Waiver & Discretionary Disclosure

Waiver

The determination of whether an exemption has been waived through prior disclosure, or by express authorization from the party or parties affected by the disclosure, requires a careful analysis of the specific nature and circumstances of the prior disclosure.[1]

The Court of Appeals for the District of Columbia Circuit has held that "the government cannot rely on an otherwise valid exemption claim to justify withholding information that has been 'officially acknowledged' or is in the 'public domain.'"[2] The D.C. Circuit has found that ordinarily an "exemption can serve no purpose once information . . . becomes public."[3] Thus, an "official" disclosure has been found to waive

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[1] See Mobil Oil Corp. v. EPA, 879 F.2d 698, 700 (9th Cir. 1989) ("The inquiry into whether a specific disclosure constitutes waiver is fact specific."); Carson v. DOJ, 631 F.2d 1008, 1016 n.30 (D.C. Cir. 1980) ("[T]he extent to which prior agency disclosure may constitute a waiver of the FOIA exemptions must depend both on the circumstances of prior disclosure and on the particular exemptions claimed.").

[2] Davis v. DOJ, 968 F.2d 1276, 1279 (D.C. Cir. 1992); see, e.g., Bullock v. FBI, 577 F. Supp. 2d 75, 78 (D.D.C. 2008) (explaining that audio tapes played in open court and admitted into evidence "cannot be withheld under any FOIA exemption" because such information is in public domain (citing Cottone v. Reno, 193 F.3d 550, 554 (D.C. Cir. 1999)); Starkey v. Dep't of the Interior, 238 F. Supp. 2d 1188, 1193 (S.D. Cal. 2002) (ordering agency to disclose two records identical to documents in the public domain and available through local government office).

[3] Cottone, 193 F.3d at 555. But cf. Fitzgibbon v. CIA, 911 F.2d 755, 766 (D.C. Cir. 1990) (suggesting that "fact that [national security] information resides in the public domain does not eliminate the possibility that further disclosures can cause harm to intelligence sources, methods and operations"); Edmonds v. FBI, 272 F. Supp. 2d 35, 48 (D.D.C. 2003) (same).

an otherwise applicable FOIA exemption.[4] Significantly, the D.C. Circuit has held that for waiver to occur the specific information sought must have already been "'disclosed and preserved in a permanent public record.'"[5]

While the agency bears the burden of justifying application of any FOIA exemption, courts have consistently held that the FOIA plaintiff bears the burden of

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[4] See, e.g., New York Times Co. v. DOJ, 756 F.3d 100, 115 (2d Cir. 2014) (concluding that Exemptions 1 and 5 were waived for portions of document containing legal analysis, where numerous public statements regarding lawfulness of program provided context and where the government has made "public a detailed analysis of nearly all the legal reasoning contained in the withheld [document]"); Wolf v. CIA, 473 F.3d 370, 379-80 (D.C. Cir. 2007) (holding that agency waived ability to refuse to confirm or deny existence of responsive records pertaining to individual because agency head had discussed that individual during congressional testimony); Kimberlin v. DOJ, 921 F. Supp. 833, 835 (D.D.C. 1996) [hereinafter Kimberlin I] (holding exemption waived when material was released pursuant to "valid, albeit misunderstood, authorization"), aff'd in pertinent part & remanded in other part, 139 F.3d 944 (D.C. Cir. 1998); Quinn v. HHS, 838 F. Supp. 70, 75 (W.D.N.Y. 1993) (finding attorney work-product privilege waived where "substantially identical" information was previously released to requester); Myles-Pirzada v. Dep't of the Army, No. 91-1080, slip op. at 6 (D.D.C. Nov. 23, 1992) (finding waiver when agency official read report to requester over telephone); Shell Oil Co. v. IRS, 772 F. Supp. 202, 211 (D. Del. 1991) (finding waiver when agency employee read aloud entire draft document at public meeting); Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 569 (S.D.N.Y. 1989) (finding that "off-the-record" disclosure to press by agency official cannot be protected under Exemption 1).

[5] Cottone, 193 F.3d at 554; see also Bloomgarden v. DOJ, 874 F.3d 757 (D.C. Cir. 2017) (holding that "there [is no] record of the letter or material referring to the letter that was made public[]" and "[the requester's] waiver argument is therefore easily rejected"); Pike v. DOJ, 306 F. Supp. 3d 400, 410-12 (D.D.C. 2016) (finding that information that government publically disclosed in complaint in related case, "reproduced excerpts from the written transcript *verbatim*; therefore, it is clear that those specific excerpts do in fact exist in the public domain," but rejecting plaintiff's argument that this also waived audio recordings because "*written* transcripts of recordings do not contain information that is identical to the *audio* recorded version"); Judicial Watch, Inc. v. DOD, 963 F. Supp. 2d 6, 13 (D.D.C 2013) (holding that agency has not waived ability to withhold names because, while plaintiff "claims that the five redacted names at issue here are in the public domain, [plaintiff] has not 'point[ed] to specific information . . . that duplicates that being withheld,' much less a 'permanent public record' in which those names have been 'disclosed and preserved'"); North v. DOJ, 810 F. Supp. 2d 205, 207 (D.D.C. 2011) (noting that "'materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record'" (quoting Cottone, 193 F.3d at 554)); cf. Am. Civil Liberties Union v. DOJ, 640 Fed. Appx. 9 (D.C. Cir. 2016) (rejecting requester's request to remand case because government advised that it would publically release the withheld information in coming weeks and holding that "the question in FOIA cases is typically whether an agency improperly withheld documents at the time that it processed a FOIA request" and "[i]t is . . . not yet possible to determine whether the information the government plans to release will duplicate that being withheld").

demonstrating that the withheld information is publicly available.[6] As the D.C. Circuit has observed: "It is far more efficient, and obviously fairer, to place the burden of production on the party who claims that the information is publicly available."[7] In another case, the D.C. Circuit reasoned that the burden of production should fall upon the requester "because the task of proving the negative – that the information has not been revealed - might require the government to undertake an exhaustive, potentially limitless search."[8] If a plaintiff meets the burden of production, it is then "up to the government, if it so chooses, to rebut the plaintiff's proof" and demonstrate that the specific records are not publicly available.[9]

The D.C. Circuit has held that plaintiffs must establish three elements to prove that an official public disclosure has occurred: the information requested (1) is "as specific as the information previously released," (2) "match[es] the information previously

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[6] See, e.g., Assassination Archives & Research Ctr. v. CIA, 334 F.3d 55, 60 (D.C. Cir. 2003) (holding that plaintiff must show that previous disclosure duplicates specificity of withheld material); Pub. Citizen v. Dep't of State, 276 F.3d 634, 645 (D.C. Cir. 2002) [hereinafter Public Citizen II] (reaffirming that burden is on requester to establish that specific record in public domain duplicates that being withheld (citing Afshar v. Dep't of State, 702 F.2d 1125, 1133 (D.C. Cir. 1983) (same))); Cottone, 193 F.3d at 555 (holding that requester satisfied his burden by producing trial transcript indicating "precisely which tapes were, in fact, played" and officially disclosed in open court); Davoudlarian v. DOJ, No. 93-1787, 1994 WL 423845, at *3 (4th Cir. Aug. 15, 1994) (per curiam) (requester has burden of demonstrating that specific information was disclosed at trial); Davis v. DOJ, 968 F.2d 1276, 1280 (D.C. Cir. 1992) (concluding that plaintiff has burden of showing "permanent public record of the exact portions" of tapes played in court to establish waiver); Story of Stuff Project v. U.S. Forest Serv., 366 F. Supp. 3d 66 (D.D.C. 2019) (holding that plaintiff "'has the burden of showing that there is a permanent public record of the exact portions' it seeks" (quoting Davis, 968 F.2d at 1279)); Buzzfeed, Inc. v. DOJ, 344 F. Supp. 3d 396, 408 (D.D.C. 2018) (holding that plaintiffs had not met burden of pointing to information in public domain that matches withheld information); Elec. Frontier Found. v. DOJ, 890 F. Supp. 2d 35, 46 (D.D.C. 2012) (reiterating that plaintiff carries burden of "producing at least some evidence" of waiver); North, 810 F. Supp. 2d at 207 (acknowledging that plaintiff "bears the burden of showing that there is a permanent public record of the documents he seeks"); Am. Lawyer Media, Inc. v. SEC, 2002 U.S. Dist. LEXIS 16940, at *4 (D.D.C. Sept. 6, 2002) (holding that agency did not waive right to withhold portions of training manual because plaintiff had not shown that manual is in public domain); Shores v. FBI, 185 F. Supp. 2d 77, 86 (D.D.C. 2002) (finding plaintiff did not meet his burden of production when he "fail[ed] to demonstrate that any of the documents he seeks have actually entered the public domain").

[7] Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 342 (D.C. Cir. 1989) (expressing this requirement in context of reverse FOIA suit where agency sought to release records that submitter claimed were protected by Exemption 4).

[8] Davis, 968 F.2d at 1279.

[9] Cottone, 193 F.3d at 556.

disclosed," and (3) has "already . . . been made public through an official and documented disclosure."[10] The D.C. Circuit explained that these requirements ensure that the "information sought is truly public and that the requester receive no more than what is publicly available."[11]

Courts have found that when the information that is available to the public is less specific than the requested information, the agency may properly invoke an exemption to protect the more detailed information.[12] General public discussion of a subject by agency

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[10] Fitzgibbon, 911 F.2d at 765 (citing Afshar, 702 F. 2d at 1130-33); see, e.g., ACLU v. DOD, 628 F.3d 612, 620-21 (D.C. Cir. 2011) (same); Wolf, 473 F.3d at 378 (same); Public Citizen v. Dep't of State, 11 F.3d 198, 202 (D.C. Cir. 1995) [hereinafter Public Citizen I] (same).

[11] Cottone, 193 F.3d at 555; see also Higgins v. DOJ, 919 F. Supp. 2d 131, 147 (D.D.C. 2013) (explaining that "[s]peculation as to the content of the withheld information does not establish that it has entered the public domain"); Lewis v. DOJ, 609 F. Supp. 2d 80, 85 (D.D.C. 2009) (finding no waiver for documents disclosed at criminal trial because compelled disclosure to single party does not equal release into public domain); Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Representative, 505 F. Supp. 2d 150, 159 (D.D.C. 2007) (holding that "'while the logic of FOIA postulates that an exemption can serve no purpose once information . . . becomes public, we must be confident that the information sought is truly public and that the requestor receive no more than what is publicly available before we find a waiver'" (quoting Students Against Genocide v. Dep't of State, 257 F.3d 828, 836 (D.C. Cir. 2001))).

[12] See, e.g., Pickard v. DOJ, 713 Fed. Appx. 609 (9th Cir. 2018) ("[W]hat Plaintiff seeks . . . is not exactly the same information that was publicly disclosed, so FOIA exemption 7(D) applies."), cert. denied 139 S.Ct. 108 (2018); Marino v. DOJ, No. 16-5280, 2017 U.S. App. LEXIS 24658 (D.C. Cir. Dec. 6, 2017) (finding that "[the requester] . . . has failed to 'point to "specific" information' in the public domain that is 'identical to that being withheld'"); Assassination Archives & Research Ctr., 334 F.3d at 60 (holding that defendant has not waived ability to withhold certain documents because plaintiff "made no specific showing that any of the . . . disclosures revealed information that is 'as specific as' and 'match[es]' that included in the [withheld material]"); Isley v. EOUSA, No. 98-5098, 1999 WL 1021934, at *4 (D.C. Cir. Oct. 21, 1999) (holding that requester may gain access to information on basis of waiver only if it can point to specific information that is identical to that which is currently being withheld); Pub. Citizen I, 11 F.3d at 201 (holding "plaintiffs cannot simply show that similar information has been released, but must establish that a specific fact already has been placed in the public domain"); Davis, 968 F.2d at 1280 (rejecting plaintiff's assertion of waiver when plaintiff can only identify that some tapes were played in open court rather than point to exact tapes); Associated Press v. FBI, 265 F. Supp. 3d 82, 96 (D.D.C. 2017) (finding that no waiver occurred because agency " provided only [] general[ities] . . ., rather than the specific[s]" in testimony discussing agreement with technology vendor who assisted FBI in unlocking smartphone of suspected terrorist); Judicial Watch, Inc. v. NARA, 214 F. Supp. 3d 43, 57 (D.D.C. 2016) (rejecting plaintiff's waiver argument involving "paraphrased and quoted grand jury testimony" and finding that "plaintiff has not pointed to specific items of information in the public domain that sufficiently demonstrate that the information contained in the drafts of the proposed indictment are publicly available to warrant disclosure"), aff'd on other grounds, 876 F.3d

officials does not generally lead to a finding on waiver with respect to specific information or records.[13] Courts ordinarily do not penalize agency officials for sharing information concerning government activities with the public in general terms because "[t]o do so would give the Government a strong disincentive ever to provide its citizenry with briefings of any kind on sensitive topics."[14]

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346 (D.C. Cir. 2017); Am. Civil Liberties Union v. CIA, 109 F. Supp. 3d 220, 241 (D.D.C. 2015) (rejecting plaintiff's waiver argument because "[plaintiff] has merely pointed to alleged disclosures of vaguely similar information, but has failed to identify officially disclosed information that 'precisely track[s]' or 'duplicates' the information it has requested"), aff'd, 640 Fed. Appx. at 12 (finding that plaintiff failed to point to information that appears to duplicate or match that being withheld); Coastal Delivery Corp. v. U.S. Customs Serv., 272 F. Supp. 2d 958, 966 (C.D. Cal. 2003) (rejecting requester's waiver argument because withheld information was "merely the same category of information, not the exact information" as that previously disclosed); Doolittle v. DOJ, 142 F. Supp. 2d 281, 286 (N.D.N.Y. 2001) (holding that disclosure of confidential informant's identity during court proceedings did not waive government's ability to assert exemptions as to material provided by informant).

[13] See, e.g., Kimberlin v. DOJ, 139 F.3d 944, 949 (D.C. Cir. 1998) [hereinafter Kimberlin II] (holding that public official's acknowledgment of investigation of his actions and "vague reference to its conclusion" does not establish waiver of his privacy interests as to details of investigation); Afshar v. Dep't of State, 702 F.2d 1125, 1131-33 (D.C. Cir. 1983) (explaining that because "disclosure of the withheld information could cause damage not already caused by the information released," release of general comments is not waiver); Trea Senior Citizens League v. U.S. Dep't of State, 923 F. Supp. 2d 55, 64-65 (D.D.C. 2013) (finding no waiver regarding ancillary documents that explain meaning of publicly disclosed documents); Goodman v. U.S. Dep't of Labor, No. 01-515, 2001 WL 34039487, at *5 (D. Or. Dec. 21, 2001) (finding no waiver because agency official was merely describing disputed documents, rather than releasing them); Rothschild v. DOE, 6 F. Supp. 2d 38, 40-41 (D.D.C. 1998) (finding no waiver where requester failed to specify how public discussion of particular economic model revealed agency deliberative process with respect to project); Marriott Employees' Fed. Credit Union v. Nat'l Credit Union Admin., No. 96-478-A, 1996 WL 33497625, at *2 (E.D. Va. Dec. 24, 1996) ("Although the existence and general subject of the investigations is known to the public, there is no evidence in the record indicating that specific information concerning these investigations has been shared with unauthorized parties."). But see Wash. Post Co. v. U.S. Dep't of the Air Force, 617 F. Supp. 602, 605 (D.D.C. 1985) (finding that disclosure of document's conclusions waived privilege for body of document).

[14] Public Citizen I, 11 F.3d at 203; see also Bassiouni v. CIA, 392 F.3d 244, 247 (7th Cir. 2004) ("[I]f even a smidgen of disclosure required the CIA to open its files, there would be no smidgens."); Dow Jones & Co. v. DOJ, 880 F. Supp. 145, 151 (S.D.N.Y. 1995) (holding that agency's "limited, general and cursory discussions" of investigative subject matter during press conference did not waive Exemption 7(A)), vacated on other grounds, 907 F. Supp. 79 (S.D.N.Y. 1995).

Courts have also consistently found that release of certain documents does not waive the use of exemptions "as to other documents."[15] Further, the prior public disclosure must "match" the exempt information in question.[16] Any difference between

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[15] Mobil Oil, 879 F.2d at 701; see, e.g., Appleton Papers, Inc. v. EPA, 702 F.3d 1018, 1024 (7th Cir. 2012) (declining to find waiver for all documents where agency only used two documents to support consent decree); Rockwell Int'l. Corp. v. DOJ, 235 F.3d 598, 605 (D.C. Cir. 2001) (finding privilege not waived because "quoting portions of some attachments" is not inconsistent with desire to protect rest); Students Against Genocide, 257 F.3d at 835 (explaining that limited sharing of classified information with foreign government does not result in waiver); Hronek v. DEA, 7 F. App'x 591, 592 (9th Cir. 2001) (rejecting contention that DEA waived claimed exemptions where documents at issue merely "relate[d] to documents released to [plaintiff during] the course of his criminal conviction"); Housley v. DEA, No. 92-16946, 1994 WL 168278, at *2 (9th Cir. 1994) (explaining that disclosure of some information at criminal trial does not result in waiver as to other information); Cooper v. Dep't of Navy, 594 F.2d 484, 487-88 (5th Cir. 1979) (finding that Navy waived FOIA exemptions for portion of report that had been released, but portion not released was not waived); Ctr. for Biological Diversity v. OMB, No. C 07-04997, 2009 WL 1246690, at *11 (N.D. Cal. May 5, 2009) (rejecting plaintiff's assertion of waiver by release of related documents to third parties); Shinnecock Indian Nation v. Kempthorne, 652 F. Supp. 2d 345, 364 (E.D.N.Y. 2009) (disagreeing with plaintiff's assertion that voluntary disclosure of certain attorney work-product in redacted document compels disclosure of the entire document); Riquelme v. CIA, 453 F. Supp. 2d 103, 115 (D.D.C. 2006) (holding that declassification of records pertaining to Chilean and Argentinian involvement in regional intelligence initiative does not result in waiver as to possible Paraguayan involvement in same intelligence initiative).

[16] Fitzgibbon, 911 F.2d at 765; see, e.g., New York Times Co., 756 F.3d at 117 (finding waiver only for portions of document and holding that "loss of protection for the legal analysis . . . does not mean, however, that the entire document must be disclosed"); Isley, 1999 WL 1021934, at *4 (finding that disclosures made during trial do not waive government's right to withhold specific information because plaintiff failed to point to "specific information, identical to that being withheld" which is publicly available); Osen LLC v. Dep't of State, 360 F. Supp. 3d 258, 265 (S.D.N.Y. 2019) (finding that "the disclosed documents, while they may overlap to some degree with the subjects of conversation in the cables, do not relate the same discussions and, accordingly, by no means match or are as specific as the information redacted from the cables"); Mobley v. CIA, 924 F. Supp. 2d 24, 46 (D.D.C. 2013) (explaining that "[i]n the Glomar context, then, if the prior disclosure establishes the existence (or not) of records responsive to the FOIA request, the prior disclosure necessarily matches both the information at issue – the existence of records – and the specific request for that information"), aff'd, Mobley v. CIA, 806 F.3d 568, 584 (D.C. Cir. 2015); Edmonds v. DOJ, 405 F. Supp. 2d 23, 29 (D.D.C. 2005) (finding that agency's disclosure of classified documents to plaintiff's counsel in an interview did not amount to waiver of Exemption 1 because plaintiff fails to show that disclosed material "appears to duplicate" the material sought (citing Afshar, 702 F.2d at 1130)); Assassination Archives & Research Ctr. v. CIA, 177 F. Supp. 2d 1, 10 (D.D.C. 2001) (holding that plaintiff had not demonstrated that information at issue matched documents previously disclosed or released by CIA under JFK Act), aff'd, 334 F.3d 55 (D.C. Cir. 2003); Edmonds v. FBI, 272 F. Supp. 2d at 49 (explaining

the two may be found to be a sufficient basis for reaching the conclusion that no waiver has occurred.[17] This includes differences in the dates[18] and contents[19] of the documents.

To have been "officially" disclosed, information generally must have been disclosed under circumstances in which an authoritative government official allowed the specific

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that information being withheld is not identical to the quoted statements in the media attributed to the government).

[17] See, e.g., Wolf, 473 F.3d at 379-80 (distinguishing official acknowledgment of record's existence from official acknowledgment of record's content); Heeney v. FDA, 7 F. App'x 770, 772 (9th Cir. 2001) (concluding that "[b]ecause . . . FDA's previous disclosures involved unrelated files . . . the information [at issue] was properly withheld"); Nowak v. IRS, No. 98-56656, 2000 WL 60067, at *2 (9th Cir. Jan. 21, 2000) (determining that in order for plaintiff to establish waiver, he must establish that information in his possession originated from same documents that are subject of request); Kimberlin II, 139 F.3d at 949 (D.C. Cir. 1998) (holding that public acknowledgment of investigation of government official by that official and "vague reference to its conclusion" does not waive use of Exemption 7(C) to protect "details of the investigation"); Afshar, 702 F.2d at 1132 (finding that "withheld information is in some material respect different" from that which requester claimed had been released previously); Grandison v. DOJ, 600 F. Supp. 2d 103, 117 (D.D.C. 2009) (holding that "excerpts produced" do not suffice to establish waiver; requester must show that "complete copies of the depositions and answers to interrogatories requested under the FOIA have been disclosed and are preserved in a permanent public court record"); Hertzberg v. Veneman, 273 F. Supp. 2d 67, 81-82 (D.D.C. 2003) (holding that "selective" disclosure of some withheld material does not waive use of exemptions to protect similar, but undisclosed, information); Nat'l Sec. Archive Fund, No. 99-1160, slip op. at 14 (D.D.C. July 31, 2000) (reiterating that CIA's release of several declassified biographies of world leaders did not compel it to disclose whether it maintained other information on those world leaders); cf. Herrick v. Garvey, 200 F. Supp. 2d 1321, 1329 (D. Wyo. Dec. 12, 2000) (finding no waiver where record released before company reversed authorization for disclosure, differs from materials sought in request, which had not previously been released).

[18] See Fitzgibbon, 911 F.2d at 766 (finding no waiver when withheld information "pertain[s] to a time period later than the date of the publicly documented information").

[19] See Afshar, 702 F.2d at 1132 (concluding that public information is "in some material respect different" from requested records when public record does not mention foreign intelligence agency referenced in request); Ludlam v. U.S. Peace Corps, 934 F. Supp. 2d 174, 182 (D.D.C. 2013) (explaining that waiver argument fails when survey questions remain constant each year but survey responses necessarily change with different groups of respondents); ACLU v. DOD, 723 F. Supp. 2d 621, 630 (S.D.N.Y. 2010) (finding that agency has not waived its right to assert exemptions when the "information at issue is more extensive and more detailed than the previous disclosures"); Kay v. FCC, 867 F. Supp. 11, 20 (D.D.C. 1994) (finding that "[p]laintiffs have made no showing that the sources identified in the remaining documents are identical to the sources that have been disclosed").

information to be made public.[20] The D.C. Circuit has held that release by a former government official is not an official disclosure.[21] Moreover, the D.C. Circuit has held that release of information by one agency does not constitute an official release by another agency; to be an official disclosure, the release must have been made by "the agency from which the information is being sought."[22] Courts have also held that an agency does not

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[20] See, e.g., Mobley, 806 F.3d at 583 (finding that "a foreign government . . . cannot waive a federal agency's right to assert a FOIA exemption" and "disclosure by private litigants in a foreign court proceeding" is "insufficiently official to trigger waiver"); Wolf, 473 F.3d at 379-80 (holding that then CIA director's testimony before congressional subcommittee, which included reading from dispatch mentioning individual who was subject of request, waived CIA's ability to refuse to confirm or deny existence of responsive records pertaining to that individual); Nowak, 2000 WL 60067, at *2 (holding that "[i]n order to establish a waiver, the [plaintiff must be able to demonstrate that the previous disclosure was] authorized and voluntary"); Simmons v. DOJ, 796 F.2d 709, 712 (4th Cir. 1986) (finding that unauthorized disclosure does not constitute waiver); Lazardis v. U.S. Dep't of State, 934 F. Supp. 2d 21, 35 (D.D.C. 2013) (rejecting waiver argument where information was disclosed by child's mother, who did not have "any authority to speak or act on behalf of the government"); Skurow v. DHS, 892 F. Supp. 2d 319, 330 (D.D.C. 2012) (noting that statement from unnamed airport employee was not official or documented and therefore does not waive agency's ability to refuse to confirm or deny plaintiff's presence on watch list).

[21] See Afshar, 702 F.2d at 1133 (noting that books by former agency officials do not constitute "official and documented disclosure"); Military Audit Project v. Casey, 656 F.2d 724, 745 (D.C. Cir. 1981) (finding statements by former agency director in French edition of his book, especially when edition was not cleared by the agency, are "not an official governmental pronouncement"); CNN, Inc. v. FBI, 293 F. Supp. 3d 59, 73 (D.D.C. 2018) (finding that former FBI Director no longer served as FBI Director when he testified concerning memoranda and therefore he lacked any authority to make official releases on agency's behalf), rev'd and remanded on other grounds, No. 18-5041, 2018 WL 3868760 (D.C. Cir. Aug. 8, 2018); Armstrong v. Executive Office of the President, No. 89-142, slip op. at 16-17 (D.D.C. Aug. 29, 1995) (holding that book by former agency official is not official disclosure); Rush v. Dep't of State, 748 F. Supp. 1548, 1556 (S.D. Fla. 1990) (finding that author of agency documents, who had since left government service, did not have authority to waive Exemption 5 protection).

[22] Frugone v. CIA, 169 F.3d 772, 774 (D.C. Cir. 1999); Hunt v. CIA, 981 F.2d 1116, 1120 (9th Cir. 1992) (finding that agency not required to confirm or deny accuracy of information released by other government agencies regarding its interest in certain individuals); Abbotts v. NRC, 766 F.2d 604, 607 (D.C. Cir. 1985) (holding agency estimates not waived by prior public estimates from other agencies); Nielsen v. BLM, 252 F.R.D. 499, 519 (D. Minn. 2008) ("This Court will not construe the release of the . . . unredacted email by the Forest Service as waiver of the deliberative process privilege by the BLM, considering that it was not the BLM that released the document."); Talbot v. CIA, 578 F. Supp. 2d 24, 29 (D.D.C. 2008) (finding that "one agency's acknowledgment of a document (no matter its origin) does not constitute an official disclosure sufficient to negate the other agency's invocation of a FOIA exemption"); Van Atta v. Def. Intelligence Agency, No. 87-1508, 1988 WL 73856, at *2 (D.D.C. July 6, 1988) (same); cf. Edwards v. EOUSA, 436 F. App'x 922, 923 (11th Cir. 2011)

waive its ability to use FOIA exemptions when an agency official merely promises to make a disclosure.[23]

When disclosure occurs by an employee making an unauthorized disclosure or a "leak," courts have ruled that no waiver has occurred.[24] As one court has phrased it, finding waiver in such circumstances would only lead to "exacerbation of the harm created by the leaks."[25]

If a disclosure was made by an authoritative government official, but was made because of agency carelessness or mistake, courts generally find that these disclosures are not equivalent to waiver.[26] However, if such a release has occurred and the agency has

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(ruling that disclosure of record by local law enforcement entity does not waive application of FOIA exemption for that information).

[23] See Hertzberg, 273 F. Supp. 2d at 82 (concluding that agency official's assurances that information would be released did not waive Exemption 5); Anderson v. U.S. Dep't of the Treasury, No. 98-1112, 1999 WL 282784, at *4 (W.D. Tenn. Mar. 24, 1999) (finding that mere promise of an IRS agent to disclose document to FOIA requester did not constitute waiver, because "[n]othing in [the] FOIA . . . make[s] such a statement binding and irrevocable").

[24] See, e.g., Hanson v. U.S. Agency for Int'l Dev., 372 F.3d 286, 294 (4th Cir. 2004) (finding no waiver when attorney consulting for federal agency unilaterally released documents that he authored during course of attorney-client relationship between him and agency); Edmonds v. FBI, 272 F. Supp. 2d at 49 (holding that because statements were made by anonymous sources, agency may withhold identical information because "'release would amount to official confirmation or acknowledgment of [its] accuracy"' (quoting Wash. Post v. DOD, 766 F. Supp. 1, 9 (D.D.C. 1991))); Trans-Pac. Policing Agreement v. U.S. Customs Serv., No. 97-2188, 1998 WL 34016806, at *4 (D.D.C. May 14, 1998) (finding no waiver from "isolated and unauthorized" disclosures that were not "in accordance with [agency] regulations or directions"), rev'd & remanded on other grounds, 177 F.3d 1022 (D.C. Cir. 1999); LaRouche v. DOJ, No. 90-2753, 1993 WL 388601, at *7 (D.D.C. June 25, 1993) (explaining that fact that some aspects of grand jury proceeding were leaked to press has "no bearing" on FOIA litigation); cf. NARA v. Favish, 541 U.S. 157, 171 (2004) (implicitly accepting concept that leak and subsequent publication of death-scene photograph of body of presidential aide did not prevent agency from invoking Exemption 7(C) to protect privacy of surviving family members).

[25] Murphy v. FBI, 490 F. Supp. 1138, 1142 (D.D.C. 1980).

[26] See, e.g., Mobley, 806 F.3d at 584 (rejecting requester's contention that FOIA response letter waived Exemption 1 Glomar and finding that "[a]lthough a FOIA response could [qualify as an official disclosure], a simple clerical mistake in FOIA processing cannot[;] [a] contrary conclusion would be inconsistent with the deference granted to agency determinations in the national security context"); Ford v. West, No. 97-1342, 1998 WL 317561, at *3 (10th Cir. June 12, 1998) (rejecting claim that defendant's inadvertent release of names constituted waiver); Cooper, 594 F.2d at 485 (explaining that unauthorized release arising from negligence does not mean that FOIA exemptions have been waived); Bartko v.

not taken affirmative steps to remedy the disclosure, some courts have determined that the agency's actions constitute waiver.[27] Similarly, an agency's failure to heed its own regulations regarding circulation of internal agency documents has been found sufficient to warrant a finding of waiver.[28]

When an agency shares information with Congress, without making an official disclosure of the information to the public, courts have ruled that this exchange of information does not result in waiver.[29] As the D.C. Circuit has noted, "Congress . . .

DOJ, 167 F. Supp. 3d 55, 68 (D.D.C. 2016) (finding that agency's inadvertent disclosure of individual names does not constitute waiver of privacy interests because "'privacy interest at stake belongs to the individual, not the government agency'" (quoting Petrucelli v. Dep't of Justice, 153 F.Supp.3d 355, 360, 362, (D.D.C. 2016))); Azmy v. DOD, 562 F. Supp. 2d 590, 605 n.12, 606 (S.D.N.Y. 2008) (explaining that "accidental or inadvertent disclosure of material that should have been withheld pursuant to exemption 1" does not declassify material; thus, such information need not be released); Hersh & Hersh v. HHS, No. C 06-4234, 2008 WL 901539, at *7 (N.D. Cal. Mar. 31, 2008) (explaining that "documents made publicly available on the docketing system were inadvertently produced [and] cannot form the basis for a waiver argument"); Garcia v. DOJ, 181 F. Supp. 2d 356, 377 (S.D.N.Y. 2002) (ruling that inconsistent redactions of names of confidential sources does not waive government's ability to invoke Exemption 7(D)); Billington v. DOJ, 11 F. Supp. 2d 45, 66 (D.D.C. 1998) (finding no waiver of Exemption 7(D) protection in case involving more than 40,000 documents where agency mistakenly released one document to previous requester); Pub. Citizen Health Research Group v. FDA, 953 F. Supp. 400, 404-06 (D.D.C. 1996) (finding no waiver where material accidently released and information not disseminated by requester); Kay, 867 F. Supp. at 23-24 (explaining that inadvertent disclosure of documents caused entirely by clerical error has no effect on remaining material at issue); Astley v. Lawson, No. 89-2806, 1991 WL 7162, at *8 (D.D.C. Jan. 11, 1991) (holding that inadvertent placement of documents into public record did not waive exemption when it was remedied immediately upon agency's awareness of mistake).

[27] See Memphis Publ'g Co. v. FBI, 879 F. Supp. 2d 1, 13 (D.D.C. 2012) (finding waiver after inadvertent release where no steps were taken to remediate disclosure); Caton v. Norton, No. Civ. 04-Civ-439-JD, 2005 WL 3116613 (D.N.H. Nov. 21, 2005) (finding waiver when agency took minimal remedial steps once it realized plaintiff had reviewed exempt information); cf. Eden Isle Marina, Inc. v. U.S., 89 Fed. Cl. 480, 506-08 (2009) (finding attorney work-product protection waived by inadvertent disclosure of document in response to FOIA request when agency did not take reasonable steps to prevent disclosure and to promptly correct error) (non-FOIA case).

[28] See Shermco Indus., Inc. v. Sec'y of the Air Force, 613 F.2d 1314, 1320 (5th Cir. 1980) (explaining that "[w]aiver occurs when an agency makes its information more broadcast than is allowed by its own regulations"); see also Cooper, 594 F.2d at 486 (explaining that "Navy did not adhere to its own regulations pertaining to the dissemination of information," resulting in waiver for portions disclosed).

[29] See Rockwell, 235 F.3d at 604-05 (finding no waiver when agency provided congressional subcommittee with agency report); Fla. House of Representatives v. U.S. Dep't of Commerce, 961 F.2d 941, 946 (11th Cir. 1992) (holding no waiver resulting from disclosure

carve[d] out for itself a special right of access to privileged information not shared by others" and so when it receives information pursuant to that authority, "no waiver occurs."[30] One court has found that sharing information with the Government Accountability Office (an arm of Congress) does not result in waiver.[31]

In addition, when an agency has disclosed a document under limited and controlled conditions, courts have found no waiver has occurred.[32] By contrast, the Court of Appeals for the Ninth Circuit has held that even though an agency was compelled to

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to Congress under threat of Congressional subpoena); Heggestad v. DOJ, 182 F. Supp. 2d 1, 12-13 (D.D.C. 2000) (finding no waiver of deliberative process or attorney work-product privileges where information was disclosed to chair of subcommittee); Edmonds, 272 F. Supp. 2d at 49 (affirming that disclosure of information to congressional committee does not constitute waiver).

[30] Murphy v. Dep't of the Army, 613 F.2d 1151, 1155-56 (D.C. Cir. 1979); see also Rockwell, 235 F.3d at 604 (finding no waiver for documents provided to congressional oversight subcommittee, in accordance with FOIA's specific congressional-disclosure provision). See generally FOIA Update, Vol. V, No. 1 at 3-4 (distinguishing between individual members of Congress and Congress as an institutional entity, which exercises its authority through its committee chairs).

[31] Shermco Indus., Inc., 613 F.2d at 1320 (concluding that forwarding of legal memoranda to GAO did not result in waiver because forwarding was "no more than the submission of the agency's legal opinion in defense of a bid protest" and waiver “does not occur when an agency whose action is being reviewed forwards to the reviewing agency legal memoranda in support of its position”).

[32] See, e.g., Students Against Genocide, 257 F.3d at 836 (holding that no waiver occurred when documents were released to Security Council delegates because "[f]or the public domain doctrine to apply, the specific information sought must have already been 'disclosed and preserved in a permanent public record'" (citing Cottone, 193 F.3d at 554); Jordon v. Dep't of Labor, 273 F. Supp. 3d 214, 227 (D.D.C. 2017) (holding that "[the submitter's] judicially compelled disclosure of the unredacted versions of its emails to [an administrative law judge] for in camera review did not waive its claim to [Exemption 4]"), aff'd on other grounds, No. 18-5128, 2018 WL 5819393 (Oct. 19, 2018); Abrams v. Office of the Comptroller of the Currency, No. 05-2433, 2006 WL 1450525 at *5 (N.D. Tex. May 25, 2006) (concluding that agency did not waive Exemption 8 protection when it released information to limited number of people in conjunction with administrative subpoena, as required by agency regulations) aff'd, 243 F. App'x 4 (5th Cir. 2007); Silverberg v. HHS, No. 89-2743, 1991 WL 633740, at *3 (D.D.C. June 14, 1991) (ruling that fact that individual who is subject of drug test by particular laboratory has statutory right of access to its performance and testing information does not render such information publicly available); Allnet Commc'n Servs. v. FCC, 800 F. Supp. 984, 989 (D.D.C. 1992) (finding no waiver where information was made available pursuant to strict confidentiality agreements), aff'd, No. 92-5351 (D.C. Cir. May 27, 1994).

disclose a document pursuant to a statute, if it did not impose any restrictions on the recipient of the information, that disclosure constituted a waiver.[33]

Circulation of a document within an agency has been found not to waive an exemption, particularly when the dissemination is limited.[34] Similarly, disclosure among federal agencies,[35] or to an advisory committee during a closed session,[36] has been permitted without a waiver consequence. Further, properly controlled disclosures to state

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[33] Watkins v. Customs and Border Protection, 643 F.3d 1189, 1197 (9th Cir. 2011) (concluding statutorily required, but "no-strings-attached disclosure" to aggrieved trademark owner "voids any claim to confidentiality and constitutes a waiver of Exemption 4").

[34] See Direct Response Consulting Serv. v. IRS, No. 94-1156, 1995 WL 623282, at *5 (D.D.C. Aug. 21, 1995) (attorney-client privilege not waived when documents sent to other divisions within agency); Chemcentral/Grand Rapids Corp. v. EPA, No. 91-C-4380, 1992 WL 281322, at *7 (N.D. Ill. Oct. 6, 1992) (no waiver of attorney-client privilege when documents in question were circulated to only those employees who needed to review legal advice contained in them); Murphy v. Tenn. Valley Auth., 571 F. Supp. 502, 507 (D.D.C. 1983) (finding that limited circulation among "staff members participating in the contract settlement process does not constitute a waiver").

[35] See Chilivis v. SEC, 673 F.2d 1205, 1211-12 (11th Cir. 1982) (rejecting plaintiff's argument that agency waived Exemption 5 by disclosing records that are protected by attorney work-product and deliberative process privileges to other agencies); Shermco, 613 F.2d at 1320 (stating "the mere fact that one federal agency releases intra-agency communications to another federal agency cannot by itself imply the waiver of Exemption 5" and deliberative process privilege).

[36] See Aviation Consumer Action Project v. Washburn, 535 F.2d 101, 107 (D.C. Cir. 1976) (affirming agency withholding because "[t]he policy behind exemption five is particularly applicable to advisory committees, whose sole function is to advise the agency"); Adair v. Mine Safety & Health Admin., No. 08-1573, 2009 WL 9070947, at *5 (D.D.C. Sept. 23, 2009) (holding that defendant's disclosure of requested transcript to review team that was appointed and controlled by defendant "does not negate defendant's reliance on Exemption 7(A)").

or local law enforcement officials,[37] or to state attorney generals,[38] have been found not to waive FOIA exemption protection.

Some courts have held that selective disclosure "waives any otherwise applicable FOIA exemption."[39] However, the District Court for the District of Columbia has rejected such a position finding that the D.C. Circuit "has been clear that the enforcement of an otherwise applicable exemption is only pointless when the withheld information is 'truly public.'"[40]

Moreover, the Court of Appeals for the Fifth Circuit rejected a waiver argument based on selective disclosure when the information at issue was personal information covered by Exemption 6.[41] The Fifth Circuit held that while it shared concerns "regarding

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[37] See Gen. Elec. Co. v. EPA, 18 F. Supp. 2d 138, 143 (D. Mass. 1998) (concluding that when federal agencies consult with state agencies in formulating federal policy, disclosures in consultation process do not constitute waiver); Kansi v. DOJ, 11 F. Supp. 2d 42, 45 (D.D.C. 1998) (declaring that "'disclosure' from a federal law enforcement agency to a state prosecutor has not been held to be a waiver"); Erb v. DOJ, 572 F. Supp. 954, 956 (W.D. Mich. 1983) (holding that disclosure of FBI report to local prosecutor did not cause waiver of Exemption 7(A)).

[38] See Interco, Inc. v. FTC, 490 F. Supp. 39, 44 (D.D.C. 1979) (disclosure to state attorney generals would constitute limited, "nonpublic release[] for legislative or law enforcement purposes").

[39] Natural Res. Def. Council v. DOD, 442 F. Supp. 2d 857, 865-66 (C.D. Cal. 2006) (finding that "'FOIA does not permit selective disclosure of information only to certain parties'" (quoting Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1082, 1088 (9th Cir. 1997)); N.D. ex rel. Olson v. Andrus, 581 F.2d 177, 182 (8th Cir. 1978) (finding "selective disclosure" of record to one party in litigation to be "offensive" to FOIA and sufficient to prevent agency's subsequent invocation of Exemption 5 against other party to litigation); see also Watkins v. U.S. Bureau of Customs & Border Prot., 643 F.3d 1189, 1198 (9th Cir. 2011) (holding that "when an agency freely discloses to a third party confidential information covered by a FOIA exemption without limiting the third party's ability to further disseminate the information then the agency waives the ability to claim an exemption to a FOIA request for the disclosed information").

[40] Judicial Watch, Inc. v. DOD, 963 F. Supp. 2d 6, 15 (D.D.C. 2013) (holding that disclosure of information to private party "would not be enough to establish waiver in this circuit" (citing Students Against Genocide, 257 F.3d at 836 (holding that enforcement of otherwise applicable exemption is only pointless when withheld information is "truly public") (quoting Cottone, 193 F.3d at 554)); see also Brown v. Dep't of State, No. 317 F. Supp. 3d 370, 375 (D.D.C. 2018) (holding that there is "nothing in the record to suggest that this limited disclosure [to the private attorney for the former Secretary of State at a single outside law firm] resulted in the information becoming known to anyone else, let alone the general public").

[41] Sherman v. U.S. Dep't of the Army, 244 F.3d 357, 363-64 (5th Cir. 2001) ("only the individual whose informational privacy interests are protected by exemption 6 can effect a

selective disclosure with respect to those exemptions that protect the government's interest in non-disclosure of information, [it] conclude[d] that this concern, and the related waiver analysis, are not implicated when a government agency relies on exemption 6 to prevent disclosure of personal information."[42] Consistent with the protections afforded individual privacy by the Supreme Court, the Fifth Circuit concluded that "only the individual whose informational privacy interests are protected . . . can effect a waiver of those privacy interests when they are threatened by a[] FOIA request."[43] Other courts have similarity declined to find waiver when the information at issue was personal information.[44]

There have been occasions where the individuals whose interests are at stake in the documents have authorized release or made a disclosure themselves, thereby waiving otherwise applicable privacy exemptions.[45]

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waiver of those privacy interests"); cf. McSheffrey v. EOUSA, No. 02-5239, 2003 WL 179840, at *1 (D.C. Cir. Jan. 24, 2003) (affirming that individuals who provided personal information to prison officials during visit with inmate did not waive personal privacy protection), reh'g denied, No. 02-5239 (D.C. Cir. May 1, 2003).

[42] Sherman, 244 F.3d at 363.

[43] Id.

[44] See Prison Legal News v. EOUSA, 628 F.3d 1243, 1249 (10th Cir. 2011) (discussing family's privacy interest in video and photographs of decedent and finding that: "neither the government's conduct in introducing the records [at trial] nor its failure to have them admitted under seal is relevant to a waiver analysis"); Lankin Law Firm, P.C. v. FTC, 352 F.3d 1122, 1124 (7th Cir. 2003) (holding FTC cannot waive individual's privacy interest by "whatever it does or fails to do"); Ford, 1998 WL 317561, at *3 (finding that "defendant's inadequate redactions do not operate to waive the personal privacy interests of the individuals discussed in the investigative file"); Higgins, 919 F. Supp. 2d at 147 (explaining that "the privacy interests belong to the individuals, not the government agency"); Blackwell v. FBI, 680 F. Supp. 2d 79, 94 n.6 (D.D.C. 2010) (noting that agency did not waive individuals' privacy interest by inadvertently releasing some names when disclosing records); Judicial Watch v. Reno, No. 00-0723, 2001 WL 1902811, at *7 (D.D.C. Mar. 30, 2001) (holding that privacy interest belongs to individual whose interest is at stake and agency cannot surrender that interest). But see Iowa Citizens for Cmty. Improvement v. USDA, 256 F. Supp. 2d 946, 955 (S.D. Iowa Aug. 13, 2002) (noting that "common sense dictates that prior disclosure – either by the government, the news media or private individuals – does lessen an individual's expectation of privacy"); Kimberlin I, 921 F. Supp at 836 (finding that "[o]nce information has been disclosed pursuant to the authority of a high government official, there is no basis to argue that a privacy interest continues to exist").

[45] See, e.g., Kimberlin I, 921 F. Supp. at 835 (holding exemption waived when material was released pursuant to "valid, albeit misunderstood, authorization"), Schwartz v. DOJ, No. 94-7476, 1995 WL 675462, at *8 (S.D.N.Y. Nov. 14, 1995) (holding that requester waived privacy interest in presentence report by voluntarily disclosing it in court filings), aff'd, 1996 WL 335757 (2d Cir. 1996); Key Bank of Me., Inc. v. SBA, No. 91-362, 1992 U.S. Dist. LEXIS

Finally, courts have rejected waiver arguments based on requesters' claims that they know, or can discern the withheld information.[46]

Discretionary Disclosure

The Supreme Court has recognized that the FOIA's exemptions are themselves discretionary, not mandatory.[47] As a result, agencies may make "discretionary

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22180, at *25-26 (D. Me. Dec. 31, 1992) (finding that subject has specifically waived any privacy interest she might have in requested information by authorizing agency to disclose all records concerning her); cf. Providence Journal Co. v. U.S. Dep't of the Army, 981 F.2d 552, 567 (1st Cir. 1992) (finding source statements not entitled to Exemption 7(D) protection when individuals expressly waived confidentiality); Blanton v. DOJ, 63 F. Supp. 2d 35, 49 (D.D.C. 1999) (finding that FBI confidential sources waived their privacy interests by writing books about their experiences as confidential informants). But see Lazardis, 934 F. Supp. 2d at 35 (declining to find waiver of privacy interests even when information at issue was "widely and very publicly disseminated by the very persons whose 'personal privacy'" agency sought to protect).

[46] See Schiffer v. FBI, 78 F.3d 1405, 1411 (9th Cir. 1996) (explaining that requester's "personal knowledge" has no bearing on request); Judicial Watch Inc. v. Dep't of State, No. 18-300, 2019 WL 1166757, at *4 (D.D.C. Mar. 13, 2019) (rejecting plaintiff's argument that exemptions were waived because of media reports); Evans v. Legislative Affairs Div., ATF, No. 12-00641, 2013 WL 708941, at *3 (D.S.C. Feb. 26, 2013) (confirming that exemption is not waived when identities of witnesses and agents became known to plaintiff during plaintiff's trial), aff'd, 548 Fed. Appx. 72 (4th Cir. 2013); Whalen v. U.S. Marine Corps, 407 F. Supp. 2d 54, 60 (D.D.C. 2005) (holding that government did not waive exemptions even though plaintiff might surmise redacted information by using knowledge obtained from nonfiction books); Rubis v. DEA, No. 01-1132, slip op. at 7 (D.D.C. Sept. 30, 2002) (reaffirming that exemption is not waived by fact that plaintiff might well already know identities of individuals); Am. Lawyer Media, Inc. v. SEC, 2002 U.S. Dist. LEXIS 16940, at *4 (D.D.C. Sept. 6, 2002) (rejecting plaintiff's assertion that he was previously allowed to review withheld documents and holding that agency did not waive right to withhold portions of training manual because plaintiff has not shown that manual is in public domain); Valencia-Lucena v. DEA, No. 99-0633, slip op. at 7 (D.D.C. Feb. 8, 2000) ("The fact that plaintiff can guess whose names have been deleted from the released documents does not act as a waiver to disclosure."); LaRouche v. DOJ, No. 90-2753, slip op. at 11-12 (D.D.C. Nov. 17, 2000) (finding that Exemption 7(D) protection for confidential sources who provided information was not waived just because plaintiff might well identify sources from documents disclosed by different agency); Tanks v. Huff, No. 95-568, 1996 U.S. Dist. LEXIS 7266, at *10 (D.D.C. May 28, 1996) (holding that requester's knowledge of identities of informants who testified against him does not affect ability of agency to invoke exemption).

[47] See Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979) (reasoning that application of agency FOIA policies may require "some balancing and accommodation," and noting that "Congress did not design the FOIA exemptions to be mandatory bars to disclosure"); Bartholdi Cable Co. v. FCC, 114 F.3d 274, 282 (D.C. Cir. 1997) (observing that "FOIA's

disclosures" of exempt information, as a matter of their administrative discretion, where they are not otherwise prohibited by law from doing so.[48] Such a disclosure prohibition can apply, for example, to personal information covered by Exemptions 6 and 7(C) of the FOIA to the extent the information falls within the protective coverage of the Privacy Act of 1974.[49] Specifically, the Privacy Act contains a prohibition on disclosure of information not required to be released under the FOIA.[50] Thus, if Privacy Act-protected information falls within a FOIA exemption, a discretionary release of such information is not appropriate.[51]

In a case addressing the issue of the impact of discretionary disclosures on the ability of an agency to protect other, similar documents, the Court of Appeals for the Ninth Circuit surveyed the law of waiver under the FOIA and found "no case . . . in which the release of certain documents waived the exemption as to other documents" and noted that "[o]n the contrary, [courts] generally have found that the release of certain documents waives FOIA exemptions only for those documents released."[52] As the District Court for

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exemptions simply permit, but do not require, an agency to withhold exempted information").

[48] See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1334 n.1 (D.C. Cir. 1987) (explaining that agency's FOIA disclosure decision can "be grounded either in its view that none of the FOIA exemptions applies, and thus that disclosure is mandatory, or in its belief that release is justified in the exercise of its discretion, even though the data fall within one or more of the statutory exemptions."); see also FOIA Update, Vol. VI, No. 3, at 3 ("OIP Guidance: Discretionary Disclosure and Exemption 4") ("[A]gencies generally have discretion under the Freedom of Information Act to decide whether to invoke applicable FOIA exemptions.").

[49] 5 U.S.C. § 552a (2012 & Supp. V 2017).

[50] 5 U.S.C. § 552a(b)(2).

[51] See DOD v. FLRA, 964 F.2d 26, 30-31 n.6 (D.C. Cir. 1992) (discussing Privacy Act's limitations on discretionary FOIA disclosure); see also OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government (posted 2009, updated 8/6/2014).

[52] Mobil Oil Corp. v. EPA, 879 F.2d 698, 701 (9th Cir. 1989) (opining that implying waiver for other documents "could tend to inhibit agencies from making any disclosures other than those explicitly required by law," which in turn "would tend to thwart the [FOIA's] underlying statutory purpose"); see also Students Against Genocide v. Dep't of State, 257 F.3d 828, 835-36 (D.C. Cir. 2001) (explaining that "releasing some photographs" does not mean government has waived its right to withhold other photographs); Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) ("[D]isclosure of a similar type of information in a different case does not mean that the agency must make its disclosure in every case."); Stein v. DOJ, 662 F.2d 1245, 1259 (7th Cir. 1981) (holding that exercise of discretion should waive no right to withhold records of "similar nature"); ACLU v. DOD, 752 F. Supp. 2d 361, 372-373 (S.D.N.Y. 2010) (concluding that "discretionary disclosure does not constitute a waiver for the rest of the requested information"); Ctr. for Biological Diversity v. OMB, No. 07-

the District of Columbia has phrased it: "A contrary rule would create an incentive against voluntary disclosure of information."[53] To find otherwise "would create the untenable result of discouraging the government" from making such disclosures.[54]

04997, 2009 WL 1246690, at *11 (N.D. Cal. May 5, 2009) (finding that "'waiver of exemption for these documents based on the release of related documents . . . would be contrary to both the case law on waiver and to the policies underlying FOIA'" (quoting Mobil Oil, 879 F. 2d at 700)); Ctr. for Int'l Environmental Law v. Office of the U.S. Trade Representative, 505 F. Supp. 2d 150, 158-59 (D.D.C. 2007) (holding that prior disclosure of "similar information does not suffice" as waiver); Enviro Tech Int'l. Inc. v. EPA, No. 02-C-4650, slip op. at 15 (N.D. Ill. Mar. 11, 2003) (stating that "courts have refused to find that the discretionary disclosure of a document effectuates a waiver of other related documents").

[53] Mehl v. EPA, 797 F. Supp. 43, 47 (D.D.C. 1992); see also Williams & Connolly v. SEC, 662 F.3d 1240, 1245 (D.C. Cir. 2011) (holding that to uphold a waiver theory would "deter agencies from voluntarily honoring FOIA requests"); Military Audit Project v. Casey, 656 F.2d 724, 754 (D.C. Cir. 1981) (reasoning that agency should not be penalized for declassifying and releasing documents during litigation; otherwise, there would be "a disincentive for an agency to reappraise its position and, when appropriate, release documents previously withheld"); Schoenman v. FBI, No. 04-2202, 2006 WL 1126813, at * 19 (D.D.C. Mar. 31, 2006) ("Courts have refrained from accepting legal arguments that would create disincentives for agencies to take actions that would benefit requesters overall."); Stone v. FBI, 727 F. Supp. 662, 666 (D.D.C. 1990) (reasoning that agencies should be free to make "voluntary" disclosures without concern that they "could come back to haunt" them in other cases).

[54] Ctr. for Biological Diversity, 2009 WL 1246690, at *11.