y. May 22, 2006) (holding that res judicata

res judicata does not bar a plaintiff from filing a lawsuit under the FOIA for records that were previously at issue in a non-FOIA case.[96] In addition, res judicata generally does not apply where there has been a change in the factual circumstances or legal principles pertinent to the lawsuit.[97]

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barred plaintiff's claims against FBI because claims had already been adjudicated and because plaintiff "failed to take the necessary action to contest that decision"); Tobie v. Wolf, No. 01-3899, 2002 WL 1034061, at *1 (N.D. Cal. May 8, 2002) (finding privity between "officers of the same government," and therefore dismissing suit, because plaintiff previously litigated same issues against component of agency named as co-defendant in later suit); cf. Tally v. U.S. Dep't of Lab., No. 19-00493, 2020 WL 3966312, at *10-11 (W.D. Mo. Jul. 13, 2020) (finding res judicata where plaintiff was acting as their attorney's proxy in rechallenging withholdings attorney previously unsuccessfully challenged), aff'd sub nom. Campo v. DOJ, 854 F. App'x 768 (8th Cir. 2021).

[96] See, e.g., Montgomery v. IRS, 292 F. Supp. 3d 391, 398 (D.D.C. 2018) ("The 'nucleus of facts' that the Court will need to consider in adjudicating Plaintiffs' FOIA claim – i.e., whether the IRS' search was adequate and its claimed exemptions appropriate – is wholly different from the previous assessed – namely, the [requesters'] correct tax liability. The present suit is, therefore, not barred by *res judicata*."); North v. Walsh, 881 F.2d 1088, 1093-95 (D.C. Cir. 1989) (deciding that claim for records under FOIA was not barred by prior discovery prohibition for same records in criminal case in which FOIA claim could not have been interposed).

[97] See, e.g., Negley v. FBI, 169 F. App'x 591, 594 (D.C. Cir. 2006) (holding that res judicata was inapplicable because both lawsuits -- one to obtain records from Sacramento office and another to obtain records from San Francisco office -- did not involve same "nucleus of facts"; declaring further that "FOIA does not limit a party to a single request, and because the records maintained by an FBI office may change over time, a renewal of a previous request inevitably raises new factual questions"); Croskey v. U.S. Off. of Special Couns., 132 F.3d 1480, 1480 (D.C. Cir. 1997) (unpublished table decision) (finding res judicata inapplicable because document was not in existence when earlier litigation was brought); Hanner v. Stone, 1992 WL 361382, at *1 (6th Cir. Dec. 8, 1992) (unpublished table decision) (determining that present claim was not precluded under doctrine of res judicata when appellate court had previously adjudicated claim that was similar, but involved different issue); ACLU v. DOJ, 321 F. Supp. 2d 24, 34 (D.D.C. 2004) (finding res judicata inapplicable where changed circumstances, namely, Attorney General's decision to declassify records in question, altered legal issues surrounding plaintiff's FOIA request); Primorac v. CIA, 277 F. Supp. 2d 117, 120 (D.D.C. 2003) (dismissing case on basis of statute of limitations but noting res judicata would have otherwise barred plaintiff's claim because automatic declassification section of Executive Order 12,958, which was unavailable to plaintiff in previous lawsuit for same records, was still unavailable because it was not yet effective); Wolfe v. Froehlke, 358 F. Supp. 1318, 1319 (D.D.C. 1973) (stating that lawsuit was not barred where national security status had changed), aff'd, 510 F.2d 654 (D.C. Cir. 1974). But see Bernson v. ICC, 635 F. Supp. 369, 371 (D. Mass. 1986) (refusing to accept argument that changed circumstances rendered inapplicable previous decision affirming invocation of FOIA exemption and dismissing claim based on res judicata).

When parallel FOIA suits are brought by the same party for the same records, dismissal has been found appropriate by operation of the "first-filed" or "first-in time" rule.[98] This rule holds that generally "'[w]here there are two competing lawsuits, the first suit should have priority.'"[99] Although both rules advance the goals of minimizing redundant litigation and conserving judicial resources, the "first-filed" rule differs from res judicata because, in the latter, a case involving the same parties already has been decided, whereas in the former, the cases are still pending.[100]

Collateral estoppel, or "issue preclusion," which precludes a party from litigating issues that have been previously adjudicated, has also been found to foreclose further consideration of a FOIA suit.[101] For example, if an agency's search for records already has

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[98] See, e.g., Broward Bulldog, Inc. v. DOJ, 939 F.3d 1164, 1196 (11th Cir. 2019) (holding that district court did not err in refusing to order production of certain records that were already currently before different court, observing that "'two courts of equal authority should not hear the same case simultaneously' and potentially 'generate dueling appeals'" (quoting UtahAmerican Energy, Inc. v. Dep't of Lab., 685 F.3d 1118, 1124 (D.C. Cir. 2012))); McHale v. FBI, No. 99-1628, slip op. at 8-9 (D.D.C. Nov. 7, 2000) (dismissing "essentially duplicative action").

[99] Emp. Ins. v. Fox Entm't Grp., Inc., 522 F.3d 271, 275 (2d Cir. 2008) (quoting First Nat'l Bank & Tr. Co. v. Simmons, 878 F.2d 79, 79 (2d Cir. 1989)) (non-FOIA cases); see also UtahAmerican Energy, Inc., 685 F.3d at 1123-25 (reversing district court's decision and concluding that, pursuant to first-in time rule, district court abused its discretion where it ordered government to release records that are subject of separate FOIA litigation pending before another district court judge).

[100] See UtahAmerican Energy, Inc., 685 F.3d at 1124 (noting that "[t]he rationale for allowing the first court to proceed to its disposition" is that courts "should not expend judicial resources – and potentially produce contradictory decisions – by allowing the same FOIA plaintiff multiple bites at the apple"); Emp. Ins., 522 F.3d at 275 (explaining that first-filed rule "'embodies considerations of judicial administration and conservation of resources' by avoiding duplicative litigation and honoring the plaintiff's choice of forum" (quoting First Nat'l Bank, 878 F.2d at 80) (non-FOIA case))).

[101] See Martin v. DOJ, 488 F.3d 446, 454 (D.C. Cir. 2007) (defining elements of collateral estoppel: "'[1], the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case [; 2], the issue must have been actually and necessarily determined by a court of competent jurisdiction [; and 3] preclusion in the second case must not work a basic unfairness to the party bound by the first determination'" (quoting Yamaha Corp. of Am. v. United States, 961 F.2d 245, 254 (D.C. Cir. 1992))); Church of Scientology of Cal. v. Dep't of the Army, 611 F.2d 738, 750-51 (9th Cir. 1980) (declaring that complete identity of plaintiff and document at issue precludes relitigation); cf. Cotton v. Heyman, 63 F.3d 1115, 1118 nn.1-2 (D.C. Cir. 1995) (holding that doctrine of direct estoppel, which precludes relitigating issue finally decided in "separate proceeding" within same suit, prevented Smithsonian Institution from challenging district court determination that it is subject to FOIA in connection with appeal from award of

been found to be adequate, a plaintiff is precluded from challenging the sufficiency of that same search in a subsequent action.[102] Similarly, FOIA plaintiffs have been precluded from challenging an agency's disclosure determinations or other matters that have already been litigated.[103] Collateral estoppel has not been applied in the FOIA context in those instances where there is not an expressed or implied legal relationship between the plaintiff in the first action and the plaintiff in the successive suit.[104] As with the doctrine

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attorney fees; however, "Smithsonian is free to relitigate the issue against another party in a separate proceeding"). But see North, 881 F.2d at 1093-95 (finding issue preclusion inapplicable when exemption issues raised in FOIA action differ from relevancy issues raised in prior action for discovery access to same records); Hall v. CIA, No. 04-00814, 2005 WL 850379, at *3 (D.D.C. Apr. 13, 2005) (holding doctrine of collateral estoppel inapplicable where plaintiff previously challenged adequacy of search and withholdings but in instant case, by contrast, sought immediate production of documents and reduction or waiver of fees).

[102] See, e.g., Allnutt v. DOJ, 99 F. Supp. 2d 673, 677 (D. Md. 2000) (refusing, "[i]n accord with basic res judicata principles," to reconsider adequacy of search issue that was decided by another court), aff'd per curiam sub nom. Allnut v. Handler, 8 F. App'x 225 (4th Cir. 2001).

[103] See, e.g., Martin, 488 F.3d at 454-55 (holding that plaintiff is collaterally estopped from challenging FDIC's withholding of report because issue was contested in prior case, which was decided by court of competent jurisdiction, and where plaintiff had "ample opportunity to have his challenge heard and [there were] no circumstances sufficient to exempt him from rules of preclusion."); Hall v. CIA, 668 F. Supp. 2d 172, 179 (D.D.C. 2009) (reiterating that, consistent with an earlier ruling in this case, collateral estoppel bars plaintiffs "from arguing that the Senate Committee's records are 'agency records'").

[104] See Taylor v. Sturgell, 553 U.S. 880, 895-905 (2008) (disapproving theory of "virtual representation," whereby person could be bound by prior judgment if he was adequately represented by party to earlier proceeding, in favor of traditional notions of nonparty preclusion); Favish v. Off. of Indep. Couns., 217 F.3d 1168, 1171 (9th Cir. 2000) (finding collateral estoppel did not apply to attorney's FOIA lawsuit even though that attorney previously acted as "associate counsel" to unsuccessful plaintiff who sought same records because prior representation did not create legal relationship that would make former plaintiff accountable to attorney); Nielsen v. U.S. Bureau of Land Mgmt., 252 F.R.D. 499, 511 (D. Minn. 2008) (concluding that "defendants are not entitled to summary judgment based on the doctrines of res judicata or collateral estoppel" where there was lack of "any basis for finding [current plaintiff] was acting in a representative capacity for plaintiff in the [prior] litigation"); cf. Doe v. Glickman, 256 F.3d 371, 380 (5th Cir. 2001) (permitting third-party intervention in reverse FOIA suit in order to avoid collateral estoppel effect of decision potentially adverse to third-party interests); Robertson v. DOD, 402 F. Supp. 1342, 1347 (D.D.C. 1975) (concluding that private citizen's interest in subsequent FOIA action was not protected by government in prior reverse FOIA suit over same documents).

of res judicata, collateral estoppel has been found to not be applicable to a subsequent lawsuit if there is an intervening, material change in the law or the facts.[105]

"Policy or Practice" Claims

The Court of Appeals for the District of Columbia Circuit has held that "even though a party may have obtained relief as to a *specific request* under the FOIA, this will not moot a claim that an agency *policy or practice* will impair the party's lawful access to information in the future."[106] (For a further discussion of mootness generally, see Litigation Considerations, Mootness and Other Grounds for Dismissal, above.)

Courts have held that in order to demonstrate a policy or practice[107] and adequately state a claim, plaintiffs need not identify a formal practice or official policy statement,[108]

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[105] See, e.g., Croskey v. U.S. Off. of Special Couns., 1997 WL 702364, at *1 (D.C. Cir. Oct. 17, 1997) (unpublished table decision) (concluding that access to investigator's notes and impressions of witnesses adjudicated in prior proceeding was "sufficiently different" from witness statements themselves to bar application of collateral estoppel); Minnis v. USDA, 737 F.2d 784, 786 n.1 (9th Cir. 1984) (declaring that "an intervening Supreme Court decision clarifying an issue that had been uncertain in the lower courts defeats collateral estoppel"); Reps. Comm. for Freedom of Press v. FBI, No. 15-1392, 2020 WL 1324397, at *5 (D.D.C. Mar. 20, 2020) (finding plaintiff not precluded from challenging similar withholdings on new records because "[t]he key to collateral estoppel in the FOIA context is that the documents withheld, not the rationales for the withholdings, be the same"); McQueen v. United States, 264 F. Supp. 2d 502, 513-14 (S.D. Tex. 2003) (refusing to find that collateral estoppel prevented plaintiff from litigating "requests for information that may not be essentially identical[,]" despite agency's argument that the contested documents were "the same kinds . . . but for different years."), aff'd, 100 F. App'x 964 (5th Cir. 2004); see also Horowitz v. Tschetter, No. 06-5020, 2007 WL 1381608, at *4-5 (N.D. Cal. May 8, 2007) (holding that finding in FOIA action regarding nature of certain records did not have preclusive effect on non-FOIA litigation because cases concerned different issues of fact and law).

[106] Payne Enters., Inc. v. United States, 837 F.2d 486, 491 (D.C. Cir. 1988) (citing Better Gov't Ass'n v. Dep't of State, 780 F.2d 86, 90-92 (D.C. Cir. 1986)).

[107] Occasionally, courts use the term "pattern or practice" to describe these claims. See, e.g., Hajro v. USCIS, 811 F.3d 1086 (9th Cir. 2016); Muttitt v. U.S. Cent. Command, 813 F. Supp. 2d 221 (D.D.C. 2011).

[108] See, e.g., Muttitt, 813 F. Supp. 2d at 231 ("The fact that the practice at issue is informal, rather than articulated in regulations or an official statement of policy, is irrelevant to determining whether a challenge to that policy or practice is moot.") (quoting Payne Enters., Inc. v. United States, 837 F.2d 486, 491 (D.C. Cir. 1988))); Muckrock, LLC v. CIA, 300 F. Supp. 3d 108, 130-31 (D.D.C. 2018) (rejecting agency's argument that "plaintiff needs to point to a regulation that establishes the policy, or that the agency must concede the policy's existence as a *threshold*" to bring policy or practice claim); Brown v. U.S. Customs & Border

but must allege facts establishing that an agency has "adopted, endorsed, or implemented" an ongoing unlawful policy or practice.[109] In doing so, courts have found that plaintiffs must allege more than one instance of unlawful behavior,[110] as well as some level of uniformity in the agency's alleged unlawful treatment of the relevant class of requests.[111]

While often dismissed for lack of standing or as unripe, courts have adjudicated the merits of policy or practice claims brought for various types of alleged FOIA

Prot., 132 F. Supp. 3d 1170, 1174 (N.D. Cal. 2015) (finding plaintiffs do not need to "name a specific policy at the pleading stage to maintain a FOIA 'pattern or practice' claim"); Muttitt, 813 F. Supp. 2d at 231 (holding that "a formal policy or regulation is not required to sustain a claim for relief enjoining a pattern or practice of violating FOIA"); cf. Scudder v. CIA, 281 F. Supp. 3d 124, 129 (D.D.C. 2017) (dismissing policy or practice claim because plaintiffs "have not alleged any instance where the Defendant was found to have violated FOIA – or even a specific instance where the Defendant allegedly violated the FOIA – by failing to provide the requested information electronically where readily producible").

[109] Muttitt, 813 F. Supp. 2d at 293.

[110] See, e.g., Hajro, 811 F.3d at 1103-04 (remanding for determination as to whether "the agency's FOIA violation was not merely an isolated incident" and holding that plaintiff "can provide evidence that he has been subjected to a FOIA violation more than once . . . or a plaintiff can provide the court with affidavits of people similarly situated to the plaintiff who were also harmed by the pattern or practice"); Cause of Action Inst. v. Eggleston, 224 F. Supp. 3d 63, 72 (D.D.C. 2016) ("Plaintiff cannot state a 'policy or practice' claim based on a single incident."); Navigators Ins. Co. v. DOJ, 155 F. Supp. 3d 157, 168 (D. Conn. 2016) (refusing to draw general conclusions about agency-wide practices from its handling of one case); N.Y. Times Co. v. FBI, 822 F. Supp. 2d 426, 431 (S.D.N.Y. 2011) (dismissing plaintiff's "policy or practice" claim where it has "failed to provide evidence of prior similar instances to support its claim"); Muttitt, 813 F. Supp. 2d at 230 (finding plaintiff stated claim against Department of State by alleging ten instances of failure to provide estimated dates of completion, but failed to state pattern and practice claim against Department of the Treasury by alleging single FOIA violation); Nkihtaqmikon v. BIA, 672 F. Supp. 2d 154, 171 (D. Me. 2009) (holding that "to draw general conclusions about . . . agency-wide patterns and practices from its handling of one case is a step too far").

[111] See, e.g., Am. Ctr. for L. & Just. v. FBI, 470 F. Supp. 3d 1, 6-7 (D.D.C. 2020) (declining to find FBI has unlawful policy or practice of failing to produce all nonexempt, responsive records until after suit is filed, concluding that variation in FBI's conduct among the three cases cuts against inference that FBI is acting pursuant to actual policy and undermines contention that FBI is engaged in persistent practice); Am. Oversight v. EPA, 386 F. Supp. 3d 1, 8-15 (D.D.C. 2019) (declining to hold, after extensive analysis, that agency had unlawful policy or practice of "refusing to process" requests on the grounds that they do not specify keywords, search terms, or particular subject matters, because "undisputed record" demonstrates that EPA engages in a case-by-case approach to each request).

violations, including failure to abide by the FOIA's procedural requirements,[112] improper invocation of FOIA exemptions,[113] and unreasonable delay.[114] In the case of

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[112] See, e.g., Am. First L. Found., No. 21-3024, slip op. at 4-9 (D.D.C. Sept. 30, 2022) (adjudicating, in agency's favor, policy or practice claim based on denials of expedited processing requests); Atchafalaya Basinkeeper, Inc. v. U.S. Army Corps of Eng'rs, No. 21-317, 2022 WL 219050, at *10-11 (E.D. La. Jan. 25, 2022) (evaluating policy or practice claim based on alleged agency failure to provide tracking numbers and estimated dates of completion, as well as untimely FOIA responses); Am. Oversight, 386 F. Supp. 3d at 8-15 (adjudicating policy or practice claim regarding agency refusal to process requests as "unreasonably described"); Nat'l Sec. Couns. v. CIA, 960 F. Supp. 2d 101, 141 (D.D.C. 2013) (finding that "a categorical policy of refusing to recognize assignments [of rights related to FOIA requests] violates the FOIA"); cf. Muttitt, 813 F. Supp. 2d at 231 (concluding that "based on the multiple alleged instances in which State failed to provide the plaintiff with an estimated completion date, the plaintiff has stated a viable pattern and practice claim") (claim dismissed by joint stipulation).

[113] See, e.g., Newport Aeronautical Sales v. Dep't of the Air Force, 684 F.3d 160, 168 (D.C. Cir. 2012) (considering policy or practice claim regarding improper use of Exemption 3, and holding that "even assuming *arguendo* that the Air Force is violating Directive 5230.25 by restricting the disclosure of technical information that does not depict "critical technology," that practice does not violate [Exemption 3 of the] FOIA"); Payne Enters., Inc. v. United States, 837 F.2d 486, 494-95 (D.C. Cir. 1988) (holding that defendant agency's repeated practice of withholding "copies of bid abstracts" pursuant to FOIA Exemptions 4 and 5 and then releasing them upon administrative appeal entitled plaintiff to judgment in support of its policy or practice claim); Cause of Action v. Dep't of Com., No. 19-2698, 2022 WL 4130813, at *4-9 (D.D.C. Sept. 12, 2022) (adjudicating policy or practice claim based on agency's repeated withholding of specified reports to the President pursuant to Exemption 5's presidential communications privilege, and holding that plaintiff's claim fails because "even assuming that Commerce does have such a practice, the Court finds that it does not constitute a failure to abide by the terms of FOIA" because the reports were properly withheld).

[114] See, e.g., Jud. Watch, Inc. v. DHS, 895 F.3d 770, 780-84 (D.C. Cir. 2018) (holding that plaintiff stated plausible policy or practice claim by alleging prolonged, unexplained delays after agency repeatedly failed to provide requested documents until after lawsuits were filed, remanding to district court for further proceedings and to determine appropriateness of injunctive relief); Liverman v. Off. of Inspector Gen., 139 F. App'x 942, 944 (10th Cir. 2005) (concluding that defendant agency did not engage in pattern of unreasonable delay after conducting de novo review); Long v. IRS, 693 F.2d 907, 910 (9th Cir. 1982) (holding that agency practice of delaying release of documents until lawsuits are filed constitute "unreasonable delays" in disclosure that "violate the intent and purpose of the FOIA" and remanding to district court to "weigh all the relevant factors [for injunctive relief] and require compliance within a reasonable time"); Nightingale v. USCIS, 507 F. Supp. 3d 1193, 1201-07 (N.D. Cal. 2020) (finding that, even absent "egregious policy" to violate statutory deadlines, informal conduct and "unmistakable history" resulting in long delays may serve as basis for policy or practice claim); Cmty. Ass'n for Restoration of the Env't, Inc., v. EPA, 36 F. Supp. 3d 1039, 1049-54 (E.D. Wa. 2014) (finding that "[p]laintiffs may bring a claim

delay, the D.C. Circuit has explained that "not all agency delay or other failure to comply with FOIA's procedural requirements will warrant judicial intervention, much less injunctive relief."[115] Rather, FOIA plaintiffs must allege an agency policy or practice of "prolonged, unexplained delays" and courts must evaluate whether the agency's conduct "demonstrates a lack of due diligence and is so delinquent or recalcitrant as to warrant injunctive relief because ordinary remedies, such as a production order . . . would be inadequate to overcome an agency policy or practice."[116]

Before adjudicating a policy or practice claim on the merits, courts have required that FOIA plaintiffs meet two threshold requirements: standing and ripeness.[117] As

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alleging a pattern and practice of unreasonable delay in responding to FOIA requests," but ultimately finding that single violation of a "delay of only a few days" was insufficient to prevail on the merits).

[115] Jud. Watch, Inc., 895 F.3d at 782.

[116] Id. at 780, 783; see also Naumes v. Dep't of the Army, 588 F. Supp. 3d 23, 34 (D.D.C. Feb. 28, 2022) (finding no policy or practice of unlawful delay because "nothing beyond the two-year delay here would suggest that the Army routinely ignores FOIA requirements" and "there is no sign of a fixed decision or of repeated denials or delays in producing records of the same type," and observing that the only penalty warranted for delay is prohibiting agency from relying on administrative exhaustion as bar to judicial review); Basinkeeper, 2022 WL 219050, at *11 (determining that plaintiffs are not entitled to declaratory or injunctive relief for delayed responses when evidence in record indicates good faith and due diligence by agency and "little beyond the delays themselves" to support policy or practice claim); Am. Ctr. for L. & Just., 470 F. Supp. 3d at 6 (explaining that "key question" in determining whether to grant equitable relief based on delay is whether complaint alleges sufficient facts to allow "'the reasonable inference that the [agency] has adopted'—formally or informally—'a practice of delay,' or whether the complaint alleges "'merely isolated mistakes by agency officials'" (quoting respectively Jud. Watch, Inc., 895 F.3d at 780-81 and Payne Enters., Inc., 837 F.2d at 491)); Am. Ctr. for L. & Just. v. U.S. Dep't of State, 249 F. Supp. 3d 275, 283-84 (D.D.C. 2017) (finding that complaint fails to allege facts sufficient to establish that delays are result of an unlawful policy or practice, and observing that "while tardiness would violate FOIA, it only becomes actionable when 'some policy or practice' undergirds it"); Cause of Action Inst. v. Eggleston, 224 F. Supp. 3d 63, 72 (D.D.C. 2016) (noting that "delay alone, even repeated delay, is not the type of illegal policy or practice that is actionable" and finding that complaint fails to allege sufficient facts to establish policy or practice of delay).

[117] See, e.g., Cause of Action Inst. v. DOJ, 999 F.3d 696, 704 (D.C. Cir. 2021) (explaining that although appellant has standing for policy or practice claim, case must be dismissed as unripe for judicial review: "'[I]f a plaintiff's allegations go not only to a specific agency action, but to an ongoing policy as well, and the plaintiff has standing to challenge the future implementation of that policy, then declaratory relief may be granted *if* the claim is ripe for review.' If a claim is not ripe for review, we are constrained to dismiss." (quoting City of Houston v. HUD, 24 F.3d 1421, 1430 (D.C. Cir. 1994) (emphasis added))).

discussed above, in order to have standing to bring a cause of action under FOIA, plaintiffs must show that an agency has (1) "improperly," (2) "withheld," (3) "agency records."[118] However, when plaintiffs seek prospective declaratory or injunctive relief stemming from a policy or practice claim, courts have held that "allegations of past harms are insufficient" to establish standing.[119] Rather, in such cases plaintiffs "must show [they are] suffering an ongoing injury or face[] an immediate threat of [future] injury."[120] Moreover, "voluntary cessation" of the practice may moot the claim if the agency can demonstrate that "'there is no reasonable expectation that the wrong will be repeated.'"[121] (For further discussion of voluntary cessation as a basis for mootness, see Litigation Considerations, Mootness and Other Grounds for Dismissal, above.)

To adequately plead a "threat of repetition," plaintiffs must make "more than a nebulous assertion of the existence of a 'policy'" that violates the FOIA and that plaintiffs are "likely to be subjected to the policy again."[122] Generally, plaintiffs must have another

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[118] Kissinger v. Reps. Comm. for Freedom of the Press, 445 U.S. 136, 150 (1980).

[119] Nat'l Sec. Couns. V. CIA, 931 F. Supp. 2d 77, 91 (D.D.C. 2013) (citing Dearth v. Holder, 641 F.3d 499, 501 (D.C. Cir. 2011) (non-FOIA case)); see also Nat'l Whistleblower Ctr. v. HHS, 839 F. Supp. 2d 40, 48 (D.D.C. 2012) (holding plaintiffs lacked standing to bring policy or practice claim challenging HHS failure to finalize expedited processing regulations because plaintiffs "have identified no real support for their allegation that they have suffered and will likely in the future suffer a cognizable injury" where "the standard HHS currently employs in evaluating requests for expedited processing is the same as that outlined in the statute and the same as that which a final regulation would likely entrench").

[120] Nat'l Sec. Couns., 931 F. Supp. 2d at 91 (quoting City of L. A. v. Lyons, 461 U.S. 95, 105 (1983) (non-FOIA case)); see also Telematch, Inc. v. U.S. Dep't of Agric., No. 19-2372, 2020 WL 7014206, at *12 (D.D.C. Nov. 27, 2020) (holding that plaintiff lacked standing for policy or practice claim based on unreasonable delay because it "identifies no policy or practice that threatens it with future injury" when agency substantially complied with FOIA's deadlines, and that mere fact of an administrative appeal backlog is not enough to show a policy or practice of unlawful delay, and declaring that "without a policy or practice to frame [plaintiff's] future risk of injury, exercising jurisdiction over this claim would turn the judicially-created FOIA policy-or-practice claim – intended to bypass mootness – into a mechanism to micromanage agency FOIA offices"). But see Brown v. U.S. Customs & Border Prot., 132 F. Supp. 3d 1170, 1174 (N.D. Cal. 2015) (finding that defendant's contention "that a pattern and practice claim requires specific allegations of future harm . . . is bereft of support").

[121] Payne Enters. Inc., 837 F.2d at 492 (quoting Cnty. of L. A. v. Davis, 440 U.S. 625, 631 (1979)); see also Porup v. CIA, 997 F.3d 1224, 1233 (D.C. Cir. 2021) (finding agency's voluntary cessation of challenged practice rendered dispute moot where agency provided sufficient assurance that new policy [had] displaced the practice contested by [requester]").

[122] Nat'l Sec. Couns. v. CIA, 898 F. Supp. 2d 233, 260 (D.D.C. 2012) (quoting Haase v. Sessions, 835 F.2d 902, 911 (D.C. Cir. 1987) (non-FOIA case)); see also Hajro v. USCIS, 811

FOIA request pending before the agency in order to satisfy the future threat of harm element.[123] District courts within the District of Columbia have generally held that the requirement to demonstrate a future threat of harm cannot be supported by a requesters' mere intention to file FOIA requests in the future.[124] However, when plaintiffs' entire business depends upon the filing of FOIA requests, the D.C. Circuit has found that there is sufficient likelihood of future injury to confer standing.[125]

F.3d 1086, 1103 (9th Cir. 2016) (holding that plaintiffs must show that "the plaintiff himself has a sufficient likelihood of future harm by the policy or practice"); Cause of Action v. Dep't of Com., No. 19-2698, 2022 WL 4130813, at *3 (D.D.C. Sept. 12, 2022) (determining that plaintiff has standing to challenge withholding of specific category of reports, having adequately alleged that it "is likely to be subject to the same deprivation of access in the future" as frequent requester that intends to continue requesting same type of reports (quoting Pl.'s Mem. in Supp. of Summ. J.)); Gatore v. DHS, 327 F. Supp. 3d 76, 93-94 (D.D.C. 2018) (finding that plaintiff has standing, as plaintiff has several pending requests and will continue to make future requests likely to be impacted by alleged policy or practice); Nat'l Whistleblower Ctr., 839 F. Supp. 2d at 48 (finding plaintiff's allegation that agency's final rule "might . . . identify additional circumstances in which it would grant requests for expedition . . . speculative at best").

[123] See Coleman v. DEA, 134 F. Supp. 3d 294, 306 (D.D.C. 2015) (finding plaintiff lacked standing for policy or practice claim based on fee waiver denial because plaintiff "has not averred that he has a pending FOIA request"); Nat'l Sec. Couns., 931 F. Supp. 2d at 93 (holding that "where FOIA requesters challenge an alleged ongoing policy or practice and can demonstrate that they have pending FOIA requests that are likely to implicate that policy or practice, future injury is satisfied"); Nat'l Sec. Couns., 898 F. Supp. 2d at 260-63 (holding that plaintiff had standing to pursue policy or practice claims when "it had already submitted fifteen FOIA requests to the CIA since filing the Complaints" which were "likely to implicate the claimed policies and practices at issue because the pending and future requests appear to be of the same character as the specific requests that form the basis of the plaintiff's current claims"); Citizens for Resp. & Ethics in Wash. v. SEC, 858 F. Supp. 2d 51, 60 (D.D.C. 2012) (noting that "outstanding FOIA requests that involve documents that likely will be unavailable due to the challenged policy" are sufficient to allege future injury).

[124] See, e.g., Citizens for Resp. & Ethics in Wash. v. DHS, 527 F. Supp. 2d 101, 106 (D.D.C. 2007) (finding plaintiff lacked standing because it failed to allege pending FOIA request and plaintiff's allegation that "it will continue to use the FOIA" too speculative and remote); Am. Hist. Ass'n v. NARA, 310 F. Supp. 2d 216, 228 (D.D.C. 2004) (finding no standing where "[p]laintiffs have no outstanding requests for presidential records"); Quick v. U.S. Dep't of Com., 775 F. Supp. 2d 174, 187 (D.D.C 2001) (finding plaintiff lacked standing where plaintiff "plan[ned] to file additional FOIA requests to the [defendant] in the future").

[125] Newport Aeronautical Sales v. Dep't of the Air Force, 684 F.3d 160, 164 (D.C. Cir. 2012) (finding that plaintiff had standing where it showed that "its business depends on continually requesting and receiving documents that the policy permits [defendant] to withhold"); accord Smith v. ICE, 249 F. Supp. 3d 1203, 1209-10 (D. Colo. 2017) (finding standing where filing FOIA requests for immigration records was "an integral part" of plaintiff's practice). But cf. Tipograph v. DOJ, 146 F. Supp. 3d 169, 177 (D.D.C. 2015)

Even if the standing requirement is met, policy or practice claims will be dismissed if they are not ripe for adjudication.[126] The D.C. Circuit has held that policy or practice claims are ripe when the issue presented is "sufficiently sharp for adjudication," the challenged agency practice has sufficiently "crystallized" such that the court need not "guess at the ramifications of vague [] standards before an agency lends them content by applying them," and plaintiffs would face hardship if adjudication were delayed.[127]

(finding that while plaintiff could plausibly file requests in the future that could implicate the alleged policy "due to 'the nature of [plaintiff's] work—representing criminal defendants and activists,'" plaintiff had failed to "'establish likely future injury that is both concrete and imminent'" because plaintiff "has no consistent history of filing these types of requests" (quoting Pl.'s Decl. & Coleman, 134 F. Supp. 3d at 307)); Nat'l Sec. Couns., 931 F. Supp. 2d at 93-94 (finding organization's "generalized" allegation that it "stands to continue to be harmed . . . as it regularly files FOIA requests with [defendant] and will continue to do so in the future" insufficient to establish standing).

[126] See, e.g., Walsh v. VA, 400 F.3d 535, 537 (7th Cir. 2005) (holding that "faint possibility" that plaintiff might again have to wait for records in a future request is insufficient to keep claim alive when "there is little reason to think that [plaintiff] will ever request additional records" because plaintiff had already received "the whole kit and caboodle" of records sought, and delay in receiving those records was due to "simple confusion about the physical location of the records" that is not likely to be repeated); Reg'l Mgmt. Corp. v. Legal Servs. Corp., 186 F.3d 457, 465-66 (4th Cir. 1999) (finding that challenge to alleged policy of nondisclosure of documents relating to ongoing investigations not ripe for review when "policy is not necessarily 'crystallized' because" it is not clear whether [defendant] has a fully developed policy" or that alleged policy will have any future effect on plaintiff or others and any hardship to plaintiff in delaying adjudication will be minimal because "policy has no present effect at all" on plaintiff's day to day business); Cause of Action Inst., 2022 WL 4130813, at *3-4 (finding that policy or practice claim regarding withholding of reports pursuant to Exemption 5's presidential communications privilege is ripe for judicial review because it "requires no speculation about future application, nor does it depend on the facts of a particular case"); Long v. DOJ, 450 F. Supp. 2d 42, 85 (D.D.C. 2006) (determining that plaintiff's claim regarding its fee status with respect to future requests is not ripe for adjudication where agency had not taken final action on plaintiff's fee status, requester fee status can change over time and "requires a factual inquiry as well as a legal one," and any declaration by court about plaintiff's fee status "at this time would be tantamount to an advisory opinion" (internal citation omitted)).

[127] Payne Enters., Inc. v. United States, 837 F.2d 486, 492-94 (D.C. Cir. 1988) (determining that claim is ripe because it entails a "concrete legal dispute" about sufficiently crystallized policy or practice of "unjustified delay by means of an initial denial followed by the eventual release of the requested document, resulting in financial injury to [plaintiff]" and where "nothing would be gained by postponing resolution"); see also Cause of Action Inst. v. DOJ, 999 F.3d 696, 703-05 (D.C. Cir. 2021) (holding that although plaintiff has standing for policy or practice claim alleging DOJ FOIA Guidance is unlawful, claim is not ripe because it

Exhaustion of Administrative Remedies

Under the FOIA, administrative remedies generally must be exhausted prior to judicial review.[128] In order to exhaust administrative remedies, a requester generally must follow agency regulations,[129] including making a proper FOIA request in the first instance,[130] as well as filing an administrative appeal prior to seeking relief in the

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"rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all,'" and declining to find that DOJ Guidance "cannot be lawful under any circumstances" while observing that "[t]he operation of [FOIA] is better grasped when viewed in light of a particular application" (citing Texas v. U.S., 523 U.S. 296, 300 (1998) (non-FOIA case))).

[128] See, e.g., Aguirre v. NRC, 11 F.4th 719, 726 (9th Cir. 2021) (holding "that a requestor must exhaust his administrative remedies under FOIA so long as an agency properly responds before suit is filed"); Machado Amadis v. U.S. Dep't of State, 971 F.3d 364, 372 (D.C. Cir. 2020) ("'As a general matter, a FOIA requester must exhaust administrative appeal remedies before seeking judicial redress.'" (quoting Citizens for Resp. & Ethics in Wash. v. FEC, 711 F.3d 180, 182 (D.C. Cir. 2013))); Calhoun v. FBI, 546 F. App'x 487, 490 (5th Cir. 2013) ("Under the FOIA, a plaintiff must exhaust his administrative remedies prior to seeking judicial review of a federal agency's decision.").

[129] See, e.g., McDermott v. Donahue, 408 F. App'x 51, 51 (9th Cir. 2011) (affirming district court's decision holding that in order to exhaust requesters must follow published agency regulations rather than just ask any government employee for records); Calhoun v. DOJ, No. 10-5125, 2010 WL 4340370, at *1 (D.C. Cir. Oct. 19, 2010) (affirming district court's determination that claims were barred by failure to exhaust administrative remedies where FOIA request was not made in accordance with published regulations); Wilson v. DOT, 730 F. Supp. 2d 140, 151 (D.D.C. 2010) (finding failure to exhaust even when plaintiff lodged complaints with several DOT offices and requested mediation because those efforts did not comply with DOT's FOIA regulations); Booth v. IRS, No. 09-0637, 2009 WL 2031766, at *4 (E.D. Cal. July 9, 2009) (determining that plaintiff failed to exhaust administrative remedies by failing to comply with IRS regulations when he sent request to wrong address). But cf. Elec. Priv. Info. Ctr v. IRS, 910 F.3d 1232, 1239 (D.C. Cir 2018) (finding "[n]one of the purposes of exhaustion supports barring judicial review" where IRS regulations unreasonably required requester "to establish that records are not subject to [26 U.S.C. §] 6103(a)'s disclosure bar").

[130] See, e.g., Davidson v. BOP, No. 15-351, 2017 WL 1217168, at *11 (E.D. Ky. Mar. 31, 2017) (holding that "the plaintiff in a FOIA action bears the burden of demonstrating not merely that he mailed a request, but that the agency actually received it"); Powell v. Gibbons, No. 09-00093, 2010 WL 4293278, at *6 (D. Nev. Oct. 20, 2010) (dismissing plaintiff's FOIA count for failing to allege "full and proper" request was made), aff'd, 453 F. App'x 712 (9th Cir. 2011); Brown v. FBI, 675 F. Supp. 2d 122, 127 (D.D.C. 2009) (dismissing FOIA claim for plaintiff's failure to properly submit request even though FBI responded to attempted request); Pickering-George v. Registration Unit, DEA/DOJ, 553 F. Supp. 2d 3, 4 (D.D.C.

courts.[131] (For a further discussion of the requirements for making requests and filing administrative appeals, see Procedural Requirements, Proper FOIA Requests, and Procedural Requirements, Administrative Appeals.) Courts have found that a plaintiff has not exhausted his administrative remedies when he attempts to file a new request and/or expand the scope of his original FOIA request as part of a judicial proceeding.[132]

The Court of Appeals for the District of Columbia Circuit has explained that exhaustion allows the top-level officials of an agency the opportunity to use their expertise and experience to review the matter and to make an administrative record, potentially

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2008) (dismissing plaintiff's FOIA claim where agency had no record of receiving it); Arnold v. U.S. Secret Serv., No. 05-0450, 2006 WL 2844238, at *2 (D.D.C. Sept. 29, 2006) (holding that "certified mail return receipt is not competent evidence of plaintiff's compliance with the FOIA's exhaustion requirement"); Schoenman v. FBI, No. 04-2202, 2006 WL 1126813, at *13 (D.D.C. Mar. 31, 2006) (dismissing FOIA claims where agencies contended that they never received requests, and noting that plaintiff provided no proof that draft requests on his counsel's computer were ever mailed and received, and declaring that "[w]ithout a copy of a stamped envelope . . . or a returned receipt . . . [p]laintiff cannot meet the statutory requirements under FOIA"); cf. Chelmowski v. FCC, No. 16-5587, 2017 WL 736893, at *8 (N.D. Ill. Feb. 24, 2017) (finding that request to OGIS for assistance does not supplant an application for review by the defendant agency). But cf. Animal Legal Def. Fund v. USDA, 935 F.3d 858, 876 (9th Cir. 2019) (determining that "judicial power to adjudicate a claim that an agency has violated § 552(a)(2)'s obligation to post agency records online does not turn on a request").

[131] See, e.g., Aguirre, 11 F.4th at 727 (holding that FOIA "requires parties to administratively appeal agency determinations before turning to the courts"); Rossmann v. SSA, No. 20-5296, 2021 U.S. App. LEXIS 3870, at *1 (D.C. Cir. Feb. 10, 2021) (finding "district court correctly concluded that appellant failed to exhaust administrative remedies . . . as he did not administratively appeal"); Manivannan v. Dep't of Energy, 843 F. App'x 481, 482 (4th Cir. 2021) (per curiam) (affirming district court's determination that plaintiff failed to exhaust administrative remedies as to one request because plaintiff did not administratively appeal); DeBrew v. Atwood, 792 F.3d 118, 123 (D.C. Cir. 2015) (finding that requester failed to exhaust administrative remedies by not responding to agency's request for clarity on requester's inadequately described request or, alternatively, administratively appealing agency's interpretation of that request).

[132] See Spears v. DOJ, 139 F. Supp. 3d 79, 86 (D.D.C. 2015) (holding that "[plaintiff] will not be permitted to expand the scope of the request underlying this action and then assert an unexhausted claim"); Pray v. DOJ, 902 F. Supp. 1, 2-3 (D.D.C. 1995) (finding that plaintiff "failed to exhaust administrative remedies" as to request for DEA records and request to FBI field office "made only in response to the government's motion for summary judgment"); cf. Houser v. Church, 271 F. Supp. 3d 197, 204 (D.D.C. 2017) (holding that requester may not "expand the scope of his FOIA request in the course of litigation"); Pollack v. DOJ, No. 89-2569, 1993 WL 293692, at *4 (D. Md. July 26, 1993) (finding that court lacks subject matter jurisdiction when request not submitted until after litigation filed).

obviating the necessity of judicial review.[133] When a FOIA plaintiff attempts to obtain judicial review without first properly undertaking full and timely administrative exhaustion, the D.C. Circuit has held that the lawsuit is subject to dismissal because the "exhaustion of administrative remedies is a mandatory prerequisite to a lawsuit under FOIA."[134] There have been times, however, when courts have allowed the suit to proceed without exhaustion.[135]

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[133] See Khine v. DHS, 943 F.3d 959, 964 (D.C. Cir. 2019) ("'[E]xhaustion of administrative remedies is generally required before filing suit in federal court so that the agency has an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision.'" (quoting Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 61 (D.C. Cir. 1990))); see also Taylor v. Appleton, 30 F.3d 1365, 1369 (11th Cir. 1994) ("Allowing a FOIA requester to proceed immediately to court to challenge an agency's initial response would cut off the agency's power to correct or rethink initial misjudgments or errors."); Hogan v. Huff, No. 00-6753, 2002 WL 1359722, at *4 (S.D.N.Y. June 21, 2002) (explaining that administrative appeal procedures "provide agencies an opportunity to correct internal mistakes"); cf. Hoeller v. SSA, 670 F. App'x 413, 414 (7th Cir. 2016) (denying post-judgment motion to reconsider dismissal of FOIA claim for failure to exhaust because "exhaustion must be completed *before* initiating suit in order to realize the goal of allowing administrative remedies to relieve the burden of litigation on the courts").

[134] Wilbur v. CIA, 355 F.3d 675, 676 (D.C. Cir. 2004) (per curiam) (citing Oglesby, 920 F.2d at 61-64, 65 n.9); see, e.g., Freedom Watch, Inc. v. NSA, 783 F.3d 1340, 1344 (D.C. Cir. 2015) (upholding dismissal for failure to exhaust because requester "failed to internally appeal the agencies' denials"); Almy v. DOJ, No. 96-1207, 1997 WL 267884, at *3 (7th Cir. May 7, 1997) ("[T]he FOIA requires exhaustion of administrative remedies before the filing of a lawsuit."); Taylor, 30 F.3d at 1367 ("The FOIA clearly requires a party to exhaust all administrative remedies before seeking redress in the federal courts."); McDonnell v. United States, 4 F.3d 1227, 1240, 1241 (3d Cir. 1993) (same); Voinche v. U.S. Dep't of the Air Force, 983 F.2d 667, 669 (5th Cir. 1993) ("We conclude that the FOIA should be read to require that a party must present proof of exhaustion of administrative remedies prior to seeking judicial review."); see also Scherer v. U.S. Dep't of Educ., 78 F. App'x 687, 690 (10th Cir. 2003) (affirming dismissal based on failure to exhaust because while plaintiff's "labors may have been exhausting . . . he failed to pursue any of his requests as far as he could"); McKevitt v. Mueller, 689 F. Supp. 2d 661, 667 (S.D.N.Y 2010) (finding "no jurisdiction under the FOIA, because the FOIA administrative process was never used").

[135] See, e.g., Nat'l Sec. Couns. v. DOJ, 848 F.3d 467, 470 (D.C. Cir. 2017) (allowing plaintiff to maintain unexhausted claim because "two co-plaintiffs jointly asserting precisely the same claim in the same action did exhaust"); Bayala v. DHS, 827 F.3d 31, 32 (D.C. Cir. 2016) (holding that plaintiff was not required to exhaust where defendant "reversed course and spontaneously released a number of previously withheld documents" shortly after plaintiff filed suit); Gonzales & Gonzales Bonds & Ins. Agency v. DHS, No. 11-2267, 2012 WL 1815632, at *4 (N.D. Cal. May 17, 2012) (holding that courts will not dismiss for failure to exhaust where "the party's claim rests upon statutory interpretation–an area of court, rather than agency, expertise"); People for the Ethical Treatment of Animals v. NIH, 853 F. Supp. 2d 146, 153 (D.D.C. 2012) (determining plaintiff's failure to file timely administrative appeal did not bar court's consideration under exhaustion where agency provided substantive

When a plaintiff has failed to exhaust administrative remedies, many courts, including the Court of Appeals for the D.C. Circuit,[136] Eleventh Circuit,[137] Tenth Circuit,[138]

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response to untimely appeal); Skybridge Spectrum Found. v. FCC, 842 F. Supp. 2d 65, 77 (D.D.C. 2012) (finding doctrine of exhaustion did not bar judicial review where agency failed to inform requester of exemption relied upon until its response to administrative appeal); Am. Small Bus. League v. SBA, No. 09-1098, 2009 WL 1916896, at *5 (N.D. Cal. July 1, 2009) (determining additional administrative review unnecessary where that review is considered "futile" because agency's position appears to already be set); Fischer v. FBI, No. 07-2037, 2008 WL 2248711, at *2 (D.D.C. May 29, 2008) (permitting plaintiff's suit to proceed despite failure to exhaust administrative remedies because "considering [agency's] own disregard of the FOIA appeal deadline, jurisprudential considerations strongly favor plaintiff's position").

[136] See Hidalgo v. FBI, 344 F.3d 1256, 1258-59 (D.C. Cir. 2003) (finding exhaustion requirement is not jurisdictional because "the FOIA does not unequivocally make it so," but then explaining that exhaustion is required if "'the purposes of exhaustion' and the 'particular administrative scheme' support such a bar" (quoting Oglesby, 920 F.2d at 61)); see also Pinson v. DOJ, No. 12-1872, 2016 WL 29245, at *12 (D.D.C. Jan. 4, 2016) (noting that "FOIA's exhaustion requirement is a prudential consideration, rather than a jurisdictional prerequisite"); Hines v. United States, 736 F. Supp. 2d 51, 53 (D.D.C. 2010) (dismissing claim for failure to exhaust administrative remedies while noting that "the exhaustion requirement is a prudential consideration, not a jurisdictional prerequisite, and therefore a plaintiff's failure to exhaust does not deprive the court of subject-matter jurisdiction"); Jones v. DOJ, 576 F. Supp. 2d 64, 66 (D.D.C. 2008) ("It is settled in this circuit, however, that exhaustion of administrative remedies in a FOIA case is *not* a jurisdictional bar to judicial review . . . the matter is properly the subject of a motion brought under Rule 12(b)(6) for failure to state a claim upon which relief may be granted.").

[137] See Thompson v. U.S. Marine Corp., 398 F. App'x 532, 535 (11th Cir. 2010) (maintaining that "[e]xhaustion of administrative remedies is not a jurisdictional requirement, but 'performs a function similar to the judicial doctrine of ripeness by postponing judicial review'" (quoting Taylor, 30 F.3d at 1367 n.3)).

[138] See Watters v. DOJ, 576 F. App'x 718, 721 (10th Cir. 2014) (noting that exhaustion of administrative remedies is "prudential matter"); Hull v. IRS, 656 F.3d 1174, 1181 (10th Cir. 2011) (finding "exhaustion under FOIA is a prudential consideration rather than a jurisdictional prerequisite").

Ninth Circuit,[139] Seventh Circuit,[140] and certain lower courts within the Fifth Circuit[141] have held that exhaustion of administrative remedies in a FOIA case is "a jurisprudential doctrine" rather than a jurisdictional prerequisite, and therefore Rule 12(b)(6) is the appropriate vehicle for dismissal based on a failure to exhaust administrative remedies. However, some courts have held that exhaustion of administrative remedies is a jurisdictional requirement and dismissal is therefore appropriate under Rule 12(b)(1) of the Federal Rules of Civil Procedure.[142]

Constructive Exhaustion

The FOIA permits requesters to treat an agency's failure to comply with statutory time limits as "constructive" exhaustion of administrative remedies.[143] Thus, when an

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[139] See Aguirre v. NRC, 11 F.4th 719, 725 (9th Cir. 2021) (finding "[e]xhaustion under FOIA is a prudential rather than jurisdictional consideration"); Yagman v. Pompeo, 868 F.3d 1075, 1084 (9th Cir. 2017) (finding "any failure to exhaust does not bear on the district court's subject matter jurisdiction"); see also Stanco v. IRS, 18-00873, 2021 WL 3912259, at *5 (E.D. Cal. Sept. 1, 2021) (same).

[140] See Scherer v. Balkema, 840 F.2d 437, 443 (7th Cir. 1988) (ruling that plaintiff failed to state claim when plaintiff failed to allege exhaustion of administrative remedies).

[141] See Gambini v. U.S. Customs Serv., No. 01-300, 2001 U.S. Dist. LEXIS 21336, at *4-5 (N.D. Tex. Dec. 21, 2001) (dismissing complaint under Rule 12(b)(6) because plaintiff had not exhausted administrative remedies).

[142] See, e.g., Kemmerly v. U.S. Dep't of Interior, 430 F. App'x 303, 303 (5th Cir. 2011) (per curiam) (affirming district court's grant of defendant's motion to dismiss for lack of subject matter jurisdiction "for failure to exhaust administrative remedies" where plaintiff failed to pay fees); McMillan v. Togus Reg'l Off., VA, 120 F. App'x 849, 852 (2d Cir. 2005) (affirming district court's dismissal for lack of subject matter jurisdiction "for failure to exhaust administrative remedies"); McDonnell v. United States, 4 F.3d 1227, 1240 & n.9 (3d Cir. 1993) (affirming dismissal for lack of subject matter jurisdiction because plaintiff failed to exhaust administrative remedies); Sharkey v. FBI, No. 16-837, 2017 WL 3336617, at *6-7 (N.D. Ohio Aug. 4, 2017) (dismissing plaintiff's claim because "exhaustion is a jurisdictional prerequisite in the Sixth Circuit"); Robert VIII v. DOJ, No. 05-2543, 2005 WL 3371480, at *7 (E.D.N.Y Dec. 12, 2005) (holding that "court lacks subject matter jurisdiction over a requester's claim where the requester has failed to exhaust the administrative remedies provided under the FOIA statute"); Redding v. Christian, 161 F. Supp. 2d 671, 674 (W.D.N.C. 2001) (finding that "when this action was filed, this court lacked jurisdiction over the subject matter of this case as a matter of law because plaintiff had not sought any administrative remedies, much less exhausted them"); Jones v. Shalala, 887 F. Supp. 210, 214 (S.D. Iowa 1995) (declaring that failure to exhaust administrative remedies deprives court of jurisdiction to compel disclosure of records).

[143] See 5 U.S.C. § 552(a)(6)(C) (2018); see also Nurse v. Sec'y of the Air Force, 231 F. Supp. 2d 323, 328 (D.D.C. 2002) ("The FOIA is considered a unique statute because it recognizes

agency "fails to comply with the applicable time limit provisions" of the FOIA,[144] requesters are deemed to have exhausted their administrative remedies and can seek immediate judicial review, even if they have not filed an administrative appeal.[145]

In Citizens for Responsibility & Ethics in Washington v. FEC,[146] the United States Court of Appeals for the District of Columbia Circuit addressed the issue of "what kind of agency response qualifies as a 'determination'" under the FOIA in order to trigger the requirement that the requester exhaust administrative remedies (i.e., file an administrative appeal) prior to filing suit.[147] The D.C. Circuit held that the FOIA "requires that, within the relevant time period, an agency must determine whether to comply with a request – that is, whether a requester will receive all of the documents the requester seeks."[148] The court held that to "make a 'determination' and thereby trigger the

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a constructive exhaustion doctrine for purposes of judicial review upon the expiration of certain relevant FOIA deadlines.").

[144] 5 U.S.C. § 552(a)(6)(A)(i).

[145] See, e.g., Calhoun v. FBI, 546 F. App'x 487, 490 (5th Cir. 2013) (finding requester deemed to have exhausted administrative remedies where "agency fails to respond to a FOIA request in a timely manner"); Pollack v. DOJ, 49 F.3d 115, 118-19 (4th Cir. 1995) ("Under FOIA's statutory scheme, when an agency fails to comply in a timely fashion with a proper FOIA request, it may not insist on the exhaustion of administrative remedies . . . unless the agency responds to the request before suit is filed."); Campbell v. Unknown Power Superintendent of the Flathead Irrigation & Power Project, 961 F.2d 216, 216 (9th Cir. 1992) (unpublished table decision) (noting that exhaustion is deemed to have occurred if agency fails to respond to request within statutory time limit); Pinson v. DOJ, 145 F. Supp. 3d 1, 10 (D.D.C. 2015) (finding constructive exhaustion as to some of plaintiff's claims due to agency's failure to respond to certain requests before requester filed suit); Accuracy in Media, Inc. v. NTSB, No. 03-0024, 2006 WL 826070, at *6 (D.D.C. Mar. 29, 2006) (finding constructive exhaustion because plaintiff filed its FOIA complaint seven months after NTSB received its request and before NTSB complied with it); cf. Or. Nat. Desert Ass'n v. Gutierrez, 409 F. Supp. 2d 1237, 1247 (D. Or. 2006) (finding constructive exhaustion with respect to "cut-off" date challenge, even though plaintiff did not raise such claim in its administrative appeal because document production from agency and referral agencies continued after plaintiff filed suit and plaintiff could not have foreseen effect of "cut-off" policy at time appeal was filed); Anderson v. USPS, 7 F. Supp. 2d 583, 586 (E.D. Pa. 1998) (finding that "vague positive response" from agency received after statutory time limit allows plaintiff to claim "constructive" exhaustion), aff'd, 187 F.3d 625 (3d Cir. 1999) (unpublished table decision).

[146] 711 F.3d 180 (D.C. Cir. 2013).

[147] See id.

[148] Id. at 186; cf. Machado Amadis v. DOJ, 388 F. Supp. 3d 1, 13 (D.D.C. 2019) (An agency's offer to conduct an 'additional' search does not alter the final, appealable nature of its

administrative exhaustion requirement, the agency must at least: (i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the 'determination' is adverse."[149] The D.C. Circuit clarified that "a 'determination' does not require actual *production* of the records to the requester at the same time that the 'determination' is communicated to the requester."[150] The court concluded that what the FOIA does require is that the agency make the records "promptly available" which "typically would mean within days or a few weeks of a 'determination,' not months or years."[151]

Multiple circuit courts have held that the right to immediate judicial review that arises from the lack of a timely determination lapses if an agency responds to a request at any time before the requester's FOIA suit is filed; in that situation, the requester must administratively appeal a denial and wait at least twenty working days for the agency to adjudicate that appeal – as is required by 5 U.S.C. § 552(a)(6)(A)(ii) – before commencing litigation.[152] If an agency makes an adverse determination after the requester has filed

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determination. Instead, it allows a requester additional process that is not required by FOIA."), aff'd sub nom. Machado Amadis v. U.S. Dep't of State, 971 F.3d 364 (D.C. Cir. 2020).

[149] Citizens for Resp. & Ethics in Wash., 711 F.3d at 189 (summarizing that "agency usually has 20 working days to make a 'determination,'" that this can be extended "to 30-working days if unusual circumstances delay the agency's ability to search for, collect, examine, and consult about the responsive documents," and if more time is needed, "exhaustion requirement will not apply," but "in exceptional circumstances, the agency may continue to process the request," and if litigation has been filed, court "will supervise the agency's ongoing process"); cf. Jud. Watch, Inc. v. DOJ, 410 F. Supp. 3d 216, 225 (D.D.C. 2019) (finding agency's response letter, "coupled with prior representations in virtually identical litigations with the same counsel, constituted a determination to comply with Plaintiff's FOIA request").

[150] Citizens for Resp. & Ethics in Wash., 711 F.3d at 188.

[151] Id.

[152] See, e.g., Aguirre v. NRC, 11 F.4th 719, 726 (9th Cir. 2021) ("We now join our sister circuits, holding that a requester must exhaust his administrative remedies under FOIA so long as an agency properly responds before suit is filed."); Manivannan v. DOE, 843 F. App'x 481, 482 (4th Cir. 2021) (per curiam) (holding that requester did not exhaust administrative remedies because agency cured "the statutory violations based on its failure to timely respond . . . by responding before [requester] filed suit"); Rease v. Harvey, 238 F. App'x 492, 495 (11th Cir. 2007) ("Even when an agency belatedly responds to a FOIA request, the requester still must exhaust his administrative remedies."); Almy v. DOJ, 114 F.3d 1191, 1191 (7th Cir. 1997) (unpublished table decision) (holding that requester's failure to appeal agencies' untimely "no records" responses constitutes "failure to exhaust his administrative remedies"); Taylor v. Appleton, 30 F.3d 1365, 1369 (11th Cir. 1994) ("We,

suit, however, the requester need not first administratively appeal that determination before pressing forward with the court action.[153]

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therefore, join the District of Columbia Circuit and the Third Circuit on this issue."); McDonnell v. United States, 4 F.3d 1227, 1240 (3d Cir. 1993) (applying Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 63 (D.C. Cir. 1990)); Oglesby, 920 F.2d at 63 (ruling that if requester receives agency response before filing suit – even response that is untimely – requester must submit an administrative appeal before filing suit); Yang v. IRS, No. 06-1547, 2006 WL 2927548, at *2 (D. Minn. Oct. 12, 2006) (same); Sloman v. DOJ, 832 F. Supp. 63, 66-67 (S.D.N.Y. 1993) (same); cf. Wadhwa v. VA, 342 F. App'x 860, 862 (3d Cir. 2009) (unpublished table decision) (finding that although agency sent response, "[u]nder FOIA's constructive exhaustion provision, [plaintiff] was not required to exhaust administrative remedies if he did not receive a response to his FOIA request before filing suit"); Farah v. DOJ, No. 20-622, 2020 WL 5017824, at *2-3 (D. Minn. Aug. 25, 2020) (holding agency's response prior to filing of lawsuit did not trigger exhaustion requirement where response was not "fully transmitted" to requester and agency did not return calls seeking status, one of which was made after "the decision was allegedly relayed," and additionally noting that "had DOJ returned the call, it is unlikely that [requester] would have filed this action"); Mosby v. Hunt, No. 09-1917, 2010 WL 1783536, at *3 (D.D.C. May 5, 2010) (finding requester failed to exhaust administrative remedies where OIP had remanded request to component for additional search and final determination had not been rendered); Thomas v. Comptroller of the Currency, 684 F. Supp. 2d 29, 32 (D.D.C. 2010) (finding constructive exhaustion where defendant's initial response was untimely and it was undisputed that plaintiff never received any response sent); Citizens for Resp. & Ethics in Wash. v. Bd. of Governors of the Fed. Rsrv., 669 F. Supp. 2d 126, 130 (D.D.C. 2009) (finding plaintiff failed to exhaust administrative remedies when agency correspondence regarding ten-day working extension was sent before plaintiff filed complaint, even though it was not received until day complaint was filed); Percy Squire Co. v. FCC, No. 09-428, 2009 WL 2448011, at *5 (S.D. Ohio Aug. 7, 2009) (finding that agency cured its untimely response when requesters agreed to phased response before filing suit). But cf. Rosenfeld v. DOJ, No. 07-03240, 2008 WL 3925633, at *9 (N.D. Cal. Aug. 22, 2008) (finding that plaintiff exhausted administrative remedies in spite of failure to appeal from FBI's interim response to one request); Or. Nat. Desert Ass'n v. Gutierrez, 409 F. Supp. 2d 1237, 1247 (D. Or. 2006) (finding some "difficulty in applying Oglesby" when agency responds in piecemeal fashion); Or. Nat. Desert Ass'n, 409 F. Supp. 2d at 1247 (finding some "difficulty in applying Oglesby" when agency responds in piecemeal fashion).

[153] See Pollack v. DOJ, 49 F.3d 115, 119 (4th Cir. 1995) (holding that "it was error for the district court to conclude that it was somehow deprived of jurisdiction because [the requester] failed to file administrative appeals . . . during the litigation"); Pinson v. DOJ, 145 F. Supp. 3d 1, 9 (D.D.C. 2015) ("Where, as here, the agency belatedly responds only *after* the plaintiff has filed suit, the plaintiff is nevertheless considered to have constructively exhausted his administrative remedies."); Crooker v. Tax Div. of DOJ, No. 94-30129, 1995 WL 783236, at *8 (D. Mass. Nov. 17, 1995) (magistrate's recommendation) (concluding that disclosures made during litigation did not moot plaintiff's complaint based on agency's failure to respond; instead complaint "remained alive to test the adequacy of the disclosures, once made"), adopted, (D. Mass. Dec. 15, 1995). But cf. Calhoun v. FBI, 546 F. App'x 487, 490 (5th Cir. 2013) (holding that although FBI did not produce responsive records until

Even in instances where the agency has provided a timely response, the requester's exhaustion obligation may be excused if the agency's response fails to supply notice of the right to file an administrative appeal as required by 5 U.S.C. § 552(a)(6)(A)(i),[154] or ultimately to supply notice of the right to seek judicial review at the conclusion of the administrative appeal process.[155] However, so long as such notice is given, there is no particular formula or set of "magic words" that the agency must employ in giving it.[156] (For further discussions of administrative notification requirements, see Procedural

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after lawsuit was filed, requester must still challenge adequacy of search "through the appropriate administrative appeals process" and, therefore, lower court's dismissal for failure to exhaust was proper).

[154] See Ruotolo v. DOJ, 53 F.3d 4, 9 (2d Cir. 1995) (holding that exhaustion requirement was not triggered when agency response contained no notification of right to administratively appeal); Oglesby, 920 F.2d at 65 (finding exhaustion requirement only triggered if response includes "the agency's determination of whether or not to comply with the request; the reasons for its decision; and notice of the right of the requester to appeal"); Ozment v. DHS, No. 11-429, 2011 WL 6026590, at *2 (M.D. Tenn. Dec. 1, 2011) (finding agency's notice insufficient although within statutory time period where notice did not provide administrative appeal rights); In Def. of Animals v. NIH, 543 F. Supp. 2d 83, 97 (D.D.C. 2008) (holding that agency's action "did not trigger the exhaustion requirement" because agency notified plaintiff of right to file administrative appeal only after plaintiff filed suit); Leinbach v. DOJ, No. 05-744, 2006 WL 1663506, at *6 (D.D.C. June 14, 2006) (excusing plaintiff's failure to file administrative appeal, because agency's response letter failed to provide him with "[correct] information regarding the administrative process to be followed"); Lamb v. IRS, 871 F. Supp. 301, 303 (E.D. Mich. 1994) (declaring that failure to inform requester of requester's right to appeal constitutes failure to comply with statutory time limits, thus permitting lawsuit). But cf. Env't Prot. Info. Ctr. & Forest Issues Grp. v. U.S. Forest Serv., No. 03-449, slip op. at 8 (N.D. Cal. Oct. 14, 2003) (holding that "[t]he requirements under 5 U.S.C. § 552(a)(6)(A)(i) pertain [only] to the agency's decision whether or not to release the requested files," not to its decision to provide records in format different from that requested).

[155] See, e.g., Nurse v. Sec'y of the Air Force, 231 F. Supp. 2d 323, 328-29 (D.D.C. 2002) (finding that agencies are required to notify requesters of right to judicial review just as agencies are required to notify requesters of right to administratively appeal).

[156] See Kay v. FCC, 884 F. Supp. 1, 2-3 (D.D.C. 1995) (upholding letter which "gave the Plaintiff notice of his right to secure further agency review of the adverse determination, of the manner in which he could exercise that right, of the time limits for filing such request, and of the regulatory provisions containing general procedures pertaining to review applications"); see also Jones v. DOJ, No. 94-2294, slip op. at 5 (D. Md. Jan. 18, 1995) (finding requester was not relieved of appeal obligation simply because agency response included statement that requester would be notified if missing records were later located; response letter also advised that it constituted "final action" of agency component and notified plaintiff of right to administratively appeal).

Requirements, Responding to FOIA Requests; and Procedural Requirements, Administrative Appeals.) Furthermore, Oglesby counsels that a requester must file an administrative appeal within the time limit specified in an agency's FOIA regulations or else face dismissal for failure to exhaust administrative remedies.[157]

Whether the agency has met or exceeded its statutory time period for making a determination on a request or appeal,[158] requesters have been deemed not to have exhausted administrative remedies when they have failed to comply with the necessary requirements of the FOIA's administrative process. This has been the case, for example, when requesters have failed to:

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[157] See Oglesby, 920 F.2d at 65 n.9 (citing regulations of agencies involved); ExxonMobil Corp. v. Dep't of Com., 828 F. Supp. 2d 97, 104 (D.D.C. 2001) (holding that "a requester under FOIA must file an administrative appeal within the time limit specified in an agency's FOIA regulations or face dismissal of any lawsuit complaining about the agency's response"); Hamilton Sec. Grp., Inc. v. HUD, 106 F. Supp. 2d 23, 27 (D.D.C. 2000) (finding that requester failed to exhaust administrative remedies when it submitted administrative appeal one day after agency's regulatory time period had expired), summary affirmance granted, No. 00-5331, 2001 WL 238162 (D.C. Cir. Feb. 23, 2001) (per curiam); Voinche v. CIA, No. 96-1708, slip op. at 3 (W.D. La. Nov. 25, 1996) (holding that plaintiff's filing of administrative appeal eleven months after agency's response justifies dismissal notwithstanding delay of almost four years by agency in responding to request). But cf. People for the Ethical Treatment of Animals v. NIH, 853 F. Supp. 2d 146, 152 (D.D.C. 2012) (finding that requester did exhaust administrative remedies although it filed administrative appeal late where agency nevertheless provided substantive response to appeal); Kennedy v. DOJ, No. 93-0209, slip op. at 2-3 (D.D.C. July 12, 1993) (explaining that when requester's affidavit attests to mailing of timely administrative appeal but agency affidavit denies receipt, court may permit requester additional time to submit another appeal and agency additional time to respond, as "nothing in the FOIA statute or regulations requires the Plaintiff to do more than mail his administrative appeal in a timely fashion").

[158] See 5 U.S.C. § 552(a)(6)(A)-(B).

(1) provide required proof of identity[159] in first-party requests[160] or disclosure authorization by third parties when required by agency regulations;[161]

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[159] See Summers v. DOJ, 999 F.2d 570, 572-73 (D.C. Cir. 1993) (holding that authorization for release of records need not be notarized but can be attested to under penalty of perjury pursuant to 28 U.S.C. § 1746).

[160] See Ruston v. BOP, No. 10-0917, 2010 WL 2266065, at *1 (D.D.C. June 4, 2010) (finding agency had no obligation to respond to request when requester did not provide certification of identity); Ramstack v. Dep't of the Army, 607 F. Supp. 2d 94, 102-03 (D.D.C. 2009) (holding that plaintiff failed to exhaust administrative remedies because request was not notarized or submitted under penalty of perjury as required by agency's regulations); Lee v. DOJ, 235 F.R.D. 274, 286 (W.D. Pa. 2006) (dismissing FOIA claims because plaintiff failed to verify identity in accordance with agency regulations by omitting full name and place of birth from request); Davis v. U.S. Att'y, Dist. of Md., No. 92-3233, slip op. at 2-3 (D. Md. July 5, 1994) (dismissing suit without prejudice when plaintiff failed to provide identification by notarized consent, attestation under 28 U.S.C. § 1746, or alternative form of identification in conformity with agency regulations); Lilienthal v. Parks, 574 F. Supp. 14, 18 (E.D. Ark. 1983) (holding that plaintiff failed to exhaust administrative remedies because plaintiff did not submit proper identification in accordance with IRS regulations).

[161] Compare Strunk v. Dep't of State, 693 F. Supp. 2d 112, 115 (D.D.C. 2010) (finding plaintiff's third-party request not proper because it failed to include written authorization from third party), Penny v. DOJ, 662 F. Supp. 2d 53, 54-55 (D.D.C. 2009) (dismissing FOIA claim as to third parties when plaintiff failed to submit privacy waivers before commencing lawsuit), Pusa v. FBI, No. 99-04603, slip op. at 5 (C.D. Cal. Aug. 5, 1999) (dismissing case because plaintiff did not comply with agency regulations concerning third-party requests), Harvey v. DOJ, No. 92-176, slip op. at 17-18 (D. Mont. Jan. 9, 1996) (declining to grant motion for production of third-party records because plaintiff failed to submit authorization at administrative level), and Freedom Mag. v. IRS, No. 91-4536, 1992 U.S. Dist. LEXIS 18099, at *10-13 (C.D. Cal. Nov. 13, 1992) (finding that court lacked jurisdiction when, prior to filing suit, plaintiff failed to provide waivers for third-party records as required by IRS regulations), with Lewis v. DOJ, 609 F. Supp. 2d 80, 83 (D.D.C. 2009) (holding that according to agency's regulations privacy waivers "[are] 'help[ful]' but not required," but nonetheless concluding that "defendant properly invoked the FOIA's personal privacy provisions – exemptions 6 and 7(C) – to justify its categorical denial of the request for third-party records"), and Martin v. DOJ, No. 96-2866, slip op. at 7-8 (D.D.C. Dec. 15, 1999) (ruling that agency was not justified in refusing to process third-party request in absence of privacy waiver because agency's regulation on privacy waivers was permissive, not mandatory, but nevertheless dismissing complaint because all records would be subject to Exemption 7(C) protection in any event). But see Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. DHS, 913 F. Supp. 2d 865, 880 (N.D. Cal. 2012) (enjoining agency from using regulation which made authorized consent by third party mandatory, not permissive, before considering FOIA request perfected).

(2) "reasonably describe" the records sought;[162]

(3) comply with fee requirements;[163]

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[162] See, e.g., Vest v. Dep't of the Air Force, 793 F. Supp. 2d 103, 113 (D.D.C. 2011) (finding requester failed to exhaust administrative remedies as request did not reasonably describe records sought); Keys v. DHS, No. 08-0726, 2009 WL 614755, at *5 (D.D.C. Mar. 10, 2009) (holding that plaintiff failed to exhaust administrative remedies because plaintiff did not reasonably describe records sought by not responding to EOUSA's request to identify specific offices to be searched); Dale v. IRS, 238 F. Supp. 2d 99, 104-05 (D.D.C. 2002) (finding that requester failed to exhaust administrative remedies and noting that agency is "under no obligation to release records that have not been reasonably described" and that requests which fail to conform to agency requirements "amount[] to an all-encompassing fishing expedition . . . at taxpayer expense"); cf. Voinche v. U.S. Dep't of the Air Force, 983 F.2d 667, 669 n.5 (5th Cir. 1993) (concluding that administrative remedies on fee waiver request were not exhausted when requester failed to amend request to achieve specificity required by agency regulations).

[163] See, e.g., Reynolds v. Att'y Gen. of the U.S., 391 F. App'x 45, 46 (2d Cir. 2010) (affirming dismissal for failure to exhaust because plaintiff failed to either pay or request waiver of assessed fees); Pollack v. DOJ, 49 F.3d 115, 119-20 (4th Cir. 1995) (affirming dismissal for failure to exhaust and rejecting plaintiff's argument that untimeliness of agency response required it to provide documents free of charge); Pinson v. DOJ, No. 12-1872, 2016 WL 29245, at *12 (D.D.C. Jan. 4, 2016) (noting that when agency seeks advance payment, requester has not exhausted administrative remedies unless fees are paid or administrative appeal is filed); Kurdyukov v. DEA, 578 F. Supp. 2d 61, 65-66 (D.D.C. 2008) (holding that agency's failure to comply with FOIA's statutory time limits does not relieve plaintiff from obligation to exhaust administrative remedies by either paying fees or appealing denial of fee waiver); Hicks v. Hardy, No. 04-769, 2006 WL 949918, at *2 (D.D.C. Apr. 12, 2006) (holding that "plaintiff cannot maintain his claim without paying the assessed fee," and explaining that this holds true "[r]egardless of whether . . . plaintiff 'filed' suit before or after receiving a request for payment"); Thorn v. United States, No. 04-1185, 2005 WL 3276285, at *1-2 (D.D.C. Aug. 11, 2005) (finding that plaintiff's administrative remedies were not exhausted, because plaintiff failed to pay assessed fees, and noting that "[c]ommencement of a civil action pursuant to FOIA does not relieve a requester of his obligation to pay any required fees"). Compare Antonelli v. ATF, 555 F. Supp. 2d 16, 23 (D.D.C. 2008) (finding that plaintiff's failure to pay owed fees prior to commencing litigation entitles agency to summary judgment on claims arising from non-payment of fees, notwithstanding plaintiff's alleged payment of fees "some three years" after litigation began), with Hemmings v. Freeh, No. 95-738, 2005 WL 975626, at *3 (D.D.C. Apr. 25, 2005) (denying defendant's motion to dismiss because plaintiff "cured" his failure to exhaust by paying assessed fees, even though he did so only after government filed its dismissal motion). But cf. Saldana v. BOP, 715 F. Supp. 2d 10, 22 (D.D.C. 2010) (finding that because plaintiff did not agree to pay copying fees for certain records, agency could not claim that plaintiff has failed to exhaust because plaintiff "is free to decline an offer to copy records he does not want"); King v. DOJ, 772 F. Supp. 2d 14, 18 (D.D.C. 2010) (holding that while plaintiff failed to exhaust administrative remedies with respect to agency's search for failure to pay fees, merits of withholdings could still be adjudicated); Francis v. FBI, No. 06-0968, 2008 WL 1767032, at *7 (E.D. Cal. Apr.

(4) pay authorized fees incurred in a prior request before making new requests;[164]

(5) administratively request a waiver of fees;[165]

(6) challenge a fee waiver denial at the administrative appeal stage;[166] or

(7) present for review at the administrative appeal level any objection to earlier processing practices of which the requester was put on notice.[167]

16, 2008) (magistrate's recommendation) ("[W]here the agency provides a response to the FOIA request rather than substantively addressing a request for fee waiver, the exhaustion requirement may be waived."); Wiggins v. Nat'l Credit Union Admin., No. 05-2332, 2007 WL 259941, at *5 (D.D.C. Jan. 30, 2007) (finding that, despite plaintiff's failure to exhaust, "no purpose would be served by having this matter delayed until plaintiff pays the required fee" because agency "has already considered and processed plaintiff's request"); Sliney v. BOP, No. 04-1812, 2005 WL 839540, at *4 (D.D.C. Apr. 11, 2005) (recognizing that plaintiff's failure to pay requested fees "constitutes a failure to exhaust," but excusing failure to pay duplication fee because agency "produced no evidence" that it ever informed him of fee amount).

[164] See, e.g., Trenerry v. IRS, 78 F.3d 598, 598 (10th Cir. 1996) (unpublished table decision) (affirming lower court's finding that plaintiff failed to exhaust administrative remedies by not paying fees owed on previous FOIA request); Crooker v. U.S. Secret Serv., 577 F. Supp. 1218, 1219-20 (D.D.C. 1983) (dismissing FOIA lawsuit for failure to exhaust administrative remedies where plaintiff failed to pay fees in previous FOIA request).

[165] See, e.g., Ivey v. Snow, No. 05-1095, 2006 WL 2051339, at *4 (D.D.C. July 20, 2006) (finding failure to exhaust administrative remedies, in part, because plaintiff failed to request fee waiver or reduction of fees), aff'd sub nom. Ivey v. Paulson, 227 F. App'x 1 (D.C. Cir. 2007); Antonelli v. ATF, No. 04-1180, 2005 WL 3276222, at *8 (D.D.C. Aug. 16, 2005) (explaining that "payment or waiver of assessed fees or an administrative appeal from the denial of a fee waiver request is a condition precedent to filing a FOIA claim in the district court").

[166] See, e.g., Voinche, 983 F.2d at 669 (holding "that claimants seeking a fee waiver under FOIA must exhaust their administrative remedies prior to seeking judicial relief"); Anderson v. U.S. Dep't of State, 661 F. Supp. 2d 6, 10 n.1 (D.D.C. 2009) (holding sua sponte that plaintiff failed to exhaust administrative remedies for fee waiver issue because issue was not administratively appealed); Jones v. DOJ, 653 F. Supp. 2d 46, 50 (D.D.C. 2009) ("Any dispute regarding fees, the aggregation, or a fee waiver must first be raised and pursued to exhaustion in the administrative process before it will be entertained in a federal lawsuit."); Tinsley v. Comm'r of IRS, No. 96-1769, 1998 WL 59481, at *4 (N.D. Tex. Feb. 9, 1998) (finding no exhaustion because plaintiff failed to appeal fee waiver denial).

[167] See, e.g., Halpern, 181 F.3d at 285 (approving FBI practice of seeking clarification of requester's possible interest in "cross-references," and dismissing portion of suit challenging

Despite statutory language referring to administrative appeals of denials of requests for expedited processing,[168] the few courts that have considered the issue thus far have ruled that exhaustion of administrative remedies is not required prior to seeking court review of an agency's denial of requested expedited access.[169]

"Open America" Stays of Proceedings

When a requester who has constructively exhausted administrative remedies due to an agency's failure to comply with the FOIA's time deadlines files a suit in court, the court may retain jurisdiction over the case – sometimes through issuance of a stay of proceedings – while allowing the agency additional time to complete its processing of the request. The FOIA itself explicitly permits such a stay if it can be shown that "exceptional circumstances exist and that the agency is exercising due diligence in responding to the request."[170] This provision of the FOIA provides an important "safety valve" for agencies that are often overwhelmed by increasing numbers of FOIA requests.[171]

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failure to process those records when plaintiff did not dispute agency action until after suit was filed); Dettmann, 802 F.2d at 1477 (same); Skybridge Spectrum Found., 842 F. Supp. 2d at 77 (finding that while requester did fail to raise exemption 6 on administrative appeal, that omission did not bar judicial review because requester was not put on notice of agency's reliance on exemption 6 until agency's response to administrative appeal); Kenney, 700 F. Supp. 2d at 118 (finding failure to exhaust where requester argued for first time in litigation that he should not have to provide privacy waivers for individuals who already signed waivers for previous request but failed to present this argument to FBI through administrative process).

[168] See 5 U.S.C. § 552(a)(6)(E)(ii)(II) (referring to "expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing").

[169] See, e.g., Citizens for Resp. & Ethics in Wash. v. DOJ, 436 F. Supp. 3d 354, 359 (D.D.C. 2020) (finding that requestors denied expedited processing are not required to exhaust administrative remedies); ACLU v. DOJ, 321 F. Supp. 2d 24, 28-29 (D.D.C. 2004) (concluding that FOIA does not require administrative appeal of agency's denial of expedition request); Al-Fayed v. CIA, No. 00-2092, 2000 WL 34342564, at *2 (D.D.C. Sept. 20, 2000) (concluding that "[n]othing in the statute or its legislative history" indicates that administrative appeal of denial of expedited processing is required before applicant may seek judicial review); cf. NAACP Legal Def. & Educ. Fund, Inc. v. HUD, No. 07-3378, 2007 WL 4233008, at *4 (S.D.N.Y. Nov. 30, 2007) (finding that plaintiff constructively exhausted administrative remedies when agency failed to respond to expedited processing request within ten days).

[170] 5 U.S.C. § 552(a)(6)(C)(i)-(iii) (2018).

[171] See Manna v. DOJ, No. 93-81, 1994 WL 808070, at *10 (D.N.J. Apr. 13, 1994) (noting "huge number of [FOIA] requests that have overwhelmed [agency's] human and related

The leading case construing this FOIA provision is Open America v. Watergate Special Prosecution Force.[172] In Open America, the Court of Appeals for the District of Columbia Circuit held that "exceptional circumstances" may exist when an agency can show that it "is deluged with a volume of requests for information vastly in excess of that anticipated by Congress [and] when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A)."[173]

The Electronic FOIA Amendments of 1996 explicitly redefined the term "exceptional circumstances" to exclude any "delay that results from a predictable agency workload of requests . . . unless the agency demonstrates reasonable progress in reducing its backlog of pending requests."[174] Courts have found that this definition of "exceptional circumstances" requires more than just the existence of a FOIA backlog as the basis for a stay.[175] At the same time, in enacting the Electronic FOIA amendments, Congress specifically contemplated that other factors may be relevant to a court's determination as to whether "exceptional circumstances" exist: An agency's efforts to reduce its pending request backlog; the size and complexity of other requests being processed by the agency; the amount of classified material involved; and the number of requests for records by

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resources"); Cohen v. FBI, 831 F. Supp. 850, 854 (S.D. Fla. 1993) (explaining that court "cannot focus on theoretical goals alone, and completely ignore the reality that these agencies cannot possibly respond to the overwhelming number of requests received within the time constraints imposed by FOIA"); see also Nat. Res. Def. Council v. DOE, 191 F. Supp. 2d 41, 42 (D.D.C. 2002) (noting that "it is commonly accepted that no federal agency can meet the impossibly rigorous timetable set forth in the [FOIA]," but nevertheless granting motion for expedited release of records).

[172] 547 F.2d 605 (D.C. Cir. 1976).

[173] Id. at 616.

[174] Pub. L. No. 104-231, § 7(c), 110 Stat. 3048, 3051 (1996) (codified as amended at 5 U.S.C. § 552(a)(6)(C)(ii)).

[175] See, e.g., Gov't Accountability Project v. HHS, 568 F. Supp. 2d 55, 60 (D.D.C. 2008) (holding that "allowing a mere showing of a normal backlog of requests to constitute 'exceptional circumstances' would render the concept and its underlying Congressional intent meaningless"); Leadership Conf. on C.R. v. Gonzales, 404 F. Supp. 2d 246, 259 n.4 (D.D.C. 2005) ("An agency must show more than a great number of requests to establish[] exceptional circumstances under the FOIA."); Donham v. DOE, 192 F. Supp. 2d 877, 882 (S.D. Ill. 2002) (refusing to accept agency's argument that its backlog qualifies as "exceptional circumstances" because "the 'exceptional circumstances' provision would render meaningless the twenty-day response requirement"); Al-Fayed v. CIA, No. 00-2092, slip op. at 5 (D.D.C. Jan. 16, 2001) ("Rather than overturn Open America, the 1996 amendments merely explain that predictable agency workload and a backlog alone, will not justify a stay."), aff'd on other grounds, 254 F.3d 300 (D.C. Cir. 2001).

courts or administrative tribunals that are also pending.[176] Furthermore, the amendments include a companion provision that specifies that a requester's "refusal . . . to reasonably modify the scope of a request or arrange for an alternative time frame for processing . . . shall be considered as a factor in determining whether exceptional circumstances exist."[177]

In Open America, the D.C. Circuit ruled that the "due diligence" requirement in the FOIA may be satisfied by an agency's good faith processing of all requests on a "first-in, first-out" basis and that a requester's right to have his request processed out of turn requires a particularized showing of "exceptional need or urgency."[178] In so ruling, the D.C. Circuit rejected the notion that the mere filing of a lawsuit was a basis for such expedited treatment.[179] The Electronic FOIA amendments modified this first in, first out

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[176] See H.R. REP. NO. 104-795, at 24-25 (1996), as reprinted in 1996 U.S.C.C.A.N. 3448, 3467-68 (specifying factors that may be considered in determining whether "exceptional circumstances" exist); see also Huddleston v. FBI, No. 20-447, 2021 WL 327510, at *2 (E.D. Tex. Feb. 1, 2021) ("If the COVID-19 crisis is not an 'exceptional circumstance' under § 552(a)(6)(C)(i), the Court is unsure when the exception would ever apply.").

[177] 5 U.S.C. § 552(a)(6)(C)(iii); see also Sierra Club v. Dep't of Interior, 384 F. Supp. 2d 1, 31 (D.D.C. 2004) (finding that plaintiff's refusal to reasonably modify "extremely broad" request or to arrange alternate time frame for disclosure constituted "unusual circumstances" and relieved agency of statutory timeliness requirements); Peltier v. FBI, No. 02-4328, slip op. at 8 (D. Minn. Aug. 15, 2003) (granting stay and explaining that plaintiff's refusal "to modify the scope of his request supports a finding of exceptional circumstances"); Al-Fayed, No. 00-2092, slip op. at 6, 12 (granting stay and characterizing plaintiffs' ostensible efforts to limit scope of their requests as "more symbolic than substantive").

[178] Open Am., 547 F.2d at 616; see also Nat'l Sec. Archive v. SEC, 770 F. Supp. 2d 6, 8 (D.D.C. 2011) (granting twelve-month stay and finding agency exercised due diligence to reduce backlog by adopting first-in, first-out processing system, "implement[ing] new technology to streamline and expedite the processing of FOIA requests and [making] agency records available on [agency's] public website"); Gov't Accountability Project, 568 F. Supp. 2d at 63-64 (denying stay and noting that although agency's efforts towards improving FOIA request processing suggest generalized due diligence, agency's handling of plaintiff's request "cannot be described as a model of due diligence").

[179] Open Am., 547 F.2d at 615 ("We do not think that Congress intended, by fixing a time limitation on agency action and according a right to bring suit when the applicant has not been satisfied within the time limits, to grant an automatic preference by the mere action of filing a case in United States district court."); see also Fiduccia v. DOJ, 185 F.3d 1035, 1040-41 (9th Cir. 1999) (refusing to approve automatic preference for FOIA requesters who file suit because it "would generate many pointless and burdensome lawsuits"); Cohen v. FBI, 831 F. Supp. 850, 854 (S.D. Fla. 1993) ("[L]ittle progress would result from allowing FOIA requesters to move to the head of the line by filing a lawsuit. This would do nothing to eliminate the FOIA backlog; it would merely add to the judiciary's backlog."); cf.

rule by explicitly allowing agencies to establish "multitrack" processing for requests, based on the amount of time and/or work involved in responding to a particular request.[180] The amendments specified that creation of multiple tracks "shall not be considered to affect the requirement . . . to exercise due diligence."[181]

When the requirements of the statute and Open America are met, courts have granted agency motions to stay judicial proceedings to allow for additional time to complete the administrative processing of a request.[182] By contrast, such motions have

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Hunsberger v. DOJ, No. 94-0168, 1994 U.S. Dist. LEXIS 6060, at *1-2 (D.D.C. May 3, 1994) (prohibiting requester from circumventing Open America stay by filing new complaint based on nearly identical request), summary affirmance granted, No. 94-5234 (D.C. Cir. Apr. 10, 1995).

[180] Pub. L. No. 104-231, § 7(a), 110 Stat. 3048, 3050 (1996) (codified at 5 U.S.C. § 552(a)(6)(D)(i)).

[181] Id. § 7(a)(D)(ii), 110 Stat. 3050 (codified at 5 U.S.C. § 552(a)(6)(D)(iii)).

[182] See, e.g., Democracy Forward Found. v. DOJ, 354 F. Supp. 3d 55, 60-61 (D.D.C. 2018) (granting stay and holding that "[defendant's] Declaration establishes that the uptick in FOIA demands over the last two years is a significant departure from the rate of increase seen over the prior decade" and also "describes what steps OIP has taken to address the recent rise in such requests"); Eakin v. DOD, No. 16-00972, 2017 WL 3301733, at *8 (W.D. Tex. Aug. 2, 2017) (granting stay after finding four conditions necessary to grant stay were satisfied because of sheer volume of plaintiff's request and defendant's exercise of due diligence); Elec. Frontier Found. v. DOJ, 563 F. Supp. 2d 188, 195 (D.D.C. 2008) (granting stay because enormous workload, coupled with diminished workforce, demonstrates exceptional circumstances, and agency "has [also] demonstrated both due diligence in processing the FOIA requests submitted to it and is making reasonable progress in reducing its backlog"); CareToLive v. FDA, No. 08-005, 2008 WL 2201973, at *9 (S.D. Ohio May 22, 2008) (awarding stay because exceptional circumstances exist and agency is exercising due diligence in processing FOIA requests); Ctr. for Pub. Integrity v. U.S. Dep't of State, No. 05-2313, 2006 WL 1073066, at *5 (D.D.C. Apr. 24, 2006) (finding exceptional circumstances where agency experienced unpredictable "increase in the number of FOIA requests for the two most recent fiscal years and also the unforeseen increase in . . . [its FOIA staff's] other information access duties"); Elec. Priv. Info. Ctr. v. DOJ, No. 02-0063, 2005 WL 6793645, at *4-7 (D.D.C. Aug. 31, 2005) (approving stay where FBI faced "unanticipated amount of lengthy FOIA requests," showed "reasonable progress" in reducing its backlog, and demonstrated due diligence by adopting three-tiered processing system, as well as certain electronic processing techniques); Bower v. FDA, No. 03-224, 2004 WL 2030277, at *3 (D. Me. Aug. 30, 2004) (granting stay where FDA faced "enormous litigation demands" and demonstrated reasonable progress with its FOIA backlog); Emerson v. CIA, No. 99-0274, 1999 U.S. Dist. LEXIS 19511, at *3-4 (D.D.C. Dec. 16, 1999) (granting two-year stay because of "extraordinary circumstances" and multiple agency efforts to alleviate FOIA backlog). But see Donham v. DOE, 192 F. Supp. 2d 877, 882 (S.D. Ill 2002) (finding Open America

proven unsuccessful when agencies have failed to set forth sufficient facts to demonstrate the propriety of such a stay.[183] In some instances, courts have agreed that some additional

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standard "inconsistent with the [plain] language of FOIA, especially in light of the 1996 Amendments").

[183] See, e.g., Fiduccia, 185 F.3d at 1042 (overturning stay of proceedings granted by district court because "slight upward creep in the caseload" does not constitute exceptional circumstances); Huddleston v. FBI, No. 20-447, 2021 WL 327510, at *3 (E.D. Tex. Feb. 1, 2021) (denying stay, in part, because agency failed to explain exceptional circumstances associated with handling request, and proposed production schedule was too vague); Elec. Priv. Info. Ctr. v. FBI, 933 F. Supp. 2d 42, 48-49 (D.D.C. 2013) (finding that while "[t]he amount of classified material involved in [plaintiff's] request as well as [plaintiff's] refusal to narrow its request" do support a stay, "considering the record as a whole, exceptional circumstances do not exist" because "the FBI did not provide the Court with sufficient information from which it could conclude that the overall complexity of the FBI's workload has increased over time"); Buc v. FDA, 762 F. Supp. 2d 62, 70-72 (D.D.C. 2011) (denying stay, in part, because agency failed to establish that it made reasonable progress in reducing its backlog and that its resources were inadequate to address both volume and complexity of requests); Elec. Frontier Found. v. DOJ, 517 F. Supp. 2d 111, 118 (D.D.C. 2007) (explaining that "the fact that the FBI faces obligations in other litigations is not, in and of itself, sufficient to establish exceptional circumstances"); Weinberg v. Von Eschenbach, No. 07-1819, 2007 WL 5681722, at *2 (D.N.J. Oct. 10, 2007) (denying stay because steady decrease in number of FOIA requests received constitutes predictable agency workload); Bloomberg L.P. v. FDA, 500 F. Supp. 2d 371, 375-76 (S.D.N.Y. 2007) (determining that stay is unwarranted because agency has merely shown manageable workload flow coupled with actions demonstrating pattern "of unresponsiveness, delays, and indecision that suggest an absence of due diligence"); Leadership Conf. on C.R. v. Gonzales, 404 F. Supp. 246, 259 (D.D.C. 2005) (rejecting agency's stay request predicated on "large backlog of pending FOIA requests, including 16 requests which take much longer to process than other[s]," reallocation of resources to respond to court orders, and "personnel issues"); Los Alamos Study Grp. v. DOE, No. 99-201, slip op. at 4-5 (D.N.M. Oct. 26, 1999) (declining to approve stay of proceedings predicated on agency's need to review sensitive materials because such review "is part of the predictable agency workload of requests"); Gilmore v. DOE, 4 F. Supp. 2d 912, 925 (N.D. Cal. 1998) ("Where a pattern and practice of late responses is alleged, courts have held that a normal, predictable workload cannot constitute 'exceptional circumstances,' at least without a showing that the agency unsuccessfully sought more FOIA resources from Congress or attempted to redirect its existing resources."); cf. Hall v. CIA, No. 04-00814, 2005 WL 850379, at *5 (D.D.C. Apr. 13, 2005) (refusing to accept CIA's argument that stay was warranted while agency awaited "final guidance from the Court" on plaintiff's previous lawsuit); Homick v. DOJ, No. 98-00557, slip op. at 2 (N.D. Cal. Oct. 27, 2004) (denying FBI's motion for stay because it "repeatedly failed to meet various [court imposed] deadlines . . . over more than two years"). But cf. Nat'l Sec. Archive v. U.S. Dep't of the Air Force, No. 05-571, 2006 WL 1030152, at *5 (D.D.C. Apr. 19, 2006) (finding that agency failed to process plaintiff's requests with due diligence but declining to order immediate disclosure of unprocessed documents because they first had to be reviewed for declassification, and declaring that "[r]elease of classified documents cannot be ordered without such review no matter how dilatory an agency might be").

processing time is appropriate, but have ordered stays for less time than requested by the agency.[184]

While the Open America decision itself does not address the additional time needed by an agency to justify nondisclosure of any withheld records once they are processed, courts have, as a practical matter, tended to merge the record-processing and declaration-preparation stages of a case when issuing stays of proceedings under Open America.[185] And when there is a large volume of responsive documents that have not been processed, a court may grant a stay of proceedings that provides for interim or "timed" releases and/or interim status reports on agency processing efforts.[186]

Even if otherwise warranted, an "Open America" stay may be denied when the requester can show an "exceptional need or urgency" for having his request processed out of turn.[187] Such a showing has been found if the requester's life or personal safety, or

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[184] See Elec. Frontier Found., 563 F. Supp. 2d at 196 (granting stay until August 1, 2008, instead of February 2013); Hendricks v. DOJ, No. 05-05-H, slip op. at 13 (D. Mont. Aug. 18, 2005) (concluding that FBI did not demonstrate exceptional circumstances sufficient to warrant stay for full length of time requested); Bower, 2004 WL 2030277, at *3 (approving seven-month stay, rather than leaving FDA "to its own, unmonitored devices" for full two-and-one-half-year period that it had requested); Beneville v. DOJ, No. 98-6137, slip op. at 8 (D. Or. Dec. 17, 1998) (declining to approve full stay of proceedings requested by FBI regarding Unabomber files); cf. Donham, 192 F. Supp. 2d at 884 (refusing to set processing deadline, but also refusing to grant open-ended stay of proceedings).

[185] See, e.g., Lisee v. CIA, 741 F. Supp. 988, 989-90 (D.D.C. 1990) ("Open America" stay granted for both processing records and preparing Vaughn Index); Ettlinger v. FBI, 596 F. Supp. 867, 878-79 (D. Mass. 1984) (same).

[186] See, e.g., Elec. Frontier Found., 517 F. Supp. 2d at 121 (awarding stay but ordering agency to provide plaintiff with interim releases and to file status reports with Court every ninety days); Al-Fayed v. CIA, No. 00-2092, slip op. at 12 (D.D.C. Jan. 16, 2001) (granting stays for four agencies, but requiring status reports every sixty days), aff'd on other grounds, 254 F.3d 300 (D.C. Cir. 2001); Raulerson v. Reno, No. 95-2053, slip op. at 1 (D.D.C. Sept. 11, 1998) (approving thirty-month stay to process over 19,000 pages, but ordering four interim status reports); Samuel Gruber Educ. Project v. DOJ, No. 90-1912, slip op at 6 (D.D.C. Feb. 8, 1991) (granting nearly two-year stay, but requiring six-month progress reports); cf. Bower, 2004 WL 2030277, at *3 (requiring FDA to produce status report at end of seven-month stay, which included estimated time by which document production would be completed).

[187] See Open Am. v. Watergate Special Prosecution Force, 547 F.2d 605, 616 (D.C. Cir. 1976) (suggesting that stay of proceedings which would allow for processing on first-in, first-out basis could be denied where "exceptional need or urgency is shown" for requested records); see also Edmonds v. FBI, No. 02-1294, 2002 WL 32539613, at *4 (D.D.C. Dec. 3, 2002) (denying motion for "Open America" stay even though it was justified by exceptional circumstances because requester demonstrated that subject of request was of "widespread

substantial due process rights, would be jeopardized by the failure to process a request immediately.[188] (For further discussion of expedited processing, see Procedural Requirements, Expedited Processing.)

Discovery

Discovery is the exception, not the rule, in FOIA cases.[189] The decision to grant discovery and the conditions under which it is permitted are within the discretion of the

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and exceptional media interest" and "call[ed] into question 'the integrity of the . . . [FBI] which affect[s] public confidence'"); Aguilera v. FBI, 941 F. Supp. 144, 149-52 (D.D.C. 1996) (finding initially that FBI satisfied "exceptional circumstances-due diligence test" warranting eighty-seven-month delay, but subsequently granting expedited access due to requester demonstrating "exceptional and urgent need" for records to challenge criminal conviction); cf. Open Soc'y Just. Initiative v. DOD, No. 20-5096, 2020 U.S. Dist. LEXIS 235372, at * 3-4 (S.D.N.Y Dec. 15, 2020) (ordering monthly production increases of fifty percent per month until monthly production reaches 2,000 pages per month given requested records concern COVID-19 which "is an issue of heightened national importance and urgency").

[188] See, e.g., Ferguson v. FBI, 722 F. Supp. 1137, 1143 (S.D.N.Y. 1989) (denying stay, even though agency "nominally" satisfies "due diligence-exceptional circumstances" test set forward in Open America, because "plaintiff's liberty interests require expedition"); cf. Gilmore v. FBI, No. 93-2117, slip op. at 1, 3 (N.D. Cal. July 26, 1994) (expediting request, despite showing of due diligence and exceptional circumstances, based upon finding that "[p]laintiff has sufficiently shown that the information he seeks will become less valuable if the FBI processes his request on a first-in, first-out basis"). Compare Freeman v. DOJ, No. 92-557, slip op. at 6 (D.D.C. Oct. 2, 1992) (vacating order granting stay and granting expedited processing when scope of request was limited, when Jencks Act material was unavailable in state prosecution and when information useful to plaintiff's criminal defense might have been contained in requested documents), with Freeman v. DOJ, No. 92-557, 1993 WL 260694, at *5 (D.D.C. June 28, 1993) (denying further expedited treatment when processing "would require an additional hand search of approximately 50,000 pages, taking approximately 120 days").

[189] See, e.g., CareToLive v. FDA, 631 F.3d 336, 345-46 (6th Cir. 2011) ("Claims under the [FOIA] are typically resolved without discovery on the basis of the agency's affidavits."); Lane v. Dep't of Interior, 523 F.3d 1128, 1134 (9th Cir. 2008) (noting that in FOIA cases "discovery is limited because the underlying case revolves around the propriety of revealing certain documents"); Heily v. Dep't of Com., 69 F. App'x 171, 174 (4th Cir. 2003) (per curiam) ("It is well-established that discovery may be greatly restricted in FOIA cases."); Just. v. IRS, 798 F. Supp. 2d 43, 47 (D.D.C. 2011) (noting that "discovery is disfavored" in FOIA actions), aff'd, 485 F. App'x 439 (D.C. Cir. 2012); Wheeler v. CIA, 271 F. Supp. 2d 132, 139 (D.D.C. 2003) ("Discovery is generally unavailable in FOIA actions.").

district court.[190] In the limited instances where discovery is determined to be appropriate, courts ordinarily confine it to the scope of an agency's search or indexing and classification procedures,[191] and other factual matters.[192]

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[190] See, e.g., World Publ'g Co. v. DOJ, 672 F.3d 825, 832 (10th Cir. 2012) (noting that "[t]he decision whether to allow discovery in FOIA cases is largely left to the discretion of the district court judge"); Lane, 523 F.3d at 1134 (stating that "[a] district court 'has wide latitude in controlling discovery, and its rulings will not be overturned in absence of a clear abuse of discretion'" (quoting White v. City of San Diego, 605 F.2d 455, 461 (9th Cir. 1979))); Wood v. FBI, 432 F.3d 78, 84 (2d Cir. 2005) (recognizing that "[a] district court has broad discretion to manage pre-trial discovery" (citing Grand Cent. P'ship v. Cuomo, 166 F.3d 473, 488 (2d Cir. 1999))); Becker v. IRS, 34 F.3d 398, 406 (7th Cir. 1994) (same); Maynard v. CIA, 986 F.2d 547, 567 (1st Cir. 1993) (same); Gillin v. IRS, 980 F.2d 819, 823 (1st Cir. 1992) (per curiam) ("Where the agency's affidavits are adequate to substantiate the adequacy and results of its search, and the validity of the exemptions it claims, then the 'district judge has discretion to forgo discovery and award summary judgement on the basis of affidavits.'" (quoting Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978))); N.C. Network for Animals, Inc. v. USDA, 924 F.2d 1052, 1052 (4th Cir. 1991) (unpublished table decision) ("The district court should exercise its discretion to limit discovery in this as in all FOIA cases, and may enter summary judgment on the basis of agency affidavits when they are sufficient to resolve issues . . . ."); Petrus v. Brown, 833 F.2d 581, 583 (5th Cir. 1987) ("A trial court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined."); Meeropol v. Meese, 790 F.2d 942, 960-61 (D.C. Cir. 1986) (same, with respect to broad district court discretion).

[191] See, e.g., Heily, 69 F. App'x at 174 (explaining that when discovery is permitted, generally it is "limited to the scope of agency's search and its indexing and classification procedures"); Ruotolo v. DOJ, 53 F.3d 4, 11 (2d Cir. 1995) (holding that discovery on scope of burden that search would entail should have been granted); Weisberg v. DOJ, 627 F.2d 365, 371 (D.C. Cir. 1980) (finding discovery appropriate to inquire into adequacy of document search); Pulliam v. EPA, 292 F. Supp. 3d 255, 260-61 (D.D.C. 2018) (allowing limited discovery to resolve discrepancy between prior declarations which stated only email records were searched and fourth declaration which stated that all electronic records were searched); Carr v. NLRB, No. 12-0871, 2012 WL 5462751, at *4 (S.D. W.Va. Nov. 8, 2012) (finding that "[i]n the unusual case when discovery has been allowed it is often limited to the agency's search, indexing and classification procedures"); Fams. for Freedom v. U.S. Customs & Border Protect., 837 F. Supp. 2d 331, 336-37 (S.D.N.Y. 2011) (granting plaintiff's request for discovery without showing of bad faith because there was evidence in record that agency had not performed adequate search); El Badrawi v. DHS, 583 F. Supp. 2d 285, 299-301 (D. Conn. 2008) (permitting limited discovery where agency failed to adequately describe general scheme of its file system and did not explain why it chose to search only one database and not others); Kozacky & Weitzel, P.C. v. United States, No. 07-2246, 2008 WL 2188457, at *7 (N.D. Ill. Apr. 10, 2008) (directing agency to answer several of plaintiff's interrogatories concerning nature and adequacy of its search); Long v. DOJ, 10 F. Supp. 2d 205, 210 (N.D.N.Y. 1998) (finding discovery appropriate to test adequacy of search).

[192] Am. Small Bus. League v. DOD, No. 18-01979, 2019 WL 4416613, at *3 (N.D. Cal. Sept. 15, 2019) (allowing limited discovery in Exemption 4 case where submitter's declarations

Discovery generally is not available "where an agency's declarations are reasonably detailed, submitted in good faith and the court is satisfied that no factual dispute remains."[193] Unsubstantiated claims that an agency has acted in bad faith are not

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were inconsistent on whether withheld information at issue was "customarily" treated by submitter as confidential); Raher v. BOP, No. 09-526, 2012 WL 2721613, at *2-3 (D. Or. July 9, 2012) (permitting discovery to probe "applicable record[s] retention policies" and agency's compliance with such policies where agency admitted to practice of routinely destroying employees' emails following their departures); Citizens for Resp. & Ethics in Wash. v. VA, 828 F. Supp. 2d 325, 334 (D.D.C. 2011) (approving deposition of two VA employees for "purpose of determining whether the explanation for the [potential improper destruction of responsive records] is document destruction, incompetence, or something in between"); Citizens for Resp. & Ethics in Wash. v. DOJ, No. 05-2078, 2006 WL 1518964, at *3-6 (D.D.C. June 1, 2006) (granting plaintiff's motion for discovery in form of time-limited depositions because plaintiff raised sufficient question of bad faith on part of government to "warrant limited discovery for the purpose of exploring the reasons behind the [purported] delays in processing [plaintiff's] FOIA requests"); Pa. Dep't of Pub. Welfare v. United States, No. 99-175, 1999 WL 1051963, at *3 (W.D. Pa. Oct. 12, 1999) (allowing limited discovery "regarding the authenticity and completeness of the material produced by HHS, as well as the methodology used to compile it" because plaintiff "'does not know the contents of the information sought and is, therefore, helpless to contradict the government's description of the information or assist the trial judge'" (quoting Davin v. DOJ, 60 F.3d 1043, 1049 (3d Cir. 1995))).

[193] Schrecker v. DOJ, 217 F. Supp. 2d 29, 35 (D.D.C. 2002), aff'd, 349 F.3d 657 (D.C. Cir. 2003); see, e.g., People for the Ethical Treatment of Animals v. USDA, 918 F.3d 151, 159 (D.C. Cir. 2019) (remanding for clarification on affidavits concerning "voluntary cessation" but nevertheless finding that district court did not abuse its discretion denying motion for discovery on "voluntary cessation" issue as agency declarations are afforded presumption of good faith); Freedom Watch, Inc. v. NSA, 783 F.3d 1340, 1345 (D.C. Cir. 2015) (affirming district court's decision to deny discovery as to adequacy of search on ground that agency's affidavits were sufficiently detailed); Becker, 34 F.3d at 406 (finding district court did not err by granting summary judgment to government without addressing plaintiff's motion for discovery, explaining that judge "must have been satisfied that discovery was unnecessary when she concluded that the IRS's search was reasonable and ruled in favor of the IRS on summary judgment"); Long v. OPM, 692 F.3d 185, 191 (2d Cir. 2012) (holding that "'discovery relating to the agency's search and the exemptions it claims for withholding records generally is unnecessary if the agency's submissions are adequate on their face'" (quoting Carney v. DOJ, 19 F.3d 807, 812 (2d Cir.1994))); Cause of Action Inst. v. OMB, No. 18-1508, 2019 WL 6052369, at *8 (D.D.C. Nov. 15, 2019) (holding that discovery is inappropriate "because the defendants have submitted reasonably detailed declarations that are probative of the issues in this case, and the plaintiff has not established bad faith on the part of the defendants"); Reich v. DOE, 784 F. Supp. 2d 15, 22 (D. Mass. 2011) (denying request for discovery where agency affidavits were "'reasonably detailed' and 'submitted in good faith'" and plaintiff presented no evidence that declarants "misled the court or had any motivation to do so" (quoting Schrecker, 217 F. Supp. 2d at 35)); Fla. Immigrant Advoc. Ctr. v. NSA, 380 F. Supp. 2d 1332, 1343 (S.D. Fla. 2005) (denying discovery because agency's affidavit was "sufficiently detailed, nonconclusory and submitted in good faith").

sufficient to warrant discovery.[194] Courts likewise have denied discovery when the FOIA plaintiff failed to demonstrate that the discovery requested will uncover information that would create a genuine issue of material fact.[195] In fact, even when an agency's

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[194] See, e.g., In re Clinton, 973 F.3d 106, 114 (D.C. Cir. 2020) ("The mere suspicion of bad faith on the part of the government cannot be used as a dragnet to authorize voluminous discovery that is irrelevant to the remaining issues in a case."); Schoeffler v. USDA, 795 F. App'x 526, 527 (9th Cir. 2020) (affirming lower court's denial of discovery and finding that "[t]he evidence does not support [requester's] assertion that the Department's declarations were submitted in bad faith"); CareToLive v. FDA, 631 F.3d 336, 345-46 (6th Cir. 2011) (concluding that district court did not abuse its discretion in denying discovery where challenge to FDA's decision to place plaintiff's request in "complex" track and claims regarding adequacy of search and pre-request destruction of records did not evidence agency bad faith); Wilson v. U.S. Dep't of Transp., No. 10-5295, 2010 WL 5479580, at *1 (D.C. Cir. Dec. 30, 2010) (per curiam) (holding that "[b]ecause appellant offered no evidence of bad faith to rebut agency's affidavits, he is not entitled to discovery"); Wood, 432 F.3d at 85 (affirming denial of discovery, and holding that "district court did not abuse its discretion in finding [plaintiff's] assertion insufficient to overcome the government's good faith showing"); Grand Cent. P'ship, 166 F.3d at 489-90 (finding discovery unwarranted based on plaintiff's "speculation that there must be more documents" and that agency acted in "bad faith" by not producing them); Freedom Watch, Inc. v. NSA, 220 F. Supp. 3d 40, 46 (D.D.C. 2016) (denying motion for discovery and finding that "'mistakes do not imply bad faith[;]' '[i]n fact, [an] agency's cooperative behavior of notifying the Court and plaintiff that it . . . discovered a mistake, if anything, shows good faith'" (quoting Fischer v. DOJ, 723 F. Supp. 2d 104, 108-09 (D.D.C. 2010))); N.Y. Times Co. v. Treasury, No. 15-5740, 2016 WL 1651867, at *4 (S.D.N.Y. Apr. 26, 2016) (denying plaintiff's motion for discovery to review defendant's responsiveness determinations, finding "only a weak inference of bad faith, at best"); Hall v. CIA, 881 F. Supp. 2d 38, 73 (D.D.C. 2012) (denying plaintiff's request for discovery based on plaintiff's allegation of bad faith in connection with fee assessment because "[e]stimating the search fees — especially of such a broad search as that of the plaintiffs — is no doubt a difficult proposition, and a recalculation of those fees does not show that the previous estimate was intentionally inaccurate"); Exxon Mobil Corp. v. Dep't of the Interior, No. 09-6732, 2010 WL 4668452, at *7 (E.D. La. Nov. 4, 2010) (rejecting plaintiff's request to depose agency declarant where "declarations are facially adequate" and plaintiff has not demonstrated bad faith).

[195] See In re Clinton, 970 F.3d 357, 363-64 (D.C. Cir. 2020) (reversing district court's discovery order which permitted deposition of Secretary of State because there was "no evidence [the Secretary] was involved in running the instant searches – conducted years after she left the State Department – and since she has turned over all records in her possession . . . the proposed deposition topics are completely attenuated from any relevant issue" in FOIA case); Trentadue v. FBI, 572 F.3d 794, 806-08 (10th Cir. 2009) (reversing district court's discovery order permitting plaintiff to depose two federal prisoners for purpose of establishing that FBI maintains responsive records, finding that plaintiff failed to show any possibility that depositions would produce relevant evidence); Sharkey v. FDA, 250 F. App'x 284, 291 (11th Cir. 2007) (affirming district court's denial of discovery request for information related to potential market for vaccine in Exemption 4 case where plaintiff failed to "state with particularity the facts [that] he believes discovery will reveal [that are]

declarations are found to be insufficient, courts often order the submission of supplemental information rather than resorting to discovery.[196]

In addition, courts have denied discovery when a FOIA plaintiff attempts to probe the agency's "thought processes" for claiming particular exemptions.[197] Moreover, discovery has been disallowed when a plaintiff seeks to utilize it as a way to uncover the contents of the withheld documents.[198]

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sufficient to create a genuine issue of material fact"); Jarvik v. CIA, 741 F. Supp. 2d 106, 122 (D.D.C. 2010) (declining to permit deposition in order to ascertain declarant's personal knowledge of search where declarant holds supervisory position overseeing FOIA requests and therefore is ordinarily deemed to have personal knowledge of search); Thomas v. HHS, 587 F. Supp. 2d 114, 115 n.2 (D.D.C. 2008) (noting that discovery is "an extraordinary procedure in a FOIA action," and denying discovery request on the basis that plaintiff "gives no reason for needing" it); Scarver v. McGlocklyn, No. 05-2775, 2008 WL 686757, at *5 (E.D.N.Y. Mar. 4, 2008) (concluding that discovery was not warranted where plaintiff "offer[ed] absolutely no facts to support her allegations"); Dinisio v. FBI, No. 05-6159, 2007 WL 2362253, at *3 (W.D.N.Y. Aug. 16, 2007) (finding discovery inappropriate where plaintiff's motions "are based on rank speculation and unsupported assertions, and fail to show how the requested discovery would be likely to demonstrate the existence of any genuine issue of material fact"); O'Neill v. DOJ, No. 06-0671, 2006 WL 3538991, at *2 (E.D. Wis. Dec. 7, 2006) (denying plaintiff's motion to compel discovery as information sought is irrelevant to instant FOIA case).

[196] See, e.g., Beltranena v. Clinton, 770 F. Supp. 2d 175, 187 (D.D.C. 2011) (denying requests for discovery and in camera review and instead ordering agency to supplement affidavits to establish that it conducted adequate searches and to provide particularized explanations for its segregability determinations); Reich, 784 F. Supp. 2d at 21 (observing that "courts generally will request a supplement before ordering discovery"); Jarvik, 741 F. Supp. 2d at 122 ("Even if an agency's affidavits regarding its search are deficient, courts generally do not grant discovery but instead direct the agency to supplement its affidavits.").

[197] Ajluni v. FBI, 947 F. Supp. 599, 608 (N.D.N.Y. 1996) (explaining that discovery is not permitted into the "thought processes of [the] agency in deciding to claim a particular FOIA exemption"); see Murphy v. FBI, 490 F. Supp. 1134, 1136 (D.D.C. 1980) (stating that "discovery is limited to factual disputes . . . [and that] the thought processes of the agency in deciding to claim a particular FOIA exemption . . . are protected from disclosure").

[198] See, e.g., Lane v. Dep't of Interior, 523 F.3d 1128, 1135 (9th Cir. 2008) (noting that "this circuit has affirmed denials of discovery where, as here, the plaintiff's requests consisted of 'precisely what defendants maintain is exempt from disclosure to plaintiff pursuant to the FOIA'" (quoting Pollard v. FBI, 705 F.2d 1151, 1154 (9th Cir. 1983))); Tax Analysts v. IRS, 410 F.3d 715, 722 (D.C. Cir. 2005) (reasoning that "[Appellant's] demand for further inquiry into the substance of the documents would, if granted, turn FOIA on its head, awarding Appellant in discovery the very remedy for which it seeks to prevail in the suit"); Loc. 3, Int'l Bhd. of Elec. Workers v. NLRB, 845 F.2d 1177, 1179 (2d Cir. 1988) (finding plaintiff not entitled to discovery that would be tantamount to disclosure of contents of exempt

Discovery also has not been permitted when a plaintiff attempts to use a FOIA lawsuit as a means of questioning investigatory action taken by the agency or the underlying reasons for undertaking such investigations,[199] or uses discovery "as a fishing expedition [for] investigating matters related to separate lawsuits."[200]

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documents); Driggers v. United States, No. 11-229, 2011 WL 2883283, at *2 (N.D. Tex. July 18, 2011) (noting that to extent that plaintiff seeks contents of documents, and opinions and conclusions regarding that information, [plaintiff's] request "far exceeds the limited scope of discovery usually allowed in a FOIA case"); Laws.' Comm. for C.R. of S.F. Bay Area v. Dep't of Treasury, 534 F. Supp. 2d 1126, 1137 (N.D. Cal. 2008) (concluding that plaintiff's discovery requests are improper "because they seek information beyond merely investigating the scope of Treasury's search for responsive documents and instead seek under the guise of discovery, the same records which its FOIA requests ostensibly seek"); Johnson v. DOJ, No. 06-1248, 2007 U.S. Dist. LEXIS 57963, at *4 (W.D. Wis. Aug. 8, 2007) (finding discovery inappropriate because plaintiff "is seeking to obtain through discovery the very same information he sought to obtain by virtue of his FOIA request, namely substantive information related to his earlier trial on drug charges"); Fla. Immigrant Advoc. Ctr., 380 F. Supp. 2d at 1343 (observing that discovery is impermissible when plaintiff is seeking to obtain "information [that] would not be available to it under the FOIA and may be classified or otherwise protected by disclosure by statute"); cf. Immanuel v. Sec'y of Treasury, No. 94-884, 1995 WL 464141, at *1 (D. Md. Apr. 4, 1995) (rejecting discovery that would constitute "a fishing expedition into all the possible funds held by the Department of [the] Treasury which may fall within the terms of [plaintiff's] broad FOIA request. Such an expedition is certainly not going to come at the government's expense when it is evident that [plaintiff] seeks this information only for his own commercial use.").

[199] See, e.g., Shannahan v. IRS, 672 F.3d 1142, 1151 (9th Cir. 2012) (affirming district court's denial of "discovery requests for information concerning the nature and origins of documents" related to plaintiff's clients' prosecution for tax fraud); Flowers v. IRS, 307 F. Supp. 2d 60, 72 (D.D.C. 2004) (denying plaintiff 's discovery requests which were designed to "investigate the IRS' motives in selecting her for an audit"); Cecola v. FBI, No. 94-4866, 1995 WL 143548, at *3 (N.D. Ill. Mar. 31, 1995) (disallowing deposition concerning factual basis for assertion of Exemption 7(A), because "there is concern that the subject of the investigation not be alerted to the government's investigative strategy"); Williams v. FBI, No. 90-2299, 1991 WL 163757, at *3 (D.D.C. Aug. 6, 1991) ("An agency's rationale for undertaking an investigation of the Plaintiff is not the proper subject of FOIA discovery requests.").

[200] Changzhou Laosan Grp. v. U.S. Customs & Border Prot. Bureau, No. 04-1919, 2005 WL 913268, at *7 (D.D.C. Apr. 20, 2005) (denying plaintiff's request for discovery because "the purpose of FOIA is not to serve as a tool for obtaining discovery for an administrative forfeiture proceeding"); see, e.g., RNR Enters. v. SEC, 122 F.3d 93, 98 (2d Cir. 1997) (finding no abuse of discretion in district court denial of discovery propounded in FOIA case for need "in 'defense of [a] subpoena enforcement case . . . .'"); Al-Fayed v. CIA, No. 00-2092, slip op. at 17 (D.D.C. Dec. 11, 2000) (terming plaintiff's discovery request "a fishing expedition" and refusing to grant it); cf. Tannehill v. Dep't of the Air Force, No. 87-1335, 1987 WL 25657, at *2 (D.D.C. Nov. 12, 1987) (limiting discovery to determination of FOIA issues, not to underlying personnel decision).

In addition, courts have found "'curtailment of discovery'" appropriate when the court undertakes an in camera review.[201] Moreover, when discovery is sought prior to the time the government moves for summary judgment and submits its supporting affidavits and memorandum of law, courts will frequently deny the request or grant a protective order staying discovery on the grounds that it is premature.[202]

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[201] Ajluni, 947 F. Supp. at 608 (quoting Katzman v. Freeh, 926 F. Supp. 316, 320 (E.D.N.Y. 1996)); see Laborers' Int'l Union of N. Am. v. DOJ, 772 F.2d 919, 921 (D.C. Cir. 1984) (finding that "curtailment of discovery" was proper exercise of district court's discretion where "the court reasonably determined that an *in camera* examination was required of the sole document being sought by the FOIA requester-litigant in order for the court to make the substantive determination as to the pertinent statutory exemption's applicability"); Nat'l Whistleblower Ctr. v. HHS, 903 F. Supp. 2d 59, 71 (D.D.C. 2012) (finding that "[p]laintiffs have essentially obtained the discovery they sought because the [c]ourt agreed to conduct *in camera* review" and "[h]aving obtained that review, there is nothing else discovery could offer them"); Mehl v. EPA, 797 F. Supp. 43, 46 (D.D.C. 1992) (employing in camera review, rather than discovery, to resolve inconsistency between representations in Vaughn Index and agency's prior public statements).

[202] See, e.g., Lane, 523 F.3d at 1134-35 (holding that district court's "delay of discovery" with respect to plaintiff's FOIA claim until after summary judgment "was certainly within its discretion"); Miscavige v. IRS, 2 F.3d 366, 369 (11th Cir. 1993) ("The plaintiff's early attempt in litigation of this kind . . . to take discovery depositions is inappropriate until the government has first had a chance to provide the court with the information necessary to make a decision on the applicable exemptions."); Farese v. DOJ, No. 86-5528, slip op. at 6 (D.C. Cir. Aug. 12, 1987) (affirming denial of discovery filed prior to affidavits because discovery "sought to short-circuit the agencies' review of the voluminous amount of documentation requested"); Mullen v. U.S. Army Crim. Investigation Command, No. 10-262, 2011 WL 5870550, at *3-4 (E.D. Va. Nov. 22, 2011) (vacating court's previous scheduling order with respect to discovery and allowing government to first file its motion for summary judgment); Driggers, 2011 WL 2883283, at *2 (granting defendant's motion for protective order staying discovery until after defendant submits its motion for summary judgment and accompanying affidavits); Taylor v. Babbit, 673 F. Supp. 2d 20, 23-24 (D.D.C. 2009) (denying without prejudice plaintiff's request for discovery, and concluding that plaintiff may refile the request after government has submitted its renewed motion for summary judgment); Lion Raisins, Inc. v. USDA, No. 08-0358, 2009 WL 160283, at *3 (E.D. Cal. Jan. 21, 2009) (denying discovery request before summary judgment stage because "there is not enough information to conclusively determine, at this time, whether or to what extent discovery should be permitted, or whether the case or particular issues can be properly decided without discovery"). But see Long v. DOJ, 10 F. Supp. 2d 205, 210 (N.D.N.Y. 1998) (allowing discovery prior to government's motion for summary judgment but only to test adequacy of search).

Lastly, courts have held that in appropriate cases the government can conduct discovery against a FOIA plaintiff.[203]

[203] See, e.g., In re Engram, 966 F.2d 1442, 1442 (4th Cir. 1992) (per curiam) (unpublished table decision) (permitting discovery regarding how plaintiff obtained defendant's document as relevant to issue of waiver under Exemption 5); Weisberg v. DOJ, 749 F.2d 864, 868 (D.C. Cir. 1984) (ruling that agency "should be able to use the discovery rules in FOIA suits like any other litigant"); McSheffrey v. EOUSA, No. 98-0650, slip op. at 3 (D.D.C. Sept. 8, 1999) (recognizing that by conducting discovery against plaintiff, government could have confirmed receipt of agency's response to FOIA request), aff'd on other grounds, 13 F. App'x 3 (D.C. Cir. 2001). But see Kurz-Kasch, Inc. v. DOD, 113 F.R.D. 147, 148 (S.D. Ohio 1986) (indicating that "only . . . agencies of the government" can be subject to discovery in FOIA cases).