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

* This section primarily includes case law, guidance and statutes up until April 30, 2024. While some legal authorities after this date may be included, for a comprehensive accounting of all recent court decisions, please visit OIP's Court Decisions webpage (https://www.justice.gov/oip/court-decisions-overview). Please also note that this section generally only includes subsequent case history in the citations when it is relevant to the point for which the case is being cited.

[1] See 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, 1015 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."); Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Com., No. 18-03022, 2020 WL 4732095, at *2 (D.D.C. Aug. 14, 2020), appeal dismissed, No. 20-5307, 2021 WL 672384 (D.C. Cir. Feb. 8, 2021) (stressing that "the focus [of the waiver analysis] is not whether the recipient reviewed the disclosed information; instead, it is whether a disclosure occurred in the first place").

[2] Davis v. DOJ, 968 F.2d 1276, 1279 (D.C. Cir. 1992); accord ACLU v. DOD, 628 F.3d 612, 620 (D.C. Cir. 2011) ("If the government has officially acknowledged information, a FOIA plaintiff may compel disclosure of that information even over an agency's otherwise valid exemption claim."); see, e.g., Bullock v. FBI, 577 F. Supp. 2d 75, 78 (D.D.C. 2008)

D.C. Circuit has further held that ordinarily an "exemption can serve no purpose once information . . . becomes public."[3] Thus, an "official" disclosure has been found to waive 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]

(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).

[4] See, e.g., N.Y. Times Co. v. DOJ, 756 F.3d 100, 116 (2d Cir. 2014) (concluding that Exemptions 1 and 5 were waived for portions of document containing legal analysis, where numerous public statements by "senior Government officials" 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) (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); Laws. Comm. for Hum. Rts. 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, 761 (D.C. Cir. 2017) (holding that "there [is no] record of the letter or any material referring to the letter that was made public[]" and "[the requester's] waiver argument is therefore easily rejected"); Reps. Comm. for Freedom of the Press v. FBI, No. 17-1701, 2022 WL 13840088, at *9 (D.D.C. Oct. 21, 2022) (finding waiver for information posted on and then removed from agency-controlled webpage, but captured and posted on third-party website, because "[defendant] cannot cite a single case for the proposition that only a website's original URL can be in the public domain for FOIA purposes"); Pike v. DOJ, 306 F. Supp. 3d 400, 410-12 (D.D.C. 2016) (finding that information that government publicly 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

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 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

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do not contain information that is identical to the *audio* recorded version"); Jud. Watch, Inc. v. DOD, 963 F. Supp. 2d 6, 13 (D.D.C. 2013) (holding that agency had 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. ACLU v. DOJ, 640 F. App'x 9, 12-13 (D.C. Cir. 2016) (rejecting request to remand case because government advised that it would publicly 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").

[6] See, e.g., Assassination Archives & Rsch. 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) (reaffirming that burden is on requester to identify "'specific information in the public domain' that might 'duplicate that being withheld'" (quoting Afshar v. Dep't of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983))); Cottone, 193 F.3d at 555 (holding that requester satisfied the 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) (confirming that plaintiff failed to meet "burden of satisfying that specific documents were in the public domain" and is not entitled to records concerning witness interviews where plaintiff cited "only a list of exhibits" and "portions of an . . . agent's deposition"); 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); Reclaim the Recs. v. VA, No. 18-8449, 2020 WL 1435220, at *6-7 (S.D.N.Y. Mar. 24, 2020) (holding that plaintiff "met its burden of production" because it "is requesting the same information, at the same level of specificity as was disclosed [to another requester], and that information remains accessible to the public"); Story of Stuff Project v. U.S. Forest Serv., 366 F. Supp. 3d 66, 75 (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 1280)); 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); Am. Law. Media, Inc. v. SEC, No. 01-1967, 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).

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 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[s] 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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[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.

[10] Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990) (citing Afshar, 702 F.2d at 1133); see, e.g., Knight First Amend. Inst. v. CIA, 11 F.4th 810, 815 (D.C. Cir. 2021) (citing Fitzgibbon, 911 F.2d at 765); ACLU v. DOD, 628 F.3d 612, 620-21 (D.C. Cir. 2011) (citing Afshar, 702 F.2d at 1133).

[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 Env't Law v. Off. of the U.S. Trade Rep., 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 F. App'x 609, 610 (9th Cir. 2018) ("[W]hat Plaintiff seeks . . . is not exactly the same information that was publicly disclosed, so FOIA exemption 7(D)

officials does not generally lead to a finding of waiver with respect to specific information or records.[13] Courts ordinarily do not penalize agency officials for sharing information

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applies."); Marino v. DOJ, No. 16-5280, 2017 WL 6553398, at *1 (D.C. Cir. Dec. 6, 2017) (concluding that "[the requester] . . . has failed to 'point to "specific" information' in the public domain that is 'identical to that being withheld'" (quoting Davis, 968 F.2d at 1280)); Assassination Archives & Rsch. Ctr. v. CIA, 334 F.3d 55, 60-61 (D.C. Cir. 2003) (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 requester can point to specific information that is identical to that which is currently being withheld); Pub. Citizen v. Dep't of State, 11 F.3d 198, 201 (D.C. Cir. 1993) [hereinafter Pub. Citizen I] (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); Hettena v. CIA, No. 22-877, 2024 WL 1239705, at *7-8 (D.D.C. Mar. 22, 2024) (rejecting argument that agency officially acknowledged information in requested report because "there are 'substantive differences' between [agency] general public disclosure and the 'comprehensive' information contained in the report" (quoting ACLU, 628 F.3d at 621)); 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); Jud. 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 346 (D.C. Cir. 2017); ACLU 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 F. App'x 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., N.Y. Times Co. v. DOJ, 939 F.3d 479, 497 (2d Cir. 2019) (finding that references to United States Attorney's Office reports in public statements made by the Attorney General, even "with an intent to explain [a] decision not to prosecute," "do not waive the work product privilege over the documents"); Kimberlin v. DOJ, 139 F.3d 944, 949 (D.C. Cir. 1998) [hereinafter Kimberlin II] (holding that public official's acknowledgment of investigation of their actions and "vague reference to its conclusion" does not establish

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]

Further, the prior public disclosure must "match" the exempt information in question.[15] Any difference between the two may be found to be a sufficient basis for

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waiver of their 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 for ancillary documents that explain meaning of publicly disclosed agreement); 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's deliberative process with respect to project); Marriott Emps.' Fed. Credit Union v. Nat'l Credit Union Admin., No. 96-478, 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] Pub. 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).

[15] Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990); see, e.g., Knight First Amend. Inst. at Columbia Univ. v. USCIS, 30 F.4th 318, 332-33 (2d Cir. 2022) (rejecting plaintiff's argument that "enterprising researcher[s]" could potentially reconstruct information withheld under Exemption 7(E) using certain information that defendant had made public and holding that "[e]ven if all of this might conceivably be achieved, the necessity of the reconstruction exercise itself demonstrates that the information in question is not in the public domain"); N.Y. Times Co. v. DOJ, 756 F.3d 100, 117 (2d Cir. 2014) (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' that is publicly available" (quoting Davis, 968 F.2d at 1280)); Hettena, 2024 WL 1239705, at *8 (finding previous agency public disclosure to be "not 'as specific' as [requested report]" and therefore "does not 'match' the information therein" (quoting Fitzgibbon, 911 F.2d at 765)); Osen LLC v. Dep't of State, 360 F. Supp. 3d 258, 265 (S.D.N.Y. 2019) (concluding that "the disclosed documents, while they may overlap

to some degree with the subjects of conversation in the cables, do not relate [to] 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'" (quoting Wolf v. CIA, 473 F.3d 370, 379 (D.C. Cir. 2007))), aff'd, 806 F.3d 568 (D.C. Cir. 2015); Edmonds v. DOJ, 405 F. Supp. 2d 23, 30 (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 (quoting Afshar, 702 F.2d at 1130)); Edmonds v. FBI, 272 F. Supp. 2d 35, 49 (D.D.C. 2003) (explaining that information being withheld is not identical to quoted statements in media attributed to government); Assassination Archives & Rsch. 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).

reaching the conclusion that no waiver has occurred.[16] This includes differences in the dates[17] and contents[18] of the documents. Courts have also consistently found that

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[16] See, e.g., Wolf, 473 F.3d at 379-80 (distinguishing official acknowledgment of record's existence from official acknowledgment of record's contents); Heeney v. FDA, 7 F. App'x 770, 770 (9th Cir. 2001) (concluding that "[b]ecause the 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) (concluding that, to show waiver, plaintiff must establish that information in their possession originated from same documents that are subject of request); Kimberlin II, 139 F.3d at 949 (holding that public acknowledgment of investigation of government official by that same 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); Hettena, 2024 WL 1239705, at *7 (concluding after in camera review "that there are 'substantive differences' between [previous agency] public disclosure and the 'comprehensive' information contained in the report [requested]" (quoting ACLU, 628 F.3d at 621)); ACLU v. DOD, 435 F. Supp. 3d 539, 556 (S.D.N.Y. 2020) (noting that "an official acknowledgement does not compel the disclosure of other classified information where the prior disclosure is only similar to, or partially overlaps with, the withheld information"); 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. Protect Democracy Project, Inc. v. NSA, 10 F.4th 879, 891 (D.C. Cir. 2021) (finding that government's publication of Mueller Report did not waive Presidential Communications Privilege as to memorandum concerning Russia investigation because the two "are not a complete match; the memo contains details and statements that were not disclosed in the report" and rejecting requester's argument that government must disclose any parts of memorandum that matches facts revealed in report because "[i]t would in effect require segregability through waiver analysis – a result in tension with [the court's] holding that [the] memo is either privileged in full or not at all").

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

[18] 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); Hettena, 2024 WL 1239705, at *8 (noting that previous agency public disclosure referenced by plaintiff "does not disclose any portions of the [] report [they] now seeks"); ACLU, 435 F. Supp. 3d at 563-64 (holding that comments made at press briefing "generally discuss[ing] categories of military action without

"release of certain documents" does not waive the use of exemptions "as to other documents."[19]

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providing details as to the time, place, or manner of specific instances of such action" did not waive protection of email chains discussing specific "military tactics and strategy"); 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").

[19] Mobil Oil Corp. v. EPA, 879 F.2d 698, 701 (9th Cir. 1989); see, e.g., Jud. Watch, Inc. v. DOJ, No. 22-5209, 2023 WL 4397354, at *4 (D.C. Cir. July 7, 2023) (holding that FBI agents' affidavits filed in criminal case do not waive exemptions as to records of communications underlying affidavits); N.Y. Times Co. v. DOJ, 939 F.3d 479, 496 (2d Cir. 2019) (affirming that waiver of the applicable privilege "with respect to [certain] parts of the documents does not automatically . . . waive[] the privilege with respect to the [entirety of the] documents"); Appleton Papers, Inc. v. EPA, 702 F.3d 1018, 1024-25 (7th Cir. 2012) (declining to find waiver for all documents where agency used only portions of documents to support consent decrees); Students Against Genocide, 257 F.3d 828, 835-36 (D.C. Cir. 2001) (rejecting plaintiff's argument "that by releasing some photographs . . . the government waived its right to withhold any others"); 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"); 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 a desire to keep the rest secret"); Housley v. DEA, No. 92-16946, 1994 WL 168278, at *2 (9th Cir. May 4, 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 not for portions not released); Council on Am.-Islamic Rels.-Conn. v. USCIS, 669 F. Supp. 3d 64, 82 (D. Conn. 2023) (finding no waiver of Presidential Communications Privilege regarding certain immigration report because plaintiffs had not shown that any related agency actions, guidance, administration officials' tweets, op-eds, press releases, rallies and public testimony, contained information as specific as or matching report's contents); Shinnecock Indian Nation v. Kempthorne, 652 F. Supp. 2d 345, 363-69 (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, 114-16 (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).

However, in Citizens for Responsibility & Ethics in Washington v. DOJ,[20] the D.C. Circuit held that where an agency admitted to previously releasing specific drug-concentration and expiration-date information, a remand was necessary to determine whether the *very same information* was still being withheld in other records, and if so, to ensure disclosure of any such information where it could be reasonably segregated from within the other records.[21] On remand, the District Court for the District of Columbia found that "[w]hen identical *information* appears in a 'reasonably segregable portion[]' of a withheld record, the government must release the public portions of the document with redactions."[22]

To have been "officially" disclosed, information generally must have been disclosed under circumstances in which an authoritative government official allowed the specific information to be made public.[23] The D.C. Circuit has held that release by a former government official is not an official disclosure.[24] Moreover, the D.C. Circuit has held

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[20] 58 F.4th 1255 (D.C. Cir. 2023).

[21] Id. at 1271-72.

[22] Citizens for Resp. & Ethics in Wash. v. DOJ, 728 F. Supp. 3d 113, 127 (D.D.C. 2024) (quoting Citizens for Resp. & Ethics in Wash., 58 F.4th at 1273).

[23] See, e.g., Mobley v. CIA, 806 F.3d 568, 583-84 (D.C. Cir. 2015) (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"); Edwards v. EOUSA, 436 F. App'x 922, 923 (11th Cir. 2011) (ruling that disclosure of record by local law enforcement entity does not waive application of FOIA exemption for that information); Wolf v. CIA, 473 F.3d 370, 379-80 (D.C. Cir. 2007) (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 where agency affidavits confirm that disclosure was not done "in an official capacity"); Cooper v. DOJ, No. 99-2513, 2022 WL 602532, at *50 (D.D.C. Mar. 1, 2022) (finding that no waiver occurred when city government released same documents); Lazaridis v. 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).

[24] See Afshar, 702 F.2d at 1133 (noting that books by former agency officials do not constitute "official and documented disclosure"); Mil. Audit Project v. Casey, 656 F.2d 724, 742-44 (D.C. Cir. 1981) (finding statements by former agency director, in French edition of former director's book, especially when edition was not cleared by agency, are "not an

that release of information by one agency does not constitute an official disclosure by another agency; to be an official disclosure, the release must have been made by "the agency from which the information is being sought."[25] Courts have also held that an

official governmental pronouncement"); Am. Ctr. for L. & Just. v. NSA, 474 F. Supp. 3d 109, 122 (D.D.C. 2020) (finding that disclosures by former officials are not official disclosures and are thus insufficient to establish waiver); 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 lacked any authority to make official releases), rev'd & remanded on other grounds, No. 18-5041, 2018 WL 3868760 (D.C. Cir. Aug. 8, 2018); Klayman v. CIA, 170 F. Supp. 3d 114, 124 (D.D.C. 2016) (noting that statements by former officials did not constitute official acknowledgments sufficient to waive Glomar response); Armstrong v. Exec. Off. 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, cannot waive Exemption 5 protection); cf. ACLU of Mass. v. CIA, No. 22-11532, 2023 WL 3394485, at *10 (D. Mass. May 11, 2023) (finding that, while strict waiver might not have occurred, defendants had not adequately explained how multiple former administration officials' public statements on subject at issue may have undercut defendant's Exemption 7(A) Glomar response).

[25] Frugone v. CIA, 169 F.3d 772, 774 (D.C. Cir. 1999); accord Mobley, 806 F.3d at 583 ("Disclosure by one federal agency does not waive another agency's right to assert a FOIA exemption."); see also Knight First Amend. Inst. at Columbia Univ. v. CIA, 11 F.4th 810, 818 (D.C. Cir. 2021) (holding that "statements made by the State Department spokesman do not foreclose the intelligence agencies from asserting their Glomar responses"); Hunt v. CIA, 981 F.2d 1116, 1120 (9th Cir. 1992) (finding that agency was not required to confirm or deny accuracy of information released by other government agencies regarding agency's interest in certain individuals); Abbotts v. NRC, 766 F.2d 604, 607-08 (D.C. Cir. 1985) (finding that withholding of agency estimates was not waived by prior public releases of estimates from other agencies); Hettena v. CIA, No. 22-877, 2024 WL 1239705, at *6-7 (D.D.C. Mar. 22, 2024) (holding that CIA's alleged review of DOD report prior to its public release by DOD did not constitute official acknowledgment by CIA); 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"); Nielsen v. U.S. Bureau of Land Mgmt., 252 F.R.D. 499, 519-20 (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 to [the previous requester]."); cf. ACLU of Mass., 2023 WL 3394485, at *9 ("While it is certainly true that 'a third party agency's disclosures cannot waive the asserting agency's right to a Glomar response, . . . such disclosures may well shift the factual groundwork upon which a district court assesses the merits of such a response.'" (quoting Florez v. CIA, 829 F.3d 178, 186-89 (2d Cir. 2023))).

agency does not waive its ability to use FOIA exemptions when an agency official merely promises to make a disclosure.[26]

When disclosure occurs by an employee making an unauthorized disclosure or a "leak," courts have ruled that no waiver has occurred.[27] As one court has phrased it, finding waiver in such circumstances would only lead to "exacerbation of the harm created by the leaks."[28]

Even if a disclosure is made by an authoritative government official, if it is made because of agency carelessness or mistake, courts generally find that such a disclosure is not equivalent to waiver.[29] However, if such a disclosure has occurred and the agency has

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[26] See Hertzberg v. Veneman, 273 F. Supp. 2d 67, 82 (D.D.C. 2003) (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").

[27] See, e.g., Hanson v. USAID, 372 F.3d 286, 294 (4th Cir. 2004) (finding no waiver where 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 35, 49 (D.D.C. 2003) (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'" (citation omitted)); 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 "the fact that aspects of grand jury proceedings have been leaked to the public has no bearing on this 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); Osen LLC v. Dep't of State, 360 F. Supp. 3d 258, 265 (S.D.N.Y. 2019) ("Acknowledging the existence and scope of a leak [by a government official] does not have the same effect as officially disclosing the leaked information.").

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

[29] 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 v. Dep't of the Navy, 594 F.2d 484, 488 (5th Cir. 1979) (explaining generally that unauthorized release of a "document would not in the normal

not taken affirmative steps to remedy the disclosure once it is discovered, some courts have determined that the agency's actions constitute waiver.[30] Similarly, an agency's

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course operate as waiver"); Nat'l Press Club Journalism Inst. v. ICE, No. 18-2932, 2023 WL 9001337, at *18 (D.D.C. Dec. 28, 2023) (agreeing with agency "that the inadvertent disclosure of a few documents does not prevent the agency from later asserting that information contained in those documents is exempt . . . under FOIA"); Hum. Rts. Def. Ctr. v. U.S. Park Police, No. 19-1502, 2023 WL 5561602, at *6 (D.D.C. Aug. 29, 2023) (finding that "names are [still] covered by Exemption 6" where agency "inadvertently disclosed the names of two claimants" and noting that courts may "bar dissemination of information inadvertently disclosed in FOIA proceedings"); Blackwell v. FBI, 680 F. Supp. 2d 79, 94 n.6 (D.D.C. 2010) (noting that agency did not waive individuals' privacy interests when it "inadvertently released some names when it produced documents"); 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 [E]xemption 1" does not declassify material; thus, such information need not be released); Hersh & Hersh v. HHS, No. 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 redaction of names of confidential sources does not waive government's ability to invoke Exemption 7(D)); Pub. Citizen Health Rsch. Grp. v. FDA, 953 F. Supp. 400, 404-06 (D.D.C. 1996) (finding no waiver where material accidentally released and information not disseminated by requester); Kay v. FCC, 867 F. Supp. 11, 23-24 (D.D.C. 1994) (explaining that inadvertent disclosure of documents, which was "entirely the result of 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).

[30] See Nat'l Press Club Journalism Inst., 2023 WL 9001337, at *19 (concluding that agency "may assert that all or part of the mistakenly disclosed documents are exempt . . . under FOIA" because "once it realized its error, [agency] reprocessed and reproduced redacted versions of those same documents"); Amiri v. Nat'l Sci. Found., 664 F. Supp. 3d 1, 16 (D.D.C. 2021) (finding no waiver of Exemption 6 where agency "took prompt steps to protect the unredacted documents from public view"), aff'd on other grounds, No. 21-5241, 2022 WL 1279740 (D.C. Cir. Apr. 28, 2022); Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Com., No. 18-03022, 2020 WL 4732095, at *2 (D.D.C. Aug. 14, 2020), appeal dismissed, No. 20-5307, 2021 WL 672384 (D.C. Cir. Feb. 8, 2021) (finding several ways agencies may show attempts were made to remedy a disclosure including "investigating the disclosure, contacting the individuals involved, or otherwise attempting to ensure that the privileged materials were not further disclosed"); Reclaim the Recs. v. VA, No. 18-8449, 2020 WL 1435220, at *7 (S.D.N.Y. Mar. 24, 2020) (finding waiver of Exemption 6 occurred, despite inadvertent release, where information has been available on a third party website for nine years and agency "[made] no attempt to strip . . . such information" from the website); 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. 04-439, 2005 WL 3116613, at *8 (D.N.H. Nov. 21, 2005) (finding waiver when agency took minimal remedial steps once it realized plaintiff had reviewed exempt

failure to heed its own regulations regarding circulation of internal agency documents has been found sufficient to warrant a finding of waiver.[31]

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.[32] As the D.C. Circuit has noted, "Congress . . . 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."[33] One court has found that sharing information with the Government Accountability Office (an arm of Congress) does not result in waiver.[34] Moreover, "disclosures by members of Congress" are "not official agency disclosures" for purposes of waiver.[35]

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information); Scott v. PPG Indus., Inc., 142 F.R.D. 291, 294 (N.D. W.Va. 1992) (finding no waiver of deliberative process for information where, upon discovery, agency promptly made an effort to remedy "the release [which] was inadvertent").

[31] 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 "the Navy did not adhere to its own regulations pertaining to the dissemination of information," resulting in waiver for portions disclosed).

[32] See Rockwell Int'l Corp. v. DOJ, 235 F.3d 598, 604-05 (D.C. Cir. 2001) (confirming that no waiver occurred where agency provided congressional subcommittee with agency report); Fla. House of Representatives v. U.S. Dep't of Com., 961 F.2d 941, 946 (11th Cir. 1992) (holding no waiver resulting from disclosure to Congress under threat of congressional subpoena); Edmonds v. FBI, 272 F. Supp. 2d 35, 49 (D.D.C. 2003) (affirming that disclosure of information to congressional committee does not constitute waiver); Heggestad v. DOJ, 182 F. Supp. 2d 1, 12-13 (D.D.C. 2000) (concluding there was no waiver of deliberative process or attorney work-product privileges where information was disclosed to chair of congressional subcommittee).

[33] Murphy v. Dep't of the Army, 613 F.2d 1151, 1155-56 (D.C. Cir. 1979); see also Rockwell Int'l Corp., 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 ("OIP Guidance: Congressional Access Under FOIA") (distinguishing between individual members of Congress and Congress as an institutional entity, which exercises its authority through its committee chairs).

[34] See Shermco Indus., Inc., 613 F.2d at 1320-21 (concluding that forwarding of legal memoranda to Government Accountability Office 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").

[35] Am. Ctr. for L. & Just. v. NSA, 474 F. Supp. 3d 109, 122 (D.D.C. 2020) (observing that "[a] contrary rule would almost certainly raise significant constitutional problems"); see also

In addition, when an agency has disclosed a document under limited and controlled conditions, courts have found no waiver has occurred.[36] By contrast, the Court of Appeals for the Ninth Circuit has held that even though an agency was compelled to disclose a document pursuant to a statute, if it did not impose any restrictions on the recipient of the information, then that disclosure constituted a waiver.[37]

Circulation of a document within an agency has been found not to waive an exemption, particularly when the dissemination is limited.[38] Similarly, disclosure among

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BuzzFeed, Inc. v. FBI, 613 F. Supp. 3d 453, 472 (D.D.C. 2020) (holding that "the Senate Judiciary Committee's disclosure of an executive summary did not constitute waiver of any extant Executive Branch privilege under FOIA's Exemption 5" absent an official agency disclosure).

[36] See, e.g., Students Against Genocide v. Dep't of State, 257 F.3d 828, 836 (D.C. Cir. 2001) (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'" (quoting Cottone v. Reno, 193 F.3d 550, 554 (D.C. Cir. 1999))); Jordan v. U.S. Dep't of Lab., 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 (D.C. Cir. Oct. 19, 2018); Abrams v. Off. 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 issuing administrative subpoena, as required by agency regulations), aff'd, 243 F. App'x 4 (5th Cir. 2007); Allnet Commc'n Servs. v. FCC, 800 F. Supp. 984, 989 (D.D.C. 1992) (finding no waiver where information was made available during agency proceeding "pursuant to strict confidentiality agreements"), aff'd, No. 92-5351 (D.C. Cir. May 27, 1994); 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).

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

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

federal agencies,[39] or to an advisory committee during a closed session,[40] has been permitted without a waiver consequence. Further, properly controlled disclosures to state or local law enforcement officials,[41] or to state attorneys general,[42] have been found not to waive FOIA exemption protection.

Some courts have held that selective disclosure "waives any otherwise applicable FOIA exemption."[43] 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

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[39] See Chilivis v. SEC, 673 F.2d 1205, 1211-12 (11th Cir. 1982) (rejecting plaintiff's argument that agency waived Exemption 5 "by disclosing documents to other agencies" that are protected by attorney work-product and deliberative process privileges); Shermco Indus., 613 F.2d at 1320 (reasoning that "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).

[40] See Aviation Consumer Action Project v. Washburn, 535 F.2d 101, 107 (D.C. Cir. 1976) (upholding agency withholding because "[t]he policy behind exemption five is particularly applicable to advisory committees" composed of members of the public "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 agency "does not negate defendant's reliance on Exemption 7(A)").

[41] See Gen. Elec. Co. v. EPA, 18 F. Supp. 2d 138, 142-43 (D. Mass. 1998) (concluding that when federal agencies consult with state agencies in formulating and implementing 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 "the limited release of the [FBI investigative] report" to local prosecutor did not cause waiver of Exemption 7(A)).

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

[43] Nat. Res. Def. Council v. DOD, 442 F. Supp. 2d 857, 866 (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))); see also Watkins v. CBP, 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"); 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 the purposes underlying the FOIA" and sufficient to prevent agency's subsequent use of Exemption 5 against other party to litigation).

public.'"[44] Finally, courts have rejected waiver arguments based on requesters' claims that they know or can discern the withheld information.[45]

Exemption-Specific Waiver Determinations

In evaluating whether waiver has occurred, courts have analyzed agency use of exemptions and made exemption-specific determinations. A finding of waiver in the Exemption 1 context is "quite strict," and "this 'insistence on exactitude recognizes the Government's vital interest in information relating to national security and foreign

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[44] Jud. 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" (quoting Students Against Genocide v. Dep't of State, 257 F.3d 828, 836 (D.C. Cir. 2001))); see also 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 v. Reno, 193 F.3d 550, 555 (D.C. Cir. 1999))); Brown v. Dep't of State, 317 F. Supp. 3d 370, 375 (D.D.C. 2018) (finding that "[t]here 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"); cf. Gun Owners of Am., Inc. v. FBI, No. 22-3379, 2024 WL 195829, at *4 (D.D.C. Jan. 18, 2024) (finding that disclosure of portion of video at criminal trial does not waive applicability of Exemption 7(E) to remainder of video because although disclosure "'risked circumvention [of law] to some degree,'" "[d]isclosure of additional footage . . . would provide a 'holistic view'" of defendant's surveillance operations (quoting agency declaration)).

[45] See Schiffer v. FBI, 78 F.3d 1405, 1411 (9th Cir. 1996) (explaining that requester's "personal knowledge of much of the information contained in the requested documents" has no bearing on request); Kowal v. DOJ, No. 18-938, 2021 WL 3363445, at *5 (D.D.C. Aug. 3, 2021) (rejecting plaintiff's attempt to show waiver by demonstrating that she could determine identities of trial witnesses and finding that plaintiff did not meet her burden to show that "identical documents and information that [defendant] seeks to withhold . . . were made public"); Evans v. 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 F. App'x 72 (4th Cir. 2013); Whalen v. U.S. Marine Corps, 407 F. Supp. 2d 54, 59 (D.D.C. 2005) (holding that government did not waive exemptions even though plaintiff might surmise redacted information by using information from nonfiction books); Am. Law. Media, Inc. v. SEC, No. 01-1967, 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 has not shown that manual is in public domain, even if plaintiff had been allowed to view manual during a conference); Tanks v. Huff, No. 95-568, 1996 WL 293531, at *6 (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); cf. Jud. Watch, Inc. v. U.S. Dep't of State, 373 F. Supp. 3d 142, 148-49 (D.D.C. 2019) (rejecting plaintiff's argument that exemptions were waived because of "certain media reports" and because "'everyone knows about the . . . investigation'" in the records requested (quoting plaintiff's motion)).

affairs'"[46] (For further discussion concerning waiver in the Exemption 1 context, see Exemption 1, Waiver of Exemption 1 Protection.)

In the context of the attorney-client privilege of Exemption 5, the D.C. Circuit has found that "[d]isclosure 'by the holder' of the privilege can give rise to a waiver," emphasizing that "it 'is axiomatic that the attorney-client privilege is held by the *client*.'"[47] (For further discussion concerning waiver in the attorney-client privilege context, see Exemption 5, Attorney-Client Privilege.)

Additionally, concerning the use of Exemption 6, the Court of Appeals for the Fifth Circuit rejected a waiver argument based on selective disclosure.[48] Although the Fifth Circuit acknowledged a concern "regarding selective disclosure with respect to those exemptions that protect *the government's interest* in non-disclosure of information," it concluded that "this concern, and the related waiver analysis, are not implicated when a government agency relies on [E]xemption 6 to prevent disclosure of personal information."[49] Consequently, the court 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."[50] Other courts have similarly declined to find waiver when personal information was at issue.[51]

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[46] ACLU v. DOJ, 640 F. App'x 9, 11 (D.C. Cir. 2016) (quoting Wolf v. CIA, 473 F.3d 370, 378 (D.C. Cir. 2007) (internal quotation marks omitted)); see also Students Against Genocide, 257 F.3d at 835 (holding that prior release of photographs similar to those withheld did not waive Exemption 1 because fact that "some 'information resides in the public domain does not eliminate the possibility that further disclosures can cause harm to [national security]'" (quoting Fitzgibbon v. CIA, 911 F.2d 755, 766 (D.C. Cir. 1990))).

[47] Nat'l Sec. Couns. v. CIA, 969 F.3d 406, 411-12 (D.C. Cir. 2020) (concluding that "disclosures concerning the two [legal] opinions at issue, then, did not effect a waiver of the attorney-client privilege, at least absent any indication (absent here) that [the government attorney] was acting on behalf of the client when making the disclosures" (quoting In re Subpoenas Duces Tecum, 738 F.2d 1367, 1369 (D.C. Cir. 1984) & plaintiff's declaration)).

[48] Sherman v. U.S. Dep't of the Army, 244 F.3d 357, 367 (5th Cir. 2001) ("Though the Army may previously have been less diligent in preventing unnecessary public disclosure of soldiers' SSNs, such disclosure cannot waive the soldiers' privacy interest in them."); 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).

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

[50] Id. at 363-64 (observing that "[t]he Supreme Court has explained that the privacy interest at stake . . . belongs to the individual, not the agency holding the information").

[51] 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 concluding that "neither

There have, however, been occasions where the individuals whose personal interests are at stake in the documents have authorized release or made a disclosure themselves, thereby waiving otherwise applicable privacy exemptions.[52] (For further

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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"); Lakin Law Firm, P.C. v. FTC, 352 F.3d 1122, 1124 (7th Cir. 2003) (holding "the FTC cannot waive individual consumers' privacy interests [by] whatever it does or fails to do"); Ford v. West, No. 97-1342, 1998 WL 317561, at *3 (10th Cir. June 12, 1998) (holding that "defendant's inadequate redactions do not operate to waive the personal privacy interests of the individuals discussed in the investigative file"); Colo. Wild Pub. Lands v. U.S. Forest Serv., 691 F. Supp. 3d 149, 169 (D.D.C. 2023) (rejecting plaintiff's contention that selective disclosure of privacy-protected information occurred, but also finding that, regardless, "the private privacy interests protected under Exemption 6 are not waived through selective disclosure"); Amiri v. Nat'l Sci. Found., 664 F. Supp. 3d 1, 8-9 (D.D.C. 2021) (finding that no waiver occurred when agency took remedial measures, specifically requesting that requester return, destroy, or sequester the records upon learning of inadvertent release, and regardless, no waiver could have occurred in this instance because "an agency's inadvertent disclosure of individual names and other PII rarely waives privacy interests under Exemption 6 because those interests belong to the individuals, not to the agency"), aff'd on other grounds, No. 21-5241, 2022 WL 1279740 (D.C. Cir. Apr. 28, 2022); Bartko v. 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. DOJ, 153 F. Supp. 3d 355, 360, 362, (D.D.C. 2016))); Higgins v. DOJ, 919 F. Supp. 2d 131, 147 (D.D.C. 2013) (explaining that "the privacy interests [of federal, state, and local law enforcement agents and officers] belong to the individuals, not to the government agency" and holding that agency properly relied upon Exemption 7(C) to withhold agent names); Jud. Watch, Inc. 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]"); cf. Hum. Rts. Def. Ctr. v. U.S. Park Police, No. 19-1502, 2023 WL 5561602, at *6 (D.D.C. Aug. 29, 2023) (ordering plaintiff "not to disclose, disseminate, or make use of the [] names" in response to agency claim that "it inadvertently disclosed the names of two claimants and seeks to claw [them] back" because the names "are covered by Exemption 6, and there is no discernible public interest in having the names of private citizens disclosed").

[52] See, e.g., 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, No. 95-6423, 1996 WL 335757 (2d Cir. June 6, 1996); Key Bank of Me., Inc. v. U.S. Small Bus. Admin., No. 91-362, 1992 U.S. Dist. LEXIS 22180, at *25-26 (D. Me. Dec. 31, 1992) (holding that subject has specifically waived any privacy interest she might have in requested information by authorizing agency to disclose all records concerning her); cf. Iowa Citizens for Cmty. Improvement v. USDA, 256 F. Supp. 2d 946, 955 (S.D. Iowa 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" and "a person's privacy interest is lessened, if not entirely eliminated, when the person who is identified by or is the subject of the information

discussion concerning waiver in the Exemption 6 context, see Exemption 6, Privacy Assurances and Waivers.)

Courts have also found that any "judicial effort to create a 'waiver' exception to [E]xemption 7(D)'s language runs afoul of the statute's 'intent to provide "workable" rules.'"[53] (For further discussion concerning waiver in the Exemption 7(D) context, see Exemption 7(D), Waiver of Confidentiality.)

Discretionary Disclosure

The Supreme Court has recognized that FOIA exemptions themselves are discretionary, not mandatory.[54] As a result, agencies may make "discretionary disclosures" of exempt information, as a matter of administrative discretion, where they are not otherwise prohibited by law from doing so.[55] Such a disclosure prohibition can

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maintained by the agency has commented publicly about such information"); 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 FBI informants"). But cf. Lazaridis v. U.S. Dep't of State, 934 F. Supp. 2d 21, 34-36 (D.D.C. 2013) (declining to find waiver of privacy interest in exempt personal information of child, mother, and other third parties that was released and discussed publicly by child's mother because "the [resulting] publicity . . . cannot be said to constitute a waiver by the agency of its right to invoke FOIA exemptions").

[53] Irons v. FBI, 880 F.2d 1446, 1455 (1st Cir. 1989) (quoting FTC v. Grolier, Inc., 462 U.S. 19, 27 (1983)); see also Neely v. FBI, 208 F.3d 461, 466 (4th Cir. 2000) (observing that the FOIA "statute by its terms does not provide for . . . waiver" of Exemption 7(D)); Parker v. DOJ, 934 F.2d 375, 380 (D.C. Cir. 1991) (noting that "[a]bsent from the language of Exemption 7(D) is any mention of 'waiver'"); Shem-Tov v. DOJ, 531 F. Supp. 3d 102, 116 (D.D.C. 2021) (holding that "with limited exceptions . . . the concept of waiver does not apply to withholdings made pursuant to Exemption 7(D)").

[54] 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"); see also Bartholdi Cable Co. v. FCC, 114 F.3d 274, 282 (D.C. Cir. 1997) (observing that "FOIA's exemptions simply permit, but do not require, an agency to withhold exempted information from the public").

[55] See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1133 n.1 (D.C. Cir. 1987) (explaining that agency's FOIA disclosure decision "normally will 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 DOJ's 2022 FOIA Guidelines ("Information that might technically fall within an exemption should not be withheld from a FOIA requester unless the agency can identify a foreseeable harm or legal bar to disclosure. In case of doubt, openness should prevail. Moreover, agencies are strongly encouraged to make discretionary disclosures of information where appropriate."); FOIA Update, Vol. VI,

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.[56] Specifically, the Privacy Act contains a prohibition on disclosure of information not required to be released under the FOIA.[57] Thus, if Privacy Act-protected information falls within a FOIA exemption, a discretionary release of such information is not appropriate.[58]

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*."[59] The District Court for the

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No. 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.").

[56] 5 U.S.C. § 552a (2018).

[57] 5 U.S.C. § 552a(b)(2).

[58] See DOD v. Fed. Lab. Rels. Auth., 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 4/17/2009).

[59] 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, which is to implement a policy of broad disclosure of government records"); 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 "the government waived its right to withhold [other photographs]"); Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) ("The fact of disclosure 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 a similar nature"); ACLU v. DOD, 752 F. Supp. 2d 361, 372-73 (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. 07-04997, 2009 WL 1246690, at *11 (N.D. Cal. May 5, 2009) (observing that "'a waiver of exemption for these documents based on the release of related documents . . . would be contrary both to the case law on waiver and to the policies underlying FOIA and its exemptions'" (quoting Mobil Oil, 879 F.2d at 700)); Ctr. for Int'l Env't L. v. Off. of the U.S. Trade Representative, 505 F. Supp. 2d 150, 158 (D.D.C. 2007) ("Prior disclosure of similar information does not suffice as a general waiver of a FOIA exemption; instead, it must be proven that the information requested has been officially released into the public domain.").

District of Columbia observed: "A contrary rule would create an incentive against voluntary disclosure of information."[60] To find otherwise "would create the untenable result of discouraging the government from" making such disclosures.[61]

[60] 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"); Mil. 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 and limit their options in future cases"), aff'd, No. 90-5065, 1990 WL 134431 (D.C. Cir. Sept. 14, 1990).

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