Procedural Requirements*

The Freedom of Information Act establishes a statutory scheme for the public to use in making requests for agency records and imposes requirements on agencies to make such records promptly available.[1] To provide a general overview of the Act's procedural requirements for responding to FOIA requests, this section follows a roughly chronological discussion of how a typical FOIA request is processed – beginning with whether an entity in receipt of a request is subject to the FOIA in the first place, and continuing through the review of an agency's initial decision regarding a FOIA request on administrative appeal.

OPEN Government Act

The OPEN Government Act of 2007 amended several procedural aspects of the FOIA, setting forth new agency requirements and statutorily mandating existing agency practices that assist requesters and facilitate the processing of FOIA requests.[2] This section will cover procedural aspects of the FOIA that were not later impacted by the FOIA Improvement Act of 2016.

Specifically, the Open Government Act amended the FOIA to require that agencies assign, and provide to requesters, an individualized tracking number for any request that

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* This section primarily includes case law, guidance and statutes up until June 30, 2023. 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] 5 U.S.C. § 552 (2018).

[2] See OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also OIP Guidance: Congress Passes Amendments to the FOIA (posted 1/9/2008, updated 12/19/2024) (summarizing substantive sections of OPEN Government Act).

will take longer than ten days to process.[3] Agencies must also establish a telephone line or an internet site where requesters, using the assigned tracking number, can obtain information regarding the status of their request, including the date the agency received the request and an estimated date when the agency will complete its action on it.[4]

The OPEN Government Act also codified the role of FOIA Public Liaisons, who are "responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes."[5] Likewise, the role of each agency's Chief FOIA Officer is codified.[6] This official has "agency-wide responsibility for efficient and appropriate compliance" with the FOIA and reports to top agency officials and to the Attorney General regarding the agency's performance in implementing the FOIA.[7]

In addition, the OPEN Government Act established the Office of Government Information Services (OGIS) within NARA to "offer mediation services to resolve disputes."[8] The OPEN Government Act directed the Government Accountability Office to audit agencies on their implementation of the FOIA.[9] The OPEN Government Act set forth extensive new reporting requirements for agencies' annual FOIA reports[10] and the

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[3] OPEN Government Act § 7 (codified at 5 U.S.C. § 552(a)(7)(A)); see OIP Guidance: Assigning Tracking Numbers and Providing Status Information for Requests (Updated Guidance) (posted 7/8/2014, updated 6/11/2025).

[4] OPEN Government Act § 7 (codified at 5 U.S.C. § 552(a)(7)(B)); see OIP Guidance: Assigning Tracking Numbers and Providing Status Information for Requests (Updated Guidance) (posted 7/8/2014, updated 6/11/2025).

[5] OPEN Government Act § 10 (codified at 5 U.S.C. § 552(l)); see OIP Guidance: The Importance of Quality Requester Services: Roles and Responsibilities of FOIA Requester Service Centers and FOIA Public Liaisons (posted 6/12/2018, updated 7/22/2021).

[6] OPEN Government Act § 10 (codified at 5 U.S.C. § 552(j)).

[7] Id. at § 10 (codified at 5 U.S.C. § 552(k)); see OIP Guidance: Memorandum from the Principal Deputy Associate Attorney General to Agency General Counsels and Chief FOIA Officers regarding Chief FOIA Officer Designations (posted 1/30/2019).

[8] OPEN Government Act § 10 (codified at 5 U.S.C. § 552(h)); see OIP Guidance: Notifying Requesters of the Mediation Services Offered by OGIS (posted 7/9/2010, updated 7/22/2021) (discussing creation of Office of Government Information Services at NARA).

[9] OPEN Government Act § 10 (codified at 5 U.S.C. § 552(i)).

[10] Id. at § 8 (codified at 5 U.S.C. § 552(e)); see OIP Guidance: Department of Justice Handbook for Agency Annual Freedom of Information Act Reports (published yearly); OIP Guidance: 2008 Guidelines for Agency Preparation of Annual FOIA Reports (posted

Department of Justice's FOIA Litigation and Compliance Reports,[11] and established new reporting requirements for the Attorney General and the Special Counsel concerning referrals to the Special Counsel.[12] (For a discussion of these Attorney General and Special Counsel reporting requirements, see Litigation Considerations, Special Counsel Provision and Litigation Considerations, Frivolous Lawsuits.)

The OPEN Government Act also amended the definition of agency records,[13] and established new rules concerning FOIA's time limits,[14] routing of misdirected requests,[15] and document marking.[16] (For a discussion of these provisions, see Procedural Requirements, "Agency Records;" Procedural Requirements, Time Limits; and Procedural Requirements, Records Processing Requirements, "Reasonably Segregable" Requirement, below.)

FOIA Improvement Act of 2016

The FOIA Improvement Act of 2016 was signed into law on June 30, 2016.[17] (For further discussion of this Act, see Introduction, History of the FOIA.)

Specific to procedural issues, Section 2 of the FOIA Improvement Act codified the Department of Justice's foreseeable harm standard, directing that agencies "shall . . . withhold information . . . only if the agency reasonably foresees that disclosure would

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5/22/2008). For current Annual Report guidelines, please refer to the current Department of Justice Handbook for Agency Annual FOIA Reports.

[11] OPEN Government Act § 5 (codified at 5 U.S.C. § 552(e)(6)).

[12] Id. at § 5 (codified at 5 U.S.C. § 552(a)(4)(F)).

[13] Id. at § 6 (codified at 5 U.S.C. § 552(f)(2)); see OIP Guidance: Treatment of Agency Records Maintained For an Agency By a Government Contractor for Purposes of Records Management (posted 9/9/2008, updated 7/28/2021).

[14] OPEN Government Act § 6 (codified at 5 U.S.C. § 552(a)(6)(A)); see OIP Guidance: New Limitations on Tolling the FOIA's Response Time (posted 11/18/2008, updated 12/6/2022).

[15] OPEN Government Act § 6 (codified at 5 U.S.C. § 552(a)(6)(A)(ii)); see OIP Guidance: New Requirement to Route Misdirected FOIA Requests (posted 11/18/2008, updated 7/18/2021).

[16] OPEN Government Act § 12 (codified at 5 U.S.C. § 552(b)); see OIP Guidance: Segregating and Marking Documents for Release in Accordance with the OPEN Government Act (posted 10/23/2008, updated 12/6/2022).

[17] Pub. L. No. 114-185, 130 Stat. 538; see OIP Summary of the FOIA Improvement Act of 2016 (posted 8/17/2016).

harm an interest protected by an exemption" or if "disclosure is prohibited by law."[18] Section 2 also addressed segregation, directing agencies to "consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible."[19] (For further discussion of these requirements in the processing context, see Procedural Requirements, Records Processing Requirements, "Reasonably Segregable" Requirement, below)

Section 2 also made changes to certain procedures when processing requests. Specifically, when agencies extend the FOIA's time limits by more than ten additional working days, they must notify the requester of the right to seek dispute resolution services from the Office of Government Information Services (OGIS) at NARA.[20] Additionally, the Act imposed further limitations on the assessment of certain fees if the FOIA's response times are not met.[21] (For further discussion of the fee implications of the FOIA Improvement Act, see Fees and Fee Waivers, Fees.)

Furthermore, the FOIA Improvement Act of 2016 imposed new requirements for agency response letters.[22] When agencies make their determinations on requests, they must offer the services of their FOIA Public Liaison and, if the determination is adverse, they must also notify requesters of the services provided by OGIS.[23] Agencies must also

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[18] FOIA Improvement Act § 2 (codified at 5 U.S.C. § 552(a)(8)(A)(i)); see also OIP Guidance: Applying a Presumption of Openness and the Foreseeable Harm Standard (posted 3/13/2023, updated 9/4/2024) (emphasizing that "agencies should administer FOIA with a presumption of openness[;] [a]gencies should process records with an eye toward disclosure, applying FOIA's foreseeable harm standard and giving due consideration to discretionary releases of information").

[19] FOIA Improvement Act § 2 (codified at 5 U.S.C. § 552(a)(8)(A)(ii)); see OIP Guidance: Applying a Presumption of Openness and the Foreseeable Harm Standard (posted 3/13/2023, updated 9/4/2024) (further encouraging agencies to consider making partial disclosure of records when full disclosure is not possible).

[20] FOIA Improvement Act § 2 (codified at 5 U.S.C. § 552(a)(6)(A)(i)(III)(bb)); see OIP Guidance: New Requirements for FOIA Response Letters (posted 7/18/2016, updated 7/26/2021).

[21] FOIA Improvement Act § 2 (codified at 5 U.S.C. § 552(a)(4)(A)(viii)); see OIP Guidance: Prohibition on Assessing Certain Fees When the FOIA's Time Limits Are Not Met (posted 10/19/2016, updated 7/7/2025); OIP Guidance: Decision Tree for Assessing Fees (posted 10/19/2016, updated 12/7/2022).

[22] FOIA Improvement Act § 2 (codified at 5 U.S.C. § 552(a)(6)(A)(i)); see OIP Guidance: New Requirements for FOIA Response Letters (posted 7/18/2016, updated 7/26/2021).

[23] FOIA Improvement Act § 2 (codified at 5 U.S.C. § 552(a)(6)(A)(i)(III)); see OIP Guidance: The Importance of Quality Requester Services: Roles and Responsibilities of FOIA Requester Service Centers and FOIA Public Liaisons (posted 6/12/2018, updated

allow requesters a period of at least ninety days within which to file an administrative appeal.[24]

The FOIA Improvement Act of 2016 delineated additional responsibilities for agency Chief FOIA Officers, which include ensuring that FOIA training is made available to agency staff and serving as a liaison with OGIS and the Office of Information Policy.[25]

Entities Subject to the FOIA

In defining which entities are subject to the FOIA, the FOIA relies on the Administrative Procedure Act's (APA) definition of "agency"[26] and specifically enumerates executive departments, military departments, Government corporations, Government controlled corporations, or other establishments in the executive branch of the Government (including the Executive Office of the President), and any independent regulatory agencies as being included in the definition of "agency".[27] The FOIA also incorporates the APA's exclusion of certain authorities such as Congress[28] and courts of

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7/22/2021); OIP Guidance: New Requirements for FOIA Response Letters (posted 7/18/2016, updated 7/26/2021)..

[24] FOIA Improvement Act § 2 (codified at 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa)); see OIP Guidance: Adjudicating Administrative Appeals Under the FOIA (posted 2/14/2019, updated 8/12/2021); OIP Guidance: New Requirements for FOIA Response Letters (posted 7/18/2016, updated 7/26/2021).

[25] FOIA Improvement Act § 2 (codified at 5 U.S.C. § 552(j)(2)(F-G)); see OIP Guidance: Memorandum from the Principal Deputy Associate Attorney General to Agency General Counsels and Chief FOIA Officers regarding Chief FOIA Officer Designations (posted 1/30/2019); OIP Guidance: OIP Summary of the FOIA Improvement Act of 2016 (posted 8/17/2016).

[26] 5 U.S.C. § 551(1) (2018) (defining "'agency' [to] mean[] each authority of the Government of the United States, whether or not it is within or subject to review by another agency").

[27] See id.; H.R. Rep. No. 93-1380, at 128 (1974) (explaining that definition of "agency" is derived from U.S.C. § 551(1)).

[28] 5 U.S.C. § 551(1)(A-B); see Dow Jones & Co. v. DOJ, 917 F.2d 571, 574 (D.C. Cir. 1990) (explaining that "Congress is simply not an agency"); Dunnington v. DOD, No. 06-0925, 2007 WL 60902, at *3-4 (D.D.C. Jan. 8, 2007) (ruling that U.S. Senate and House of Representatives are not agencies under FOIA).

the United States[29] from the definition of "agency." Congress has clearly made other entities subject to[30] or exempt from[31] the FOIA by statute.

The Court of Appeals for the District of Columbia Circuit utilizes a functional definition of "agency" to determine if an office within the Executive Office of the President is subject to the FOIA: Offices within the Executive Office of the President that "'wield[] substantial authority independent of the President'" are subject to the FOIA.[32] The Council on Environmental Quality (a unit within the Executive Office of the President) has been found to be an agency subject to the FOIA because its investigatory, evaluative, and recommendatory functions exceed merely advising the President.[33] Similarly, because the Office of Management and Budget exercises substantial independent authority to prepare the annual budget, and the Office of Science and Technology has independent authority to evaluate and fund research, both are subject to the FOIA.[34]

In contrast, the Office of the President, including the "'President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President'" are not agencies under the FOIA.[35] Under the advise-and-assist analysis,

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[29] 5 U.S.C. § 551(1)(A-B); see United States v. Johnson, 539 F. App'x 198, 201 (4th Cir. 2013) (per curiam) (finding that district court did not violate FOIA by failing to disclose records because "federal courts are not 'agencies' subject to FOIA"); Megibow v. Clerk of the U.S. Tax Ct., 432 F.3d 387, 388 (2d Cir. 2005) (per curiam) (affirming district court's conclusion that U.S. Tax Court is not subject to FOIA); United States v. Casas, 376 F.3d 20, 22 (1st Cir. 2004) (stating that "[t]he judicial branch is exempt from the [FOIA]"); United States v. Choate, 102 F. App'x 634, 635 (10th Cir. 2004) (noting that Congress explicitly excepted the federal courts from FOIA).

[30] See, e.g., 49 U.S.C. § 24301(e) (2007) (stating the FOIA applies to Amtrak "for any fiscal year in which Amtrak receives a Federal subsidy"); Neighborhood Reinvestment Corp. Act, 42 U.S.C. § 8103(h) (1988) (indicating the agency is subject to the FOIA); U.S. Institute of Peace Act, 22 U.S.C. § 4607(i) (2003) (indicating the agency is subject to the FOIA).

[31] See, e.g., 47 U.S.C. § 1426(d)(2) (2012) (exempting FirstNet from the FOIA).

[32] Citizens for Resp. & Ethics in Wash. v. Off. of Admin., 566 F.3d 219, 222-23 (D.C. Cir. 2009) (quoting Sweetland v. Walters, 60 F.3d 852, 854 (D.C. Cir. 1995))".

[33] Pac. Legal Found. v. Council on Env't Quality, 636 F.2d 1259, 1263 (D.C. Cir. 1980).

[34] Sierra Club v. Andrus, 581 F.2d 895, 901-02 (D.C. Cir. 1978), rev'd on other grounds, 442 U.S. 347 (1979); Soucie v. David, 448 F.2d 1067, 1073-75 (D.C. Cir. 1971).

[35] Kissinger v. Reps. Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980) (quoting H.R. Rep. No. 93-1380, at 15, reprinted in House Comm. on Gov't Operations and Senate Comm. on the Judiciary, 94th Cong. 1st Sess., Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Sourcebook).

the Office of Counsel to the President,[36] the Executive Residence staff,[37] the Domestic Policy Council,[38] the National Security Council,[39] the National Energy Policy Development Group,[40] the Council of Economic Advisers,[41] the Vice President and his staff,[42] the National Climate Task Force,[43] and the former Presidential Task Force on Regulatory Relief[44] have all been found not to be agencies subject to the FOIA.

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[36] See Nat'l Sec. Archive v. Exec. Off. of the President, 688 F. Supp. 29, 31 (D.D.C. 1988), aff'd sub nom. Nat'l Sec. Archive v. Archivist of the U.S., 909 F.2d 541, 545 (D.C. Cir. 1990).

[37] See Sweetland v. Walters, 60 F.3d 852, 855 D.C. Cir. 1995) (per curiam).

[38] See Indiana v. Biden, No. 22-00430, 2023 WL 348230, at *8 (S.D. Ind. Jan. 20, 2023).

[39] See Risenhoover v. U.S. Dep't of State, No. 20-5276, 2020 U.S. App. LEXIS 40171, at *2 (D.C. Cir. Dec. 22, 2020) (per curiam) (holding that NSC is not an agency for purposes of FOIA); Main St. Legal Servs. v. NSC, 811 F.3d 542, 549-66 (2d Cir. 2016) (analyzing NSC functions, legislative history and other statutory sources and finding that NSC is not agency subject to FOIA); Armstrong v. Exec. Off. of the President, 90 F.3d 553, 556 (D.C. Cir. 1996) (holding that NSC is not agency subject to FOIA).

[40] See Jud. Watch, Inc. v. DOE, 412 F.3d 125, 129 (D.C. Cir. 2005).

[41] See Rushforth v. Council of Econ. Advisers, 762 F.2d 1038, 1042-43 (D.C. Cir. 1985).

[42] See Jud. Watch, Inc. v. Nat'l Energy Pol'y Dev. Grp., 219 F. Supp. 2d 20, 55 (D.D.C. 2002).

[43] See Competitive Enter. Inst. v. Podesta, No. 21-1238, 2022 WL 17250237, at *3-5 (D.D.C. Nov. 28, 2022) (finding that National Climate Task Force is made up of individuals who lack substantial independence from President, including member agency heads who exercise no independent authority on Task Force; Task Force does not have self-contained structure as it is made up entirely of people "'borrowed'" from other government organizations for limited purpose and duration; and Task Force's only function is advising and assisting President).

[44] See Meyer v. Bush, 981 F.2d 1288, 1294, 1298 (D.C. Cir. 1993) (reasoning that Task Force chaired by Vice President and composed of cabinet members was not subject to FOIA because cabinet members acted not as heads of their departments "but rather as the functional equivalents of assistants to the President").

Courts have addressed whether the FOIA applies to the Smithsonian Institution,[45] and have also held that it does not apply to state and local governments,[46] foreign governments,[47] municipal entities,[48] other entities of the Judicial Branch,[49] members and

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[45] See Cotton v. Heyman, 63 F.3d 1115, 1119 n.2, 1123 (D.C. Cir. 1995) (refusing to examine district court's ruling that Smithsonian Institution was agency under FOIA due to doctrine of direct estoppel, but noting that Smithsonian Institution "could reasonably interpret our precedent to support its position that it is not an agency under FOIA" and stressing that agency status holding "is binding only between these two parties"); cf. Dong v. Smithsonian Inst., 125 F.3d 877, 879 (D.C. Cir. 1997) (holding that Smithsonian Institution is not agency for purposes of the Privacy Act of 1974, as it is neither an "establishment of the [E]xecutive [B]ranch" nor a "government-controlled corporation").

[46] See, e.g., Davis v. California, 734 F. App'x 560, 564 (10th Cir. 2018) (holding that FOIA does not apply to state governments); Jimenez v. Fourth Jud. Dist. Att'y's Off., 663 F. App'x 584, 587 (10th Cir. 2016) (per curiam) ("FOIA and the Privacy Act govern document requests of federal agencies, not state agencies."); Mouton v. Neustrom, 644 F. App'x 287, 287 (5th Cir. 2016) (per curiam) (holding that FOIA does not apply to local sheriff); Parker v. Lehigh Cnty. Domestic Rel. Ct., 621 F. App'x 125, 130 (3d Cir. 2015) (determining that FOIA does not apply to family court); Sykes v. United States, 507 F. App'x 455, 463 (6th Cir. 2012) (affirming district court dismissal of amended complaint because FOIA does not apply to state entities like the University of Cincinnati Medical Center).

[47] See Moore v. United Kingdom, 384 F.3d 1079, 1089-90 (9th Cir. 2004) (finding no cause of action against British government because FOIA only applies to U.S. executive branch agencies).

[48] See Willis v. DOJ, 581 F. Supp. 2d 57, 67 (D.D.C. 2008) (determining that federal FOIA does not apply to Missouri Police Department because it is not a federal agency); Jones v. City of Indianapolis, 216 F.R.D. 440, 443 (S.D. Ind. 2003) (determining that municipal agencies and municipal corporations do not qualify as federal executive branch agencies subject to the FOIA).

[49] See Andrade v. U.S. Sent'g Comm'n, 989 F.2d 308, 309-10 (9th Cir. 1993) (per curiam) (holding that Sentencing Commission, as independent body within judicial branch, is not subject to FOIA); Banks v. DOJ, 538 F. Supp. 2d 228, 231-32 (D.D.C. 2008) (holding that U.S. Probation Office and Administrative Office of the U.S. Courts are not subject to the FOIA); Coleman v. Lappin, No. 06-2255, 2007 WL 1983835, at *1 n.1 (D.D.C. July 3, 2007) (unpublished disposition) (stating that "Office of Bar Counsel is a creature of the District of Columbia Court of Appeals, and is not a federal agency to which the FOIA applies"); United States v. Richardson, No. 2001-10, 2007 U.S. Dist. LEXIS 77, at *3 (W.D. Pa. Jan. 3, 2007) (holding that federal grand jury is "an arm of the federal judiciary" and is not subject to the FOIA); Woodruff v. Off. of the Pub. Def., No. 03-0791, slip op. at 4 (N.D. Cal. June 3, 2004) (finding that Federal Public Defender's Office, which is controlled by courts, is not agency under FOIA); Wayne Seminoff Co. v. Mecham, No. 02-2445, 2003 U.S. Dist. LEXIS 5829, at *20 (E.D.N.Y. Apr. 10, 2003) ("[T]he Administrative Office of the United States Courts is not an agency for purposes of FOIA."), aff'd, 82 F. App'x 740 (2d Cir. 2003); United States v. Ford, No. 96-0271, 1998 WL 742174, at *1 (E.D. Pa. Oct. 21, 1998) ("The Clerk of Court, as

offices of Congress,[50] presidential transition teams,[51] private citizens and corporations,[52] and non-profit organizations.[53]

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part of the judicial branch, is not an agency as defined by FOIA."); Callwood v. Dep't of Prob., 982 F. Supp. 341, 342 (D.V.I. 1997) ("[T]he Office of Probation is an administrative unit of [the] Court . . . [and] is not subject to the terms of the Privacy Act.").

[50] See Mayo v. U.S. Gov't Printing Off., 9 F.3d 1450, 1451 (9th Cir. 1994) (deciding that Government Printing Office is part of congressional branch and therefore is not subject to FOIA); Dow Jones & Co. v. DOJ, 917 F.2d 571, 574 (D.C. Cir. 1990) ("recogniz[ing] that members of Congress are not within the definition of agency under FOIA").

[51] See Behar v. DHS, 39 F.4th 81, 89 (2d Cir. 2022) ("Neither a presidential campaign nor a transition qualifies as an 'agency' of the federal government under the FOIA. A transition receives government funding, but funding 'short of Government control' leaves 'grantees free from the direct obligations imposed by the FOIA.'" (quoting Forsham v. Harris, 445 U.S. 169, 182 (1980))); Ill. Inst. for Continuing Legal Educ. v. Dep't of Lab., 545 F. Supp. 1229, 1231-33 (N.D. Ill. 1982) (concluding that transition staff has autonomy from President and is therefore not agency under FOIA); cf. Wolfe v. HHS, 711 F.2d 1077, 1079, 1082 (D.C. Cir. 1983) (assuming for purposes of opinion that presidential transition team was not agency subject to FOIA and finding transition team records are not agency records because agency never possessed records at issue); Democracy Forward Found. v. GSA, 393 F. Supp. 3d 45, 53 (D.D.C. 2019) (noting that parties agree that transition team is not subject to FOIA and finding that transition team emails were not agency records because "[a]t most, GSA 'might' have been exposed to the content of communications but only incident to its monitoring of the transition team's networks to ensure their operation and security").

[52] See Odums v. Greenpoint Mortg. Funding, Inc., 831 F. App'x 32, 34 (2d Cir. 2020) (finding Capital One is private bank and not Federal Reserve bank, and thus is not subject to FOIA); Henderson v. Off. & Prof'l Emps. Int'l Union, 143 F. App'x 741, 744 (9th Cir. 2005) (finding that "district court properly dismissed [FOIA claim] because union and union representative are not 'agencies' . . . under the FOIA"); United States v. Mitchell, No. 03-6938, 2003 WL 22999456, at *1 (4th Cir. Dec. 23, 2003) (holding that private attorney and law firms are not subject to the FOIA); Rutland v. Santander Consumer USA, Inc., No. 11-15250, 2012 WL 3060949, at *3 (E.D. Mich. July 26, 2012) (finding private corporation not subject to FOIA); Jackson v. Ferrell, No. 09-0025, 2009 U.S. Dist. LEXIS 24893, at *3 (E.D. Mo. Mar. 25, 2009) (finding that federal attorney is not an agency); Few v. Liberty Mut. Ins. Co., 498 F. Supp. 2d 441, 452 (D.N.H. 2007) (holding that private corporations and individuals are not federal agencies); Furlong v. Cochran, No. 06-5443, 2006 WL 3254505, at *1 (W.D. Wash. Nov. 9, 2006) (holding that the FOIA does not apply to lawyer and law firm because they are private individuals and corporations); In re Olsen, No. 98-088, 1999 Bankr. LEXIS 791, at *4 (B.A.P. 10th Cir. June 24, 1999) (holding that FOIA does not apply to chapter 7 bankruptcy trustee who lacks "substantial independent authority" and represents the estate, not the United States).

[53] See Lazaridis v. DOJ, 713 F. Supp. 2d 64, 67-69 (D.D.C. 2010) (holding that National Center for Missing & Exploited Children and the International Centre for Missing & Exploited Children, both nonprofit organizations, were not subject to FOIA because their

In Forsham v. Harris,[54] the Supreme Court held that private grantees receiving federal financial assistance are not agencies subject to the FOIA.[55] The Court reasoned that private grantees are not subject to the FOIA because Congress "exclud[ed] them from the definition of 'agency,' an action consistent with its prevalent practice of preserving grantee autonomy."[56] The Court observed that private grantees are not converted to government actors "absent extensive, detailed, and virtually day-to-day supervision."[57]

Finally, certain operational files of some intelligence agencies are not within the scope of the FOIA. For example, the Central Intelligence Agency Information Act affords

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"seemingly 'public authority' is 'entirely ancillary to [their] informational and educational mission'" (quoting Dong v. Smithsonian Inst., 125 F.3d 877, 882 (D.C. Cir. 1997))).

[54] 445 U.S. 169 (1980).

[55] Id. at 179-80; see also Missouri v. Dep't of Interior, 297 F.3d 745, 750 (8th Cir. 2002) (holding that "[t]he provision of federal resources, such as federal funding, is insufficient to transform a private organization into a federal agency"); Pub. Citizen Health Rsch. Grp. v. Dep't of Health, Educ. & Welfare, 668 F.2d 537, 543-44 (D.C. Cir. 1981) (stating that Professional Standards Review Organization, established and funded through Social Security Act to review health care services paid for through Medicare and Medicaid reimbursement, is not agency under FOIA); Irwin Mem'l Blood Bank v. Am. Nat'l Red Cross, 640 F.2d 1051, 1057 (9th Cir. 1981) (determining that American National Red Cross is not agency under FOIA); Gilmore v. DOE, 4 F. Supp. 2d 912, 919-20 (N.D. Cal. 1998) (finding that privately owned laboratory that developed electronic conferencing software, for which government owned nonexclusive license regarding its use, is not "a government-controlled corporation" as it is not subject to day-to-day supervision by federal government, nor are its employees or management considered government employees).

[56] Forsham, 445 U.S. at 179 (clarifying that Congress "did 'not intend to include corporations which receive appropriated funds but are neither chartered by the Federal Government nor controlled by it'" in the definition of "agency" (quoting H.R. Rep. No. 93-1380, at 231-232, reprinted in House Comm. on Gov't Operations and Senate Comm. on the Judiciary, 94th Cong. 1st Sess., Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Sourcebook)).

[57] Id. at 180 (citing United States v. Orleans, 425 U.S. 807, 818 (1976)). But c.f. OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," 64 Fed. Reg. 54,926, at 54,930 (Oct. 8, 1999) (requiring agencies to make research data available to public through FOIA in response to "request for research data relating to published research findings produced under an award that were used by the [government] in developing an agency action that has the force and effect of law").

special FOIA treatment to CIA "operational files."[58] (For further discussion of this subject, see Exemption 3, "Operational Files" Provisions.)

"Agency Records"

As the Supreme Court noted in Forsham v. Harris,[59] the FOIA originally did not define the term "agency records."[60] For context in defining the term, the Court looked to the Records Disposal Act as one indicator of Congress's intent regarding the definition of a "record."[61] The Records Disposal Act defines a record as "books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency."[62] Regarding the types of documentary material considered records under the FOIA, "records" do not include

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[58] 50 U.S.C. § 3141 (2018) (original version at 50 U.S.C. § 431 (1947)) (authorizing CIA to exempt certain operational files from the search, review, and disclosure requirements of the FOIA); Porup v. CIA, No. 17-72, 2020 WL 1244928, at *5 (D.D.C. Mar. 16, 2020) (confirming that the statutory text of "[t]he CIA Information Act generally exempts CIA operational files from the search, review, publication, and disclosure requirement of FOIA"); see also Morley v. CIA, 508 F.3d 1108, 1116-19 (D.C. Cir. 2007) (concluding that request met criteria of exception to rule that CIA "[o]perational files are exempt from FOIA disclosure," and requiring agency to search such files upon remand since it had not initially done so); FOIA Update, Vol. V, No. 4, at 1-2 ("Special FOIA Relief for CIA") (discussing statutory removal of CIA "operational files" from scope of FOIA as threshold matter).

[59] 445 U.S. 169 (1980).

[60] Id. at 178.

[61] Id. at 169, 182-83 (noting that, "[w]hile these definitions are not dispositive of the proper interpretation of congressional use of the word in the FOIA, it is not insignificant that Congress has associated creation or acquisition with the concept of a governmental record"); see also Bureau of Nat. Affairs, Inc. v. DOJ, 742 F.2d 1484, 1493 (D.C. Cir. 1984) (acknowledging that agency's treatment of documents under its record retention and disposal obligations is relevant for determining agency records question, but refusing to apply a rigid test); cf. Cause of Action Inst. v. NOAA, No. 19-1927, 2023 WL 3619345, at *3 (D.D.C. May 24, 2023) (holding that "the definitions of 'agency records' in the Federal Records Act . . . cannot displace FOIA's definition of that term" and looking to entirety of control factors to conduct analysis).

[62] Forsham, 445 U.S. at 183 (quoting Records Disposal Act, 44 U.S.C. § 3301 (1980)); see also Federal Records Act, 44 U.S.C. § 2901 (2018) (referring to Records Disposal Act, 44 U.S.C. § 3301 (2018) for definition of "records").

tangible, evidentiary objects,[63] but courts have found that audiotape and motion picture film are records.[64]

As a result of the 1996 amendments to the FOIA,[65] Congress included a definition of the term "records" in the FOIA, defining it as including "any information that would be an agency record . . . when maintained by an agency in any format, including an electronic format."[66] The question of whether computer software is included within the definition has been decided according to the particular nature and functionality of the software at issue.[67]

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[63] See Friedman v. U.S. Secret Serv., 923 F. Supp. 2d 262, 275 (D.D.C. 2013) (holding that "vehicles and other equipment are not records under the FOIA"); Chong v. DEA, No. 85-3726, 1988 WL 26083, at *8 (D.D.C. Mar. 14, 1988) (concluding that physical items "seized in connection with the criminal investigation of [requester] and his subsequent trial" are not agency records); Nichols v. United States, 325 F. Supp. 130, 135-37 (D. Kan. 1971) (holding that archival exhibits consisting of guns, bullets, and clothing pertaining to assassination of President Kennedy are not "records").

[64] See N.Y. Times Co. v. NASA, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (holding that audiotape of Space Shuttle *Challenger* astronauts is "record" as "FOIA makes no distinction between information in lexical and . . . non-lexical form"); Save the Dolphins v. Dep't of Com., 404 F. Supp. 407, 410-11 (N.D. Cal. 1975) (finding that motion picture film is "record" for purposes of FOIA).

[65] Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048.

[66] 5 U.S.C. § 552(f)(2)(A) (2018); see Am. Immigr. Laws. Ass'n v. EOIR, 830 F.3d 667, 678 (D.C. Cir. 2016) (noting that statutory "description provides little help in understanding what is a 'record' in the first place," and commenting that "[u]nder FOIA, agencies instead in effect define a 'record' when they undertake the process of identifying records that are responsive to a request"); OIP Guidance: Defining a "Record" Under the FOIA (posted 1/11/2017, updated 7/23/2021) (outlining principles for agencies to follow in determining what constitutes a "record" responsive to a given FOIA request).

[67] See Gilmore v. DOE, 4 F. Supp. 2d 912, 920-21 (N.D. Cal. 1998) (holding that video conferencing software developed by privately-owned laboratory was not a record under FOIA because it was "not designed to be . . . responsive to any particular database" and "does not illuminate anything about [agency's] structure or decision-making process"); Cleary, Gottlieb, Steen & Hamilton v. HHS, 844 F. Supp. 770, 781-82 (D.D.C. 1993) (concluding that software program was a record because it was "uniquely suited to its underlying database" such that "the software's design and ability to manipulate the data reflect the [agency's study]," thereby "preserving information and 'perpetuating knowledge'" (quoting DiViaio v. Kelley, 571 F.2d 538, 542 (10th Cir. 1978))); cf. Aguiar v. DEA, 992 F.3d 1108, 1112 (D.C. Cir. 2021) (rejecting amicus's argument that because federal prisoner has no access to the internet or maps, DEA is obligated to provide map data in a comprehensible format that DEA does not possess, and finding that "nothing in § 552(a)(3)(B)'s legislative history support[s] a categorical obligation on agencies to display requested information in a

In DOJ v. Tax Analysts,[68] the Supreme Court articulated a two-part test for determining when a "record" constitutes an "agency record" under the FOIA: "Agency records" are records that are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request.[69] In determining whether the first part of the test is satisfied, the Supreme Court examined "whether an agency covered by the FOIA has 'create[d] or obtaine[d]' the materials sought, not whether the organization from which the documents originated is itself covered by the FOIA."[70] For example, in Forsham, the Supreme Court held that certain research data generated by a private entity through federal grants are not considered agency records subject to the FOIA where the agency never obtained the records.[71] However, OMB Circular A-110 later required that, in the event of a FOIA request for "research data . . . produced under an award that was used by the Federal Government in developing an agency action that has the force and effect of law, the . . . award recipient shall provide . . . the research data [to the agency] so that they can be made available . . . through . . . the FOIA.[72]

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way usable or convenient for the FOIA requestor whenever doing so does not alter the information's substantive content").

[68] 492 U.S. 136 (1989).

[69] Id. at 144-45 (holding that court opinions in agency files are agency records); see also Callaway v. Dep't of the Treasury, 893 F. Supp. 2d 269, 275 (D.D.C. 2012) (holding that FOIA "'only obligates [Customs] to provide access to those [records] which it in fact has created and retained'" and "need not produce records maintained by another federal government agency or obtain records from any other sources" (quoting Kissinger v. Reps. Comm. for Freedom of the Press, 445 U.S. 136, 153 (1980))); cf. Hyatt v. U.S. Pat. & Trademark Off., 346 F. Supp. 3d 141, 149 (D.D.C. 2018) (finding that while creation and reading of email thread may have been outside scope of examiners" employment with agency, that fact is not dispositive as to whether email is agency record).

[70] Tax Analysts, 492 U.S. at 146 (citing Forsham v. Harris, 445 U.S. 169, 182 (1980)); see also Marzen v. HHS, 632 F. Supp. 785, 801 (N.D. Ill. 1985) (declaring that records created outside federal government that agency "obtained without legal authority" are not agency records).

[71] Forsham v. Harris, 445 U.S. 169, 186 (1980) (holding that "FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained"); see ExxonMobil v. Dep't of Com., 828 F. Supp. 2d 97, 105-06 (D.D.C. 2011) (concluding that research data are not agency records where agency served in "a limited, ministerial role" on behalf of Trustee Council and did not appropriate funds to private researchers, and studies were not conducted on agency's behalf).

[72] OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," 64 Fed. Reg. 54,926 (Oct. 8, 1999); see also Am. Chemistry Council, Inc. v. HHS, 922 F. Supp. 2d 56, 62 (D.D.C. 2013) (noting that Circular A-110's requirements impose "a dual responsibility upon agencies: [n]ot only

The "agency record" analysis typically hinges upon the second part of the Tax Analysts test, whether an agency has "control" over a record.[73] The Court of Appeals for the District of Columbia Circuit has identified four factors to consider when evaluating agency "control" of a record: "'(1) the intent of the document's creator to retain or relinquish control over the record[]; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record systems or files.'"[74] The D.C. Circuit has further held that these factors "are not an

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must they produce their own responsive 'records,' but they must also request 'research data' from the grantees of the pertinent federally funded research study."); FOIA Update, Vol. XIX, No. 4 ("Congress Enacts FOIA-Related Legislation") (discussing grantee records subject to FOIA under Circular A-110's definition of "research data").

[73] See, e.g., Behar v. DHS, 39 F.4th 81, 89 (2d Cir. 2022) ("We have explained that agency 'control' is key to determining whether materials qualify as 'agency records' under FOIA." (quoting Doyle v. DHS, 959 F.3d 72, 77 (2d Cir. 2020))); see also Fox News Network, LLC v. Bd. of Governors of the Fed. Rsrv. Sys., 601 F.3d 158, 160-62 (2d Cir. 2010) (examining Board's regulations and authorizing statute to conclude that certain Federal Reserve Bank loan records were not agency records because they were not under Board control, but holding conversely that Bank administrative records are agency records); Int'l Bd. of Teamsters v. Nat'l Mediation Bd., 712 F.2d 1495, 1496 (D.C. Cir. 1983) (determining that transitory possession of gummed-label mailing list, as required by court order, was not sufficient to give agency "control" over record); Baizer v. Dep't of the Air Force, 887 F. Supp. 225, 228-29 (N.D. Cal. 1995) (holding that database of Supreme Court decisions used for reference purposes or as research tool is not agency record); KDKA v. Thornburgh, No. 90-1536, 1992 U.S. Dist. LEXIS 22438, at *16-17 (D.D.C. Sept. 30, 1992) (concluding that Canadian Safety Board report of air crash, although possessed by NTSB, is not under agency "control" because of restrictions on its dissemination imposed by the Convention on International Civil Aviation); Teich v. FDA, 751 F. Supp. 243, 248-49 (D.D.C. 1990) (holding that documents submitted to FDA in "'legitimate conduct of its official duties'" are agency records notwithstanding FDA's pre-submission review regulation, allowing submitters to withdraw their documents from agency's files (quoting Tax Analysts, 492 U.S. at 145)); Rush v. Dep't of State, 716 F. Supp. 598, 600 (S.D. Fla. 1989) (finding that correspondence between former ambassador and Henry Kissinger (then Assistant to the President) were agency records of Department of State as it exercised control over the correspondence).

[74] Burka v. HHS, 87 F.3d 508, 515 (D.C. Cir. 1996) (quoting Tax Analysts v. DOJ, 845 F.2d 1060, 1069 (D.C. Cir. 1988)); see also Jud. Watch v. Fed. Hous. Fin. Agency, 646 F.3d 924, 928 (D.C. Cir. 2011) ("[W]here an agency has neither created nor referenced a document in the 'conduct of its official duties,' the agency has not exercised the degree of control required to subject the document to disclosure under FOIA" (quoting Tax Analysts, 492 U.S. at 145)); Consumer Fed'n of Am. v. USDA, 455 F.3d 283, 288 (D.C. Cir. 2006) (determining that agency employees' electronic calendars maintained on work computers were not agency records because they were not distributed to other employees so that they could perform their duties); Jud. Watch, Inc. v. DOE, 412 F.3d 125, 127 (D.C. Cir. 2005) (holding that "records created or obtained by employees detailed from an agency to the NEPDG [an

inflexible algorithm" and instead "must be understood as part of the ultimate question of whether a document is an agency record."[75] The court explained that the control analysis "is assessed under a 'totality of the circumstances' test that 'focus[es] on a variety of factors surrounding the creation, possession, control, and use of the document by an agency.'"[76] "Actual use is often '"the decisive factor"' when determining whether a

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advisory group within Office of the Vice President] are not 'agency records' subject to disclosure under the FOIA"); Missouri v. Dep't of Interior, 297 F.3d 745, 750-51 (8th Cir. 2002) (holding that records maintained in agency office by agency employee who was acting as full-time coordinator of nonprofit organization that had "cooperative" relationship with agency were not "agency records" because they were not integrated into agency files and were not used by agency in performance of its official functions); Katz v. NARA, 68 F.3d 1438, 1442 (D.C. Cir. 1995) (holding that autopsy x-rays and photographs of President Kennedy created and handled as personal property of Kennedy estate are presidential papers, not records of any agency); Gen. Elec. Co. v. Nuclear Regul. Comm'n, 750 F.2d 1394, 1400-01 (7th Cir. 1984) (determining that agency "use" of internal report submitted in connection with licensing proceedings renders report agency record); Cause of Action Inst. v. Exp.-Imp. Bank of the U.S., No. 19-1915, 2022 WL 252028, at *3-5 (D.D.C. Jan. 27, 2022) (holding that email messages in possession of agency sent from employee of Office of the Vice President (OVP) to agency employee are "records [that] fall within FOIA's scope and must be disclosed" because agency made no showing of OVP's intent to maintain control of these email messages and noting that, as to other control factors, agency "certainly 'read or relied upon the' emails, and the mails appear to have been fully 'integrated into the agency's records system or files'"); Reich v. DOE, 784 F. Supp. 2d 15, 21-23 (D. Mass. 2011) (applying control factors to conclude that contractor's constraints placed on documents and lack of reliance and integration render report not agency record), aff'd on reh'g, 811 F. Supp. 2d 52 (D. Mass. 2011); cf. Junk v. Bd. of Governors of Fed. Rsrv. Sys., 404 F. Supp. 3d 794, 797-99 (S.D.N.Y. 2019) (finding based on regulation 12 C.F.R. § 261.2(i)(1)(i) that loan records issued by Federal Reserve Bank of New York and authorized by the Federal Reserve Board (the Board) during the financial crisis "coming into the possession and under the control of . . . any Federal Reserve Bank . . . in the performance of functions for or on behalf of the Board that constitute part of the Board's official files" were agency records under the FOIA); Edelman v. SEC, 172 F. Supp. 3d 133, 152 (D.D.C. Mar. 24, 2016) (finding that "whether a document is kept on an attorney's agency computer or in her agency desk" does not matter for agency records purposes because "it is safe to assume that some of the most consequential records in the government have at times resided in individual offices rather than in agencies' centralized filing systems").

[75] Cause of Action Inst. v. OMB, 10 F.4th 849, 855 (D.C. Cir. 2021) (internal citation omitted) (finding that browsing histories are not agency records in this instance after reviewing agencies' retention and access policies for browsing histories, along with fact they did not use any of requested browsing histories for any reason).

[76] Id. at 855 ("In determining whether a document is an agency record in light of the 'totality of the circumstances,' any fact related to the document's creation, use, possession, or control may be relevant.").

requested document is an agency record."[77] Similarly, rather than applying a strict four-factor test, the Court of Appeals for the Ninth Circuit has held that a range of evidence may be considered to determine whether specified records are in the agency's possession in connection with agency-related business.[78] Of note, the authority of an agency to control the records is not determinative; actual agency control is the key consideration in the agency records analysis.[79]

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[77] Id. at 857 (quoting Jud. Watch, Inc. v. Fed. Housing Finance Agency, 646 F.3d 924, 928 (D.C. Cir. 2011) ("In deciding whether an agency controls a document its employees created, we have consistently found that 'use is the decisive factor.'" (quoting Consumer Fed'n of Am. v. Dep't of Agric., 455 F.3d 283, 288 (D.C. Cir. 2006))).

[78] Rojas v. FAA, 941 F.3d 392, 409 (9th Cir. 2019) (declining to adopt D.C. Circuit four-factor test, but noting that, "[a]s suggested by the D.C. Circuit, evidence relating to the agency's use of documents (including its system for preserving, retrieving, or disposing of the documents, and any reliance on the documents by agency employees) may be relevant to this inquiry"); cf. Doyle v. DHS, 959 F.3d 72, 78 (2d Cir. 2020) (concluding "the term 'agency records' may reasonably (though not necessarily) be interpreted to exclude the [White House] visitor logs" where the White House "manifested a clear intent to control the documents" and "because it is hard for [the court] to 'believe Congress intended that FOIA requesters be able to obtain from the gatekeepers of the White House what they are unable to obtain from its occupants'" (quoting Jud. Watch, Inc. v. U.S. Secret Serv., 726 F.3d 208, 233 (D.C. Cir. 2013))); Jud. Watch, Inc. v. U.S. Secret Serv., 726 F.3d 208, 220-33 (D.C. Cir. 2013) (finding that White House visitor logs within the White House Access Control System are not "agency records" after determining that "the four-factor test is not the only test relevant to the FOIA request at issue" and that "'special policy considerations'" led the court to "not believe Congress intended that FOIA requesters be able to obtain" such records) (internal citation omitted).

[79] Cause of Action Inst., 10 F.4th at 856-57 ("Mere authority to control . . . is not enough. The relevant consideration is how much control the agencies actually asserted over the documents at issue." "The possibility of access is not equivalent to use by the agency."); Rocky Mountain Wild, Inc. v. U.S. Forest Serv., 878 F.3d 1258, 1263 (10th Cir. 2018) (holding that "it does not matter that the Forest Service *could* possess the documents by requesting them from [the contractor]: a federal right of access does not render a private organization's data 'agency records' subject to FOIA, because 'FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained'" (quoting Forsham v. Harris, 445 U.S. 169, 186 (1980))); Energy Pol'y Advocs. v. U.S. Dep't of the Interior, No. 21-1411, 2023 WL 2585761, at *4 (D.D.C. Mar. 21, 2023) (reasoning that because "Interior did not control chats sent over the Zoom platform at the time of the FOIA request[,]" and "had no FOIA obligation to obtain and store such chats, declining to search for and produce them was not improper"); Wattleton v. DOJ, No. 22-0145, 2022 WL 17149680, at *5 (D.D.C. Nov. 22, 2022) (holding that, despite fact that EOUSA had ability to obtain requested records from Public Access to Court Electronic Records system ("PACER"), EOUSA was not required to do so because such information was outside its possession and control), aff'd, 2023 WL 6531751 (D.C. Cir. Oct. 5, 2023); Physicians Comm. for Responsible Med. v. USDA, 316 F. Supp. 3d 1, 9 (D.D.C. 2018) (noting that, while "agency has the authority to audit" the intervenor's records, by "ordering the agency to 'exercise its right of

Agency "control" is also the predominant consideration in determining whether records generated or maintained by a government contractor are "agency records" under the FOIA.[80] The FOIA's definition of "record" expressly provides that the term includes information that qualifies as a record under the FOIA and "is maintained for an agency by an entity under government contract, for the purposes of records management."[81]

Unlike "agency records," which are subject to the FOIA, "congressional records" are not.[82] The D.C. Circuit has held that ascertaining whether records in an agency's

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access,' the Court 'effectively would be compelling the agency to "create" an agency record,'" which would extend the FOIA's reach beyond Congress's intent (quoting Forsham, 445 U.S. at 186)).

[80] See Am. Small Bus. League v. Small Bus. Admin., 623 F.3d 1052, 1053 (9th Cir. 2010) (reasoning that wireless provider's records were not agency records because there was no evidence that agency "extensively supervised or was otherwise entangled with [provider's] production and management of the records"); Burka v. HHS, 87 F.3d 508, 515 (D.C. Cir. 1996) (finding data tapes created and possessed by contractor to be agency records because of extensive supervision exercised by agency, which evidenced "constructive control"); Forest Cnty. v. Zinke, 278 F. Supp. 3d 181, 195-96 (D.D.C. 2017) (finding third-party contractor records were not agency records despite fact that that agency created or obtained them because agency "lacked control" of them); Buholtz v. USMS, 233 F. Supp. 3d 113, 116 (D.D.C. 2017) (finding that fact that facility was USMS contract facility alone does not convert its records into records created or controlled by USMS); In Def. of Animals v. NIH, 543 F. Supp. 2d 83, 100-01 (D.D.C. 2008) (finding agency had control over chimpanzee clinical records located at contractor-operated facility where agency owned facility, chimpanzees, and chimpanzee clinical files, and contract provided for agency access to clinical records created and maintained on site); Tax Analysts v. DOJ, 913 F. Supp. 599, 607 (D.D.C. 1996) (finding that electronic legal research database contracted by agency is not agency record because licensing provisions specifically precluded agency control), aff'd, 107 F.3d 923 (D.C. Cir. 1997) (unpublished table decision).

[81] 5 U.S.C. § 552(f)(2)(B) (2018); see, e.g., Am. Small Bus. League, 623 F.3d at 1053-54 (holding that wireless provider's records were not agency "records" because records were not "'maintained for an agency by an entity under Government contract, for the purposes of records management'" (quoting 5 U.S.C. § 552(f)(2)(B))); see also OIP Guidance: Treatment of Agency Records Maintained for an Agency by a Government Contractor for Purposes of Records Management (posted 9/9/2008, updated 7/28/2021) (advising that term "records" includes agency records maintained for agency by government contractor for purposes of records management, even if such records are not in agency's physical possession).

[82] See, e.g., United We Stand Am. v. IRS, 359 F.3d 595, 597 (D.C. Cir. 2004) (observing that "[t]he Freedom of Information Act does not cover congressional documents"); see also Cause of Action v. NARA, 753 F.3d 210, 216 (D.C. Cir. 2014) (finding that "Congress did not

possession are "agency records" or "congressional records" depends upon whether Congress manifested an intent to exert control over those records[83] and on the particular contours of that reservation of control.[84] Congress's intent to exert control over particular records must be evident from the circumstances surrounding their creation or transmittal.[85] The D.C. Circuit has rejected the argument that "when Congress transmits

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intend to expose legislative branch material to FOIA simply because the material has been deposited with the Archives").

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

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

[85] See id. at 600 (holding that "under all of the circumstances surrounding the [agency's] creation and possession of the documents," there were "sufficient indicia of congressional intent to control" certain portions of those documents); Paisley, 712 F.2d at 694 ("[W]e find that neither the circumstances surrounding the creation of the documents nor the conditions under which they were transferred to the agencies manifests a clear congressional intent to maintain control."); Holy Spirit Ass'n v. CIA, 636 F.2d 838, 842 (D.C. Cir. 1980) ("Nothing here either in the circumstances of the documents' creation or in the conditions under which they were sent to the [agency] indicates Congress' intent to retain control over the records."); Goland v. CIA, 607 F.2d 339, 348 (D.C. Cir. 1978) (holding that congressional hearing transcript maintained by agency was "not an 'agency record' but a Congressional document to which FOIA does not apply . . . because we believe that on all the facts of the case Congress' intent to retain control of the document is clear"); Jud. Watch, Inc. v. Clinton, 880 F. Supp. 1, 11-12 (D.D.C. 1995) (following Wash. Post v. DOD, 766 F. Supp. 1, 17 (D.D.C. 1991), to find that transcript of congressional testimony provided "solely for editing purposes," with cover sheet restricting dissemination, is not agency record), aff'd on other grounds, 76 F.3d 1232 (D.C. Cir. 1996); Ctr. for Nat'l Sec. Stud. v. CIA, 577 F. Supp. 584, 586-90 (D.D.C. 1983) (holding that agency report prepared "at the direct request of Congress" with intent that it remain secret and transferred to agency with congressionally imposed "conditions" of secrecy is not agency record, nor is duplicate copy of report maintained in agency's files); see also Kinnucan v. NSA, No. 20-1309, 2021 WL 6125809, at *4 (W.D. Wash. Dec. 28, 2021) (noting that "neither the Supreme Court nor the Ninth Circuit has articulated a test that addresses the constitutional considerations for congressional records" but finding "the D.C. Circuit's approach persuasive" and adopting "it here as consistent with the Ninth Circuit's guidance to take a fact-driven approach to determining whether an agency controls a particular record such that it is subject to FOIA"); Cox v. DOJ, 504 F. Supp. 3d 119, 149-50 (E.D.N.Y 2020) (noting that test for congressional records inquiry in Second Circuit is unsettled, but deciding to follow D.C. Circuit's analysis and finding "compelling evidence" that Congress intended to

documents to an agency, it must give contemporaneous instructions preserving any previous expressions of intent to control the documents to retain control over the documents."[86] The D.C. Circuit has found, however, that absent evidence of this intent to retain control over records, the records will not be found to be "congressional records" and, accordingly, will be within the reach of the FOIA.[87] "Congressional records" may include records received by an agency from Congress[88] and records generated by an agency in response to a congressional inquiry.[89]

In a similar vein, "agency records" are distinguishable from "personal records" – records that might be physically maintained by agency employees at the agency, but that are not subject to the FOIA. In determining whether a record is a "personal record," the D.C. Circuit has held that an agency should examine "the totality of the circumstances surrounding the creation, maintenance, and use" of the record.[90] Factors relevant to this

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relinquish control of committee report when, at time of transmittal, it encouraged Executive Branch use and dissemination of report).

[86] ACLU v. CIA, 823 F.3d 655, 666 (D.C. Cir. 2016) (finding that "[t]his is not the law" and focusing on letter from Congress to agency containing "no temporal limitations" and "unequivocal" command that Congress "intended to control any and all of its work product"); cf. United We Stand Am., 359 F.3d at 602 (finding that control cannot be accomplished on "post hoc" basis "long after the original creation [or] transfer of the requested documents").

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

[88] See, e.g., Goland, 607 F.2d at 347 (holding that agency acted merely "as a 'trustee' for Congress" in retaining copy of hearing transcript over which Congress "plainly" manifested intent to control by denominating it as "'secret'") (internal citations omitted); Hall v. CIA, No. 98-1319, 2000 U.S. Dist. LEXIS 22695, at *23 (D.D.C. Aug. 10, 2000) (finding that Senate committee "unequivocally" stated its intent in writing to retain control over committee documents that it entrusted to National Archives).

[89] See Holy Spirit Ass'n, 636 F.2d at 842-43 (recognizing that agency-created records can become "congressional records"); Jud. Watch, Inc., 880 F. Supp. at 12 ("Even documents created by the agencies themselves may elude FOIA's reach if prepared on request of Congress with confidentiality restrictions.").

[90] Bureau of Nat'l Affs., Inc. v. DOJ, 742 F.2d 1484, 1492 (D.C. Cir. 1984); see also Consumer Fed'n of Am. v. Dep't of Agric., 455 F.3d 283, 287-88 (D.C. Cir. 2006) (considering "[record] creation, location/possession, control, and use" – the "principal factors" identified in Bureau of Nat'l Affs. – and deciding that "*use* [of the records] is the decisive factor here" (emphasis added)); Brennan Ctr. for Just. at N.Y. Univ. Sch. of L. v. DOJ, No. 17-6335, 2019 WL 2717168, at *2 (S.D.N.Y. June 28, 2019) (rejecting defendant's position that certain emails were personal records because "[t]he emails, which concern

inquiry include, among others, (1) the purpose for which the document was created; (2) the degree of integration of the record into the agency's filing system; and (3) the extent to which the record's author or other employees used the record to conduct agency business.[91]

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voting integrity, and which were received and created by CRT employees who enforce voting law, 'reflect substance related to, and therefore shed[] light on' the conduct of their official duties" (quoting Hyatt v. U.S. Pat. & Trademark Off., 346 F. Supp. 3d 141, 148-49 (D.D.C. 2018))); Spannaus v. DOJ, 942 F. Supp. 656, 658 (D.D.C. 1996) (finding that "'personal' files" of attorney no longer employed with agency were "beyond the reach of FOIA" if they were not turned over to agency at end of employment) (internal citation omitted); FOIA Update, Vol. V, No. 4 ("OIP Guidance: 'Agency Records' vs. 'Personal Records'").

[91] See, e.g., Consumer Fed'n of Am., 455 F.3d at 288-93 (reasoning that five officials' calendars were agency records where calendars were electronically distributed to staff and relied upon for business use, but that sixth officials' calendar was personal record because it was created and used for his convenience and distributed only to his secretarial staff); Gallant v. NLRB, 26 F.3d 168, 171-72 (D.C. Cir. 1994) (ruling that letters written on agency time and equipment by board member seeking renomination, which were reviewed by other agency employees but not integrated into agency record system and over which author had not relinquished control, were not agency records); Bureau of Nat'l Affs., 742 F.2d at 1489-96 (holding that officials' uncirculated appointment calendars and telephone message slips were personal records, used for personal convenience, whereas official's daily agendas were agency records as they were created for distribution to top agency staff to facilitate scheduling of agency business); Media Rsch. Ctr. v. DOJ, 818 F. Supp. 2d 131, 140, (D.D.C. 2011) (holding that correspondence "created or received by the [Solicitor General] in her capacity as a judicial nominee" was not relied upon by the agency "in carrying out its business, but rather was used for a purely personal objective" and therefore did not constitute agency records); Fortson v. Harvey, 407 F. Supp. 2d 13, 16 (D.D.C. 2005) (finding that officer's investigation notes were personal records because notes were used only to refresh officer's memory and were neither integrated into agency files nor relied on by other agency employees); Bloomberg, L.P. v. SEC, 357 F. Supp. 2d 156, 163-67 (D.D.C. 2004) (concluding that SEC Chairman's computer calendar, telephone logs, and message slips and meeting notes of Chairman's chief of staff were personal records where they were created for personal use of Chairman or chief of staff, were not incorporated into SEC files, and were not under SEC control, even though some records were maintained by SEC personnel and were automatically "backed-up" onto SEC computer server at regular intervals); Dow Jones & Co. v. GSA, 714 F. Supp. 35, 39 (D.D.C. 1989) (determining that agency head's recusal list, shared only with personal secretary and chief of staff, was not agency record); see also FOIA Update, Vol. V, No. 4, ("OIP Guidance: 'Agency Records' vs. 'Personal Records'") (recognizing ten criteria "that should be evaluated by agencies in making all 'agency record/personal record' determinations"); cf. Cause of Action Inst. v. NOAA, No. 19-1927, 2023 WL 3619345, at *4 (D.D.C. May 24, 2023) (finding that even if certain council members were not full-time employees, they were acting on behalf of the agency in certain contexts, making their work attributable to defendant, and therefore, rejecting defendant's proposition that because these council members were using personal email accounts and were not generally compensated for this type of work the materials they created in this context were not agency records).

FOIA Requesters

The FOIA generally requires federal agencies to make records "available to any person."[92] Although the FOIA does not itself define the term "person," it incorporates the definition of "agency" from the Administrative Procedure Act,[93] which in turn defines the term "person" as "an individual, partnership, corporation, association, or public or private organization other than an agency."[94] Courts rely on this definition of "person" in the FOIA context.[95]

An attorney or other representative may make a request on behalf of "any person" if the representative clearly indicates that the request is made on behalf of a specifically identified client.[96] While individual members of Congress possess the same rights of

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[92] 5 U.S.C. § 552(a)(3)(A) (2018); see also 5 U.S.C. § 552(a)(3)(E) (prohibiting elements of intelligence community from disclosing records to foreign governments or their representatives).

[93] See 5 U.S.C. § 552(f)(1) (providing further definition of term under FOIA).

[94] 5 U.S.C. § 551(2) (2018).

[95] See SAE Prods., Inc. v. FBI, 589 F. Supp. 2d 76, 80 (D.D.C. 2008) (stating that a "'person,' as defined under FOIA, includes a corporation," (citing Administrative Procedure Act)); see also Arevalo-Franco v. INS, 889 F.2d 589, 591 (5th Cir. 1989) (indicating that meaning of "person" under FOIA is not restricted to American citizens); Stone v. Exp.-Imp. Bank, 552 F.2d 132, 136-37 (5th Cir. 1977) (holding that Bank for Foreign Trade, an agency of Soviet Union, was a "person", and declaring that Administrative Procedure Act definition of "person" does not suggest "intention to limit [itself] . . . to American individuals and 'public or private' organization[s]"); O'Rourke v. DOJ, 684 F. Supp. 716, 718 (D.D.C. 1988) (concluding that requester's status as an alien did not exclude him from access to records under the FOIA because Congress . . . distinguishes between a 'citizen' and 'any person' when it wishes to do so" and finding that "there is insufficient evidence that citizens were intended by Congress to be the sole beneficiaries of the FOIA") (internal citation omitted).

[96] See, e.g., Constangy, Brooks & Smith v. NLRB, 851 F.2d 839, 840 n.2 (6th Cir. 1988) (recognizing standing of attorney to request documents on behalf of client); Smallwood v. DOJ, 266 F. Supp. 3d 217, 220 (D.D.C. 2017) (finding that "an attorney may make a FOIA request on behalf of a client[,] . . . [b]ut the attorney 'must clearly indicate that it is being made on behalf of the [client] to give that [client] standing to bring a FOIA challenge'" (quoting Three Forks Ranch Corp. v. Bureau of Land Mgmt., 358 F. Supp. 2d 1, 2 (D.D.C. 2005))); cf. Burka v. HHS, 142 F.3d 1286, 1290 (D.C. Cir. 1998) (holding that when attorney makes request in his own name without disclosing that he is acting on behalf of a client, he may not later seek attorney fees for his legal work); McDonnell v. United States, 4 F.3d 1227, 1237-38 (3d Cir. 1993) (holding that person whose name does not appear on request does not have standing); Brown v. EPA, 384 F. Supp. 2d 271, 276-78 (D.D.C. 2005) (finding that plaintiff has standing where request stated that attorney was making request on behalf

access as those guaranteed to "any person," it is the longstanding policy of the Executive Branch to comply with requests for information from both Congressional committees and individual members of Congress to the fullest extent consistent with constitutional and statutory obligations.[97]

There are, however, three narrow exceptions to this broad "any person" standard. First, courts have denied relief under the FOIA to fugitives from justice if the requested records relate to the requester's fugitive status.[98] Second, as amended by the Intelligence Authorization Act for Fiscal Year 2003,[99] the FOIA precludes agencies of the intelligence

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of client and where "other correspondence" confirmed that all parties understood attorney to be acting on behalf of client); Mahtesian v. OPM, 388 F. Supp. 2d 1047, 1050 (N.D. Cal. 2005) (finding that lawyer's "reference to an anonymous client in a FOIA request, can not [sic], alone, confer standing on that client"); Dale v. IRS, 238 F. Supp. 2d 99, 107 (D.D.C. 2002) ("A party's counsel is not the 'requester' for purposes of a fee waiver.").

[97] See Requests by Individual Members of Congress for Executive Branch Information, 43 Op. O.L.C. 42, 49 (2019) (explaining that "the Executive Branch may – and often does – provide information to individual members that is more than what is required under the Freedom of Information Act," including "correspondence that answers substantive questions, supplies a reasoned justification for existing policy, or explains why the Executive Branch's established confidentiality interests preclude it from providing requested information").

[98] See Maydak v. Dep't of Educ., 150 F. App'x 136, 138 (3d Cir. 2005) (affirming district court's dismissal with prejudice as "there was enough of a connection between Maydak's fugitive status and his FOIA case"); Maydak v. United States, No. 02-5168, slip op. at 1 (D.C. Cir. Dec. 11, 2003) (refusing to dismiss because "[t]here is no substantial connection between [requester's] alleged fugitive status and his current [FOIA] action," which was filed four years before requester became a fugitive (citing Daccarett-Ghia v. Comm'r of IRS, 70 F.3d 621, 626 & n.4 (D.C. Cir. 1995))); Lazaridis v. DOJ, 713 F. Supp. 2d 64, 69-70 (D.D.C. 2010) (finding that agency failed to establish connection between requester's fugitive status and FOIA proceedings); see also Daccarett-Ghia v. Comm'r of IRS, 70 F.3d 621, 626-28 (D.C. Cir. 1995) (explaining that there must be connection between individual's fugitive status and proceedings, and finding that while plaintiff's tax redetermination petition had subject-matter connection to his fugitive status, that status had no effect on Tax Court's ability to conduct its proceedings and enforce any judgment against plaintiff) (non-FOIA case). But cf. O'Rourke, 684 F. Supp. at 718 (holding that convicted criminal, fugitive from his home country undergoing U.S. deportation proceedings, qualified as "any person" for purpose of making FOIA request); Doherty v. DOJ, 596 F. Supp. 423, 424-29 (S.D.N.Y. 1984) (same).

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

community[100] from disclosing records in response to FOIA requests made by any foreign government or international governmental organization, either directly or through a representative.[101] Finally, several courts have held that a requester who has waived by plea agreement his or her FOIA rights is precluded from making a FOIA request concerning any waived subject,[102] although in the context of criminal plea agreement waivers, the D.C. Circuit now requires agencies to point to a legitimate criminal-justice interest served by enforcing the waiver.[103]

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[100] See 50 U.S.C. § 3003 (2018) (specifying within National Security Act of 1947, as amended, that certain federal agencies and agency subparts are deemed to be elements of the intelligence community).

[101] 5 U.S.C. § 552(a)(3)(E) (2018); see All Party Parliamentary Grp. on Extraordinary Rendition v. DOD, 754 F.3d 1047, 1053 (D.C. Cir. 2014) (holding that intelligence agencies are prohibited from releasing records to foreign government entities or to their "representatives," and concluding that "FOIA requesters who have authority to file requests on behalf of foreign government entities are 'representatives' of such entities when they file requests of the sort they have authority to file"); see also OIP Guidance: FOIA Amended by Intelligence Authorization Act (posted 12/23/2002, updated 12/19/2024) (advising that "for any FOIA request that by its nature appears as if it might have been made by or on behalf of a non-U.S. governmental entity, a covered agency may inquire into the particular circumstances of the requester in order to properly implement this new FOIA provision").

[102] See United States v. Lucas, 141 F. App'x 169, 170 (4th Cir. 2005) (finding that requester "waived his right to bring the FOIA claim" via valid binding plea agreement); Taylor v. DOJ, No. 20-927, 2023 WL 2734082, at *4 (D.D.C. Mar. 31, 2023) (confirming that "the evidence in the record overwhelmingly shows that [Plaintiff] understood the 'nature of the right'" and concluding that "the [plea] agreement contains a clear, express waiver of his FOIA rights" to records concerning his criminal cases) (internal citation omitted); Brandon v. United States, No. 17-655, 2021 WL 4496953, at *11 (W.D.N.C. Sept. 30, 2021) (finding that express FOIA waiver in plaintiff's plea agreement foreclosed her right to "all relevant information and documents" in her criminal case under the FOIA); Boyce v. United States, No. 08-0535, 2010 WL 2691609, at *1 (W.D.N.C. July 6, 2010) (finding that waiver in plaintiff's plea agreement, whereby he waived his rights to receive any investigation and prosecution records related to his criminal case, precludes his access under FOIA); cf. Rogers v. IRS, 822 F.3d 854, 857 (6th Cir. 2016) (finding that release in forfeiture action covering all claims related to forfeiture action prevents FOIA request regarding that matter).

[103] See Price v. DOJ, 865 F.3d 676, 683 (D.C. Cir. 2017) (finding that "a plea agreement that attempts to waive a right conferred by a federal statute is, like any other contract, 'unenforceable if the interest in its enforcement is outweighed [under] the circumstances by a public policy harmed by enforcement'" (quoting Town of Newton v. Rumery, 480 U.S. 386, 392 (1987))); see also Barnes v. FBI, 35 F.4th 828, 831 (D.C. Cir. 2022) (enforcing FOIA waiver in plea agreement regarding criminal case involving confidential informant based on government's criminal-justice interest in witness security despite protection afforded by applicable FOIA exemptions); Taylor v. DOJ, No. 20-927, 2023 WL 2734082, at *4 (D.D.C. Mar. 31, 2023) (finding that "protecting the child victim . . . undeniably serves a legitimate criminal-justice interest" while rejecting Plaintiff's argument that the use of FOIA

In keeping with the broad "any person" standard, FOIA requesters generally do not have to justify or explain their reasons for making requests.[104] The Supreme Court has observed that a FOIA requester's identity generally "has no bearing on the merits of his or her FOIA request."[105] Moreover, the Supreme Court has held that a requester's basic access rights are neither increased nor decreased based upon the requester's particular interest in the records sought.[106] In the context of discovery, while the FOIA and

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exemptions could serve to protect that interest); Graham v. FBI, No. 20-210, 2022 WL 424979, at *3-4 (D.D.C. Feb. 11, 2022) (upholding FOIA waiver where plaintiff did "not identif[y] a plausible 'harm to public-policy that enforcement [of his agreement] would cause'" and where plaintiff failed to refute the government's legitimate criminal justice interests in protecting victims of child pornography and sensitive investigative techniques (quoting Price, 865 F.3d at 683)). But cf. Rogers v. EOUSA, No. 18-0454, 2019 WL 1538252, at *7 (D.D.C. Apr. 9, 2019) (finding that "[n]o published opinion, to the Court's knowledge, has found that the Price holding applies to civil settlement agreements").

[104] See, e.g., NARA v. Favish, 541 U.S. 157, 172 (2004) ("[A]s a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information."); cf. Sikes v. Navy, 896 F.3d 1227, 1234 (11th Cir. 2018) (holding that "FOIA itself contains nothing that would allow an agency to withhold records simply because it has previously given them to the requester").

[105] DOJ v. Reps. Comm. for Freedom of the Press, 489 U.S. 749, 771 (1989); see Favish, 541 U.S. at 170 ("As a general rule, withholding information under FOIA cannot be predicated on the identity of the requester."); see also Lynch v. Dep't of the Treasury, No. 98-56368, 2000 WL 123236, at *4 (9th Cir. Jan. 28, 2000) (unpublished table decision) (upholding district court's decision to not consider identity of requester in determining whether records were properly withheld under Exemption 7(A)); United Techs. v. FAA, 102 F.3d 688, 692 (2d Cir. 1996) (rejecting plaintiff's argument that Exemption 4 should be applied "on a requester-specific basis" because "[u]nder that rule, the Government would be required in every FOIA case to conduct an inquiry regarding the identity of the requester and the circumstances surrounding its request," and "[t]he FOIA was not intended to be applied on such an individualized basis"); Durns v. BOP, 804 F.2d 701, 706 (D.C. Cir. 1986) ("Congress granted the scholar and the scoundrel equal rights of access to agency records."), cert. granted, judgment vacated on other grounds & remanded, 486 U.S. 1029 (1988); FOIA Update, Vol. VI, No. 3 ("FOIA Counselor: Questions & Answers") ("It is also well established that a FOIA requester cannot rely upon his status as a private party litigant — in either civil or criminal litigation – to claim an entitlement to greater FOIA access than would be available to the average requester.").

[106] See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975) (recognizing that a requester's "rights under the Act are neither increased nor decreased by reason of the fact that [he or she] claims an interest in the [requested records] greater than that shared by the average member of the public"); see also Reps. Comm., 489 U.S. at 771 ("As we have repeatedly stated, Congress 'clearly intended' the FOIA 'to give any member of the public as much right to disclosure as one with a special interest [in a particular document].'" (quoting Sears, 421 U.S. at 149)); EPA v. Mink, 410 U.S. 73, 86 (1973) (declaring that the FOIA does

discovery provide parallel, independent avenues for obtaining government records, requesters' discovery rights are separate and distinct from their rights under the FOIA. [107]

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not "permit inquiry into particularized needs of the individual seeking the information"); Petroleum Info. Corp. v. U.S. Dep't of Interior, 976 F.2d 1429, 1437 (D.C. Cir. 1992) (stating that FOIA "is largely indifferent to the intensity of a particular requester's need"); North v. Walsh, 881 F.2d 1088, 1096 (D.C. Cir. 1989) ("In sum, [FOIA requesters'] need or intended use for the documents is irrelevant."); cf. Parsons v. FOIA Officer, No. 96-4128, 1997 WL 461320, at *1 (6th Cir. Aug. 12, 1997) (unpublished table decision) (rejecting plaintiff's argument that his "legitimate need for the documents superior to that of the general public or the press" warranted disclosure of exempt information).

[107] See United States v. Weber Aircraft Corp., 465 U.S. 792, 801-02 (1984) (holding that FOIA's Exemption 5 privileges encompass all civil discovery privileges because to hold otherwise would allow requesters to circumvent civil discovery rules); Baldrige v. Shapiro, 455 U.S. 345, 360 n.14 (1982) (noting that "primary purpose of the FOIA was not . . . to serve as a substitute for civil discovery"); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (rejecting requester's need-based argument to overcome exemption applicability and noting that "FOIA was not intended to function as a private discovery tool"); Renegot. Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974) (rejecting requester's attempt to pause non-FOIA process until he obtained documents through his FOIA request and noting that "discovery for litigation purposes is not an expressly indicated purpose of the Act"); see also, e.g., Jabar v. DOJ, 62 F.4th 44, 51 (2d Cir. 2023) ("FOIA has no special rules or exceptions that apply when the documents sought relate to a criminal case."); Williams & Connolly v. SEC, 662 F.3d 1240, 1245 (D.C. Cir. 2011) ("FOIA is neither a substitute for criminal discovery . . . nor an appropriate means to vindicate discovery abuse" (citing Roth v. DOJ, 642 F.3d 1161, 1177 (D.C. Cir. 2011) & Boyd v. DOJ, 475 F.3d 381, 390 (D.C. Cir. 2007))); Jones v. FBI, 41 F.3d 238, 250 (6th Cir. 1994) ("FOIA's scheme of exemptions does not curtail a plaintiff's right to discovery in related non-FOIA litigation; but neither does that right entitle a FOIA plaintiff to circumvent the rules limiting release of documents under FOIA."); North v. Walsh, 881 F.2d 1088, 1096 (D.C. Cir. 1989) (rejecting defendant's argument that, because plaintiff was using FOIA as an "adjunct discovery device" for his criminal case, Criminal Rule 16 materiality and relevance requirements should apply to his FOIA request, and holding that discovery limitations do not apply "when FOIA requests are presented in a discrete civil action" because plaintiff's "need or intended use for the documents is irrelevant to his FOIA action"); United States v. U.S. Dist. Ct., Cent. Dist. of Cal., 717 F.2d 478, 480 (9th Cir. 1983) (holding that FOIA does not expand scope of criminal discovery permitted under Rule 16 of Federal Rules of Criminal Procedure); Martinez v. EEOC, No. 04-0391, 2004 WL 2359895, at *6 (W.D. Tex. Oct. 19, 2004) (concluding that requester "may not use the FOIA to circumvent the discovery process and thereby frustrate the investigative procedures of the EEOC"); Comer v. IRS, No. 97-76329, 2000 WL 1566279, at *2 (E.D. Mich. Aug. 17, 2000) (finding that, "while documents obtained through FOIA requests may ultimately prove helpful in litigation by permitting a citizen to more precisely target his discovery requests, FOIA is not intended to be a substitute for discovery"); United States v. Agunbiade, No. 90-0610, 1995 WL 351058, at *7 (E.D.N.Y. May 10, 1995) (stating that FOIA requester "cannot employ the statute as a means to enlarge his right to discovery" in his criminal case); Johnson v. DOJ, 758 F. Supp. 2, 5 (D.D.C. 1991) ("Resort to Brady v. Maryland as grounds for waiving confidentiality is . . . outside the

The requester's reason for making a FOIA request may, however, be considered in the context of certain procedural decisions made during the course of processing a request, such as when the agency determines whether to grant expedited processing, or to waive fees, or when a court decides whether to award attorney fees and costs to a successful FOIA plaintiff.[108]

Proper FOIA Requests

The FOIA specifies two requirements for an access request: It must "reasonably describe[]" the records sought and it must be "made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed."[109] The Court of Appeals for the District of Columbia Circuit has held that the key to determining whether a request satisfies the first requirement is the ability of agency staff to reasonably ascertain exactly which records are being requested and to locate them.[110] Courts have

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proper role of FOIA."); Jackson v. First Fed. Sav., 709 F. Supp. 887, 889 (E.D. Ark. 1989) (declaring that "there is no rule that the parties to a lawsuit may only gather evidence through the formal discovery devices," and "it is ordinarily unnecessary for the party seeking the material to take steps to compel what will be given freely"); Injex Indus. v. NLRB, 699 F. Supp. 1417, 1419 (N.D. Cal. 1986) (holding that FOIA cannot be used to circumvent non-reviewable decision to impound requested documents); Stimac v. DOJ, 620 F. Supp. 212, 213 (D.D.C. 1985) ("Brady v. Maryland . . . provides no authority for releasing material under FOIA."); see also FOIA Update, Vol. III, No. 1, at 10 ("FOIA Counselor: Paths to Information") (acknowledging that "[u]nder present law there is no statutory prohibition to the use of FOIA as a discovery tool"). But cf. Env't Crimes Project v. EPA, 928 F. Supp. 1, 2 (D.D.C. 1995) (rejecting defendant's motion to transfer case, but ordering stay of FOIA case "pending the resolution of the discovery disputes" in parties' related lawsuit to foreclose requester's attempt to "end run" or interfere with discovery); Morrison-Knudsen Co. v. Dep't of the Army, 595 F. Supp. 352, 356 (D.D.C. 1984) ("[T]he use of FOIA to unsettle well established procedures governed by a comprehensive regulatory scheme must be . . . viewed not only 'with caution' but with concern."), aff'd, 762 F.2d 138 (D.C. Cir. 1985) (unpublished table decision).

[108] See 5 U.S.C. § 552 (a)(4)(A), (a)(6)(E) (2018) (taking into account "purpose" and "need" in fee waiver and expedited processing determinations); see, e.g., Davy v. CIA, 550 F.3d 1155, 1160-63 (D.C. Cir. 2008) (evaluating requester's interests in requested records as criteria in determining entitlement to attorney fees and costs).

[109] 5 U.S.C. § 552(a)(3)(A) (2018).

[110] See, e.g., Yeager v. DEA, 678 F.2d 315, 322, 326 (D.C. Cir. 1982) (holding request encompassing over 1,000,000 computerized records to be valid because "[t]he linchpin inquiry is whether the agency is able to determine 'precisely what records [are] being requested'" (quoting legislative history)); see also Wells v. Dep't of Educ. Off. for C.R., 450 F. App'x 431, 432 (5th Cir. 2011) ("As we cannot decipher which records the Appellants are seeking, we cannot say that the district court abused its discretion in dismissing the suit on

recognized that the legislative history of the 1974 FOIA amendments[111] indicates that a description of a requested record is sufficient if it enables a professional agency employee familiar with the subject area to locate the record with a "reasonable amount of effort."[112] Courts have also found that requests that are so broad and sweeping that they lack specificity are not reasonably described.[113]

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this basis."); Stuler v. IRS, 216 F. App'x 240, 242 (3d Cir. 2007) (per curiam) (affirming district court's finding that requester failed to comply with agency regulations requiring "reasonably described" requests, where requester was not "clear in articulating the documents [she] sought"); Marks v. DOJ, 578 F.2d 261, 263 (9th Cir. 1978) (declaring that "reasonable description relates not only to subject matter, but . . . also relates to place of search" and ruling that FBI was not required to search all field offices pursuant to request for all records "under [my] name" because such "broad, sweeping requests" do not "reasonably describe" records sought); Cato Inst. v. DOD, No. 21-1223, 2023 WL 3231445, at *3 (D.D.C. May 3, 2023) (holding that plaintiff's request seeking "documents 'pursuant to' a DOD directive" simply "does not cut it" because "[t]o reasonably describe the records it seeks, [plaintiff] must clearly identify what relation those records must have to the topic it has identified") (quoting plaintiff's request)); Leopold v. ICE, 560 F. Supp. 3d 189, 199 (D.D.C. 2021) (concluding that request for "any and all immigration enforcement actions," without clarification from Plaintiffs, is too broad and vague to "reasonably describe" the records sought); Landmark Legal Found. v. DOJ, 211 F. Supp. 3d 311, 318 (D.D.C. 2016) (finding that "Defendant contends, and the court agrees, that Plaintiff's request for '[r]ecords evincing the use of' personal email accounts and other electronic communication and social media platforms to conduct government business does not enable a professional DOJ employee to determine what records are being sought") (quoting plaintiff's request)).

[111] H.R. Rep. No. 93-0876, at 6 (1974), as reprinted in 1974 U.S.C.C.A.N. 6267, 6271.

[112] See, e.g., Truitt v. Dep't of State, 897 F.2d 540, 544-45 (D.C. Cir. 1990) (discussing legislative history of 1974 FOIA amendments as related to requirements for describing requested records); Ferri v. DOJ, 573 F. Supp. 852, 859 (W.D. Pa. 1983) (granting summary judgment where plaintiff failed to provide sufficient information to allow agency to retrieve requested information "with a reasonable amount of effort" (citing Marks, 578 F.2d at 263)).

[113] See, e.g., Yagman v. Pompeo, 868 F.3d 1075, 1081 (9th Cir. 2017) (finding request not reasonably described where request "does not identify specific persons, much less specific documents, types of documents, types of information," or "suggest much in the way of times, dates, [or] locations"); Gaunce v. Burnett, No. 85–5995, 1988 WL 63760, at *1475 (9th Cir. June 9, 1988) (affirming lower court's grant of summary judgment, and stating that request did not reasonably describe records sought where it sought "'every scrap of paper wherever located within the agency'" related to requester's aviation activities) (quoting plaintiff's request)); Marks, 578 F.2d at 263 (finding that even if plaintiff is considered to have requested search of every field office of FBI, "broad, sweeping requests lacking specificity are not permissible"); Keeping Gov't Beholden, Inc. v. DOJ, No. 17-1569, 2021 WL 5918627, at *6 (D.D.C. Dec. 13, 2021) (finding request was not reasonably described because requester failed to rebut FBI's assertions that it would need to either "search over 73,000 email accounts" or "conduct extensive research" to identify which of

Courts have explained that "[t]he rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters,"[114] or to allow requesters to conduct "fishing expeditions" through agency files.[115] An agency's FOIA staff is not required to have "clairvoyant capabilities" to discern the requester's needs.[116]

"its 36,776 employees regularly contact NARA"), aff'd sub nom. Brody v. DOJ, No. 22-5043, 2023 WL 1511679 (D.C. Cir. Feb. 3, 2023); Sai v. TSA, 315 F. Supp. 3d 218, 249 (D.D.C. 2018) (holding that "it is difficult to imagine" a request broader in scope and more burdensome than a "request for all 'policy and/or procedures documents,' past and present") (quoting plaintiff's request)); Pinson v. DOJ, 245 F. Supp. 3d 225, 244-45 (D.D.C. 2017) (request for "documents 'concerning the activities of the California Mexican Mafia and Aryan brotherhood gangs within federal prisons generated since 2007'" not reasonably described) (quoting plaintiff's request)); Cable News Network, Inc. v. FBI, 271 F. Supp. 3d 108, 112 (D.D.C. 2017) (finding that request seeking "any and all documents and records . . . [which] relate in any way to" any memos written by FBI director was too vague); cf. Shapiro v. CIA, 170 F. Supp. 3d 147 (D.D.C. 2016) (finding that "FOIA's reasonable-description requirement does not doom requests that *precisely* describe the records sought, even if compliance might overwhelm an agency's response team").

[114] Assassination Archives & Rsch. Ctr. v. CIA, 720 F. Supp. 217, 219 (D.D.C. 1989), aff'd in pertinent part, No. 89-5414, 1990 WL 123924 (D.C. Cir. Aug. 13, 1990) (per curiam); accord Nurse v. Sec'y of the Air Force, 231 F. Supp. 2d 323, 329 (D.D.C. 2002) (quoting Assassination Archives & Rsch. Ctr., 720 F. Supp. at 219); see, e.g., Bloeser v. DOJ, 811 F. Supp. 2d 316, 321 (D.D.C. 2011) (reasoning that "[b]ecause 'FOIA' was not intended to reduce government agencies to full-time investigators on behalf of requesters, . . . [t]o the extent that plaintiff can identify documents which he believes exist in a particular office within [DOJ], such identifying information should have been included as part of his original FOIA request"); Frank v. DOJ, 941 F. Supp. 4, 5 (D.D.C. 1996) (stating that agency is not required to "dig out all the information that might exist, in whatever form or place it might be found, and to create a document that answers plaintiff's questions"); Lamb v. IRS, 871 F. Supp. 301, 304 (E.D. Mich. 1994) (finding requests outside scope of FOIA when they require legal research, are unspecific, or seek answers to interrogatories). But cf. Doolittle v. DOJ, 142 F. Supp. 2d 281, 285 (N.D.N.Y. 2001) (concluding that if description of records sought is otherwise reasonable, agency cannot refuse to search for records simply because requester did not identify them by date on which they were created).

[115] Immanuel v. Sec'y of the Treasury, No. 94-0884, 1995 WL 464141, at *1 (D. Md. Apr. 4, 1995), aff'd, 81 F.3d 150 (4th Cir. 1996) (unpublished table decision); see also Dale v. IRS, 238 F. Supp. 2d 99, 104-05 (D.D.C. 2002) (concluding that request seeking "'*any* and *all* documents . . . that refer or relate in any way'" to requester failed to reasonably describe records sought and "amounted to an all-encompassing fishing expedition of files at [agency's] offices across the country, at taxpayer expense").

[116] Nurse v. Sec'y of the Air Force, 231 F. Supp. 2d 323, 330 (D.D.C. 2002); see also Cato Inst. v. DOD, No. 21-1223, 2023 WL 3231445, at *2-3 (D.D.C. May 3, 2023) (agreeing with defendants that plaintiff's request for all documents "pursuant to" a Directive "calls for

As a corollary to the "reasonably described" inquiry, courts have held that agencies are not required to conduct wide-ranging, "unreasonably burdensome" searches for records.[117] Agencies bear the burden of demonstrating that the time and expense of conducting the search would be unreasonably burdensome.[118] Courts have found that

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[defendants] to 'guess blindly what [plaintiff] really means'") (quoting agency motion)); Amnesty Int'l USA v. CIA, 728 F. Supp. 2d 479, 499 (S.D.N.Y. 2010) (holding that plaintiffs cannot "rely on the argument that the CIA should have known what information Plaintiffs were seeking, for an agency receiving a FOIA request 'is not required to divine a requester's intent'" (quoting Landmark Legal Found. v. EPA, 272 F. Supp. 2d 59, 64 (D.D.C. 2003))); Benneville v. DOJ, No. 98-6137, slip op. at 10 (D. Or. June 11, 2003) (rejecting plaintiff's contention that agency should have provided him with information on *all* environmental groups, rather than just single group specifically named in request letter because "the government should not be expected to determine [unnamed groups'] identit[ies] and determine if they should be involved in the search").

[117] See, e.g., Nat'l Sec. Couns. v. CIA, 969 F.3d 406, 410 (D.C. Cir. 2020) (finding unreasonably burdensome search where request was so general that "it is difficult to determine where responsive information would likely be located within the Agency" and would require a "search of every office for any documents containing the word 'Watson' which would amount to a 'massive undertaking'") (internal citations omitted); Nation Mag. v. U.S. Customs Serv., 71 F.3d 885, 892 (D.C. Cir. 1995) (agreeing that search requiring review of twenty-three years of unindexed files would be unreasonably burdensome, but disagreeing that search through chronologically indexed agency files for dated memorandum would be burdensome); AFGE v. Dep't of Com., 907 F.2d 203, 209 (D.C. Cir. 1990) (holding that "while [plaintiff's requests] might identify the documents requested with sufficient precision to enable the agency to identify them . . . it is clear that these requests are so broad as to impose an unreasonable burden upon the agency," because agency would have "to locate, review, redact, and arrange for [the] inspection [of] a vast quantity of material"); Ctr. for Immigr. Stud. v. USCIS, 628 F. Supp. 3d 266, 271 (D.D.C. 2022) ("The D.C. Circuit has long held that when a request entails 'an unreasonably burdensome search,' the agency need not respond.") (internal citation omitted); Leopold v. DOJ, 301 F. Supp. 3d 13, 23-24 (D.D.C. 2018) (finding that, because request used word "'including'" when referencing topic, request was broader than just topic, but also finding that FBI credibly explained that such a literal construction of request "would be 'overly broad, unduly burdensome, and inadequate to describe the records sought,' such that the FBI 'would have been unable to craft a reasonable search for such non-investigative records'") (quoting agency declaration)); Bailey v. Callahan, No. 09-0010, 2010 WL 924251, at *4-5 (E.D. Va. Mar. 11, 2010) (holding that request is so overbroad that only if requester specified particular component of interest could agency conduct a search without an "unreasonable amount of effort"). But see Ruotolo v. DOJ, 53 F.3d 4, 9-10 (2d Cir. 1995) (finding that, although request would require 803 files to be searched "begin[ning] with the most current . . . and work[ing] backward in time," it was "reasonably described" and not "unreasonably burdensome").

[118] See Nation Mag., 71 F.3d at 892 (requiring agency to "provide sufficient explanation as to why [the] search would be unreasonably burdensome"); Keeping Gov't Beholden, Inc. v.

citing the volume of requested records alone is insufficient evidence to meet this burden.[119] At the same time, "[a]n agency has no duty to narrow a request in order to make the required search reasonable."[120] (For further discussion of litigation

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DOJ, No. 17-1569, 2021 WL 5918627, at *6 (D.D.C. Dec. 13, 2021) (finding request seeking records not contained in a database was unduly burdensome where the agency conducted preliminary search and "identified 106,000 potentially responsive records and the only way to confirm whether those records are in the database is to check them one by one"), aff'd sub nom. Brody v. DOJ, No. 22-5043, 2023 WL 1511679 (D.C. Cir. Feb. 3, 2023); Hall v. CIA, 881 F. Supp. 2d 38, 53 (D.D.C. 2012) (finding conclusory statements insufficient to show search would be unreasonably burdensome); Wolf v. CIA, 569 F. Supp. 2d 1, 9 (D.D.C. 2008) (looking for "a detailed explanation by the agency regarding the time and expense of a proposed search in order to assess its reasonableness").

[119] See Anand v. HHS, No. 21-1635, 2023 WL 2646815, at *14 (D.D.C. Mar. 27, 2023) (rejecting "conclusory statement" that there would be voluminous amount of non-responsive records and finding that agency did not include any information regarding time and expense of conducting search, nor any additional details to support burdensome argument); Hoffman v. CBP, 679 F. Supp. 3d 167, 180 (E.D. Pa. 2023) (rejecting agency's "bare assertion" that search would generate "too many records" and finding that "[a] sufficient explanation should detail 'the time and expense of a proposed search in order to assess its reasonableness'" (quoting Wolf v. CIA, 569 F. Supp. 2d 1, 9 (D.D.C. 2008))); Ctr. for Immigr. Stud., 628 F. Supp. 3d at 273 (noting that "burdensomeness does not boil down to a simple game of numbers" in discussing the post-search burden on agency to process "over 1.6 million pages of responsive records"); Keeping Gov't Beholden, Inc., 2021 WL 5918627, at *6 (expressing "skeptic[ism] that a FOIA request may be denied based on sheer volume of records requested alone"); cf. Stevens v. HHS, No. 22-5072, 2023 WL 6392407, at *5 (N.D. Ill. Oct. 2, 2023) ("There is no freestanding overbreadth exception that excuses agencies from responding to requests regardless of their ready ability to do so. . . . Federal agencies vary greatly in their size, mission, the type and amount of information they collect and generate, and their record-keeping practices. A request may be unreasonably burdensome for one agency but easy to satisfy for another."); Hoffman, 679 F. Supp. 3d at 180-81 ("As database search technology continues to evolve at breakneck pace, the standard for establishing that a given search would cause an undue burden must necessarily evolve along with it.").

[120] Brody v. DOJ, No. 22-5043, 2023 WL 1511679, at *1-2 (D.C. Cir. Feb. 3, 2023) (rejecting requester's argument that agency should have used "'common sense'" to limit search to make request reasonably described *after* agency provided details about size and scope of requested search and holding that "[t]he FOIA places the burden of submitting a reasonably drafted request on the requester") (internal citation omitted); see also Anand v. HHS, No. 21-1635, 2023 WL 3600140, at *4 (D.D.C. May 23, 2023) (rejecting plaintiff's argument that "Defendants should have narrowed [plaintiff's] FOIA request to make it not burdensome" and observing that "[a]gencies have no duty to narrow the scope of a FOIA request" (quoting Nat'l Sec. Couns. v. CIA, 969 F.3d 406, 410 (D.C. Cir. 2020))); Ctr. for Immigr. Stud., 628 F. Supp. 3d at 272, 274 (rejecting plaintiff's attempt to require agency to reframe not reasonably described request to become reasonable based on plaintiff's stated topic of interest; explaining that agency's duty is to read requests as drafted, not as plaintiff wishes

considerations in conducting searches and more information on reasonableness of searches, see Litigation Considerations, Adequacy of Search.)

The D.C. Circuit has held that even if the request "is not a model of clarity," an agency should carefully consider the nature of each request and give a reasonable interpretation to its terms and overall content.[121] Courts have at times required agencies to clarify the scope of the request with the requester, particularly when doing so is required by the agency's regulations.[122]

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they were drafted); cf. Cato Inst. v. DOD, No. 21-1223, 2023 WL 3231445, at *6 (D.D.C. May 3, 2023) (granting agency's summary judgment motion despite noting that agency made "offer to 'begin processing' a reinterpreted narrowed-down request," because this offer "does not constitute a concession that [Plaintiff's] request was otherwise reasonably described") (internal citation omitted).

[121] LaCedra v. EOUSA, 317 F.3d 345, 347-48 (D.C. Cir. 2003) (concluding that agency failed to "liberally construe" request for "all documents pertaining to [plaintiff's] case" when it limited that request's scope to only those records specifically and individually listed in request letter because "drafter of a FOIA request might reasonably seek all of a certain set of documents while nonetheless evincing a heightened interest in a specific subset thereof" (citing Nation Mag., 71 F.3d at 890)); see, e.g., Miller v. Casey, 730 F.2d 773, 777 (D.C. Cir. 1984) (emphasizing that agency is required to read FOIA request as drafted, "not as either [an] agency official or [requester] might wish it was drafted"); Rocky Mountain Wild, Inc. v. U.S. Forest Serv., No. 15-0127, 2016 WL 362459, at *6 (D. Colo. Jan. 29, 2016) (finding that "when an agency learns that it has misunderstood the scope of a request, it has a duty to adjust its records search accordingly"); Laws. Comm. for C.R. v. Dep't of the Treasury, 534 F. Supp. 2d 1126, 1135-36 (N.D. Cal. 2008) (concluding that requests must be "interpreted liberally and . . . an agency cannot withhold a record that is reasonably within the scope of the request on the grounds that the record has not been specifically named by the requester"); Laws. Comm. for C.R. v. Dep't of the Treasury, No. 07-2590, 2008 WL 4482855, at *6 (N.D. Cal. Sept. 30, 2008) (finding that requester's "inartfully written" requests, when "liberally construed," seek subject records); FOIA Update, Vol. XVI, No. 3 ("OIP Guidance: Determining the Scope of a FOIA Request") (advising agencies on interpretation of terms of FOIA requests).

[122] See, e.g., Ruotolo, 53 F.3d at 10 (stating that agency failed to perform its "duty" to assist requester in reformulating request); Anand v. HHS, No. 21-1635, 2023 WL 2646815, at *13 (D.D.C. Mar. 27, 2023) (noting that HHS regulations require clarification with requester regarding questions concerning reasonable descriptions and finding that "[the] requirement to attempt to contact a FOIA requester is in place to ensure that the requester will have 'an opportunity to cooperate with the agency to narrow the scope of [their] request' or otherwise tailor it so that it reasonably describes the records sought 'without judicial intervention'" (quoting Wright v. HHS, No. 22-1378, 2022 WL 18024624, at *4 (D.D.C. Dec. 30, 2022))); Charles v. United States, No. 21-1983, 2022 WL 951242, at *6 (D.D.C. Mar. 30, 2022) (noting that agency FOIA regulations require "'duty to confer'" with requester regarding confusing request and holding that where agency fails to confer in these circumstances "courts have been disinclined to side with the agency on a claim that the request is unclear or overly broad") (internal citation omitted); Stockton E. Water Dist. v.

The District Court for the District of Columbia has held that "a person need not title a request for government records a 'FOIA request.'"[123] This same court also held that an agency "must be careful not to read [a] request so strictly that the requester is denied information the agency well knows exists in its files, albeit in a different form from that anticipated by the requester."[124] Nevertheless, courts have upheld agency decisions to limit the scope of a request when the agency acted reasonably in interpreting what the request sought.[125] The D.C. District Court has held that agencies may "consider the

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United States, No. 08-0563, 2008 WL 5397499, at *2 (E.D. Cal. Dec. 19, 2008) (noting that, if defendants believed request did not sufficiently describe records sought, they were required to contact plaintiff to clarify what records were sought). See generally OIP Guidance: The Importance of Good Communication with FOIA Requesters (posted 3/1/2010, updated 7/28/2021) (explaining that "good communication with requesters can also be exceedingly helpful in those instances where an agency is uncertain about the scope of what is being requested" because "[m]any times FOIA requesters do not know how agency records are organized or what might be involved in searching for the records they seek," and "[b]y engaging in a dialogue with the requester, both parties can ensure that they have a common understanding of what records are being sought").

[123] Newman v. Legal Servs. Corp., 628 F. Supp. 535, 543 (D.D.C. 1986); see also FOIA Update, Vol. VII, No. 1 ("FOIA Counselor: Questions & Answers") (advising that it is "good policy for agencies to treat all first-party access requests as FOIA requests" regardless of whether FOIA is cited by requester). But see Blackwell v. EEOC, No. 98-0038, 1999 WL 1940005, at *2 (E.D.N.C. Feb. 12, 1999) (finding that request was not properly made because plaintiff failed to follow agency regulation requiring that request be denominated explicitly as request for information under FOIA).

[124] Hemenway v. Hughes, 601 F. Supp. 1002, 1005 (D.D.C. 1985); see also Gun Owners of Am., Inc. v. FBI, 594 F. Supp. 3d 37, 47 (D.D.C. 2022) (rejecting agency attempt to have requester "either guess at a document's title or provide a list of terms 'mentioned' or 'referenced' in responsive documents in order to make even a facially valid request" and finding that "[a]lthough a requester must reasonably describe the documents sought, the recipient agency has a correlating duty to work in good faith to fulfill that request if reasonably possible"); Informed Consent Action Network v. FDA, No. 20-689, 2022 WL 902083, at *3-5 (S.D.N.Y. Mar. 28, 2022) (finding request not reasonably described where description of records caused latent ambiguities, level of specificity required by defendant was not a mere technicality, and defendant attempted to clarify scope of request and offered to make full universe of potentially responsive records available to plaintiff); Allen v. BOP, No. 00-0342, slip op. at 7-9 (D.D.C. Mar. 1, 2001) (concluding that agency took "an extremely constricted view" of plaintiff's FOIA request for all "records or transcripts" of intercepted phone calls by failing to construe audiotape recordings of those calls as being within request's scope), aff'd, 89 F. App'x 276 (D.C. Cir. 2004); Horsehead Indus. v. EPA, No. 94-1299, slip op. at 4 n.2 (D.D.C. Jan. 3, 1997) (ruling that "[b]y construing the FOIA request narrowly, [agency] seeks to avoid disclosing information").

[125] See, e.g., McLaughlin v. DOJ, 598 F. Supp. 2d 62, 66 (D.D.C. 2009) (concluding "[n]o reasonable fact finder could imply agency bad faith" from practice of generally treating

configuration of their records systems in deciding whether a FOIA request 'reasonably describes' the records sought."[126]

When determining the scope of a FOIA request, courts have generally held that agencies are neither required to conduct research nor answer questions posed as FOIA

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requests as requests for non-public records and requiring submission of additional request for responsive public records); Adamowicz v. IRS, 552 F. Supp. 2d 355, 362 (S.D.N.Y. 2008) (finding agency's interpretation of request reasonable when agency determined that request seeking records pertaining to tax audit did not include records pertaining to appeal of tax audit); Jud. Watch, Inc. v. DOD, No. 05-0390, 2006 WL 1793297, at *3 (D.D.C. June 28, 2006) (concluding that agency need not construe request for names of corporations related to particular subject to be request for all records related to that subject); Nat'l Ass'n of Crim. Def. Laws. v. DOJ, No. 04-0697, 2006 WL 666938, at *2 (D.D.C. Mar. 15, 2006) (concluding that agency "reasonably" read request as seeking "'any reports or studies'" and requester's attempt to narrow request resulted in request that is "substantially different" from original request) (internal citation omitted).

[126] Nat'l Sec. Couns. v. CIA, 898 F. Supp. 2d 233, 275 (D.D.C. 2012) (noting that agency is permitted to consider configuration of records system because "'[a]n agency is not required to reorganize its files in response to a plaintiff's request'" (quoting Goland v. CIA, 607 F.2d 339, 353 (D.C. Cir. 1978))), aff'd, 969 F.3d 406, 410 (D.C. Cir. 2020).

requests,[127] nor are they required to respond to requests by creating records,[128] such as by modifying exempt information to make it disclosable.[129] In general, courts have

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[127] See, e.g., Hall & Assocs. v. EPA, No. 16-5315, 2018 WL 1896493, at *2 (D.C. Cir. Apr. 9, 2018) (unpublished table decision) (affirming that requests which quoted a statement regarding scientific misconduct and asked EPA to provide all documents proving statement wrong "did not reasonably describe the documents sought [] and would have required EPA to undertake research, analysis, and formulation of opinions – actions not required by FOIA"); Willaman v. Erie ATF, 620 F. App'x 88, 89 (3d Cir. 2015) (unpublished table decision) (finding that agency was not required to respond to interrogatory explaining why individual could not pay for the processing of an application); DiViaio v. Kelley, 571 F.2d 538, 542-43 (10th Cir. 1978) (finding that "it is clear that nothing in the Act requires 'answers to interrogatories' but rather and only disclosure of documentary matters which are not exempt") (internal citation omitted); N.Y. Times Co. v. FCC, 457 F. Supp. 3d 266, 277 (S.D.N.Y. 2020) (finding that where data points requested exist in an Application Programming Interface server log, the log is searchable using a script, and the agency failed to show this particular script would interfere with operations, the "FOIA 'clearly require[s] agencies to sort a pre-existing database of information to make information intelligible so that it may be transmitted to the public . . . [and] [a]ccordingly, conducting such a search cannot constitute . . . conducting research so as to fall outside of agency disclosure requirements'" quoting Everytown for Gun Safety Support Fund v. ATF, 403 F. Supp. 3d 343, 356 (S.D.N.Y. 2019))); Jud. Watch, Inc. v. Dep't of State, 177 F. Supp. 3d 450, 456 (D.D.C. 2016) (finding that "[a] question is not a request for records under FOIA and an agency has no duty to answer a question posed as a FOIA request"); Jean-Pierre v. BOP, 880 F. Supp. 2d 95, 103-104 (D.D.C. 2012) (concluding that request for objective pieces of information, such as "who gave the order" and "on what day," are not "cognizable under FOIA, because they ask questions calling for specific pieces of information rather than records"); cf. Ferri v. Bell, 645 F.2d 1213, 1220 (3d Cir. 1981) (declaring that request "inartfully presented in the form of questions" could not be dismissed, partly because agency conceded that it could provide requester with records containing information he sought); Gun Owners of Am., Inc., 594 F. Supp. 3d at 49-50 (holding that "what matters is not the form of the request but whether compliance would require the creation of new documents" and so "an agency may not reject a FOIA request that on its face seeks only pre-existing documents just because it implicitly asks a question"); Public Emps. for Env't Resp. v. EPA, 314 F. Supp. 3d 68, 79-80 (D.D.C. 2018) (finding request for records "containing a specific scientific conclusion was not asking a question, was reasonably described, and did not require "'FOIA staff to conduct scientific research or make judgment calls"); FOIA Update, Vol. V, No. 1 ("FOIA Counselor: Questions & Answers") (advising that "while agencies do not have to create or compile new records in response to FOIA requests (whether formulated in question form or not), they should make good faith efforts to assist requesters in honing any requests for readily accessible records which are 'inartfully presented in the form of questions'" (quoting Ferri, 645 F.2d at 1220)).

[128] See, e.g., Aguiar v. DEA, 992 F.3d 1108, 1113 (D.C. Cir. 2021) (holding that "because DEA does not possess the GPS mapping software or any related map images and never created or retained the map images [of coordinates], FOIA does not obligate DEA now to create such map images"); Nat'l Sec. Couns. v. CIA, 969 F.3d 406, 409 (D.C. Cir. 2020) (finding that where the agency's FOIA database does not require the fee category field, a list of requesters

by fee category during a two-year timeframe amounts to record creation because it "would require manual review and sorting of numerous electronic records and the ensuing compilation of lists that do not otherwise exist"); Singh v. FAA, 783 F. App'x 753, 754 (9th Cir. 2019) (rejecting plaintiff's contention that FAA could have used certain geographic data that it maintained to piece together information that was responsive to the request because "FOIA does not require agencies to create new records"); LaRoche v. SEC, 289 F. App'x 231, 231 (9th Cir. 2008) (explaining that agency was not required to create new documents to satisfy FOIA request when it could not readily reproduce records sought in searchable electronic format requested); Krohn v. DOJ, 628 F.2d 195, 197-98 (D.C. Cir. 1980) (finding that agency "cannot be compelled to create the [intermediary records] necessary to produce" information sought); Indiana v. Biden, No. 22-00430, 2023 WL 348230, at *7 (S.D. Ind. Jan. 20, 2023) (finding that FOIA does not contain a record keeping requirement and that agency possession and control of record are prerequisite for triggering duties under FOIA); Long v. ICE, No. 17-506, 2022 WL 705493, at *5 (N.D.N.Y. Mar. 9, 2022) (finding that after having conducted an electronic database search, "the process of linking disparate data populations in the [agency database] to produce the information Plaintiffs request constitutes the 'creation of a new record' with the meaning of FOIA") (internal citation omitted); Colgan v. DOJ, No. 14-740, 2020 WL 2043828, at *10 (D.D.C. Apr. 28, 2020) (rejecting plaintiff's request for electronic search screenshots, concluding that "the search screen is not simply another 'form or format' of an already maintained record[,]" because agency "would have to open the software and *create* a screen, which would not otherwise exist") (emphasis added) (internal citation omitted); Moore v. Bush, 601 F. Supp. 2d 6, 15 (D.D.C. 2009) (finding that agency properly refused to issue various statements regarding brain wave technology because FOIA does not require creation of records); West v. Spellings, 539 F. Supp. 2d 55, 61 (D.D.C. 2008) (recognizing that Department of Education had no duty to create list of uninvestigated complaints to satisfy request); Ctr. for Pub. Integrity v. FCC, 505 F. Supp. 2d 106, 114 (D.D.C. 2007) (concluding that plaintiff's suggestion that agency delete some data and replace it with data suggested by plaintiff amounts to creation of new records, something not required under FOIA). But cf. Martinez v. SSA, No. 07-1156, 2008 WL 486027, at *2-3 (D. Colo. Feb. 18, 2008) (requiring agency to produce aggregate data); Schladetsch v. HUD, No. 99-0175, 2000 WL 33372125, at *3 (D.D.C. Apr. 4, 2000) ("Because [agency] has conceded that it possesses in its databases the discrete pieces of information which [plaintiff] seeks, extracting and compiling that data does not amount to the creation of a new record."); Int'l Diatomite Producers Ass'n v. SSA, No. 92-1634, 1993 WL 137286, at *5 (N.D. Cal. Apr. 28, 1993) (giving agency choice of compiling responsive list or redacting existing lists containing responsive information).

[129] See ACLU v. DOJ, 681 F.3d 61, 71 (2d Cir. 2012) (reversing district court's decision requiring agency to substitute purportedly neutral phrase composed by court for exempt material because substitution would effectively force agency to create records); FlightSafety Servs. Corp. v. Dep't of Lab., 326 F.3d 607, 613 (5th Cir. 2003) (per curiam) (recognizing that plaintiff's demand that agency "simply insert new information in the place of the redacted information requires the creation of new agency records, a task that the FOIA does not require the government to perform"); Students Against Genocide v. Dep't of State, 257 F.3d 828, 837 (D.C. Cir. 2001) (rejecting plaintiff's argument that "even if the agencies do not want to disclose the photographs in their present state, they should produce new photographs at a different resolution in order to mask the [classified] capabilities of the

distinguished between using preexisting connections between data to organize and sort such data, which is not considered records creation, and the creation of new connections between data, which is considered record creation.[130] (For a discussion of record creation in the context of electronic database searches, see Procedural Requirements, Searching for Responsive Records, below.) Courts have long held that agencies are not required to make automatic releases of records as they are created; rather, proper FOIA requests are for records already created.[131]

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reconnaissance systems that took them"); cf. Nat'l Sec. Couns., 898 F. Supp. 2d at 270 (holding that "an agency need not create a new database or a reorganize its method of archiving data, but if the agency already stores records in an electronic database, searching that database does not involve the creation of a new record," and sorting a pre-existing database of information to make information intelligible does not involve the creation of a new record" but is instead, "just another form of searching that is within the scope of an agency's duties in responding to FOIA requests"). But see ACLU Immigrants' Rts. Project v. ICE, 58 F.4th 643, 647, 655 (2d Cir. 2023) (requiring ICE to provide public with "ability to track a single individual across the various stages of immigration proceedings" in same way agency is able to do so by approving "substitution of neutral Unique IDs for exempt A-Numbers" or other means where "[s]uch substitution does not alter the content of any record, but only preserves the computer *function* necessary to afford the public access to non-exempt electronic records").

[130] See Long, 2022 WL 705493, at *5 (holding that running multiple queries to create a composite of certain identifiers for the individual, establishing relationships based on those composite identifiers, and then performing analyses and calculations in order to create the information plaintiff requested constitutes records creation because these steps "go beyond merely sorting, compiling or extracting records"); Long v. ICE, No. 17-1097, 2021 WL 3931879, at *4 (D.D.C. Sept. 2, 2021) (finding that to produce the requested data, the agency "must do more than simply sort through information using preexisting connections" between data points, but rather "must create many of those connections in the first instance," and thus holding that "production of the [data] fields is tantamount to the creation of new records"); Nat'l Sec. Couns., 898 F. Supp. 2d at 270 (holding that "an agency need not create a new database or [ ] reorganize its method of archiving data, but if the agency already stores records in an electronic database, searching that database does not involve the creation of a new record," and "sorting a pre-existing database of information to make information intelligible does not involve the creation of a new record" but is instead, "just another form of searching that is within the scope of an agency's duties in responding to FOIA requests").

[131] See Tuchinsky v. Selective Serv. Sys., 418 F.2d 155, 158 (7th Cir. 1969) (holding that no automatic release of material related to occupational deferments is required until request is in hand; "otherwise, [agency] would be required to 'run [a] loose-leaf service' for every draft counselor in the country") (internal citation omitted); see also Mandel Grunfeld & Herrick v. U.S. Customs Serv., 709 F.2d 41, 43 (11th Cir. 1983) (determining that plaintiff not entitled to automatic mailing of materials as they are updated); Howard v. Sec'y of the Air Force, No. 89-1008, slip op. at 6 (W.D. Tex. Oct. 2, 1991) (concluding that plaintiff's request for records on continuing basis would "create an enormous burden, both in time and taxpayers' money"); Lybarger v. Cardwell, 438 F. Supp. 1075, 1077 (D. Mass. 1977) (holding that

In addition to reasonably describing the records sought, a proper FOIA request must be made in accordance with an agency's "published rules stating the time, place, fees (if any), and procedures to be followed."[132] The FOIA requires agencies to promulgate regulations specifying the schedule of fees to be charged and establishing procedures for the waiver of such fees.[133] The FOIA also requires regulations providing for expedited processing.[134] Agencies may promulgate regulations providing for aggregation of requests and multi-track processing.[135]

Accordingly, courts have held that the requirements of the FOIA do not begin to apply until an agency receives a proper FOIA request – one that reasonably describes the records sought and complies with published rules regarding procedures to be followed.[136]

"open-ended procedure" advanced by requester whereby records are automatically disclosed is not required by FOIA and "will not be forced" upon agency).

[132] 5 U.S.C. § 552(a)(3)(A) (2018); see, e.g., Jones v. United States, 412 F. App'x 690, 691 (5th Cir. 2011) (affirming that request was not perfected where plaintiff mailed request to address other than that specified in agency's FOIA regulations); Indiana, 2023 WL 348230, at *10 (dismissing claim concerning a request to the Executive Office of the President because Plaintiff failed to comply with applicable agency regulations "requiring a FOIA request . . . to be directed to a specific [Executive Office of the President] entity"); Clemente v. FBI, 854 F. Supp. 2d 49, 56-57 (D.D.C. 2012) (granting summary judgment to agency because plaintiff failed to write directly to field office when seeking records from that office as required by agency's regulations); Davis v. FBI, 767 F. Supp. 2d 201, 204 (D.D.C. 2011) (granting agency's summary judgment motion where plaintiff did "not refute [agencies'] evidence establishing that his request to those agencies failed to comply" with FOIA regulations); cf. Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. DHS, 913 F. Supp. 2d 865, 875-77 (N.D. Cal. 2012) (holding that provision of agency regulations which required provision of consent or proof of death when seeking records on third parties was inconsistent with the FOIA).

[133] 5 U.S.C. § 552(a)(4)(A).

[134] See id. § 552(a)(6)(E).

[135] See id. § 552(a)(6)(B)(iv), (a)(6)(D); see also OIP Guidance: Processing Reminders for the Last Quarter of Fiscal Year 2017 (posted 7/20/2017) (encouraging agencies to utilize multi-track processing); OIP Guidance: Guidance for Agency FOIA Regulations (posted 9/8/2016, updated 6/26/2019) (discussing Template for Agency FOIA Regulations with suggested language that all agencies can use as they publish or update their FOIA regulations).

[136] See 5 U.S.C. § 552(a)(3)(A), (a)(6)(A); Borden v. FBI, No. 94-1029, 1994 WL 283729, at *1 (1st Cir. June 28, 1994) (per curiam) (affirming dismissal of case because request not perfected where it failed to comply with agency regulations and did not reasonably describe records sought); Jean-Pierre v. BOP, 880 F. Supp. 2d 95 (D.D.C. 2012) (dismissing FOIA

Time Limits

The FOIA provides that when an agency receives a proper FOIA request, it "must determine within twenty [working] days . . . whether to comply with such request."[137] The Court of Appeals for the District of Columbia Circuit has held that "in order to make a 'determination' within the statutory time periods and thereby trigger the administrative exhaustion requirement, the agency need not actually produce the documents within the relevant time period . . . [b]ut the agency must at least indicate within the relevant time period the scope of the documents it will produce and the exemptions it will claim with respect to any withheld documents."[138] The FOIA also provides that "[u]pon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request."[139]

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complaint because plaintiff did not comply with all agency FOIA regulations and thus did not properly initiate a FOIA request); see also Reynolds v. DOJ, No. 16-1428, 2017 WL 1495932, at *2 (D.D.C. Apr. 26, 2017) ("Absent receipt of the request, the agency 'has no obligation to respond to it.'" (quoting Freedom Watch v. Bureau of Land Mgmt., 220 F. Supp. 3d 65, 69 (D.D.C. 2016))); Moore v. FBI, 883 F. Supp. 2d 155, 163 (D.D.C. 2012) (holding that request to CIA for "'consciousness-altering technology'" was not "reasonably descriptive to trigger [agency's] disclosure obligations" (quoting plaintiff's request)).

[137] 5 U.S.C. § 552(a)(6)(A)(i) (2018).

[138] Citizens for Resp. & Ethics in Wash. v. FEC, 711 F.3d 180, 189 (D.C. Cir. 2013) (finding that if agency does not adhere to FOIA's explicit timelines, "'penalty" is that agency cannot rely on administrative exhaustion requirement because statute requires that agency immediately notify requester of determination of and reasons for whether to comply with request; requires that agency immediately notify requester of right to appeal to the head of the agency any adverse determination; creates unusual-circumstances safety valve that permits agency to extend twenty-working-day period for response by up to ten additional working days; and provides that, once in court, agency may further extend its response time by means of exceptional-circumstances safety valve). But see Dennis v. CIA, Nos. 12-4207, 12-4208, & 12-5334, 2012 WL 5493377, at *2 (E.D.N.Y. Nov. 13, 2012) (holding that "interim response informing [plaintiff] that [agency] is in the process of addressing [plaintiff's] inquiry is sufficient to satisfy the requirement that [agency] reply within the statutory time period).

[139] 5 U.S.C. § 552(a)(6)(C)(i); see Citizens for Resp. & Ethics in Wash., 711 F.3d at 189 (holding that, after processing FOIA request and making determination, agency may still need some additional time to physically redact, duplicate or assemble for production documents located; however, "agency must do so and then produce records 'promptly'") (internal citation omitted); S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv., No. 06-2845, 2008 WL 2523819, at *15 (E.D. Cal. June 20, 2008) (supporting practice of releasing documents "on a rolling basis" if necessary, as this respects statute's "prompt release" requirement).

In "unusual circumstances," an agency can extend the twenty-day time limit for processing a FOIA request by written notice to the requester "setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched."[140] The FOIA defines "unusual circumstances" as (1) the need to search for and collect records "from field facilities or other establishments that are separate from the office" processing the request; (2) the need to search for, collect, and examine "a voluminous amount" of records "demanded in a single request"; and (3) the need to consult with another agency or two or more agency components.[141] If the required extension exceeds ten days, the agency must allow the requester an opportunity to modify his or her request, or to arrange for an alternative time frame for completion of the agency's processing.[142] Each agency is required to make available its FOIA Public Liaison to aid the requester in this regard and to "assist in the resolution of any disputes."[143] Additionally, the FOIA Improvement Act of 2016 mandates that when agencies extend the time limit by more than ten additional working days they must notify the requester of the right to seek dispute resolution services from the Office of Government Information Services (OGIS).[144]

The FOIA provides that the standard twenty-day time period begins on the date the request is first received by the appropriate agency component (or office), but no later than ten days after the request is first received by any component within the agency that is designated by the agency's regulations to receive FOIA requests.[145] Accordingly, if a requester mistakenly sends a FOIA request to an agency component that is designated to receive FOIA requests, but is not itself the proper component within the agency to process

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[140] 5 U.S.C. § 552(a)(6)(B)(i); see Citizens for Resp. & Ethics in Wash., 711 F.3d at 189 (noting that agencies can extend twenty-working-day timeline to thirty working days if unusual circumstances delay ability to search for, collect, examine, and consult regarding responsive documents).

[141] 5 U.S.C. § 552(a)(6)(B)(iii); see also Sierra Club v. Dep't of Interior, 384 F. Supp. 2d 1, 31 (D.D.C. 2004) (finding that "onerous request" and requester's "refusal to reasonably modify it or to arrange an alternative timeframe for release of documents certainly constituted 'unusual circumstances' that relieved the [agency] of the normal timeliness for release of documents under FOIA") (internal citation omitted).

[142] 5 U.S.C. § 552(a)(6)(B)(ii); cf. Al-Fayed v. CIA, No. 00-2092, slip op. at 6 (D.D.C. Jan. 16, 2001) (observing that Act "places the onus of modification [of a request's scope] squarely upon the requester, and does not indicate that an equal burden rests with the agency to 'negotiate' an agreeable 'deadline'") (internal citation omitted).

[143] 5 U.S.C. § 552(a)(6)(B)(ii); see also OIP Guidance: The Importance of Quality Requester Services: Roles and Responsibilities of FOIA Requester Service Centers and FOIA Public Liaisons (posted 6/12/2018, updated 7/22/2021).

[144] FOIA Improvement Act, Pub. L. No. 114-185, 130 Stat. 538.

[145] 5 U.S.C. § 552(a)(6)(A)(ii).

that request, that receiving component is obligated to "route" the "misdirected" request to the appropriate component within that agency within ten days of receiving the request.[146] If the initial receiving component fails to route such a request to the proper component within ten days, the proper component's twenty-day time period to make a request determination begins to run nevertheless (provided that the request is otherwise a proper FOIA request).[147] The FOIA's routing requirement applies exclusively to components within an agency; it does not obligate components of an agency to route requests to components of a different agency.[148]

The FOIA permits agencies to toll the twenty-day time period (i.e., stop the clock) under two circumstances: (1) one time to obtain information from the requester; and (2) as "necessary" to clarify fee-related issues with the requester.[149] The one-time tolling permitted to seek information is limited to situations where the agency is awaiting information that it has "reasonably requested" from the requester.[150] While an agency may only toll once while seeking information from the requester, as a matter of sound administrative practice, an agency is not prohibited from contacting a requester as many times as needed to facilitate processing the request.[151]

An agency may also toll the time period "if necessary" to clarify with the requester issues pertaining to fee assessment.[152] Unlike the first circumstance, provided that tolling is necessary to clarify fee assessment issues, there is no statutory limit on the number of

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[146] See id.; see also OIP Guidance: New Requirement to Route Misdirected FOIA Requests (posted 11/18/2008, updated 7/28/2021); cf. ACLU v. DHS, No. 20-3204, 2023 WL 2733721, at *6 (D.D.C. Mar. 31, 2023) (declining to read agency's regulations to limit routing to static in time determination and instead finding that there is no indication in applicable regulations that designated component is limited to making routing determination only when it first received request).

[147] See 5 U.S.C. § 552(a)(6)(A)(ii).

[148] See id.

[149] See id.

[150] Id. § 552(a)(6)(A)(ii)(I).

[151] Id.; see OIP Guidance: New Limitations on Tolling the FOIA's Response Time (posted 11/18/2008, updated 12/6/2022) (advising that, if contacting requester for non-fee-related information more than one time will facilitate processing of request, agency is free to do so, but clock will continue to run); see also OIP Guidance: The Importance of Good Communication with FOIA Requesters (posted 3/1/2010, updated 7/28/2021) (noting that agencies should work "'in a spirit of cooperation'" with requesters and "'[u]necessary bureaucratic hurdles have no place in "new era of open Government"'").

[152] 5 U.S.C. § 552(a)(6)(A)(ii)(II); see also OIP Guidance: New Limitations on Tolling the FOIA's Response Time (posted 11/18/2008, updated 12/6/2022).

times an agency may toll for that purpose.[153] In either circumstance, the agency's receipt of the requester's response ends the tolling period and the response time clock resumes.[154]

The FOIA expressly authorizes agencies to promulgate regulations providing for "multitrack processing" of their FOIA requests – which allows agencies to process requests on a first-in, first-out basis within each track, and also permits them to respond to relatively simple requests more quickly than requests involving complex and/or voluminous records.[155]

The FOIA provides that a requester is "deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions."[156] In this situation, a requester may seek judicial review.[157] (For a discussion of the requirements of constructive exhaustion, see Litigation Considerations, Exhaustion of Administrative Remedies.) Once in court, the agency may receive additional time to process the request if it shows that its failure to meet the

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[153] See 5 U.S.C. § 552(a)(6)(A)(ii)(II); see also OIP Guidance: New Limitations on Tolling the FOIA's Response Time (posted 11/18/2008, updated 12/6/2022) (noting that fee issues may arise sequentially during processing of request and cannot always be resolved at one given point in time).

[154] See 5 U.S.C. § 552(a)(6)(A)(ii)(II).

[155] Id. § 552(a)(6)(D); see, e.g., OIP Guidance: Guidance for Agency FOIA Regulations (posted 9/8/2016, updated 6/26/2019); see also OIP Guidance: Guidance for Further Improvement from 2012 Chief FOIA Officer Report Review and Assessment (posted 8/7/2012, updated 7/26/2021) (encouraging agencies to consider adopting multi-track system which could allow for improved timeliness for "simple" track requests and allow requesters option of tailoring their request to fit within "simple" track system); FOIA Update, Vol. XVIII, No. 1 ("OIP Guidance: Amendment Implementation Questions") (discussing multitrack processing for agencies with decentralized FOIA operations); cf. OIP Guidance: 2008 Guidelines for Agency Preparation of Annual FOIA Reports (posted 5/22/2008) (reflecting reporting of multitrack-processing and data related to requests for expedited processing).

[156] 5 U.S.C. § 552(a)(6)(C)(i).

[157] See, e.g., Citizens for Resp. & Ethics in Wash. v. FEC, 711 F.3d 180, 189 (D.C. Cir. 2013) (holding that "if an agency does not adhere to certain statutory timelines in responding to a FOIA request, the requester is deemed by statute to have fulfilled the exhaustion requirement"); cf. Flaherty v. IRS, 468 F. App'x 8, 9 (D.C. Cir. 2012) (holding that administrative exhaustion requirement re-triggered by agency response after twenty-day limit, but before plaintiff filed complaint); Jud. Watch, Inc. v. DOE, 888 F. Supp. 2d 189, 193 (D.D.C. 2012) (same); Perez-Rodriguez v. DOJ, 888 F. Supp. 2d 175, 181 (D.D.C. 2012) (same).

statutory time limits is the result of "exceptional circumstances" and that it has exercised "due diligence" in processing the request.[158]

Finally, the FOIA restricts agencies from assessing certain fees when the FOIA's time limits are not met, unless one of three exceptions are satisfied.[159] (For full discussion on this topic, see Fees and Fee Waivers, Fee Assessment Limitations and Considerations.) If a court has determined that "exceptional circumstances," as defined by the FOIA exist, then the failure to respond within the FOIA's time limits is "excused for the length of time provided by the court order."[160] (For further discussion of exceptional circumstances, see Litigation Considerations, "Open America" Stays of Proceedings.)

Expedited Processing

The FOIA requires agencies to issue regulations that provide for the expedited processing of FOIA requests for requesters who demonstrate "compelling need,"[161] or for any other case deemed appropriate by the agency.[162] Under the FOIA, a requester can

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[158] See 5 U.S.C. § 552(a)(6)(C); Citizens for Resp. & Ethics in Wash., 711 F.3d at 185 (holding that "[i]f exceptional circumstances exist, then so long as 'the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records'" (quoting 5 U.S.C. § 552(a)(6)(C)(i))); cf. Fiduccia v. DOJ, 185 F.3d 1035, 1041 (9th Cir. 1999) (acknowledging "practical problems" such as staffing or funding levels encountered by agencies, but explaining that "these policy concerns are legislative, not judicial" and "Congress wrote a tough statute on agency delay in FOIA compliance").

[159] 5 U.S.C. § 552(a)(4)(A)(viii); see also OIP Guidance: Prohibition on Assessing Certain Fees When the FOIA's Time Limits Are Not Met (posted 10/19/2016, updated 7/7/2025).

[160] 5 U.S.C. § 552(a)(4)(A)(viii)(II)(cc).

[161] 5 U.S.C. § 552(a)(6)(E) (2018); see also H.R. Rep. 104-795, at 26 (1996), reprinted in 1996 U.S.C.C.A.N. 3448, 3465 (clarifying that "specified categories for compelling need are intended to be narrowly applied").

[162] See 5 U.S.C. § 552(a)(6)(E)(i)(II); OIP Guidance: Guidance for Agency FOIA Regulations (posted 9/8/2016, updated 6/26/2019); see also, e.g., Am. Oversight v. DOJ, 292 F. Supp. 3d 501, 508 (D.D.C. 2018) (noting that DOJ's regulation "does not ask whether possible questions exist that *might* or *could* – should they become known – affect public confidence in the government's integrity[;] [i]t asks whether there are possible questions as to the Government's integrity 'that affect public confidence,' full stop") (internal citation omitted); DOJ FOIA Regulations, 28 C.F.R. § 16.5(d)(1)(iii), (iv) (2024) (providing that requests will be granted expedited processing if they involve "[t]he loss of substantial due process rights" or "a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence"); Dep't of State FOIA Regulations, 22 C.F.R. § 171.11(f)(3) (2024) (providing for expedited processing if

show "compelling need" in one of two ways: (1) by establishing that his or her failure to obtain the records quickly "could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;"[163] or, (2) if the requester is a "person primarily engaged in disseminating information,"[164] by demonstrating that there exists an "urgency to inform the public concerning actual or alleged Federal Government activity."[165]

"[f]ailure to release the information would impair substantial due process rights or harm substantial humanitarian interests").

[163] 5 U.S.C. § 552(a)(6)(E)(v)(I); see Jud. Watch, Inc. v. Rossotti, No. 01-2672, 2002 WL 31962775, at *2 n.8 (D. Md. Dec. 16, 2002) (denying plaintiff's request for expedited processing because its allegations "that it was the victim of ongoing criminal activity" and that "it would be unable to vindicate its rights without the requested documents . . . do[] not meet the statutory definition of 'compelling need'") (internal citation omitted), aff'd sub nom. Jud. Watch, Inc. v. United States, 84 F. App'x 335 (4th Cir. 2004); see also Animal Legal Def. Fund v. U.S. Dep't of Agric., 933 F.3d 1088 (9th Cir. 2019) (rejecting requester's argument that "the term 'individual' in § 552(a)(6)(E)(v)(I) includes an animal," "[w]here, as here, 'individual' is used as a noun with no corresponding group or category, its plain meaning is 'human being'") (internal citations omitted).

[164] 5 U.S.C. § 552(a)(6)(E)(v)(II); see also, e.g., Pub. Health & Med. Pros. for Transparency v. FDA, No. 22-0915, 2023 WL 3335071, at *2 (N.D. Tex. May 9, 2023) (finding that nonprofit entity set up solely to obtain and disseminate data considered by FDA to license COVID-19 vaccines met requirements for being entity primarily engaged in disseminating information); Nat'l Day Laborer Org. Network v. ICE, 236 F. Supp. 3d 810, 817 (S.D.N.Y. 2017) (finding plaintiffs failed to establish that they are primarily engaged in disseminating information based on assertion that plaintiffs "'maintain websites that receive many visits, analyze public records regarding local law enforcement compliance with ICE holds, and will expand to include information regarding notification requests from ICE related to the Priority Enforcement Program, and will widely publish and disseminate that information to the press and to the public'" (quoting plaintiff's request)); Landmark Legal Found. v. EPA, 910 F. Supp. 2d 270, 276 (D.D.C. 2012) (holding that information dissemination as "'part of [plaintiff's] mission,'" is not sufficient to demonstrate that plaintiff is "primarily, and not just incidentally, engaged in information dissemination" (quoting plaintiff's request)); Leadership Conf. on C.R. v. Gonzales, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (concluding that "plaintiff is primarily engaged in disseminating information . . . regarding civil rights"); Tripp v. DOD, 193 F. Supp. 2d 229, 241 (D.D.C. 2002) ("To be sure, plaintiff has been the object of media attention and has at times provided information to the media, but there is no evidence . . . that she is 'primarily' engaged in such efforts.").

[165] 5 U.S.C. § 552(a)(6)(E)(v)(II); see, e.g., Energy Pol'y Advocs. v. U.S. Dep't of the Interior, No. 21-1247, 2021 WL 4306079, at *3 (D.D.C. Sept. 22, 2021) ("While the request may suggest that the requested information is important in some sense, it fails to identify any specific reason to conclude that obtaining the requested documents is time sensitive."); Prot. Democracy Project, Inc. v. DOD, 263 F. Supp. 3d 293, 300 (D.D.C. 2017) (granting motion for preliminary injunction directing expedited processing regarding request for records concerning President's legal authority to launch certain missile strikes based in part on idea that "[b]eing closed off from . . . debate is itself a harm in an open democracy");

The Court of Appeals for the District of Columbia Circuit has explained that the FOIA requires the consideration of several factors to determine if the "urgency to inform" standard is satisfied.[166] The factors for consideration include whether a request concerns a "matter of current exigency to the American public," whether the consequences of delaying a response would "compromise a significant recognized interest," whether the request concerns "federal government activity," and the credibility of the requester's "allegations regarding governmental activity."[167] In this regard, courts have found a distinction between the general public interest in the overall subject matter of a FOIA request and the public interest that might be served by disclosure of the actual records sought or those responsive to a particular FOIA request.[168]

Bloomberg, L.P. v. FDA, 500 F. Supp. 2d 371, 377-78 (S.D.N.Y. 2008) (stating that information may "concern" government activity even if agency records did not originate within agency, and that urgency of public's need is not lessened by public's alleged inability to understand certain raw data contained in records); Long v. DHS, 436 F. Supp. 2d 38, 43 (D.D.C. 2006) (finding that requester failed to link need for records to "imminent action" that would affect usefulness of records); ACLU v. DOD, No. 06-1698, 2006 WL 1469418, at *7-8 (N.D. Cal. May 25, 2006) (finding that requesters established "public's need to know" as well as "urgency of the news" related to Pentagon intelligence program, and stating that "extensive media interest usually is a fact supporting not negating urgency"); Leadership Conf. on C.R., 404 F. Supp. 2d at 260 (finding that "[p]laintiff's FOIA requests could have a vital impact on development of the substantive record" related to issue of reauthorization of provisions of Voting Rights Act); Elec. Priv. Info. Ctr. v. DOD, 355 F. Supp. 2d 98, 101 (D.D.C. 2004) (finding that, by demonstrating public interest in only general topic rather than specific subject of its requests, requester failed to demonstrate "urgency to inform"); Tripp, 193 F. Supp. 2d at 241 (holding that plaintiff's "job application to the Marshall Center and the resulting alleged Privacy Act violations by DOD are not the subject of any breaking news story"); FOIA Update, Vol. XIX, No. 4 ("Congress Enacts FOIA-Related Legislation") (discussing Nazi War Crimes Disclosure Act, 5 U.S.C. § 552 note (2006), which does not directly amend the FOIA but does impact the FOIA directly in that it provides that "any person who was persecuted by the Nazi government of Germany or its allies 'shall be deemed to have a compelling need' under 'section 552(a)(6)(E) of title 5, United States Code'" in making requests for access to classified Nazi war-criminal records (quoting 5 U.S.C. § 552 note, § 4)).

[166] Al-Fayed v. CIA, 254 F.3d 300, 310 (D.C. Cir. 2001).

[167] Id. (finding where all events occurred several years prior to request for expedited processing, that "none of the events at issue is the subject of a currently unfolding story").

[168] See, e.g., Landmark Legal Found., 910 F. Supp. 2d at 277 (rejecting notion that matter is urgent merely because it is of public interest or concerns public health and economic well-being because "such a justification would likely sweep almost any FOIA request into the ambit of 'urgency' since FOIA requests are regularly designed to elicit information about how the government is performing its work"); Elec. Priv. Info. Ctr., 355 F. Supp. 2d at 102 (upholding denial of expedited processing when requester had "failed to present the agency with evidence that there is a 'substantial interest' in the 'particular aspect' of [its] FOIA request," finding that, "[t]he fact that [the requester] has provided evidence that there is

Agencies must make a determination whether to grant a request for expedited access within ten *calendar* days of its receipt.[169] Agency denials of requests for expedited processing and the failure to respond timely to such requests are subject to judicial review.[170]

An agency that grants expedited processing of a request must process it "as soon as practicable."[171] Some courts have held that an agency's failure to process such a request within the twenty-day non-expedited time limit raises a rebuttable presumption that the agency has failed to process the request "as soon as practicable."[172]

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some media interest in data mining as an umbrella issue does not satisfy the requirement that [it] demonstrate interest in the specific subject of [its] FOIA request") (internal citations omitted); see also OIP Guidance: FOIA Counselor Q&A (posted 1/24/2006, updated 12/19/2024) (advising on "the meaning of an 'umbrella issue' under the FOIA" and noting that "[t]he term 'umbrella issue' is . . . one that has been used by agencies and courts alike to make important distinctions when considering public interest issues" in FOIA decisionmaking).

[169] See 5 U.S.C. § 552(a)(6)(E)(ii)(I); see also, e.g., OIP Guidance: Guidance for Agency FOIA Regulations (posted 9/8/2016, updated 6/26/2019).

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

[171] 5 U.S.C. § 552(a)(6)(E)(iii); see Elec. Priv. Info. Ctr. v. DOJ, 416 F. Supp. 2d 30, 39 (D.D.C. 2006) ("The legislative history of the amendments makes clear that, although Congress opted not to impose a specific deadline on agencies processing expedited requests, its intent was to 'give the request priority for processing *more quickly than otherwise would occur*.'" (quoting S. Rep. No. 104-272, at 17 (1996))); Gerstein v. CIA, No. 06-4643, 2006 WL 3462658, at *8 (N.D. Cal. Nov. 29, 2006) (noting that "FOIA does not set forth a specific deadline by which expedited processing . . . must be concluded," but rather provides that requests granted expedited processing shall be processed "'as soon as practicable'") (internal citation omitted); ACLU v. DOD, 339 F. Supp. 2d 501, 503-04 (S.D.N.Y. 2004) ("While it would appear that expedited processing would necessarily require compliance in fewer than 20 days, Congress provided that the executive was to 'process as soon as practicable' any expedited request." (citing § 552(a)(6)(E)(iii))).

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

Searching for Responsive Records

The FOIA defines the term "search" as "to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request."[173] As a general rule, courts require agencies to conduct a search that is "reasonably calculated to uncover all relevant documents."[174] The Court of Appeals for the District of Columbia Circuit has held that "'the adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search.'"[175] The adequacy of an agency's search is judged by a test of

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[173] 5 U.S.C. § 552(a)(3)(D) (2018).

[174] Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983); see Campbell v. SSA, 446 F. App'x 477, 480 (3d Cir. 2011) (same); Anderson v. DOJ, 326 F. App'x 591, 592-93 (2d Cir. 2009) (finding search "reasonable and adequate" where agency described in detail two searches conducted, including "operation of the internal database" used); Miccosukee Tribe of Indians of Fla. v. United States, 516 F.3d 1235, 1247-48, 1257-58 (11th Cir. 2008) (reiterating that agency must show search was reasonably calculated to uncover all relevant documents, but rejecting assertion that agency must provide testimony from each person involved in search, and declining to establish "what inference [as to search adequacy], if any, can be . . . drawn from the late production . . . of FOIA documents"); Williams v. DOJ, 177 F. App'x 231, 233 (3d Cir. 2006) (recognizing that "[u]nder the FOIA, an agency has a duty to conduct a reasonable search for responsive records" (citing Oglesby v. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990))); Miller v. Dep't of State, 779 F.2d 1378, 1383 (8th Cir. 1985) (recognizing that search must be "'reasonably calculated to uncover all relevant documents'" (quoting Weisberg, 705 F.2d at 1351)); Nat. Res. Def. Council v. EPA, No. 17-5928, 2019 WL 4142725, at *4 (S.D.N.Y. Aug. 30, 2019) (confirming that agency "carried its burden of showing that its search was adequate" because it "developed a reasonably broad set of search terms in consultation with [agency] subject matter experts . . . and [its] Office of General Counsel"); Media Rsch. Ctr. v. DOJ, 818 F. Supp. 2d 131, 138-39 (D.D.C. 2011) (concluding that search was "reasonably calculated to uncover relevant materials" because "broad search terms" used would uncover responsive emails, even if all potential email accounts were not searched); Bonilla v. DOJ, 798 F. Supp. 2d 1325, 1330 (S.D. Fla. 2011) (finding "search was 'reasonably calculated to uncover all relevant documents'" where paralegal sent email to all personnel seeking responsive records, asked for records from attorney assigned to case, and conducted electronic search for documents using multiple search terms) (internal citation omitted); Allen v. U.S. Secret Serv., 335 F. Supp. 2d 95, 99 (D.D.C. 2004) (concluding that agency's search of its "comprehensive [Master Central Index] system is a search method that could be 'reasonably expected to produce the information requested'" (quoting Oglesby, 920 F.2d at 68)); cf. Rubman v. USCIS, 800 F.3d 381, 391 (7th Cir. 2015) (noting that agency's concern about "risk of confusion is not a legitimate basis for refusing to perform a FOIA search").

[175] Jennings v. DOJ, 230 F. App'x 1, 1 (D.C. Cir. 2007) (quoting Iturralde v. Comptroller of Currency, 315 F.3d 311, 315 (D.C. Cir. 2003)); see also Newman v. BOP, No. 20-3761, 2022 WL 1521797, at *5 (D.D.C. May 13, 2022) (acknowledging principle that "[t]he touchstone of [a search] inquiry is the reasonableness of the search, not the records produced" and concluding that agency conducted adequate search where it "conducted multiple,

"reasonableness," but what is reasonable will vary from case to case.[176] Courts have found searches to be reasonable when, among other things, they are based on a reasonable interpretation of the scope of the subject matter of the request.[177] Relatedly, courts have held that an agency's search is reasonable when it focuses on the records specifically mentioned in the request.[178] On the other hand, courts have disfavored searches which

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thoroughgoing searches of its records" and, after engaging with plaintiff, "repeatedly tried to search in a manner more likely to produce records" although "[t]hose efforts were not fruitful"); cf. N.Y. Times Co. v. FCC, 457 F. Supp. 3d 266, 276-77 (S.D.N.Y. 2020) (finding that "the risk of producing inaccurate information [agency's argument in support of its failure to conduct search of data log] is insufficient to overcome the 'strong presumption in favor of disclosure,'" and concluding that agency must conduct search) (internal citation omitted).

[176] See Miller, 779 F.2d at 1383 (recognizing that search "is judged by standard of reasonableness" and "[t]he competence of a records search must be determined in relation to the circumstances of the case"); Zemansky v. EPA, 767 F.2d 569, 571-73 (9th Cir. 1985) (observing that the reasonableness of agency search depends upon the facts of each case (citing Weisberg, 705 F.2d at 1351)).

[177] See, e.g., Machado Amadis v. U.S. Dep't of State, 971 F.3d 364, 369-70 (D.C. Cir. 2020) (holding that defendant properly construed request to exclude underlying source documents because request sought records "'memorializing or describing the processing'" of certain FOIA appeals, not entire appeal case file (quoting plaintiff's request)); Larson v. Dep't of State, 565 F.3d 857, 869 (D.C. Cir. 2009) (affirming adequacy of search based on agency's reasonable determination regarding records being requested and searched for accordingly); Rein v. U.S. Pat. & Trademark Off., 553 F.3d 353, 363 (4th Cir. 2009) (ruling that agency's "decision to use the searches conducted in response to [prior, similar] requests as the starting point for responding to [current] requests was not inherently unreasonable and appears to be a practical and common-sense approach" because "[t]he requests sought similar information related to the same subject matter"); Coal. on Pol. Assassinations v. DOD, 12 F. App'x 13, 13-14 (D.C. Cir. 2001) (finding that agency conducted reasonable search pursuant to "limited request" and "specific code words" later provided by requester); Kidder v. FBI, 517 F. Supp. 2d 17, 23-24 (D.D.C. 2007) (holding that "based on plaintiff's clear request [that did not reference aliases], [agency] is under no obligation to search . . . any names other than [name stated in request]").

[178] See Clemente v. FBI, 867 F.3d 111, 118 (D.C. Cir. 2017) (finding that "agency had no obligation to conduct further searches once it found . . . precise records" requested, and finding that because request was for informant file, agency "was not required to search cross-references"); White v. DOJ, No. 12-5067, 2012 WL 3059571, at *1 (D.C. Cir. July 19, 2012) ("Appellee's failure to locate documents responsive to appellant's request appears to be a function of the limited information provided in appellant's request, and appellant has not demonstrated that appellee had a duty to investigate and provide additional search terms."); Ledesma v. USMS, No. 05-5150, 2006 U.S. App. LEXIS 11218, at *2 (D.C. Cir. Apr. 19, 2006) (finding that search was adequate where plaintiff's "request did not specifically mention" cellblock video and agency did not conduct search for video); Halpern v. FBI, 181 F.3d 279, 289 (2d Cir. 1999) (holding cross-reference files to be beyond scope of request

because, once agency "had requested such clarification [about requester's interest in receiving such records], it could then in good faith ignore the cross-reference files until it received an affirmative response from [requester]"); Kowalczyk v. DOJ, 73 F.3d 386, 389 (D.C. Cir. 1996) (finding search limited to FBI headquarters' files reasonable because plaintiff sent request there and request's description of records did not alert agency that plaintiff sought records from field office); Maynard v. CIA, 986 F.2d 547, 560 (1st Cir. 1993) (confirming that agency's search was properly limited to records about named individual "because there is no general requirement that an agency search secondary references or variant spellings"); Wallick v. Agric. Mktg. Serv., 281 F. Supp. 3d 56, 66-70 (D.D.C. 2017) (finding search adequate when based on plain language of original request, and holding plaintiff must make new request for additional records first mentioned in clarification emails); Petit-Frere v. U.S. Att'y's Off. for the S. Dist. of Fla., 800 F. Supp. 2d 276, 279-80 (D.D.C. 2011) (affirming agency's search using only variations of plaintiff's name and not names of plaintiff's criminal co-defendants not listed in request), aff'd, No. 11-5285, 2012 WL 4774807 (D.C. Cir. Sept. 19, 2012); Hamilton Sec. Grp. v. HUD, 106 F. Supp. 2d 23, 27 (D.D.C. 2000) ("Given the exchange of correspondence between counsel and the agency relating to the scope of the request, there is no basis for plaintiff's claim that defendant should have understood that the request for a [single, specific record] was meant to include additional [records]."), aff'd per curiam, No. 00-5331, 2001 WL 238162 (D.C. Cir. Feb. 23, 2001); cf. Ahanmisi v. Dep't of Lab., 859 F. Supp. 2d 7, 10-12 (D.D.C. 2012) (noting that, although agency did not search using one variation of plaintiff's last name, search using multiple other first and last name variations constituted reasonable search).

are based on unreasonable interpretations of the scope of the request,[179] or which improperly omit certain records.[180]

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[179] See, e.g., Inst. for Just. v. IRS, 941 F.3d 567, 569-71 (D.C. Cir. 2019) (holding that where requester sought "'all records contained in'" agency's electronic records system, "the district court erred in concluding" that report from that system was an adequate substitute for a comprehensive search for "'all records'" in that system (quoting plaintiff's request)); Ctr. for Biological Diversity v. Off. of the U.S. Trade Representative, 450 F. App'x 605, 607 (9th. Cir. 2011) (concluding that agency's limitation of search to records from particular time period was unreasonable because "it is reasonably likely that records responsive to [plaintiff's] request were generated" earlier); Truitt v. Dep't of State, 897 F.2d 540, 544-46 (D.C. Cir. 1990) (stating that, when request was "reasonably clear as to the materials desired," agency failed to conduct adequate search as it did not include file likely to contain responsive records); Stein v. DOJ, 134 F. Supp. 3d 457, 482 (D.D.C. 2015) (agreeing "with Plaintiff that a 'reasonable, simple, liberal construction of [his] request includes "the FOIA Topic Page" and whatever is on it, and if it includes a page of links, whatever is behind those links is also responsive'" (quoting plaintiff's second opposition)); Nat'l Sec. Couns. v. CIA, 849 F. Supp. 2d 6, 12 (D.D.C. 2012) (confirming that, after search identified one record related to a certain Executive Order that agency determined was responsive to request, agency "cannot reasonably claim" that it did not understand scope of request as concerning records related to this same Executive Order); Amnesty Int'l USA v. CIA, 728 F. Supp. 2d 479, 499 (S.D.N.Y. 2010) (finding that, despite plaintiff's use of incorrect terminology in its request, "the accompanying definition [in attached memoranda] was sufficient to put the CIA on notice of the documents Plaintiffs requested"); Doolittle v. DOJ, 142 F. Supp. 2d 281, 285 (N.D.N.Y. 2001) (concluding that as long as description of records is otherwise reasonable, agency cannot refuse to search simply because requester did not also identify records by date on which they were created).

[180] See, e.g., Miccosukee Tribe of Indians of Fla. v. United States, 516 F.3d 1235, 1252-55 (11th Cir. 2008) (stating that agency's "self-imposed limitations on its search were unreasonable and inaccurately depicted what the Tribe really sought" where agency excluded from its search all publicly available documents when Tribe merely desired no voluminous publicly available records it already had); Am. Oversight v. OMB, 613 F. Supp. 3d 219, 229 (D.D.C. 2020) (finding that agency improperly "limit[ed] its searches to . . . particular categories of records" for requests seeking all records and requiring agency to "provide adequate justification in its supplemental declaration for limiting its searches"); Fams. for Freedom v. CBP, No. 10-2705, 2011 WL 4599592, at *5 (S.D.N.Y. Sept. 30, 2011) (finding that agency inappropriately limited scope of search when it determined that "child" attachments, but not "parent" emails, were responsive to request); cf. ACLU of Mass. v. ICE, No. 21-10761, 2022 WL 1912882, at *6-7 (D. Mass. June 3, 2022) (finding that for request seeking communications of agency officials, agency affidavit lacked specificity to determine whether excluding text messages from search was reasonable and ordering supplemental briefing for further explanation).

At times the particular records custodians selected by the agency to search are examined by the court, with searches found to be reasonable when the selection was adequately explained[181] but unreasonable when the selection was not.[182]

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[181] See Adamowicz v. IRS, 402 F. App'x 648, 651 (2d Cir. 2010) (finding agency's targeted search for records with the one employee who conducted investigation was "reasonably calculated to discover the requested documents" (quoting Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 489 (2d Cir. 1999))); Rugiero v. DOJ, 257 F.3d 534, 547-48 (6th Cir. 2001) (rejecting plaintiff's contention that "agent [who] testified against him at trial" must have records about him after agency established that agent who testified had no such records); Heffernan v. Azar, 417 F. Supp. 3d 1, 12 (D.D.C. 2019) (explaining that agency "properly searched the files of all potential custodians who reasonably could have possessed [records]" where agency identified the specific custodians and locations searched and also confirmed why others were not searched); Am. Oversight v. DOJ, 401 F. Supp. 3d 16, 30-31 (D.D.C. 2019) (finding that agency appropriately limited custodians searched based on the sole record produced to plaintiff and where agency identified no further leads and noting that plaintiff "simply claiming that it is 'common sense' and 'commonplace knowledge' that records would likely exist elsewhere . . . is far from the specific evidence that is usually required to overcome an agency's representations") (internal citation omitted); Jud. Watch v. DOD, 857 F. Supp. 2d 44, 53-55 (D.D.C. 2012) (affirming agency's search for records, and noting that, because request concerns "the most highly classified operation that this government has undertaken in many, many years . . . [i]f DOD has possession of these records, the relevant individuals are well aware of that fact"); Pub. Emps. for Env't Resp. v. U.S. Section Int'l Boundary & Water Comm'n., 839 F. Supp. 2d 304, 317-18 (D.D.C. 2012) (concluding that agency's search was reasonable where its legal affairs staff assessed request and forwarded it "to the correct division" and employee with "significant experience" in the subject matter conducted search), aff'd in part, rev'd in part & remanded on other grounds, 740 F.3d 195 (D.C. Cir. 2014); Amnesty Int'l USA, 728 F. Supp. 2d at 499-500 (concluding that "a search that included having the person most knowledgeable regarding [subject of request] inquire into the existence of [the records]" was thorough); cf. Chilingirian v. U.S. Att'y Exec. Off., 71 F. App'x 571, 572 (6th Cir. 2003) ("The record shows that defendants went beyond the requirements of a reasonable search by contacting the attorneys who might know of the existence of the [requested] records, even though they were no longer employed by defendants."); Atkin v. IRS, No. 04-0080, 2005 WL 1155127, at *3 (N.D. Ohio Mar. 30, 2005) (stating that "additional efforts to contact a former employee are irrelevant under the appropriate standard of reasonable effort" (citing Chilingirian, 71 F. App'x at 571, 572)); Blanton v. DOJ, 182 F. Supp. 2d 81, 85 (D.D.C. 2002) ("[T]he FOIA does not impose an obligation on defendant to contact former employees to determine whether they know of the whereabouts of records that might be responsive to a FOIA request.").

[182] See Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 327-28 (D.C. Cir. 1999) (finding that because requester provided agency with name of agency employee who possessed requested records during requester's criminal trial, "[w]hen all other sources fail to provide leads to the missing record, agency personnel should be contacted if there is a close nexus, as here, between the person and the particular record"); Houghton v. Dep't of State, 875 F. Supp. 2d 22, 30 (D.D.C. 2012) (finding search inadequate because it did not include email account of individual who "may have been treated as an employee of State [Department] in some ways," and, therefore, court could not rule out possibility that individual might have

Moreover, the reasonableness of an agency's search can often depend on whether the agency properly determined where responsive records were likely to be found, and

held State Department email account); cf. Transgender L. Ctr. v. ICE, 46 F.4th 771, 780-81 (9th Cir. 2022) (reversing district court's finding of an adequate search where agencies failed to explain why forty-eight custodians' email accounts identified by requester were not searched and would only confirm that emails from those custodians may have already been released with their identities withheld); New Orleans Workers' Ctr. for Racial Just. v. ICE, 373 F. Supp. 3d 16, 44-46 (D.D.C. 2019) (finding that, although defendant searched custodians' email accounts, hard drives, and shared servers, defendant failed to explain why search terms were adequate to uncover all responsive documents including any explanation for the "wide variance in the search terms used by custodians and offices with 'seemingly similar law enforcement responsibilities'") (internal citation omitted).

searched those locations,[183] or whether the agency improperly limited its search to certain record systems.[184]

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[183] See, e.g., Karantsalis v. DOJ, 635 F.3d 497, 500-501 (11th Cir. 2011) (affirming district court's determination that agency searched for records in system most likely to store responsive records and described how it retrieved records from system); Lechliter v. Rumsfeld, 182 F. App'x 113, 115-16 (3d Cir. 2006) (concluding that agency fulfilled duty to conduct a reasonable search when it searched two offices that it "determined to be the only ones likely to possess responsive documents"); Elec. Priv. Info. Ctr. v. FBI, No. 17-00121, 2018 WL 2324084, at *3 (D.D.C. May 22, 2018) (finding search adequate where, "based on consultation with subject-matter experts," agency searched location in which responsive records stored); Garcia v. USCIS, 168 F. Supp. 3d 50, 61 (D.D.C. 2016) (finding that "[b]ecause all documents related to an alien's immigration transactions 'should, as a matter of course, be consolidated in the A-File,' there is no reason to doubt that any extant files related to Plaintiff's . . . application were included in his A-File" (quoting agency declaration)); McKinley v. Bd. of Governors of the Fed. Rsrv. Sys., 849 F. Supp. 2d 47, 56-58 (D.D.C. 2012) (concluding that search was reasonable because agency determined that all responsive records were located in particular location created for express purpose of collecting records related to subject of request and searched that location); Performance Coal Co. v. U.S. Dep't of Lab., 847 F. Supp. 2d 6, 12-13 (D.D.C. 2012) (finding agency's search "reasonably tailored" when it identified two of eighteen regional offices most likely to maintain responsive records and searched those offices' paper, electronic, and archived files); James Madison Project v. CIA, 605 F. Supp. 2d 99, 108 (D.D.C. 2009) (concluding that "search method could reasonably be expected to produce the information requested" because all agency regulations requested were maintained in one records system and agency searched that system for responsive records); Brehm v. DOD, 593 F. Supp. 2d 49, 50 (D.D.C. 2009) (finding search was adequate where agency searched two systems likely to have responsive records and also declared other systems were unlikely to have responsive records); Knight v. NASA, No. 04-2054, 2006 WL 3780901, at *4-5 (E.D. Cal. Dec. 21, 2006) (stating that "there is no requirement that an agency search all possible sources in response to a FOIA request when it believes all responsive documents are likely to be located in one place" and confirming that search of one agency library "satisf[ied] its obligations under FOIA in this matter"); Sakamoto v. EPA, 443 F. Supp. 2d 1182, 1198-99 (N.D. Cal. 2006) (finding agency's search within one region to be adequate when agency "reasonably concluded" that responsive documents would "most likely" be there); Blanton v. DOJ, 63 F. Supp. 2d 35, 41 (D.D.C. 1999) (noting that, even though agency did not search two "individual informant files" for references to requester, any responsive information in such files would have been identified by agency's "'cross-reference' index" search using requester's name).

[184] See, e.g., Callaway v. Dep't of the Treasury, No. 08-5480, 2009 WL 10184495, at *1 (D.C. Cir. June 2, 2009) (finding that agency "should not have limited its search to the [plaintiff's] criminal investigative files, when the request appears to encompass additional material, which may not be located in a criminal investigative file"); Morley v. CIA, 508 F.3d 1108, 1119-20 (D.C. Cir. 2007) (holding that because agency "retained copies of the records transferred to NARA and concedes that some transferred records are likely to be responsive, it was obligated to search those records in response to [request]"); Jefferson v. DOJ, 168 F. App'x 448, 450 (D.C. Cir. 2005) (reversing district court's finding of reasonable search when

agency "offered no plausible justification" for searching only its investigative database and "essentially acknowledged" that responsive files might exist in separate database); Oglesby v. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990) (holding that "agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested"); Parker v. EOUSA, 852 F. Supp. 2d 1, 9 (D.D.C. 2012) (finding that agency failed to conduct adequate search for records that may have been transferred to NARA because "no one has been able to inform plaintiff or the Court where the records are actually located . . . [a]nd, there does not appear to have been any serious effort made to track them down"); Concepcion v. CBP, 767 F. Supp. 2d 141, 146-47 (D.D.C. 2011) (denying summary judgment because agency did "not demonstrate that responsive documents would not reasonably be found in other record systems or that it searched any other potential sources but found no responsive records"); Negley v. FBI, 658 F. Supp. 2d 50, 57-58 (D.D.C. 2009) (denying summary judgment because agency "refus[ed] to search at least the dedicated" database most likely to contain responsive records); Info. Network for Responsible Mining v. Bureau of Land Mgmt., 611 F. Supp. 2d 1178, 1184-85 (D. Colo. 2009) (concluding that agency's search was not reasonable where agency searched project file of one employee despite request identifying twenty-four employees in four offices likely to have responsive records and agency locating only six responsive documents in project file); Islamic Shura Council of S. Cal. v. FBI, No. 07-01088, slip op. at 6-7 (C.D. Cal. Apr. 20, 2009) (ordering search of electronic surveillance indices and cross-reference records where agency had initially searched only Central Records System main files); Jefferson v. BOP, No. 05-848, 2006 WL 3208666, at *6 (D.D.C. Nov. 7, 2006) (finding search not reasonable when agency searched only its Central Records System database, where breadth of request warranted search of "I" drive database); Friends of Blackwater v. U.S. Dep't of the Interior, 391 F. Supp. 2d 115, 121-22 (D.D.C. 2005) (finding that search was inadequate because agency had evidence that documents existed that originated in leadership office but did not forward request to leadership office in accordance with agency's regulations); Kennedy v. DOJ, No. 03-6077, 2004 WL 2284691, at *4 (W.D.N.Y. Oct. 8, 2004) (finding search inadequate where agency did not search field office when request specifically mentioned that field office); Wilderness Soc'y v. U.S. Dep't of the Interior, 344 F. Supp. 2d 1, 21 (D.D.C. 2004) (concluding that search was inadequate because agency failed to search Office of Solicitor in response to request for lawsuit and settlement records); Bennett v. DEA, 55 F. Supp. 2d 36, 39-40 (D.D.C. 1999) (holding search inadequate where agency failed to search investigatory files for cases in which subject of request acted as informant even though agency "did not track informant activity by case name, number, or judicial district, but tracked information only 'as it pertain[ed] to specific criminal investigations'" (quoting agency declaration)); cf. Davis v. DOJ, 460 F.3d 92, 105 (D.C. Cir. 2006) (remanding case "to provide the agency an opportunity to evaluate [search] alternatives" including non-agency internet search tools); Pena v. BOP, No. 06-2480, 2007 WL 1434869, at *2-3 (E.D.N.Y. May 14, 2007) (finding, in case involving search initially done pursuant to subpoena during which NARA sent transferred records back to BOP and which BOP could not subsequently locate, that search will be deemed adequate "only if the BOP is unable to procure additional copies . . . [and that] if BOP can obtain [them] by making a request to the National Archives . . . it is obligated to do so"); People for the Am. Way Found. v. DOJ, 451 F. Supp. 2d 6, 15 (D.D.C. 2006) (ordering agency to search non-agency database because that database is "simply a tool to aid in identifying responsive records from [agency's] database of case files"); Peltier v. FBI, No. 02-4328, 2005 WL 1009595, at *2 (D. Minn. Apr. 26, 2005) (finding it

An agency generally "is not obliged to look beyond the four corners of the request for leads to the location of responsive documents,"[185] but courts have found that an agency does "need [to] pursue [] a lead it cannot in good faith ignore, i.e., a lead that is both clear and certain."[186] However, following the conclusion of a reasonable search, an agency does

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"inexcusable" that agency withheld trial transcripts without making "a quick phone call to the Clerk's office" to determine whether documents were publicly available).

[185] Kowalczyk v. DOJ, 73 F.3d 386, 389 (D.C. Cir. 1996); see, e.g., White v. DOJ, No. 12-5067, 2012 WL 3059571, at *1 (D.C. Cir. July 19, 2012) (per curiam) (concluding that agency's "failure to locate documents responsive to [the] request appears to be a function of the limited information provided in [the] request, and [requester] has not demonstrated that [agency] had a duty to investigate and provide additional search terms"); Rein v. U.S. Pat. & Trademark Off., 553 F.3d 353, 363-65 (4th Cir. 2009) (rejecting argument that searches were inadequate merely because "responsive documents refer to other documents that were not produced" and agency did not pursue "leads" appearing in uncovered documents, and explaining that search need only be "reasonably calculated to uncover all relevant documents" based upon "four corners of [plaintiffs'] requests"); Williams v. Ashcroft, 30 F. App'x 5, 6 (D.C. Cir. 2002) (deciding that agency need not look for records not sought in initial FOIA request); Sheridan v. Dep't of the Navy, 9 F. App'x 55, 58 (2d Cir. 2001) (finding that agency was "'not obliged to look beyond the four corners of the request for leads to the location of responsive documents'" (quoting Kowalczyk, 73 F.3d at 389)); Cooper v. DOJ, 890 F. Supp. 2d 55, 63-64 (D.D.C. 2012) (finding search "reasonable" because, "as a matter of practice," agency does not "search for seized asset information unless [requested] or there is some indication in its records that assets were seized," and where, as here, agency followed "'clear and certain' leads after receiving additional information from [plaintiff]," and "engaged in an ongoing effort to locate responsive documents") (internal citation omitted).

[186] Kowalczyk, 73 F.3d at 389; see, e.g., Cato Inst. v. FBI, 638 F. Supp. 3d 13, 20 (D.D.C. 2022) ("An agency 'generally need not "search every record system"' in response to a FOIA request, but it must nevertheless continually 'revise its assessment of what [constitutes a] "reasonable" [search] in a particular case to account for leads that emerge during its inquiry.'" (quoting Campbell v. DOJ, 164 F.3d 20, 28 (D.C. Cir. 1998))); ACLU of Mass. v. ICE, No. 21-10761, 2022 WL 1912882, at *6 (D. Mass. June 3, 2022) ("The adequacy or inadequacy of an agency's search is not fixed at the outset of the search process: rather, the contours of the search may need to evolve as the agency reviews its collection and obtains information as to where additional responsive records may be found."); Montgomery v. IRS, No. 17-918, 2020 WL 1451597, at *5 (D.D.C. Mar. 25, 2020) (concluding that "[e]ven if an agency 'start[s] with [a] reasonable assumption that only . . . [searching certain locations] would be necessary,' 'it must revise its assessment of what is "reasonable" in a particular case to account for leads that emerge during its inquiry'" (quoting New Orleans Workers' Ctr. for Racial Just. v. ICE, 373 F. Supp. 3d 16, 36 (D.D.C. 2019))); see also, e.g., Transgender L. Ctr. v. ICE, 46 F.4th 771, 780-81 (9th Cir. 2022) (finding that agencies did not appropriately respond to "'positive indications of overlooked materials[,]'" additional search leads from requester's state-level public records request, or detailed indications that agencies' initial production omitted specific documents (quoting Hamdan v. DOJ, 797 F.3d

not have "an obligation to search anew based upon a subsequent clarification [from the requester]."[187] As to the search terms chosen, courts have accorded agencies some deference.[188] The D.C. Circuit has stressed that "adequacy – not perfection – is the

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759, 771 (9th Cir. 2015))); Juda v. U.S. Customs Serv., No. 99-5333, 2000 WL 1093326, at *1 (D.C. Cir. June 19, 2000) (per curiam) (concluding that agency improperly limited its search where it "not only . . . fail[ed] to pursue clear leads to other existing records, but . . . [also] identified at least one other record system . . . likely to produce the information [plaintiff] requests"); Campbell v. DOJ, 164 F.3d 20, 27-28 (D.C. Cir. 1998) (finding that agency's initial search limited to one records system "became untenable" when information in records produced suggested that searches of two additional records systems "would have identified additional information about" the subject matter of plaintiff's request); Int'l Couns. Bureau v. DOD, 864 F. Supp. 2d 101, 108 (D.D.C. 2012) (finding search inadequate because agency did not provide "a satisfactory response to [plaintiff's] contention that it should have searched for records using an alternate spelling of [a detainee's] name that [plaintiff] discovered from the Department's own records"); El Badrawi v. DHS, 583 F. Supp. 2d 285, 302-03 (D. Conn. 2008) (finding search inadequate where agency did not search U.S. Embassy in Beirut, but was aware that embassy likely had records, and where agency's other searches located records originating in embassy that suggested existence of additional embassy records); Nat. Res. Def. Council, Inc. v. DOD, 388 F. Supp. 2d 1086, 1100-03 (C.D. Cal. 2005) (ordering new search where agency searched only one office and did not forward request to another office that agency knew to be lead office in subject area); Trentadue v. FBI, No. 04-772, slip op. at 5-6 (D. Utah May 5, 2005) (ordering additional search in part because agency conducted computer search only, even though agency previously limited ability of field offices to upload documents into computer database); Tarullo v. DOD, 170 F. Supp. 2d 271, 275 (D. Conn. 2001) (declaring agency's search inadequate because "[w]hile hypothetical assertions as to the existence of unproduced responsive documents are insufficient to create a dispute of material fact as to the reasonableness of the search, plaintiff here has [himself provided copy of agency record] which appears to be responsive to the request"); Kronberg v. DOJ, 875 F. Supp. 861, 870-71 (D.D.C. 1995) (holding that search was inadequate when agency did not find records required to be maintained and plaintiff produced documents obtained by other FOIA requesters demonstrating that agency possessed files which may contain records sought).

[187] Kowalczyk, 73 F.3d at 388; see also Winn v. DOJ, No. 17-833, 2019 WL 464788, at *4 (D.D.C. Feb. 6, 2019) (emphasizing that agency's "only obligation was to disclose non-exempt records responsive to [plaintiff's] original requests" and it "had no 'obligation to search anew based upon a subsequent clarification'" (quoting Kowalczyk, 73 F.3d at 388)); cf. Williams, 30 F. App'x at 5-6 (noting that because requester's initial FOIA request "sought [only] a list of telephone calls made" and both parties in subsequent correspondence confirmed this request, agency "was not required to search for or provide tape recordings of [these] telephone conversations" upon receipt of an inquiry from requester seeking recordings).

[188] See Ladeairous v. DOJ, No. 16-5068, 2018 U.S. App. LEXIS 22293, at *1 (D.C. Cir. Aug. 8, 2018) (rejecting requester's challenge that agency "should have used different search terms," and explaining that "the government's 'search efforts were reasonable and logically organized to uncover relevant documents'" (quoting DiBacco v. U.S. Army, 795 F.3d 178, 191

standard that FOIA sets," and agencies "need not knock down every search design advanced by every requester."[189]

(D.C. Cir. 2015))); Porup v. CIA, No. 17-72, 2020 WL 1244928, at *5 (D.D.C. Mar. 16, 2020) (concluding that "agency's search terms were adequate" despite plaintiff's contention that agency "provided only examples of the search terms that it used" and noting that "[t]he agency declaration provided a detailed list of many of the terms that it used" and certified that the terms used "'were identified by subject matter experts'" and were "'most reasonably likely to return responsive records'" (quoting agency declaration)); Heffernan v. Azar, 417 F. Supp. 3d 1, 9-10 (D.D.C. 2019) (finding reasonable search where, despite failing to use exact search terms provided by plaintiff, agency both "sufficiently demonstrated why the use of certain compound search terms was appropriate" and, where such searches were inappropriate, "ran additional searches utilizing individual search terms").

[189] DiBacco, 795 F.3d at 191 (finding that "[t]he Army's burden was to show that its search efforts were reasonable and logically organized to uncover relevant documents"); see also Mobley v. CIA, 806 F.3d 568, 582 (D.C. Cir. 2015) (finding that "a request for an agency to search a particular record system – without more – does not invariably constitute a 'lead' that an agency must pursue") (internal citation omitted); Hamdan v. DOJ, 797 F.3d 759, 772 (9th Cir. 2015) (rejecting challenge to adequacy of search even "where records identified by [other agency] . . . indicated that a few documents may not have been located by the FBI" and noting that "[p]laintiffs were entitled to a reasonable search for records, not a perfect one[,] . . . [a]nd a reasonable search is what they got"); Newman v. BOP, No. 20-3761, 2022 WL 1521797, at *5 (D.D.C. May 13, 2022) (affirming adequacy of search despite agency's failure to search legacy database because requester "offers no indication that there is any such record" in the database and "bare speculation about potential records does not create a genuine dispute"); McClanahan v. DOJ, 204 F. Supp. 3d 30, 44 (D.D.C. 2016) (finding that "the reasonableness of a search is not measured against the scope dictated by a requester's search instructions, particularly when those instruction[s] do not provide 'clear and certain' 'lead[s]'" (quoting Mobley, 806 F.3d at 582)), aff'd, 712 F. App'x 6 (D.C. Cir. 2018); Bigwood v. DOD, 132 F. Supp. 3d 124, 140 (D.D.C. 2015) ("In general, a [plaintiff] cannot dictate the search terms" and "[w]here the search terms are reasonably calculated to lead to responsive documents, a court should neither 'micromanage' nor second guess the agency's search." (quoting Agility Pub. Warehousing Co. v. NSA, 113 F. Supp. 3d 313, 339 (D.D.C. 2015))); cf. Oglesby v. Dep't of the Army, 79 F.3d 1172, 1185 (D.C. Cir. 1996) (acknowledging plaintiff's assertion that search was inadequate because of previous FOIA requester's claim that agency provided her with "well over a thousand documents," and holding that "claim raises enough of a doubt to preclude summary judgment in absence of [agency] affidavit" further describing its search); Heffernan v. Azar, 417 F. Supp. 3d 1, 9 (D.D.C. 2019) (analyzing agency's use of compound search terms, and holding that, "[r]ather than adopting a blanket rule requiring the defendant to use individual search terms, as the plaintiff would have the Court do, the Court will evaluate the search terms used by the defendant in the context of the search for documents responsive to the plaintiff's FOIA request"); Fams. for Freedom v. CBP, 837 F. Supp. 2d 331, 335 (S.D.N.Y. 2011) ("In order to determine adequacy, it is not enough to know the search terms[;] [t]he method in which they are combined and deployed is central to the inquiry.").

At the same time, some courts have found that when a requester has suggested search terms that are demonstrably reasonable and could aid in the search, the burden shifts back to the agency to explain its failure to use such terms to conduct its search.[190] Additionally, an agency is not generally required to conduct a search for records outside its control.[191] Courts also presume that agency employees comply with federal records

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[190] See, e.g., ACLU of Mass., 2022 WL 1912882, at *5 (noting that "a failure to use search terms proposed and emphasized by Plaintiffs 'is not automatically unreasonable'" but holding that agency "affidavits do not establish reasonable grounds for its exclusion of Plaintiffs' two requested search terms" (quoting Knight First Amend. Inst. v. CDC, 560 F. Supp. 3d 810, 823 (S.D.N.Y. 2021))); Am. Oversight v. OMB, 613 F. Supp. 3d 219, 227-28 (D.D.C. 2020) (reasoning that where agency "objected to several of [plaintiff's] proposed search terms" "the agency must . . . 'provide[] an explanation as to why the search term was not used'" and finding "insufficient" agency "justifications for refusing to use the terms suggested" (quoting Am. Ctr. for Equitable Treatment, Inc. v. OMB, 281 F. Supp. 3d 144, 152 (D.D.C. 2017))); Brennan Ctr. for Just. at N.Y. Univ. Sch. of L. v. DOJ, 377 F. Supp. 3d 428, 434-35 (S.D.N.Y. 2019) (noting that two agencies "fail[ed] to explain why terms as obvious as those employed by [other defendant] agencies were not used" and "ma[d]e clear the unreasonableness of [their] approach" in "responding to essentially the same requests"); Am. Ctr. for Equitable Treatment, Inc., 281 F. Supp. 3d at 152 (concluding that "where . . . a FOIA requester suggests search terms that are common in practice, but the agency elects not to use them, the failure of the agency to explain its choices prevents the court from evaluating the reasonableness of the agency's search method"); cf. Summers v. DOJ, 934 F. Supp. 458, 461 (D.D.C. 1996) (notwithstanding fact that plaintiff's request specifically sought access to former FBI Director J. Edgar Hoover's "commitment calendars," finding agency's search inadequate because agency did not use additional search terms such as "appointment" or "diary"); Canning v. DOJ, 919 F. Supp. 451, 460-61 (D.D.C. 1994) (indicating that where plaintiff discovered and made agency aware that subject of request used two different last names and sought supplemental search for second last name, agency should have conducted search using both names, rather than treating this discovery as requiring plaintiff to file new request).

[191] See Jones-Edwards v. NSA, 196 F. App'x 36, 38 (2d Cir. 2006) ("An agency is not obliged to conduct a search of records outside its possession or control."); see also, e.g., Risenhoover v. U.S. Dep't of State, No. 20-5276, 2020 U.S. App. LEXIS 40171, at *2 (D.C. Cir. Dec. 22, 2020) (per curiam) (finding that the State Department did not have an obligation to "request[] responsive documents from [the Executive Office of the President]" because those records are outside of the State Department's control); Se. Legal Found., Inc. v. DOJ, No. 19-03215, 2022 WL 975598, at *5 (N.D. Ga. Mar. 31, 2022) (rejecting plaintiff's adequacy of search argument and "declin[ing] to require [the agency] to change its processes or regulations for addressing non-specific FOIA requests or otherwise require [agency component] to search for records outside its boundaries"); Skurow v. DHS, 892 F. Supp. 2d 319, 326-29 (D.D.C. 2012) (finding that "the FBI is not a component of DHS," and, thus, TSA was under no obligation to search for FBI records); Lewis v. DOJ, 867 F. Supp. 2d 1, 12-13 (D.D.C. 2011) (holding that the U.S. Attorney's Office was not obligated to search district court files, but rather only those records in its custody and control at time of request); Hussain v. DHS, 674 F. Supp. 2d 260, 265-66 (D.D.C. 2009) (finding search adequate because portion of records sought were maintained by another agency component

laws by conducting agency business through official email accounts or by appropriately copying such communications to those accounts.[192] However, courts have held that this

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and agency regulations did not require forwarding the request to appropriate component); Antonelli v. USPC, 619 F. Supp. 2d 1, 6 (D.D.C. 2009) (rejecting plaintiff's challenge to agency's search based on claim that additional records exist in files of other DOJ components "because an agency component is obligated to produce only those records in its custody and control at the time of the FOIA request"); Bonaparte v. DOJ, No. 07-0749, 2008 WL 2569379, at *1 (D.D.C. June 27, 2008) (finding search adequate when it revealed that records had been transferred to NARA consistent with agency regulations and stating that requester could request records from NARA); Jackson v. Dep't of Lab., No. 06-02157, 2008 WL 539925, at *5 n.2 (E.D. Cal. Feb. 25, 2008) (magistrate's recommendation) (finding that agency "is not required to pursue any records that may exist and be in possession of a retired employee"), adopted, No. 06-2157, 2008 WL 4463897 (E.D. Cal. Oct. 2, 2008); Pena v. U.S. Customs & Border Patrol, No. 06-2482, 2007 WL 1434871, at *2 (E.D.N.Y. May 14, 2007) (stating that "[i]ndeed, the [agency] is not required to procure documents not already in its possession" where it had no records and had referred request to other agency); Anderson v. DOJ, 518 F. Supp. 2d 1, 10 (D.D.C. 2007) (stating that agency is not required to "retain or retrieve documents which previously had been in its possession"); Askew v. United States, No. 05-200, 2006 WL 3307469, at *10 (E.D. Ky. Nov. 13, 2006) (rejecting plaintiff's contention that FOIA requires agency to search another agency's files); Williams v. U.S. Att'y's Off., No. 03-674, 2006 WL 717474, at *5 (N.D. Okla. Mar. 16, 2006) (stating that search obligations under FOIA require agency "to search adequately its own records[,]" not "records of third parties"); cf. Kohake v. Dep't of Treasury, 630 F. App'x 583, 589 (6th Cir. 2015) (holding that the fact that destroyed records were not located does not make search unreasonable because "[d]estroying records pursuant to a records retention policy, . . . does not violate the FOIA"), aff'd, 630 F. App'x 583 (6th Cir. 2015); James v. U.S. Secret Serv., 811 F. Supp. 2d 351, 357-58 (D.D.C. 2011) (holding that search "was reasonable under the circumstances" because responsive records were destroyed at time of request and therefore not under agency control), aff'd per curiam, No. 11-5299, 2012 WL 1935828 (D.C. Cir. May 11, 2012).

[192] See 44 U.S.C. § 2911(a)(1)-(2) (2018) (confirming that when conducting agency business, a federal employee "may not create or send a record using a non-official electronic messaging account unless" the employee "copies an official electronic messaging account" when creating the record or "forwards a complete copy of the record to an official electronic messaging account" within twenty days of creation); Jud. Watch, Inc. v. DOJ, 319 F. Supp. 3d 431, 437-38 (D.D.C. 2018) (confirming that "[a]bsent evidence to the contrary, a [federal] government employee is presumed to have properly discharged the duty to forward official business communications from a personal email account to an official email account"); cf. Democracy Forward Found. v. U.S. Dep't of Com., 474 F. Supp. 3d 69, 75 (D.D.C. 2020) (finding declarations describing email practices of agency employees lacking where they fail to represent "that the [employee] *routinely* copied or forwarded *all* [agency]-related emails that he sent or received through his personal email accounts, such that a search of his personal email account would be duplicative of the official email searches [the agency] previously conducted").

presumption may be rebutted by a positive indication of overlooked agency materials on personal email accounts.[193]

Further, courts generally find that an agency's inability to locate every single responsive record does not undermine an otherwise reasonable search,[194] nor does its

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[193] See Competitive Enter. Inst. v. Off. of Sci. & Tech. Pol'y, 827 F.3d 145, 149 (D.C. Cir. 2016) (holding that "[i]f the agency head controls what would otherwise be an agency record [on a non-government domain email account], then it is still an agency record and still must be searched or produced"); Bader Fam. Found. v. U.S. Dep't of Educ., 630 F. Supp. 3d 36, 44-45 (D.D.C. 2022) (holding that evidence of official emails received on personal law school email account is enough to rebut presumption that official complied with record keeping requirements); Democracy Forward Found., 474 F. Supp. 3d at 76 (finding it reasonable to probe government official's personal email accounts for agency records subject to FOIA where agency failed to demonstrate timely forwarding or copying to government accounts of emails memorializing agency business); Brennan Ctr. for Just. at N.Y. Univ. Sch. of L., 377 F. Supp. 3d at 435 (finding that "[e]vidence of a record on a personal account is sufficient to raise a question of compliance with recordkeeping obligations, rendering the presumption of compliance inapplicable" (citing Jud. Watch, Inc., 319 F. Supp. at 438)); Hunton & Williams LLP v. EPA, 248 F. Supp. 3d 220, 237 (D.D.C. 2017) (rejecting request to search personal email because "[plaintiff] is unable to identify any 'countervailing evidence' of personal email use" (quoting Morley v. CIA, 508 F.3d 1108, 1123 (D.C. Cir. 2007))); Wright v. Admin. for Child. & Fams., No. 15-218, 2016 WL 5922293, at *7-9 (D.D.C. Oct. 11, 2016) (finding that "plaintiff's purely speculative contentions [that there is "a 'substantial likelihood that personal [email] accounts were used to evade public scrutiny in this case,'"] cannot render the agency's search inadequate" (quoting plaintiff's opposition)); see also Competitive Enter. Inst. v. Off. of Sci. & Tech. Pol'y, 241 F. Supp. 3d 14, 21 (D.D.C. 2017) (agreeing with "[t]he Government['s] conten[tion] that it need not produce [the director's] OSTP-related Woods Hole account emails because they are duplicates of emails that exist on OSTP servers" on remand from D.C. Circuit); Wadelton v. Dep't of State, 208 F. Supp. 3d 20, 30 (D.D.C. 2016) (finding defendant's search adequate when "Plaintiffs' argument [that there may be information maintained on private servers] is highly speculative"); cf. Gawker Media, LLC v. Dep't of State, 266 F. Supp. 3d 152, 155 (D.D.C. 2017) (finding no obligation for agency to solicit or produce documents held solely by a *former* agency official without evidence indicating that agency or its former employee maintained documents outside agency's custody in attempt to thwart FOIA obligations); Hunton & Williams LLP, 248 F. Supp. 3d 236, 238 (D.D.C. 2017) (rejecting Plaintiff's argument that "agencies should be required to search for responsive text messages" and finding that "[plaintiff] does not point to any evidence indicating that text messages were used for agency business or otherwise show that searching text messages would be likely to lead to responsive documents").

[194] See Watkins L. & Advoc., PLLC v. DOJ, 78 F.4th 436, 446 (D.C. Cir. 2023) ("We have established that an 'agency's failure to turn up a particular document, or mere speculation that as yet uncovered documents might exist, does not undermine the determination that the agency conducted an adequate search for the requested records.'" (quoting Wilbur v. CIA, 355 F.3d 675, 678 (D.C. Cir. 2004))); Campbell v. SSA, 446 F. App'x 477, 480-81 (3d

Cir. 2011) (noting that absence of particular documents, which plaintiff claims should be among responsive records, "does not establish . . . that [agency's] search was not reasonable"); Batton v. Evers, 598 F.3d 169, 176 (5th Cir. 2010) (affirming district court's determination that search of locations most likely to hold responsive records was reasonable because "'the issue is not whether other documents may exist, but rather whether the search for undisclosed documents was adequate'" (quoting In re Wade, 969 F.2d 241, 249 n.11 (7th Cir. 1992))); Moore v. FBI, 366 F. App'x 659, 661 (7th Cir. 2010) (noting that, although agency had destroyed some potentially responsive records, that fact does not invalidate its search); Lahr v. NTSB, 569 F.3d 964, 988 (9th Cir. 2009) ("[T]he failure to produce or identify a few isolated documents cannot by itself prove the searches inadequate."); Hoff v. DOJ, No. 07-4499, slip op. at 4 (6th Cir. July 23, 2008) (unpublished disposition) (finding search adequate even though agency did not locate certain records at initial request stage because, inter alia, records "were kept in a general administrative file, rather than a file bearing [requester's] name, and they were not indexed by her name"); Piper v. DOJ, 222 F. App'x 1, 1 (D.C. Cir. Feb. 23, 2007) (per curiam) (unpublished disposition) (affirming district court's conclusion that alleged record destruction prior to FOIA request has no bearing on whether agency search was adequate); Iturralde v. Comptroller of the Currency, 315 F.3d 311, 315 (D.C. Cir. 2003) ("[I]t is long settled that the failure of an agency to turn up one specific document in its search does not alone render a search inadequate. . . . After all, particular documents may have been accidentally lost or destroyed, or a reasonable and thorough search may have missed them."); Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 489 (2d Cir. 1999) (declaring the fact "[t]hat "some documents were not discovered until a second, more exhaustive, search was conducted does not warrant overturning the district court's ruling" that agency conducted a reasonable search); Campbell v. DOJ, 164 F.3d 20, 28 n.6 (D.C. Cir. 1998) (holding that "the inadvertent omission of three documents does not render a search inadequate when the search produced hundreds of pages that had been buried in archives for decades"); Citizens Comm'n on Hum. Rts. v. FDA, 45 F.3d 1325, 1327-28 (9th Cir. 1995) (determining that search was adequate when agency spent 140 hours reviewing relevant files, notwithstanding fact that agency was unable to locate 137 of 1,000 volumes of records); Ethyl Corp. v. EPA, 25 F.3d 1241, 1246 (4th Cir. 1994) (reasoning that adequacy of search is not determined by "whether every single potentially responsive document has been unearthed"); Negley v. FBI, 825 F. Supp. 2d 63, 69-70 (D.D.C. 2011) (concluding that "[p]laintiff is challenging the failure to locate *one* document, and that is not sufficient to defeat summary judgment" given previous finding that agency complied with court's order specifying search to be conducted); Campaign for Responsible Transplantation v. FDA, 219 F. Supp. 2d 106, 111 (D.D.C. 2002) (upholding adequacy of search by declaring that agency's belated production of fifty-five additional documents located using information contained in plaintiff's summary judgment motion "is a proverbial 'drop in the bucket'" relative to 27,000 documents already provided to plaintiff and is, in fact, evidence that "[agency] utilized new information to find a few more documents") (internal citation omitted); Grace v. Dep't of the Navy, No. 99-4306, 2001 WL 940908, at *5 (N.D. Cal. Aug. 13, 2001) (concluding that, although agency apparently had misplaced records requested under FOIA, "[d]efendants have discharged their burden [by] making a good faith attempt to locate the missing files"), aff'd, 43 F. App'x 76 (9th Cir. 2002). But see Hiken v. DOD, 521 F. Supp. 2d 1047, 1054 (N.D. Cal. 2007) (explaining that while search results are not focus of reasonableness inquiry, they are not entirely irrelevant, particularly where "scope of the request is broad and the government fails to produce any responsive documents").

belated discovery of documents.[195] Finally, courts have held that the FOIA does not require agencies to conduct "unreasonably burdensome" searches for records,[196] but have

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[195] Am. Oversight v. DOJ, 401 F. Supp. 3d 16, 26 (D.D.C. 2019) (noting that agency discovered one responsive document during briefing, after its declarant had asserted that no responsive records exist, and finding "the fact that an agency discovers an error in its earlier representations, and thereafter changes course, does not alone displace the good-faith presumption courts accord its declarations"); Lamb v. Millennium Challenge Corp., 334 F. Supp. 3d 204, 212-13 (D.D.C. 2018) (finding defendant's search adequate following supplemental declaration filed by defendant which explained inadvertent omission of document in prior release to plaintiff); Ireland v. IRS, No. 16-02855, 2017 WL 1731679, at *5 (C.D. Cal. May 1, 2017) (holding "the fact '[t]hat some documents were not discovered until a second, more exhaustive, search does not warrant a finding that the original search was inadequate" (quoting Grand Cent. P'ship, Inc., 166 F.3d at 489)); Corbeil v. DOJ, No. 04-2265, 2005 WL 3275910, at *3 (D.D.C. Sept. 26, 2005) (declaring that "an agency's prompt report of the discovery of additional responsive materials may be viewed as evidence of its good faith efforts to comply with its obligations under the FOIA"); W. Ctr. for Journalism v. IRS, 116 F. Supp. 2d 1, 10 (D.D.C. 2000) (concluding that agency conducted reasonable search and acted in good faith by locating and releasing additional responsive records mistakenly omitted from its initial response because "it is unreasonable to expect even the most exhaustive search to uncover every responsive file; what is expected of a law-abiding agency is that the agency admit and correct error when error is revealed"), aff'd, 22 F. App'x 14 (D.C. Cir. 2001).

[196] See Nat'l. Sec. Couns. v. CIA, 969 F.3d 406, 410 (D.C. Cir. 2020) (finding request for "all [CIA] records pertaining to IBM supercomputer 'Watson'" would require an "unreasonably burdensome search" because the request as drafted is so general it would require a "massive undertaking" and requester refused to refine or clarify their request); Am. Fed'n of Gov't Emps., Loc. 2782 v. U.S. Dep't of Com., 907 F.2d 203, 209 (D.C. Cir. 1990) ("An agency need not honor a request that requires 'an unreasonably burdensome search.'" (quoting Goland v. CIA, 607 F.2d 339, 347 (D.C. Cir. 1978))); Ctr. for Immigr. Stud. v. USCIS, 628 F. Supp. 3d 266, 271 (D.D.C. 2022) ("The D.C. Circuit has long held that when a request entails 'an unreasonably burdensome search,' the agency need not respond.") (internal citation omitted); Dixon v. DOJ, 279 F. Supp. 3d 1, 2 (D.D.C. 2017) ("Where . . . an agency's response to a FOIA request calls for 'an unreasonably burdensome search,' . . . the agency need not honor the request.") (internal citation omitted), aff'd, No. 17-5223, 2018 WL 4610736 (D.C. Cir. Sept. 10, 2018); O'Harvey v. Off. of Workers' Comp. Programs, No. 95-0187, slip op. at 3 (E.D. Wash. Dec. 29, 1997) (finding request to be unreasonably burdensome because search would require agency "to review all of the case files maintained by the agency"), aff'd sub nom. O'Harvey v. Comp. Programs Workers, 188 F.3d 514 (9th Cir. 1999) (unpublished table decision); Spannaus v. DOJ, No. 92-372, slip op. at 6 (D.D.C. June 20, 1995) (finding that agency is not required to determine all persons having ties to associations targeted in bankruptcy proceedings "and then search any and all civil or criminal files relating to those persons"), summary affirmance granted in pertinent part, No. 95-5267, 1996 WL 523814 (D.C. Cir. Aug. 16, 1996); cf. Stewart v. Dep't of the Interior, 554 F.3d 1236, 1243-44 (10th Cir. Feb. 2, 2009) (affirming fee waiver denial because search of 610 computer backup tapes "would be unduly burdensome given the speculative nature" of request, but also stating that requester could proceed if it paid for search); Peyton v. Reno,

also at times disagreed with agency assessments of what constitutes an unreasonably burdensome search.[197] In assessing whether a search is unreasonably burdensome, courts have considered the following factors: 1) whether the request would require the agency to search a large number of offices within the agency,[198] 2) whether the agency would be required to review a vast number of search results,[199] and 3) whether the agency

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No. 98-1457, 1999 WL 674491, at *1-2 (D.D.C. July 19, 1999) (finding that request for all records indexed under subject's name reasonably described records sought because agency failed to demonstrate that name search would be unduly burdensome).

[197] See Colgan v. DOJ, No. 14-740, 2020 WL 2043828, at *9 (D.D.C. Apr. 28, 2020) (finding that agency "fail[ed] to show that a search would be unduly burdensome" because "conclusory statements about the volume of material that would need to [be] reviewed" neither "provide estimates of the cost of the search" nor discuss "whether the burden would be unusual"); New Orleans Workers' Ctr. for Racial Just. v. ICE, 373 F. Supp. 3d 16, 40 (D.D.C. 2019) (finding that defendant's unreasonably burdensome claim that manual search is required "fails[] to satisfy the defendant's burden" because it "failed to identify the specific electronic files or systems" at issue, "describe in any detail what information they contain and how that information is stored and retrieved[,]" or "provide the Court with an estimate of the time or cost required for a manual search or the total number of files . . . to be searched"); Kwoka v. IRS, No. 17-1157, 2018 WL 4681000, at *5 (D.D.C. Sept. 28, 2018) ("[E]ven taking the IRS at its word, the Court does not find roughly 2,200 hours of review time to constitute an 'unreasonably burdensome search.'") (internal citation omitted); Eakin v. DOD, No. 16-00972, 2017 WL 3301733, at *5 (W.D. Tex. Aug. 2, 2017) (holding that searching through 4.2 terabytes of data is not unreasonably burdensome and reasoning that "[i]t appears the most burdensome work is removing recently-created, non-responsive materials from the files in accordance with FOIA exemptions, rather than ascertaining or locating the responsive documents themselves"); Leopold v. NSA, 196 F. Supp. 3d 67, 75 (D.D.C. 2016) (rejecting burdensome argument where "emails and their attachments can be searched using an eDiscovery tool without needing to open each email and its attachments individually" and where agency provided no evidence "regarding the burden associated with running such searches").

[198] See Am. Fed'n of Gov't Emps., Loc. 2782, 907 F.2d at 208-09 (emphasizing that plaintiff's requests "would require [agency] to locate 'every chronological office file and correspondent file, internal and external, for every branch office, staff office [etc.]'" and affirming the district court's conclusion "that the [agency] need not comply with those requests") (internal citation omitted); Sai v. TSA, 315 F. Supp. 3d 218, 249 (D.D.C. 2018) (holding that search for all past and present policy/procedure documents, which would require "searching virtually every file at the agency[,]" would be unduly burdensome); James Madison Project v. CIA, No. 08-1323, 2009 WL 2777961, at *4-5 (E.D. Va. Aug. 31, 2009) (concluding that plaintiff's request created undue burden for agency because it would require each and every agency component to "tailor a search specific to that component's records system configuration").

[199] See Solar Sources, Inc. v. United States, 142 F.3d 1033, 1038-39 (7th Cir. 1998) (refusing to order agency "to identify all of the non-exempt documents in its investigatory files" and segregate nonexempt documents from "millions of pages of documents" in light of

government's estimate that doing so would take eight work-years); Nation Mag. v. U.S. Customs Serv., 71 F.3d 885, 892 (D.C. Cir. 1995) (agreeing that search that would require review of twenty-three years of unindexed files would be unreasonably burdensome, but noting that agency must provide sufficient explanation as to why . . . a search for a specific named and dated memo through chronologically indexed agency files would be burdensome); Van Strum v. EPA, Nos. 91-35404, 91-35577, 1992 WL 197660, at *1 (9th Cir. Aug. 17, 1992) (unpublished table decision) (accepting agency justification denying or seeking clarification of overly broad requests because agency not required to conduct search which "would have required the agency to 'locate, review, redact, and arrange' a vast amount of material'" (quoting Am. Fed'n of Gov't Emps., Loc. 2782, 907 F.2d at 209)); Am. Fed'n of Gov't Emps., Loc. 2782, 907 F.2d at 209 (noting that plaintiff's requests "would require the agency to locate, review, redact, and arrange for inspection [of] a vast quantity of material" and concluding that "it is clear that these requests are so broad as to impose an unreasonable burden upon the agency"); Wolf v. CIA, 569 F. Supp. 2d 1, 9 (D.D.C. 2008) (holding that search of microfilm files requiring frame-by-frame reel review that "would take approximately 3,675 hours and cost about $147,000" constitutes unreasonably burdensome search), aff'd in part, rev'd in part on other grounds & remanded, 473 F.3d 370 (D.C. Cir. 2007); Schrecker v. DOJ, 217 F. Supp. 2d 29, 35 (D.D.C. 2002) (finding "that to require an agency to hand search through millions of documents is not reasonable and therefore not necessary," as agency already had searched "the most likely place responsive documents would be located"), aff'd, 349 F.3d 657 (D.C. Cir. 2003); Burns v. DOJ, No. 99-3173, slip op. at 2 (D.D.C. Feb. 6, 2001) (concluding that "given the capacity of the reels and the absence of any index," a request for specific telephone conversations recorded on reel-to-reel tapes was "unreasonably burdensome" because "it would take an inordinate [amount of] time to listen to the reels in order to locate any requested conversations that might exist"); cf. Project on Predatory Lending v. DOJ, 325 F. Supp. 3d 638, 654 (W.D. Pa. 2018) (finding that searching through "nine terabytes of electronically stored information" would be burdensome because agency "does not have the technological capability to process the data" and "it would take approximately 460 years to conduct a page-by-page review of the materials").

would be required to allocate a significant amount of resources to the search where it is unlikely to locate responsive records.[200] Courts have also looked to whether the requester has refused the agency's attempts to narrow the scope of the request.[201]

With regard to electronic database searches, the FOIA requires agencies to "make "reasonable efforts" to search for requested records in electronic form or format "except when such efforts would significantly interfere with the operation of the agency's automated information system."[202] Courts have discussed whether an agency's

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[200] See Ancient Coin Collectors Guild v. U.S. Dep't of State, 866 F. Supp. 2d 28, 33 (D.D.C. June 11, 2012) (finding, on remand from D.C. Circuit for further consideration of agency backup tapes, "that although other archival and backup systems do exist, attempting additional searches would not only be unlikely to result in additional responsive material, but would also be costly and inconvenient"), aff'd in part, rev'd in part on other grounds & remanded, 641 F.3d 504 (D.C. Cir. 2011); Cuban v. SEC, 795 F. Supp. 2d 43, 48-50 (D.D.C. 2011) (concluding that requiring manual search of "'260 linear feet of cabinet space'" containing uncategorized forms constituted burdensome search, where agency already searched 145,000 forms electronically "with no [responsive] results") (internal citation omitted); cf. Wilson v. DOT, 730 F. Supp. 2d 140, 152 (D.D.C. 2010) (finding "'unduly burdensome,' if not impossible, for [agency] to identify the records responsive to [plaintiff's] request" because records "simply do not exist in the format [plaintiff] requests" (citing Nation Mag., 71 F.3d at 891-92)).

[201] See Cato Inst. v. DOD, No. 21-1223, 2023 WL 3231445 at *2-7 (D.D.C. May 3, 2023) (rejecting as not reasonably described a request for records created "pursuant to" a specific DOD Directive, where plaintiff refused to reformulate request despite agency requests for it to do so); Sack v. CIA, 53 F. Supp. 3d 154, 164 (D.D.C. 2014) (finding that agency was not required to conduct search that "borders on the 'all-encompassing fishing expedition'" where requester refused to narrow or modify request (quoting Dale v. IRS, 238 F. Supp. 2d 99, 104-05 (D.D.C. 2002))). But see Public Emps. for Env't Resp. v. EPA, 314 F. Supp. 3d 68, 78 (D.D.C. 2018) (rejecting argument that "citizens lose their right to have agencies fully respond to FOIA requests" where request is perfected and requester refused to narrow its scope).

[202] 5 U.S.C. § 552(a)(3)(C) (2018); see Long v. CIA, No. 15-1734, 2019 WL 4277362, at *4-5 (D.D.C. Sept. 10, 2019) (rejecting agency argument that "writing new computer code to locate responsive records in its database" is "creation of a new record," and concluding that agency failed to conduct a reasonable search of existing data fields in database because agency affidavits "do not provide sufficient detail for the court to determine whether a search . . . would significantly interfere with [agency's] system operations"); Ancient Coin Collectors Guild, 866 F. Supp. 2d at 34 (finding that agency's electronic backup system "was not designed to retain documents in an easily searchable form," and "therefore, any search efforts would 'significantly interfere' with the functioning of [agency's] entire information system") (internal citation omitted); Sun-Sentinel Co. v. DHS, 431 F. Supp. 2d 1258, 1276 (S.D. Fla. 2006) (stating that subsection (a)(3)(C) of the FOIA "addresses problems with searching for records as opposed to producing records," and deciding that evidentiary hearing is needed to determine whether agency's claim of significant interference relates to

involvement of information technology professionals is required to conduct a reasonable search for records,[203] and have recognized the challenges agencies face when conducting searches for records maintained in obsolete electronic media.[204]

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agency's "inability . . . to search for these records or to produce these records"); Baker & Hostetler LLP v. Dep't of Com., No. 02-2522, slip op. at 10-11 (D.D.C. Mar. 31, 2004) (finding database restoration would "significantly interfere with the operation of the agency's automated information system" where it would render servers unusable for other functions, and where database restoration attempts could fail due to absence of certain backup tapes), aff'd in pertinent part, 473 F.3d 312 (D.C. Cir. 2006); Schladetsch v. HUD, No. 99-0175, 2000 WL 33372125, at *5 (D.D.C. Apr. 4, 2000) (rejecting as insufficient agency affidavit that failed to show how creation and use of computer program to conduct electronic database search for responsive information "would require [agency] to undertake 'unreasonable efforts' or that the search would 'substantially interfere' with [agency's] computer system") (internal citations omitted); see also FOIA Update, Vol. XVIII, No. 1 ("OIP Guidance: Amendment Implementation Questions") (noting that, in searching for electronic records, agencies do not by default create new records); FOIA Update, Vol. XVII, No. 4 ("Congress Enacts FOIA Amendments") (discussing electronic search requirements); cf. Hoffman v. DOJ, No. 98-1733, slip op. at 10-11 (W.D. Okla. Dec. 15, 1999) (finding that agency is not required to conduct physical search of records "if other computer-assisted search procedures available to [the] agency are more efficient and serve the same practical purpose of reviewing hard copies of documents").

[203] See CareToLive v. FDA, 631 F.3d 336, 343-44 (6th Cir. 2011) (finding that because search of deleted emails "would merely be cumulative" of records already provided to plaintiff, agency "need not attempt to recover electronic data that has been deleted in order to . . . perform[] a reasonable search" because to adopt such a requirement "could potentially cripple agencies by requiring that after following their normal search procedures, they must have an information technology expert scan relevant computers and servers for additional information that might have been deleted"); Fox News Network v. Bd. of Governors of the Fed. Rsrv. Sys., 639 F. Supp. 2d 384, 397 (S.D.N.Y. 2009) (holding that agency's "failure to use computer experts to search for [deleted] files does not render the search inadequate" (citing Baker & Hostetler LLP v. Dep't of Com., 473 F.3d 312, 318 (D.C. Cir. 2006)); Albino v. USPS, No. 01-563, 2002 WL 32345674, at *7 (W.D. Wis. May 20, 2002) (declaring a search for responsive email messages spanning five years to be inadequate because agency "did not enlist the help of information technology personnel . . . [who] . . . would have access to e-mail message archives" possibly containing requested records).

[204] See Anand v. HHS, No. 21-1635, 2023 WL 3600140, at *3-4 (D.D.C. May 23, 2023) (finding that search of legacy electronic database would be unduly burdensome after agency thoroughly explained structure and search capabilities of database, volume of records in database, and burden on agency to conduct search of database in light of these technological limitations); Jennings v. FBI, No. 03-1651, slip op. at 8-9 (D.D.C. May 6, 2004) (finding that agency's search was adequate even when "faulty computer mechanism" rendered identifiable tape recordings of telephone conversations irretrievable); Burns, No. 99-3173, slip op. at 2 (concluding that an agency need not search through reel-to-reel audiotapes containing requested recorded conversations because "the equipment on which these reels could be played has broken and [has been] replaced with other, incompatible equipment,"

One court found a search to be unnecessary where the agency's declaration stated that a person familiar with the records sought had determined that no responsive records were, in fact, maintained by the agency.[205] In the absence of such a showing, however, courts have required agencies to conduct a search.[206]

In 2016, the D.C. Circuit addressed "a question of first impression: if the government identifies a record as responsive to a FOIA request, can the government" then remove certain information within that responsive record as not responsive to the FOIA

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and an agency is "not required to obtain new equipment to process [p]laintiff's FOIA request"); Lepelletier v. FDIC, No. 96-1363, transcript at 8 (D.D.C. Mar. 3, 2000) (refusing to require agency to undertake "an enormous effort that may not even work to try to convert [obsolete] computer files that nobody knows how to read now to provide information that [plaintiff] would like to have").

[205] See Whitaker v. Dep't of Com., 970 F.3d 200, 208 (2d Cir. 2020) (concluding that agency need not search for records where "[agency's] declarations detail specifically why the agency employees reasonably determined that a search for responsive records would be futile"); Singh v. FAA, 783 F. App'x 753, 754 (9th Cir. 2019) (finding that FAA reasonably ended its search because "any additional efforts to look for relevant information" that FAA already knew it did not typically collect "would have likely proven futile"); Espino v. DOJ, 869 F. Supp. 2d 25, 28 (D.D.C. 2012) (upholding agency component's action in not searching for records when its declarations stated that it "does not maintain [requested] records"); Thomas v. Comptroller of the Currency, 684 F. Supp. 2d 29, 32-33 (D.D.C. 2010) (affirming agency's decision not to search when it stated in its declaration that given its system of records, "there was no reasonable expectation of finding responsive documents"); Am. Arab Anti-Discrimination Comm. v. DHS, 516 F. Supp. 2d 83, 87-88 (D.D.C. 2007) (finding sufficient agency affiant's statement that agency "does not maintain [requested] information" and ruling search "unnecessary" since affiant spoke to several ICE agents and as "Deputy Assistant Secretary for Operations, . . . [was] presumed able to familiarize himself with what statistics ICE does and does not maintain").

[206] See Am. Immigr. Council v. ICE, 464 F. Supp. 3d 228, 241-42 (D.D.C. 2020) (finding that, while agency statement that requested identifiers did not exist in one database searched "is not disputed," "ICE's acknowledgement that the unique identifiers likely appear in another database creates a genuine dispute about whether the search for responsive records was adequate, and plaintiff has directed the Court to other cases in which the record reflects that ICE was apparently able to search and produce data from [that other database]"); Robert v. DOJ, No. 05-2543, 2008 WL 2039433, at *6-7 (E.D.N.Y. May 9, 2008) (ruling that agency's "conclusory statement that it does not maintain such documents" did not satisfy duty to search where unclear whether affiants "have knowledge of [agency] practices and procedures sufficient" to make such assertion); Defs. of Wildlife v. USDA, 311 F. Supp. 2d 44, 55 (D.D.C. 2004) (stating that agency's "bare assertion that the Deputy Under Secretary saw the FOIA request and that he stated that he had no responsive documents is inadequate because it does not indicate that he performed any search at all").

request?[207] The D.C. Circuit ruled that the FOIA "sets forth the broad outlines of a process for agencies to follow when responding to FOIA requests: first, identify responsive records; second, identify those responsive records or portions of responsive records that are statutorily exempt from disclosure; and third, if necessary and feasible, redact exempt information from the responsive records."[208] The D.C. Circuit then held that "once an agency identifies a record it deems responsive to a FOIA request, the statute compels disclosure of the responsive record – i.e., as a unit – except insofar as the agency may redact information falling within a statutory exemption."[209] The D.C. Circuit has

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[207] Am. Immigr. Laws. Ass'n v. EOIR, 830 F.3d 667, 677 (D.C. Cir. 2016).

[208] Id.; see also Citizens for Resp. & Ethics in Wash. v. DOJ, No. 18-007, 2020 WL 2735570, at *3-4 (D.D.C. May 26, 2020) (confirming that agency appropriately "defined each single email and each single text as 'a record,'" "[that is to say] select emails and texts within the [entire email or text] thread[,]" while rejecting plaintiff's argument that "a record must constitute only 'the full native form in which it is maintained by the agency'" and noting that plaintiff's definition of a record "is [not] found within the [FOIA] statute" (quoting plaintiff brief)); Gellman v. DHS, 613 F. Supp. 3d 124, 136 (D.D.C. 2020) (affirming that agency appropriately "withheld all unique emails that it deemed non-responsive, including by redacting any non-responsive emails that appear on the same page as responsive ones" where "that decision (1) does not deviate from its prior position in responding to a particular FOIA request and (2) is reasonable under the circumstances"); Brady Ctr. to Prevent Gun Violence v. DOJ, 410 F. Supp. 3d 225, 237 (D.D.C. 2019) (concluding that agency "reasonably–and lawfully–decided to treat wholly unrelated attachments [to responsive emails] as separate records" because "absent a reference to the attachment in the body of the main document, . . . there is no reason to conclude that the [agency's] decision to treat attachments as a separate document undermined the 'integrity' of the responsive records") (internal citation omitted); Inst. for Pol'y Stud. v. CIA, 388 F. Supp. 3d 51, 52-53 (D.D.C. 2019) (emphasizing "that notwithstanding [the application of FOIA exemptions], if a record contains information responsive to a FOIA request, the government must disclose the entire record" and suggesting that "the government slices the definition of 'record' too thinly" where it construed portions of a six-page daily intelligence report discussing Europe, the Middle East, and South America "as separate 'records' not responsive to [plaintiff's] request" which "seeks information about Pablo Escobar's activities in Central and South America") (internal citations omitted).

[209] Am. Immigr. Laws. Ass'n, 830 F.3d at 678 (noting that "parties have not addressed the antecedent question of what constitutes a distinct 'record' for FOIA purposes" and finding that "agencies instead in effect define a 'record' when they undertake the process of identifying records that are responsive to a request") (internal citations omitted); see also Cause of Action Inst. v. DOJ, 999 F.3d 696, 703 (D.C. Cir. 2021) (noting that 2016 Am. Immigr. Laws. Ass'n holding "made clear that 'once the government concludes that a particular record is responsive . . . the sole basis on which it may withhold particular information within that record is if the information falls within one of the [FOIA's] exemptions'" (quoting Am. Immigr. Laws. Ass'n, 830 F.3d at 670)); Watkins L. & Advoc., PLLC v. DOJ, No. 17-1974, 2021 WL 1026173, at *7 (D.D.C. Mar. 17, 2021) (requiring production in full of "short reports covering a single topic related to plaintiff's FOIA request" because "the sections withheld provide important context that is indivisible from

emphasized that agencies should undertake non-responsiveness determinations in a reasonable manner.[210]

Finally, courts have recognized that an agency's search obligations for each request necessarily have a temporal limitation, or a "cut-off" date.[211] Records created after the "cut-off" date are treated as not responsive to the request.[212] The D.C. Circuit declared

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the rest of the document"); Gellman, 613 F. Supp. 3d at 135 (confirming that "[a]fter [agency] defined each email as a record, it processed for production only the responsive ones" while noting that certain pages processed also contained "non-responsive email records"); OIP Guidance: Defining a "Record" Under the FOIA (posted 1/11/2017, updated 7/23/2021) (providing guidance on defining a record under FOIA).

[210] See Cause of Action Inst., 999 F.3d at 698, 702 (finding agency non-responsive determination unreasonable because documents containing questions posed by members of Congress and corresponding responses were "self-contained, with a single, overarching heading identifying the contents of the document" and because agency "itself treated the self-contained QFR documents as unitary 'records' and released the documents, albeit with portions removed, as responsive to [requester's] FOIA request" and "admits that the questions and answers 'were compiled into one large file for "efficiency"'" (quoting agency brief and declaration)); see also id. at 706 (Rao, J. concurring) (writing that "[g]iven the potential difficulty of responding to a FOIA request for some category of information, rather than a specific document, an agency may identify a record within a reasonable range and consider the information requested in determining how to segment material into records"); OIP Guidance: Defining a "Record" Under the FOIA (posted 1/11/2017, updated 7/23/2021) (emphasizing reasonable nature of non-responsiveness inquiry).

[211] See Bonner v. U.S. Dep't of State, 928 F.2d 1148, 1152 (D.C. Cir. 1991) (observing that "[t]o require an agency to adjust or modify its FOIA responses based on post-response occurrences could create an endless cycle of judicially mandated reprocessing"); Black Hills Clean Water All. v. U.S. Forest Serv., No. 21-5072, 2023 WL 2687089, at *8 (D.S.D. Mar. 29, 2023) (observing that agency's use of a consistent search cut-off date for the initial search and subsequent searches was justified because this practice "[i]n the D.C. Circuit . . . 'has routinely been found to be reasonable'" (quoting McClanahan v. DOJ, 204 F. Supp. 3d 30, 47 (D.D.C. 2016))); Hardway v. CIA, 456 F. Supp. 3d 51, 62 (D.D.C. 2020) (finding that defendant did not have "to search for 'documentation that may or may not exist but which, in any event, was created *during the course of searching* for records responsive to Plaintiff's FOIA request'" (quoting Schoenman v. FBI, 573 F. Supp. 2d 119, 140 (D.D.C. 2008))), aff'd per curiam, No. 20-5172, 2021 WL 2525722 (D.C. Cir. May 17, 2021); Church of Scientology v. IRS, 816 F. Supp. 1138, 1148 (W.D. Tex. 1993) (observing that "there has to be a temporal deadline for documents that satisfy [a FOIA] request"); see also OIP Guidance: Use of "Cut-Off" Dates for FOIA Searches (posted 5/6/2004, updated 12/19/2024) (explaining that "[t]he scope of a FOIA request has both substantive and temporal aspects").

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

that a "cut-off" date that is based on the date the agency conducts its search "results in a much fuller search and disclosure" than a less inclusive "cut-off" date, such as one based on the date of the request or date of its receipt by the agency.[213] While courts have found that an agency may choose not to use a "date-of-search cut-off" if "specific circumstances" warrant,[214] the agency may be required to articulate a "compelling justification" for doing

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"cut-off" date are not included within temporal scope of request); see also Hardway, 456 F. Supp. 3d at 61 (confirming that "the [date-of-search] cut-off date used by the CIA [] was reasonable" in response to "request for records about its own search process for records responsive to the same FOIA request" even though "none could have existed when the 'search' began") (internal citation omitted); cf. Am. Oversight v. DOJ, 401 F. Supp. 3d 16, 32-35 (D.D.C. 2019) (noting that "the fact that DOJ chose to produce a document that post-dated the beginning of its search efforts does not mean that DOJ was legally required to search for records that originated after the search began"); James v. U.S. Secret Serv., 811 F. Supp. 2d 351, 358 (D.D.C. 2011) (noting that agencies are not "require[d] to update or supplement a prior response to a request for records"), aff'd per curiam, No. 11-5299, 2012 WL 1935828 (D.C. Cir. May 11, 2012); Coven v. OPM, No. 07-1831, 2009 WL 3174423, at *5-10 (D. Ariz. Sept. 29, 2009) (agreeing that agency is neither obligated to continually provide daily, updated versions of records on ongoing basis, nor is it required to produce records created after agency responded).

[213] McGehee v. CIA, 697 F.2d 1095, 1104 (D.C. Cir. 1983), vacated on other grounds on panel reh'g & reh'g en banc denied, 711 F.2d 1076 (D.C. Cir. 1983); see also Pub. Citizen v. Dep't of State, 276 F.3d 634, 643-44 (D.C. Cir. 2002) (favoring "date-of-search cut-off" because its use "might . . . result[] in the retrieval of more [responsive] documents" than would a cut-off based on date of request); Van Strum v. EPA, Nos. 91-35404, 91-35577, 1992 WL 197660, at *2 (9th Cir. Aug. 17, 1992) (unpublished table decision) (agreeing that date-of-search "cut-off" date is "the most reasonable date for setting the temporal cut-off in this case"); Ferguson v. U.S. Dep't of Educ., No. 09-10057, 2011 WL 4089880, at *10-12 (S.D.N.Y. Sept. 13, 2011) (ordering agency to conduct search for records between date-of-request and date-of-search cut-off dates because agency improperly limited temporal scope of first search to records dated prior to date of request); Vento v. IRS, No. 08-159, 2010 WL 1375279, at *2-3 (D.V.I. Mar. 31, 2010) (finding agency's regulations requiring date-of-request cut-off date "unreasonable" and favoring date-of-search cut-off date); Nielsen v. U.S. Bureau of Land Mgmt., 252 F.R.D. 499, 516 (D. Minn. 2008) (finding "search was not reasonable" to the extent agency employed date-of-request "cut-off" date); Edmonds Inst. v. U.S. Dep't of Interior, 383 F. Supp. 2d 105, 110-11 (D.D.C. 2005) (rejecting requester's call for use of date-of-release "cut-off" date in favor of date-of-search "cut-off" date, in accordance with agency's regulations).

[214] Pub. Citizen, 276 F.3d at 643; see, e.g., ACLU v. DHS, 738 F. Supp. 2d 93, 103-04 (D.D.C. 2010) (affirming agency's use of specific cut-off date as agreed upon by plaintiff because it "does not appear under these circumstances to have been unreasonably utilized to improperly limit the scope of the plaintiff's request"); Jefferson v. BOP, 578 F. Supp. 2d 55, 60 (D.D.C. 2008) (recognizing that proper inquiry is "whether the cut-off date used was reasonable in light of the specific request" and concluding that date-of-request "cut-off" was reasonable because request sought records that had been created before request was made and that pertained to past events); Dayton Newspaper, Inc. v. VA, 510 F. Supp. 2d 441, 450-

so,[215] and searches have been found to be unreasonable when the requester was not made aware of the "cut-off" date being used.[216]

Records Processing Requirements

Exemptions

The FOIA is a disclosure-focused statute.[217] At the same time, Congress established nine exemptions, each of which describe specific categories of information

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51 (S.D. Ohio 2007) (determining that date of 1995 final response was appropriate cut-off date "[i]n the absence of a record demonstrating the VA's cut-off date," because "at that point, Plaintiffs were put on notice that the VA was no longer searching for records"), reconsideration granted on other grounds, No. 00-235, 2005 WL 2405992 (S.D. Ohio Sept. 29, 2005); Blazy v. Tenet, 979 F. Supp. 10, 17 (D.D.C. 1997) (concluding that it "was reasonable under the circumstances" for agency to apply date-of-request "cut-off" to request that sought records concerning events that already had occurred (and records that already had been created) by time request was made), summary affirmance granted, No. 97-5330, 1998 WL 315583 (D.C. Cir. May 12, 1998); OIP Guidance: Use of "Cut-Off" Dates for FOIA Searches (posted 5/6/2004, updated 12/19/2024) (describing circumstances under which use of different "cut-off" dates may be reasonable).

[215] Pub. Citizen, 276 F.3d at 644; see, e.g., Ferguson, 2011 WL 4089880, at *11 (ordering agency to conduct additional search because it failed to offer "any compelling justification" for using date-of-request cut-off date when conducting search); In Def. of Animals v. NIH, 543 F. Supp. 2d 83, 98-99 (D.D.C. 2008) (finding search inadequate because agency failed to demonstrate reasonableness of date-of-search cut-off date that preceded final disclosure by eleven months, and ordering it to employ "a cut-off date not earlier than the date of [court's decision]"); Or. Nat. Desert Ass'n v. Gutierrez, 419 F. Supp. 2d 1284, 1288 (D. Or. 2006) (concluding that agency's date-of-request "cut-off" date regulation "is not reasonable on its face and violates FOIA").

[216] See, e.g., In Def. of Animals, 543 F. Supp. 2d at 99 (finding search inadequate because, inter alia, agency failed to inform plaintiff of date-of-search cut-off date); Jud. Watch, Inc. v. DOE, 310 F. Supp. 2d 271, 305 (D.D.C. 2004) ("Because the [agency] imposed the . . . cut-off date without informing [requester] of its intention to do so, the Court must conclude that [agency's] search was inadequate."), aff'd in part, rev'd in part & remanded on other grounds, 412 F.3d 125 (D.C. Cir. 2005); cf. Techserve All. v. Napolitano, 803 F. Supp. 2d 16, 25-26 (D.D.C. 2011) (suggesting that agency should have informed requester of cut-off date, but finding that subsequent searches cured any defects related to limited time frame of initial search).

[217] See NARA v. Favish, 541 U.S. 157, 171-72 (2004) ("FOIA is often explained as a means for citizens to know 'what their Government is up to'" (quoting DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989))); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) ("The basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."); see also OIP Guidance: Applying a

that are protected from disclosure.[218] (For further discussion of the FOIA's nine exemptions, see the individual exemption-focused sections.) Because the FOIA is a disclosure statute, agencies generally have discretion as to whether a FOIA exemption should be asserted, unless the information must be protected due to classification or another law outside the FOIA. [219] (For further discussion on discretionary disclosures of information, see Waiver and Discretionary Disclosure, Discretionary Disclosure.)

"Foreseeable Harm" Requirement

Subsection (a)(8) of the FOIA,[220] added to the FOIA by the FOIA Improvement Act of 2016,[221] codifies the "foreseeable harm" standard. Specifically, the FOIA now dictates that an agency shall only withhold information if: (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the nine exemptions that FOIA enumerates; or (2) disclosure is prohibited by law.[222] Notably, the foreseeable harm analysis can vary depending on the specific exemption invoked.[223] (For further

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Presumption of Openness and the Foreseeable Harm Standard (posted 3/13/2023, updated 9/4/2024) ("Records should be reviewed with an eye toward determining what can be disclosed, rather than what can be withheld.").

[218] See 5 U.S.C. § 552(b) (2018).

[219] See Chrysler Corp. v. Brown, 441 U.S. 281, 293-94 (1979) (explaining that "Congress did not limit an agency's discretion to disclose information when it enacted the FOIA"); see also OIP Guidance: Applying a Presumption of Openness and the Foreseeable Harm Standard (posted 3/13/2023, updated 9/4/2024) ("[A]gencies may consider discretionary releases of information when the reasonable likelihood of significant harm occurring is low and the public interest in the information is high.").

[220] 5 U.S.C. § 552(a)(8).

[221] Pub. L. No. 114-185, 130 Stat. 538.

[222] 5 U.S.C. § 552(a)(8); see also OIP Guidance: Applying a Presumption of Openness and the Foreseeable Harm Standard (posted 3/13/2023, updated 9/4/2024) (explaining that agencies should conduct the foreseeable harm analysis on a case-by-case basis, individually considering applicable harms for each record or similar category of record, and noting potential need to consult with subject-matter experts).

[223] See Reps. Comm. for Freedom of the Press v. CBP, 567 F. Supp. 3d 97, 120 (D.D.C. 2021) ("[A]n agency's burden under the foreseeable harm requirement may be more easily met when invoking other privileges and exemptions [other than the deliberative process privilege] for which the risk of harm through disclosure is more self-evident and the potential for agency overuse is attenuated."); Cause of Action Inst. v. VA, No. 20-997, 2021 WL 1549668, at *15 (D.D.C. Apr. 20, 2021) ("'[T]he agency's burden to demonstrate that harm would result from disclosure may shift depending on the nature of the interests protected by the specific exemption with respect to which a claim of foreseeable harm is made.'" (quoting Ecological Rts. Found. v. EPA, No. 19- 980, 2021 WL 535725, at *32

discussion, see individual exemption sections, as well as Litigation Considerations, Evidentiary Showing, Foreseeable Harm Showing.)

Of note, the Supreme Court has held that an agency has not improperly withheld records when it is prohibited from disclosing them by a preexisting court order.[224] While it has been held that the validity of a preexisting court order does not depend on whether it is based on FOIA exemptions,[225] the Court of Appeals for the District of Columbia Circuit has held that it is the agency's burden to demonstrate that the order was intended to operate as an injunction against the agency, rather than as a mere court seal.[226] Courts have pointed to a variety of factors that can support the continuing operability of a seal.[227]

(D.D.C. Feb. 13, 2021))); Rosenberg v. DOD, 442 F. Supp. 3d 240, 259 (D.D.C. 2020) ("The degree of detail necessary to substantiate a claim of foreseeable harm is context-specific.").

[224] See, e.g., GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375, 387 (1980) ("To construe the lawful obedience of an injunction issued by a federal district court with jurisdiction to enter such a decree as 'improperly' withholding documents under the Freedom of Information Act would do violence to the common understanding of the term 'improperly' and would extend the Act well beyond the intent of Congress.") (internal citation omitted); see also Freeman v. DOJ, 723 F. Supp. 1115, 1120 (D. Md. 1988) (refusing to order release of records covered by preexisting nondisclosure order of sister district court).

[225] See Wagar v. DOJ, 846 F.2d 1040, 1047 (6th Cir. 1988) (holding that validity of nondisclosure orders does not depend on their being based on FOIA exemptions).

[226] Morgan v. DOJ, 923 F.2d 195, 197 (D.C. Cir. 1991) ("[T]he proper test for determining whether an agency improperly withholds records under seal is whether the seal, like an injunction, *prohibits* the agency from disclosing the records."); see, e.g., Jud. Watch, Inc. v. DOJ, 813 F.3d 380, 383-84 (D.C. Cir. 2016) (vacating district court's judgment and remanding to give defendant opportunity to seek clarification on intended effect and scope of sealing order because "[a]n ambiguous court order does not protect a record from disclosure pursuant to the FOIA"); Odle v. DOJ, No. 05-2771, 2006 WL 1344813, at *14 (N.D. Cal. May 17, 2006) (concluding that agency may not withhold information pursuant to sealing order unless that court order prohibits disclosure in response to FOIA requests); Gerstein v. DOJ, No. 03-04893, slip op. at 10-11 (N.D. Cal. Sept. 30, 2005) (determining that sealing orders pertaining to search and seizure warrants prohibited FOIA disclosure, because they were intended to prevent investigative targets "from learning about the warrant[s]"); McDonnell Douglas Corp. v. NASA, No. 91-3134, slip op. at 1-2 (D.D.C. July 12, 1993) ("While this court's sealing Order *temporarily* precluded release, that order was not intended to operate as the functional equivalent of an injunction prohibiting release. It was only approved by the court for the purposes of expediting this litigation and protecting information . . . until this lawsuit was resolved.").

[227] See Jud. Watch, Inc., 813 F.3d at 383 (examining "(1) any explicit sealing order from the court, if there is one; (2) extrinsic evidence about the intended scope of a purported sealing order; (3) orders of the same court in similar circumstances; and (4) the issuing court's general rules or procedures" in determining effect of court seal (citing Morgan, 923 F.2d at 197)); Luthmann v. FBI, No. 21-716, 2024 WL 2187699, at *15 (M.D. Fla. May 15, 2024)

"Reasonably Segregable" Requirement

The FOIA requires that "any reasonably segregable portion of a record" must be released "after deletion of the portions which are exempt" under the Act's nine exemptions.[228] Section 2 of the FOIA Improvement Act of 2016 addressed segregability requirements, directing that agencies shall "consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible."[229] The D.C. Circuit opined about the meaning of the segregation obligation decades ago in Mead Data Central, Inc. v. Department of the Air Force.[230] There, the Court held that "a court may decline to order an agency to commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content."[231]

(looking to the Public Access to Court Electronic Records (PACER) system to determine whether seal was still in place); Woodward v. USMS, No. 18-1249, 2022 WL 17961289, at *6 (D.D.C. Dec. 27, 2022) (looking to contents of sealing orders and "extrinsic evidence from the applications for those orders" to determine if sealing orders are intended to function as permanent injunctions barring government from disclosing materials pursuant to FOIA; and noting that "USMS does not claim to have contacted the sealing court and has not provided any instruction or order from the sealing court clarifying its intent").

[228] 5 U.S.C. § 552(b) (2018) (sentence immediately following exemptions).

[229] FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538, Section 2 (codified at 5 U.S.C. § 552(a)(8)(A)(ii)); see also OIP Guidance: Applying a Presumption of Openness and the Foreseeable Harm Standard (posted 3/13/2023, updated 9/4/2024) ("When full disclosure of a record is not possible, agencies should consider making a partial disclosure.").

[230] 566 F.2d 242, 261 n.55 (D.C. Cir. 1977).

[231] Id.; accord Cook v. NARA, 758 F.3d 168, 178 (2d Cir. 2014) ("Compelling NARA to undertake the review and redaction of almost one thousand records to produce little of value would be a waste of time and resources."); Thomas v. DOJ, 260 F. App'x 677, 679 (5th Cir. 2007) (affirming denial of request for release of portions of audiotape transcripts reflecting requester's side of conversation while redacting third party's words because, given requester's interest in the third party's portion, release of requester's words only would be "of little informational value" to requester (quoting FlightSafety Servs. v. Dep't of Lab., 326 F.3d 607, 613 (5th Cir. 2003))); Lead Indus. Ass'n, Inc. v. OSHA, 610 F.2d 70, 86 (2d Cir. 1979) (noting "banalit[y]" and "uselessness" of information district court ordered to be segregated and disclosed, and reversing such order); Maryland v. VA, 130 F. Supp. 3d 342, 355 (D.D.C. 2015) ("The Court will not order [defendant] to release the '@' symbol or the domain of each withheld email address."); Shinnecock Indian Nation v. Kempthorne, 652 F. Supp. 2d 345, 370 (E.D.N.Y. 2009) ("In light of the substantial disclosure already undertaken by the government, the [c]ourt decline[d] to compel the disclosure, line-by-line, . . . which . . . in the end, provide[d] no useful additional information to the plaintiff."); cf.

The D.C. Circuit also held in Mead Data that, when nonexempt information is "inextricably intertwined" with exempt information, reasonable segregation is not possible.[232] The segregation analysis is frequently impacted by the volume of material at issue.[233]

Arizechi v. IRS, No. 06-5292, 2008 WL 539058, at *5 (D.N.J. Feb. 25, 2008) (unpublished disposition) (stating that segregability requirement is "futile" for a summons because "[r]edaction of names and addresses of the witnesses and releasing a blank summons would serve no purpose and is not required").

[232] 566 F.2d at 260; see, e.g., Fischer v. DOJ, 723 F. Supp. 2d 104, 115 (D.D.C. 2010) ("Having shown both the highly sensitive nature of the exempt information and that nonexempt information is so intertwined with exempt information that the [agency] could not release any meaningful portion without disclosing exempt information, [the agency] has satisfied its segregability burden."); Shinnecock Indian Nation, 652 F. Supp. 2d at 372-73 (finding that "the facts as presented by the author . . . are done in a fashion that 'reveal[s] the evaluative process by which [he, as a member of the decisionmaking chain] arrived at [his] conclusions and what those predecisional conclusions are'" and holding that factual information could not be reasonably segregated (quoting Mead Data Cent., Inc. v. Dep't of Air Force, 575 F.2d 932, 935 (D.C. Cir. 1978)));; Antonelli v. BOP, 623 F. Supp. 2d 55, 60 (D.D.C. 2009) (denying summary judgment on records withheld in full, and noting that agency failed to demonstrate that exempt and non-exempt information were inextricably intertwined despite agency's assertion that segregating information would "destroy[] the integrity of [requested] document as a whole"); James Madison Project v. CIA, 607 F. Supp. 2d 109, 131 (D.D.C. 2009) (approving agency's determination that it could not reasonably segregate certain nonexempt material because it was "so inextricably intertwined" with exempt material consisting of classified information and information concerning intelligence sources and methods); Durrani v. DOJ, 607 F. Supp. 2d 77, 88 (D.D.C. 2009) (declaring that to justify withholdings in full, agencies must show that "exempt and nonexempt information are 'inextricably intertwined,' such that excision of exempt information would impose significant costs on the agency and produce an edited document with little informational value" (quoting Mays v. DEA, 234 F.3d 1324, 1327 (D.C. Cir. 2000))); Schoenman v. FBI, No. 04-2202, 2009 WL 763065, at *26 (D.D.C. Mar. 19, 2009) (approving agency's determination "that the 'fragmented' and 'isolated' occurrences of non-exempt material . . . are so 'inextricably intertwined with the exempt information' that the non-exempt material could not be reasonably segregated" (quoting agency declaration)); cf. L.A. Times Commc'ns, LLC v. Dep't of Lab., 483 F. Supp. 2d 975, 986-87 (C.D. Cal. 2007) (finding that agency met its segregability obligation where Exemption 6 protected information pertaining to civilian contractors "currently residing in Iraq or Afghanistan," and agency databases contained no information to distinguish which contractors (or families) still resided in those countries and which ones resided elsewhere).

[233] See Mead Data Cent., Inc., 566 F.2d at 261 & n.55; see also FlightSafety Servs. Corp. v. Dep't of Lab., 326 F.3d 607, 613 (5th Cir. 2003) (per curiam) (concluding that documents gathered from surveys of more than one million establishments contained no reasonably segregable information because, inter alia, "any disclosable information is so inextricably intertwined with the exempt, confidential information that producing it would require substantial agency resources and produce a document of little informational value"); Solar

In general, segregability determinations should not be based on an evaluation of whether nonexempt portions of documents would be "helpful" to the requester if segregated and released.[234] However, some courts have recognized that where particular

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Sources, Inc. v. United States, 142 F.3d 1033, 1039 (7th Cir. 1998) (finding that because agency would require eight work-years to identify all nonexempt documents in millions of pages of files, very small percentage of documents that could be released were not "reasonably segregable"); Doherty v. DOJ, 775 F.2d 49, 53 (2d Cir. 1985) ("The fact that there may be some nonexempt matter in documents which are predominantly exempt does not require the district court to undertake the burdensome task of analyzing approximately 300 pages of documents, line-by-line."); Yeager v. DEA, 678 F.2d 315, 322 n.16 (D.C. Cir. 1982) (noting that it was appropriate to consider factors of "intelligibility" and "burden" imposed by segregation of nonexempt material); Lead Indus. Ass'n, Inc., 610 F.2d at 86 (holding that information is not reasonably segregable "if the proportion of nonexempt factual material is relatively small and is so interspersed with exempt material that separation by the agency and policing . . . by the courts would impose an inordinate burden"); Brown v. DOJ, 734 F. Supp. 2d 99, 110-11 (D.D.C. 2010) (finding agency's withholdings of plaintiff's name, cities, and file numbers proper where "there is no indication that the [agency] acted in bad faith in segregating and releasing nonexempt information in the nearly 1,000 pages released to plaintiff" and "[agency] need not expend substantial time and resources to 'yield a product with little, if any, informational value'" (quoting Assassination Archives & Rsch. Ctr. v. CIA, 177 F. Supp. 2d 1, 9 (D.D.C. 2001))); Schoenman, 2009 WL 763065, at *26 (finding agency withholdings proper because, inter alia, "it makes little sense to require [agency] to spend time and resources redacting entire documents in order to provide Plaintiff with his name, dates he has already been provided, and the basic letterhead . . . of the document" (citing Mead Data Cent., Inc., 566 F.2d at 261 n.55)); Rugiero v. DOJ, 234 F. Supp. 2d 697, 707-09 (E.D. Mich. 2002) (concluding that "[i]n this case, the burden of segregation does not outweigh the significant value of the information to Plaintiff because it does not appear that the Government would have to expend a large amount of additional time and resources to provide Plaintiff with the segregable information" from 364 pages).

[234] Stolt-Nielsen Transp. Grp. v. United States, 534 F.3d 728, 734 (D.C. Cir. 2008) (rejecting agency's assertion that "the redacted documents without names and dates would provide no meaningful information," and declaring that information need not be "helpful to the requester [to require that] the government must disclose it"); see also Mead Data Cent., Inc., 566 F.2d at 261 n.55 (stating that, while "information content" is a legitimate consideration, it "does not mean that a court should approve an agency withholding because of the court's low estimate of the value to the requestor of the information withheld"); Schoenman, 2009 WL 763065, at *26 (upholding agency's segregation efforts and noting that they were not based upon an "impermissible determination that the substantive content of the [nonexempt] information, although reasonably segregable, 'provides no meaningful information'" (quoting Stolt-Nielsen Transp. Grp., Ltd., 534 F.3d at 734)); cf. Reclaim the Recs. v. VA, No. 18-8449, 2020 WL 1435220, at *10 (S.D.N.Y. Mar. 24, 2020) (holding that "the FOIA statute does not give an agency license to broadly withhold nonexempt records because the agency has errantly commingled them with exempt records").

requests require the review of a vast quantity of material, where segregation of the releasable material from the withholdable material would be very difficult, and where only a small portion of the material would be releasable or the releasable material would do little to enlighten the public or advance the stated purposes of the request, such requests require an unreasonably burdensome processing effort.[235]

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[235] See Am. Fed'n of Gov't Emps., Loc. 2782 v. U.S. Dep't of Com., 907 F.2d 203, 209 (D.C. Cir. 1990) (finding that responding to request would require agency to "locate, review, redact, and arrange for inspection a vast quantity of material" and that "[t]he unreasonableness of the attendant burden is only more obvious when one realizes that it is largely unnecessary to the appellants' purpose"); Ayuda, Inc. v. FTC, 70 F. Supp. 3d 247, 276 (D.D.C. 2014) (finding that FTC may withhold entire database where redacting small percentage of information that would be exempt requires unreasonably burdensome manual review, emphasizing unique facts of case and noting that FTC's argument for nondisclosure is based solely on burden of manual redaction across twenty million records, not on inability to segregate or retrieve information); see also Solar Sources, Inc., 142 F.3d at 1039 (concluding "the small percentage of documents that could otherwise be disclosed-less than one percent of the document reviewed . . . are not reasonably segregable from those documents that were properly withheld"); Lead Indus. Ass'n, Inc., 610 F.2d at 86 (confirming that "if the proportion of nonexempt factual material is relatively small and is so interspersed with exempt material that separation by the agency and policing of this by the courts would impose an inordinate burden, the material is still protected because, although not exempt, it is not 'reasonably segregable'"); Ctr. for Immigr. Stud. v. USCIS, 628 F. Supp. 3d 266, 273-75 (D.D.C. 2022) (finding that while "burdensomeness does not boil down to a simple game of numbers," here, processing is unduly burdensome "given this mismatch between the material that [plaintiff] says it wants and the material that [plaintiff's] requests will force USCIS to review" and "in this case, the juice is not worth the squeeze"); Nat'l Day Laborer Org. Network v. ICE, No, 16-387, 2017 WL 1494513, at *12 (S.D.N.Y. Apr. 19, 2017) (finding that "ICE has adequately demonstrated that searching for and producing the data requested . . . would be unreasonably burdensome" after assessing burden of search and processing together, acknowledging fact that review of records would take between one thousand and three thousand work weeks, and finding that it was "likely that a wide variety of information would likely need to be withheld"); cf. White v. DOJ, 460 F. Supp. 3d 725, 758-59 (S.D. Ill. 2020) (regarding agency production schedule, holding that while "it is improper to inquire into the requester's motive for his request," "it is also true that federal agencies are not private investigation agencies or copying factories for individuals seeking mountains of government documents for no articulable public purpose" and finding that "[w]hile [plaintiff] may be entitled to all of the non-excluded or non-exempt records he seeks, he is not entitled to them next week, or even next year"). But see Brennan Ctr. for Just. at N.Y. Univ. Sch. of L. v. DOJ, No. 18-1860, 2021 WL 2711765, at *13 (D.D.C. July 1, 2021) (rejecting agency's attempt, on reconsideration, to argue that sorting through 3,416 files, each requiring manual review of thousands of pages of records, was not required because it was "'burdensome,' . . . not impossible" and requiring agency to complete that [review] would not result in manifest injustice (quoting agency declaration)).

The FOIA requires courts to review agency determinations that they have disclosed all reasonably segregable, nonexempt information.[236] When the agency adequately demonstrates that the withheld records or the existence of such records are exempt in their entirety, courts have upheld the determination that no segregation is possible.[237]

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[236] 5 U.S.C. § 552(a)(4)(B) (2018); see, e.g., Morley v. CIA, 508 F.3d 1108, 1123 (D.C. Cir. 2007) (recognizing district court's affirmative duty to consider segregability issue sua sponte and remanding for segregability determination); WP Co. LLC v. Small Bus. Admin., No. 20-1240, 2021 WL 2982173, at *11 (D.D.C. July 15, 2021) (concluding agency failed to demonstrate why non-exempt Employer Identification Numbers ("EINs") are inextricably intertwined with exempt Social Security Numbers ("SSNs"), despite situation where court acknowledged that defendant "'has good reason to believe' that numbers are comingled, where the agency provided only conclusory assertion that it has 'no technical way to check or correct for' any SSNs that were incorrectly labeled as EINs" (quoting agency filing)); Brennan Ctr. for Just. at N.Y. Univ. Sch. of L., 2021 WL 2711765, at *6, 9 (declining to "relieve the Department of the obligation to segregate" and ordering the release of docket numbers that "implicated minimal privacy interests and were easily identifiable" and those which were difficult but not impossible to differentiate as linked to "cases that the Department has publicly associated with terrorism"); Am. Immigr. Council v. ICE, 464 F. Supp. 3d 228, 237 (D.D.C. 2020) (rejecting blanket justification to withhold entire birth dates, "to protect the privacy of third-parties[,]" and requiring agency to produce "reasonably segregable portions of records" while noting that "the agency has not identified any harm that would flow from a more limited disclosure [of birth month and year]"); Schoenman v. FBI, 841 F. Supp. 2d 69, 80 (D.D.C. 2012) (finding that agency's "line-by-line review of each document in an attempt to identify and release non-exempt portions of each document" satisfies requirement to reasonably segregate nonexempt information); Showing Respect to Animals v. U.S. Dep't of Interior, 730 F. Supp. 2d 180, 199 (D.D.C. 2010) (finding that FOIA officer's declaration that she "personally reviewed each of the documents . . . and conducted a thorough segregability analysis" and "provide[d] detailed descriptions of each document and portions that [were] withheld either in part or in whole" show that agency met segregability obligations); see also FOIA Update, Vol. XIV, No. 3 ("OIP Guidance: The 'Reasonable Segregation' Obligation"); cf. Prop. of the People, Inc. v. DOJ, No. 17-1193, 2021 WL 3052033, at *3 (D.D.C. July 20, 2021) (discussing the legislative history of Exemption 7; rejecting agency attempt to withhold all informant records based solely on the idea that they are all located in informant file and holding that "a 'category-of-document by category-of-document' approach is permitted, but a 'file-by-file' approach is not") (internal citations omitted).

[237] See, e.g., Carter v. NSA, No. 13-5322, 2014 WL 2178708, at *1 (D.C. Cir. Apr. 23, 2014) (noting that because the NSA properly invoked a Glomar response, it was not required "to make a segregability determination"); Jud. Watch, Inc. v. DOJ, 432 F.3d 366, 371-72 (D.C. Cir. 2005) (holding that because Exemption 5 protects from disclosure attorney work-product documents in full, including factual portions, such portions are not subject to segregability); Students Against Genocide v. Dep't of State, 257 F.3d 828, 837 (D.C. Cir. 2001) (declaring that agency is not obligated to segregate and release images from classified photographs by "produc[ing] new photographs at a different resolution in order to mask the [classified] capabilities of the reconnaissance systems that took them"); ACLU v. CIA, 892 F. Supp. 2d 234, 251 (D.D.C. 2012) (holding that court need not determine whether "limited

(For further discussion of segregability showing in litigation, see Litigation Considerations, Evidentiary Showing, "Reasonably Segregable" Showing.)

On occasion, courts have addressed the issue of an agency's technological capability to segregate records maintained in non-traditional formats and have held that records "[are] not reasonably segregable where the agency attested that it lacked the technical capabilities to edit the records in order to disclose non-exempt portions."[238] However, some courts have expressed skepticism regarding agency claims that they were

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purely factual portions" should be segregated because it already found that information was properly withheld under Exemptions 1 and 3); Elec. Frontier Found. v. DOJ, 892 F. Supp. 2d 95, 104 (D.D.C. 2012) (finding that "although only portions of the OLC Opinion were withheld under Exemption 1, the entirety of the OLC Opinion was withheld under Exemption 5, leaving nothing significant that could be disclosed in a redacted format"), aff'd, 739 F.3d 1, 12-13 (D.C. Cir. 2014); Jarvik v. CIA, 741 F. Supp. 2d 106, 121 (D.D.C. 2010) (holding that agency satisfied its burden of establishing that no portion of withheld documents could be segregated because "giving any information regarding the results of its search . . . 'would reveal sensitive intelligence capabilities and interests (or lack thereof)'" (quoting agency declaration)); Shinnecock Indian Nation v. Kempthorne, 652 F. Supp. 2d 345, 370 (E.D.N.Y. 2009) ("With respect to the work product doctrine [under Exemption 5], because the protection applies to both factual and opinion-related material, no segregability issues arise."); Covington v. McLeod, 646 F. Supp. 2d 66, 72 (D.D.C. 2009) (noting that "the nature" of "an individual's statement or minutes of a grand jury proceeding" are "simply incompatible with segregation" under applicable exemptions), aff'd, No. 09-5336, 2010 WL 2930022, at *1 (D.C. Cir. 2010) (per curiam); Makky v. Chertoff, 489 F. Supp. 2d 421, 441 n.23 (D.N.J. 2007) (noting that "[t]he Court is not in a position to second-guess agency decisions relating to the segregability of non-exempt information when the information implicates national security concerns"); Nat'l Sec. Archive Fund, Inc. v. CIA, 402 F. Supp. 2d 211, 221-22 (D.D.C. 2005) (concluding that agency's declaration "[t]aken in its entirety" shows that 2004 National Intelligence Estimate (NIE) on Iraq is summarization of classified material, and that NIE contains no "segregable portions that might sensibly be released"); Aftergood v. CIA, No. 02-1146, slip op. at 4 n.1 (D.D.C. Feb. 6, 2004) ("Because the plaintiff seeks the disclosure of a single [budget] number, the court concludes that it would be impossible to segregate information from this request."); Schrecker v. DOJ, 74 F. Supp. 2d 26, 32 (D.D.C. 1999) (finding that confidential informant "source codes and symbols are assigned in such a specific manner that no portion of the code is reasonably segregable").

[238] Milton v. DOJ, 842 F. Supp. 2d 257, 259-61 (D.D.C. 2012) (explaining that segregability analysis focuses on "the agency's current technological capacity," and holding that responsive telephone conversations were not reasonably segregable because agency did not possess technological capacity to segregate nonexempt portions of requested records); see also Mingo v. DOJ, 793 F. Supp. 2d 447, 454-55 (D.D.C. 2011) (concluding that nonexempt portions of recorded telephone calls are inextricably intertwined with exempt portions because agency "lacks the technical capability" to segregate information that is digitally recorded); Antonelli v. BOP, 591 F. Supp. 2d 15, 27 (D.D.C. 2008) (same); Swope v. DOJ, 439 F. Supp. 2d 1, 7 (D.D.C. 2006) (same).

unable to segregate portions of responsive records based on a lack of technical capability.[239]

Finally, when an agency completes its segregability analysis and determines that portions of the responsive documents can be disclosed as nonexempt and other portions are appropriately withheld as exempt, the resulting partial record disclosure must satisfy statutory document-marking obligations.[240] Agencies are required by the FOIA to mark partially-disclosed records so that the amount of deleted information and the exemptions asserted are apparent, unless such markings would harm an interest protected by the exemptions being asserted.[241] If technologically feasible, these markings should be placed in the record at the place where the deletions are made.[242]

Consultations and Referrals

When an agency locates records responsive to a FOIA request, it should determine whether another agency or agency component has a "substantial interest" in any of the records or information contained in the records.[243] As a matter of sound administrative

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[239] See Evans v. BOP, 951 F.3d 578, 587 (D.C. Cir. 2020) (taking note of "the vagueness of the government's claim of inability to segregate unprotected [surveillance footage]" given that average citizens, with limited resources are able to "regularly send each other screenshots from all sorts of video media," and inquiring "why [the government] cannot by use of such techniques as blurring out faces, either in the video itself or in screenshots, eliminate unwarranted invasions of privacy"); Stahl v. DOJ, No. 19-4142, 2021 WL 1163154, at *7 (E.D.N.Y. Mar. 26, 2021) (requiring additional evidence to support claim that "BOP does not have the technical capacity to edit or redact exempt information" in portions of videos showing "medical staff conducting the physical examinations" of an inmate on a hunger strike and faces of prison staff because "video technology has become commonplace" and "editing is routine and inexpensive").

[240] See 5 U.S.C. § 552(b) (paragraph immediately following exemptions).

[241] Id.; see OIP Guidance: Segregating and Marking Documents for Release in Accordance with the OPEN Government Act (posted 10/23/2008, updated 12/6/2022); cf. OIP Guidance: Defining a "Record" Under the FOIA (posted 1/11/2017, updated 7/23/2021) (advising agencies that when marking records for disclosure, if agency has divided multi-subject document into distinct records, then it should mark the distinct records clearly so that requester can readily see how agency has defined the records responsive to the request).

[242] 5 U.S.C. § 552(b); see OIP Guidance: Segregating and Marking Documents for Release in Accordance with the OPEN Government Act (posted 10/23/2008, updated 12/6/2022).

[243] See 5 U.S.C. § 552(a)(6)(B)(iii)(III) (2018) (describing that one of three statutory circumstances where agencies can extend time to respond concerns "the need for consultation . . . with another agency [or among two or more agency components] having a substantial interest in the determination of the request").

practice, an agency should consult with any other agency or agency component whose information appears in the responsive records, especially if that other agency or component is better able to determine whether the information is exempt from disclosure.[244]

When an agency locates records that originated with another agency or component, as a matter of sound administrative practice, it should ordinarily refer those records to their originating agency so that the originating agency can make a direct response to the requester on those records.[245] The referring agency ordinarily should advise the requester of the referral and the name of the agency FOIA office to which it was made.[246]

In Sussman v. U.S. Marshals Service,[247] the Court of Appeals for the District of Columbia Circuit ruled that although consultations are the only procedure expressly mentioned in the FOIA to address situations where another agency has an interest in the handling of requested records, it is also permissible for agencies to refer records to their originating agency or agency component for direct response to the requester.[248] The D.C. Circuit found that referring documents for direct response is a reasonable procedure so

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[244] See OIP Guidance: Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest in Them (posted 12/5/2011, updated 7/26/2021) (advising agencies to utilize time-efficient mechanisms in conducting consultations, to provide copies of material that would assist other agency in its analysis, to conduct consultations simultaneously rather than sequentially whenever possible, and to provide requesters updates on status of ongoing consultations); see also OIP Guidance: Guidance for Agency FOIA Regulations (posted 09/8/2016, updated 6/26/2019).

[245] See OIP Guidance: Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest in Them (posted 12/5/2011, updated 7/26/2021) (explaining that referrals foster efficiency and ensure consistency of responses and ensure that agencies making release determinations are fully informed about the content of the records).

[246] See id. (explaining that this information ensures that requesters understand what happened to the documents responsive to their request, are not disadvantaged by the referral process, and have a point of contact for any questions about their request).

[247] 494 F.3d 1106 (D.C. Cir. 2007).

[248] Id. at 1118 (holding that "McGehee's admonition that the agency receiving the initial request 'cannot simply refuse to act on the ground that the documents originated elsewhere . . . imposes a duty on that agency, but the agency may acquit itself through a referral, provided the referral does not lead to improper withholding'" (quoting McGehee v. CIA, 697 F.2d 1095, 1110 (D.C. Cir. 1983))).

long as it does not "lead to improper withholding."[249] Therefore, in particular, it is not appropriate for agencies to refer records for direct response to a FOIA requester if the entity that originated the records is not itself subject to the FOIA.[250]

It may sometimes be necessary for agencies to "coordinate" with another agency rather than refer records to avoid damaging national security interests or compromising sensitive law enforcement information that could invade an individual's personal privacy.[251]

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[249] Id.; see also Inst. for Pol'y Stud. v. CIA, 885 F. Supp 2d 120, 241 (D.D.C. 2012) (citing Sussman, 494 F.3d at 1108, and upholding referral, noting that "[o]nce defendant discovered that some of the requested records originated with other agencies, it followed standard procedure by referring these documents to [those agencies] for [] direct response); Wilson v. DOT, 730 F. Supp. 2d 140, 154 (D.D.C. 2010) (observing that referral of records was consistent with agency regulations which permit referral to another agency "that originated or is substantially concerned with the records"); El Badrawi v. DHS, 583 F. Supp. 2d 285, 310 (D. Conn. 2008) (granting summary judgment on "propriety and reasonableness of . . . referrals of certain records . . . to [those] . . . records' originating agencies"); Keys v. DHS, 570 F. Supp. 2d 59, 70 (D.D.C. 2008) (stating that referral was improper where agency referred records to incorrect agency and did not take steps to ensure that referred records were acted upon and where second agency did not return incorrectly-referred records for nearly one year); Cozen O'Connor v. Dep't of the Treasury, 570 F. Supp. 2d 749, 770 (E.D. Pa. 2008) (finding referral process "not exceptionally lengthy" in light of nature of documents involved and "necessity of coordination among . . . various agencies"); Or. Nat. Desert Ass'n v. Gutierrez, 409 F. Supp. 2d 1237, 1250 (D. Or. 2006) (concluding that agency's referral regulation "does not significantly impair the ability to get records" and that regulation is "reasonable").

[250] See Elec. Priv. Info. Ctr. v. NSA, 795 F. Supp. 2d 85, 94 (D.D.C. 2011) (holding that while "[i]t is true that agencies that receive FOIA requests and discover responsive documents that were created by another agency . . . may forward, or 'refer'" those documents to the originating agency, if the originating agency is not subject to the FOIA, it "cannot unilaterally be made subject to the statute by any action of an agency, including referral") (internal citation omitted); Maydak v. DOJ, 254 F. Supp. 2d 23, 40 (D.D.C. 2003) (noting that agency's referral of records requested under FOIA to entity not subject to FOIA – a United States Probation Office – "raises a genuine legal issue about the propriety" of agency's action); see also OIP Guidance: Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest in Them (posted 12/5/2011, updated 7/26/2021) (stating that, prior to referring records to entity, agencies should ensure entity is subject to FOIA).

[251] See OIP Guidance: Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest in Them (posted 12/5/2011, updated 7/26/2021) (detailing administrative procedures for coordinating a response and stressing that agency in receipt of request is responsible for providing status updates to requester during pendency of coordination process).

Courts have held that even after agencies make referrals of records in response to FOIA requests, the referring agency retains the responsibility of defending any agency action taken on those records if the matter proceeds to litigation,[252] which is typically done by submitting a declaration from the agency which processed the referral.[253] Additionally, DOJ referral guidance advises that, as a matter of sound administrative practice, agencies receiving referrals should process them on a "first-in, first-out" basis with their other FOIA requests, according to the date of the request's initial receipt at the referring agency, to avoid placing requesters at an unfair timing disadvantage through agency referral practices.[254] Finally, adjudication of any administrative appeal of a disclosure determination should be handled by the agency receiving the referral.[255]

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[252] See, e.g., Plunkett v. DOJ, 202 F. Supp. 3d 59, 63 (D.D.C. 2016) (denying summary judgment where court "cannot discern what happened to [certain referred] materials"); Hall v. CIA, 668 F. Supp. 2d 172, 182 (D.D.C. 2010) (instructing agency to "take affirmative steps to ensure that its referrals are being processed"); Skinner v. DOJ, 744 F. Supp. 2d 185, 216 (D.D.C. 2010) (denying summary judgment in part "[b]ecause the results of the [agency's] referral of records to [two agencies] have not been explained"); Schoenman v. FBI, 604 F. Supp. 2d 174, 203-04 (D.D.C. 2009) (requiring agency to submit a "comprehensive" Vaughn Index that will include "a complete accounting of all referrals made and indicate whether all documents so referred have been processed and released to Plaintiff"); Keys, 570 F. Supp. 2d at 68-69 (stating that withholding was improper where neither referring agency nor recipient agency explained nature of pages withheld on referral and where referring agency did not explain why recipient agency required requester to submit additional FOIA request for responsive public records); Hronek v. DEA, 16 F. Supp. 2d 1260, 1272 (D. Or. 1998) (noting that, with respect to records referred to nonparty agencies, "the ultimate responsibility for a full response lies with the [referring] agencies"), aff'd, 7 F. App'x 591 (9th Cir. 2001).

[253] See, e.g., Hall v. CIA, 881 F. Supp. 2d 38, 56 (D.D.C. 2012) (concluding that agency "fulfilled its burden as to the coordination" of certain documents where it processed its own responsive records and provided "supporting declarations from the coordinating agencies").

[254] See OIP Guidance: Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest in Them (posted 12/5/2011, updated 7/26/2021) (advising that agency should order referral according to date on which FOIA request was first received by agency making referral, not according to date on which referral itself was received by agency); cf. Williams v. United States, 932 F. Supp. 354, 357 & n.7 (D.D.C. 1996) (urging agency to set up an "express lane" for referred records so as to not "tie up other agencies by taking an inordinate period of time to review referred records [and] unnecessarily inhibit[ing] the smooth functioning of the [other] agencies' well[-]oiled FOIA processing systems").

[255] See OIP Guidance: Adjudicating Administrative Appeals Under the FOIA (posted 2/14/2019, updated 8/12/2021) (advising that "when records are *referred* to another agency for handling and direct response to the requester, any appeal arising from those records will be handled by the agency that received the referral and made the disclosure decision").

Although a court has found that an agency generally is under no obligation to "forward" a request (which is distinct from "referring" records) to any other agency which might maintain records,[256] an agency has been found required to do so when obligated by its own FOIA regulations.[257]

Responding to FOIA Requests and Releasing Records

The FOIA requires that each agency "shall make [disclosable] records promptly available" upon request.[258] The FOIA does not provide for limited disclosure; rather, it "speaks in terms of disclosure and nondisclosure [and ordinarily] does not recognize degrees of disclosure, such as permitting viewing, but not copying, of documents."[259] Because the statute does not provide for limited disclosure, the Supreme Court has opined that there is also "no mechanism under [the statute] for a protective order allowing only

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

[257] See Truesdale v. DOJ, 731 F. Supp. 2d 3, 6-8 (D.D.C. 2010) (denying in part defendant's motion for summary judgment because agency did not demonstrate compliance with own FOIA regulations concerning forwarding of requests).

[258] 5 U.S.C. § 552(a)(3)(A) (2018).

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

the requester to see [the information] or for proscribing its general dissemination."[260] In short, "once there is disclosure, the information belongs to the general public."[261]

Upon receipt of a request that will take longer than ten days to process, the FOIA requires agencies to provide requesters with an individualized tracking number and to maintain a telephone line or Internet service to provide requesters with information about the status of the request, including the date on which the agency originally received the request and the estimated date of its completion.[262] If an agency extends the time limits by more than ten additional working days, it must make available its FOIA Public Liaison to assist the requester and must notify the requester of the right to seek dispute resolution services from the Office of Government Information Services (OGIS).[263]

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[260] Favish, 541 U.S. at 174; see Havemann v. Colvin, 629 F. App'x 537, 541 (4th Cir. 2015) (finding that information that would permit plaintiff to locate third parties would also permit anybody else who obtains the released information to locate these individuals, and even if plaintiff were under protective order not to contact them, order could not prevent non-parties from using and disclosing personal information involved); Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1082, 1088-89 (9th Cir. 1997) (rejecting plaintiff's offer to receive requested documents under a confidentiality agreement due to rule "that FOIA does not permit selective disclosure of information only to certain parties, and that once the information is disclosed to [plaintiff], it must also be made available to all members of the public who request it"); Swan v. SEC, 96 F.3d 498, 500 (D.C. Cir. 1996) ("Once records are released, nothing in FOIA prevents the requester from disclosing the information to anyone else. The statute contains no provisions requiring confidentiality agreements or similar conditions."); Schiffer v. FBI, 78 F.3d 1405, 1410 (9th Cir. 1996) (reversing district court's conditional disclosure order, which is "not authorized by FOIA"); cf. Arieff v. Dep't of the Navy, 712 F.2d 1462, 1469 (D.C. Cir. 1983) (refusing to grant protective order that would allow plaintiff's counsel and medical expert to review exempt information).

[261] Favish, 541 U.S. at 174; see also OIP Guidance: Supreme Court Rules for "Survivor Privacy" in *Favish* (posted 4/9/2004, updated 12/19/2024) ("The well-known maxim under the FOIA that 'release to one is release to all' was firmly reinforced in the Favish decision.").

[262] 5 U.S.C. § 552(a)(7)(B)(ii); see Muttit v. U.S. Cent. Command, 813 F. Supp. 2d 221, 224, 226-30 (D.D.C. 2011) (noting requirement that agency provide status updates upon request); see also OIP Guidance: Applying a Presumption of Openness and the Foreseeable Harm Standard (posted 3/13/2023, updated 9/4/2024) (stating that agencies are required to respond promptly and provide specific updates following request for estimated date of completion); OIP Guidance: Assigning Tracking Numbers and Providing Status Information for Requests (Updated Guidance) (posted 7/8/2014, updated 7/22/2021) (advising agencies of importance of providing information about the status of their requests so that FOIA requesters can readily learn when to expect response).

[263] 5 U.S.C. § 552(a)(6)(A)(i)(III)(bb); see also OIP Guidance: The Importance of Quality Requester Services: Roles and Responsibilities of FOIA Requester Service Centers and FOIA Public Liaisons (posted 6/12/2018, updated 7/22/2021).

When responding to a request, the FOIA requires agencies to "provide the [requested] record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format" and to also "make reasonable efforts to maintain its records in forms or formats that are reproducible" for such purposes.[264] These statutory provisions require agencies to not only honor a requester's choice of format among existing formats of a record, but to also make "reasonable efforts" to disclose a record in a new format, when so requested, if the record is "readily reproducible" in that new format.[265] If the records are not readily reproducible by the

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[264] 5 U.S.C. § 552(a)(3)(B); see, e.g., Sai v. TSA, 466 F. Supp. 3d 35, 51 (D.D.C. 2020) (concluding that agency "failed to proffer 'specific, compelling evidence as to significant interference or burden' imposed on the agency by releasing records to [plaintiff in the requested format]," and finding that agency "should provide the Court with an expert declaration addressing the technical feasibility of the request, the *specific* cost (in dollars) and burdens (in time) of satisfying the request, the extent of the necessary redactions, and the security risks, if any, posed by using [the requester's preferred format]" (quoting TPS, Inc. v. DOD, 330 F.3d 1191, 1195 (9th Cir. 2003))); Sai v. TSA, 315 F. Supp. 3d 218, 240 (D.D.C. 2018) (noting that "Congress's goals of 'improv[ing] public access to agency records,' . . . and 'maximiz[ing] the usefulness of agency records' . . . would be easily frustrated if an agency could reject a request to release records in a particular format simply on the ground that releasing the records in that format would make the FOIA review process more difficult" (quoting Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 2, 110 Stat. 3048)); Public.Resource.org v. IRS, 78 F. Supp. 3d 1262, 1266 (N.D. Cal. 2015) (finding that IRS "failed to make a compelling showing that accommodating the request to produce nine Form 990s in MeF at a cost of $6200 – much of which is characterized by the government as 'one-time expenses' to set up a protocol and train staff – would significantly burden or interfere with the agency's ability to respond to FOIA requests or meet its other responsibilities" and explaining "[t]hat the IRS will have to develop new protocols and train staff to respond to [plaintiff's] request does not somehow excuse its need to comply with E–FOIA") (internal citation omitted); see also OIP Guidance: OIP Guidance for Further Improvement Based on 2022 Chief FOIA Officers Report Review and Assessment (posted 8/25/2022, updated 11/16/2022) (encouraging agencies to make records available in most useful format possible); FOIA Update, Vol. XVII, No. 4 ("Congress Enacts FOIA Amendments") (discussing form or format statutory provisions); cf. Aguiar v. DEA, 992 F.3d 1108, 1112-1113 (D.C. Cir. 2021) (finding that agency was not obligated to produce coordinate data on a map simply to make the information more "usable or convenient for the FOIA requestor" where "DEA does not possess the GPS mapping software or any related map images and never created or retained the map images").

[265] 5 U.S.C. § 552(a)(3)(B); see Sample v. BOP, 466 F.3d 1086, 1087, 1089 (D.C. Cir. 2006) (finding that statutory language "unambiguously requires" agency to disclose records in requested electronic format even though agency's regulations prohibit an inmate from possessing such electronically formatted material, without making any finding with respect to inmate "access or possession" of such records, as those questions were "not before the court"); TPS, Inc. v. DOD, 330 F.3d 1191, 1195 (9th Cir. 2003) (stating, in light of particular agency regulation, that the FOIA "requires that the agency satisfy a FOIA request [for the production of records in a certain format] when it has the capability to readily reproduce documents in the requested format"); see also FOIA Update, Vol. XIX, No. 1 ("FOIA

agency in the format requested, courts have not required agencies to release the records in that format.[266]

When an agency provides the requester with its determination on a request, it must also provide the requester with information about the availability of the FOIA Public Liaison.[267] When a determination is adverse, (i.e., the request is denied in full or in part), the FOIA requires the agency to provide the requester with certain additional information

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Counselor: Questions & Answers") (encouraging agencies to consider providing records in multiple forms "as a matter of administrative discretion" if requested to do so); FOIA Update, Vol. XVIII, No. 1 ("OIP Guidance: Amendment Implementation Questions") (noting that FOIA amendments overrule Dismukes v. Dep't of the Interior, 603 F. Supp. 760, 761-63 (D.D.C. 1984), which previously allowed agency to choose format of disclosure if it chose "reasonably"); cf. Snyder v. DOD, No. 03-4992, 2007 WL 951293, at *4-5 (N.D. Cal. Mar. 27, 2007) (ordering agency to produce file that was available on agency website, but corrupted or incomplete when viewed, and to produce reformatted version of another file that it previously disclosed, but was also corrupted, explaining that "[a]bsent exceptional circumstances, release of information is required unless it falls under one of nine statutory exemptions" and that "the prospect of compliance expenses is not one of those exceptions"); Landmark Legal Found. v. EPA, 272 F. Supp. 2d 59, 63 (D.D.C. 2003) (concluding that agency had not violated the FOIA's "readily reproducible" provision by failing to retain electronic copies of emails that were retained in paper form only because "the agency may keep its files in a manner that best suits its needs").

[266] See LaRoche v. SEC, 289 F. App'x 231, 231 (9th Cir. 2008) (affirming summary judgment in favor of agency because records sought were not readily reproducible in searchable electronic format requested by plaintiff); Sai, 466 F. Supp. 3d at 48-49 (determining that the 1996 amendments to the FOIA do not require agency to provide records requested as "distinct or discret[e] PDF files, as opposed to a single file containing multiple documents"); Long v. ICE, 149 F. Supp. 3d 39, 55-58 (D.D.C. 2015) (finding that defendants have demonstrated that producing and redacting certain snapshots of data from an entire database would create an undue burden on the agency, and "conclud[ing] that FOIA does not require Defendants to produce redacted copies of the requested snapshots"); Jackson v. Dep't of Lab., No. 06-02157, 2008 WL 539925, at *4 (E.D. Cal. Feb. 25, 2008) (magistrate's recommendation) (finding that "because [agency] has not developed a system to provide public online access, the records requested are not readily reproducible in that format"), adopted, No. 06-2157, 2008 WL 4463897, at *1 (E.D. Cal. Oct. 2, 2008); Chamberlain v. DOJ, 957 F. Supp. 292, 296 (D.D.C. 1997) ("The substantial expense of reproducing the visicorder charts, as well as the possibility that the visicorder charts might be damaged if photocopied, make the Government's proposed form of disclosure [i.e., inspection] even more compelling.").

[267] 5 U.S.C. § 552(a)(6)(A)(i)(III)(bb); see also OIP Guidance: Applying a Presumption of Openness and the Foreseeable Harm Standard (posted 3/13/2023, updated 9/4/2024) (FOIA requesters may contact agency's FOIA Requester Service Center or FOIA Public Liaison with questions regarding an adverse determination); OIP Guidance: The Importance of Quality Requester Services: Roles and Responsibilities of FOIA Requester Service Centers and FOIA Public Liaisons (posted 6/12/2018, updated 7/22/2021).

about the action taken on the request.[268] Agencies are required to "make a reasonable effort to estimate the volume" of any information withheld and should inform the requester of that estimate, unless doing so would harm an interest protected by an applied exemption.[269] For any records released in part, the FOIA requires that the released portions indicate the amount of information withheld and the exemptions being asserted, unless doing so would harm an interest protected by the exemptions being asserted.[270] If "technically feasible," the FOIA requires this information to "be indicated at the place in the record where such deletion is made."[271] (For further discussion of the FOIA's portion-marking requirements, see Procedural Requirements, Records Processing Requirements, "Reasonably Segregable" Requirement, above.) Additionally, response letters should confirm that agencies have considered the foreseeable harm standard when processing records.[272] (For further discussion of the administrative considerations for the foreseeable harm standard, see Procedural Requirements, Records Processing Requirements, "Foreseeable Harm" Requirement, above.)

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[268] 5 U.S.C. § 552(a)(6)(A)(i)(III).

[269] See id. § 552(a)(6)(F); see also Mobley v. DOJ, 845 F. Supp. 2d 120, 123-24 (D.D.C. 2012) ("The plain text of the statute does not require agencies to provide a list of withheld documents, but only to make a reasonable effort to estimate the volume of the documents withheld."); FOIA Update, Vol. XVIII, No. 2 ("FOIA Counselor: Questions & Answers") (discussing alternative methods of satisfying obligation to estimate volume of deleted or withheld information, including forms of measurement to be used).

[270] See 5 U.S.C. § 552(b) (paragraph immediately following exemptions); see also OIP Guidance: Applying a Presumption of Openness and the Foreseeable Harm Standard (posted 3/13/2023, updated 9/4/2024) ("Final agency determinations should clearly explain the basis for any denials, including, if applicable, any FOIA exemptions asserted and the number of records withheld, except in circumstances where this would cause harm."); OIP Guidance: Segregating and Marking Documents for Release in Accordance with the OPEN Government Act (posted 10/23/2008, updated 12/6/2022).

[271] See 5 U.S.C. § 552(b) (paragraph immediately following exemptions); see also Long v. DOJ, 703 F. Supp. 2d 84, 107-08 (N.D.N.Y. 2010) (accepting agency's explanation that it would not be technically feasible to show disputed redactions "because the method required to do so would cause 'system run-time problems'" and "would not produce a result" (quoting agency declaration)).

[272] See Department of Justice's 2022 FOIA Guidelines (agencies should "confirm in response letters to FOIA requesters that they have considered the foreseeable harm standard when reviewing records and applying FOIA exemptions"); see also OIP Guidance: Applying a Presumption of Openness and the Foreseeable Harm Standard (posted 3/13/2023, updated 9/4/2024) (clarifying that if final determination involved one or more FOIA exemptions (other than Exemption 3), agency should explain that it considered foreseeable harm standard and, to extent practicable and efficient, agencies "should consider brief, tailored explanations in response letters whenever doing so will increase understanding of the handling of the request").

The agency response is required by the FOIA to include specific administrative information about the agency's action.[273] While "[t]here is no requirement that administrative responses to FOIA requests contain the same documentation necessary in litigation,"[274] a decision to deny an initial request must inform the requester of the reasons for denial, the right to appeal, the right to seek dispute resolution services from the FOIA Public Liaison at the agency or OGIS, and the name and title of each person responsible for the denial.[275] The Court of Appeals for the District of Columbia Circuit has held that when an agency advises a requester that no records responsive to the request could be located, such a response is considered an adverse determination and requires the agency to notify the requester of their administrative appeal rights.[276]

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[273] See 5 U.S.C. § 552(a)(6)(A)(i) (requiring agencies to notify requesters of disclosure determinations, reasons for such determinations, administrative appeal rights, and availability of FOIA Public Liaison, and when applicable, the availability of OGIS); id. § 552(a)(6)(C)(i) (requiring agencies to notify requesters of name and title of person making determination regarding denials of requests for records).

[274] Crooker v. CIA, No. 83-1426, 1984 U.S. Dist. LEXIS 23177, at *3-4 (D.D.C. Sept. 28, 1984); see Sakamoto v. EPA, 443 F. Supp. 2d 1182, 1189 (N.D. Cal. 2006) (granting summary judgment because, inter alia, "[i]nitial agency responses to FOIA requests are not required to contain a Vaughn index"); Jud. Watch, Inc. v. Clinton, 880 F. Supp. 1, 11 (D.D.C. 1995) (finding that agencies need not provide Vaughn Index until ordered by court after plaintiff has exhausted administrative process); Schaake v. IRS, No. 91-958, 1992 U.S. Dist. LEXIS 9418, at *9-10 (S.D. Ill. June 3, 1992) (ruling that court "lacks jurisdiction" to require agency to provide Vaughn Index at either initial request or administrative appeal stages); SafeCard Servs. v. SEC, No. 84-3073, 1986 U.S. Dist. LEXIS 26467, at *5 (D.D.C. Apr. 21, 1986) (noting that requester has no right to Vaughn Index during administrative process), aff'd on other grounds, 926 F.2d 1197 (D.C. Cir. 1991); see also FOIA Update, Vol. VII, No. 3 ("FOIA Counselor: Questions & Answers").

[275] See 5 U.S.C. § 552(a)(6)(A)(i), (a)(6)(C)(i); Stanley v. DOD, No. 93-4247, slip op. at 14-15 (S.D. Ill. July 28, 1998) (finding constructive exhaustion when agency failed to provide requester with notice of administrative appeal rights regarding disputed fee estimate); Mayock v. INS, 714 F. Supp. 1558, 1567 (N.D. Cal. 1989) (denying plaintiff's request for Vaughn Index at administrative level, but suggesting that agency regulations then in effect required "more information than just the number of pages withheld and an unexplained citation to the exemptions"); Hudgins v. IRS, 620 F. Supp. 19, 20-21 (D.D.C. 1985) (suggesting that statement of appeal rights should be provided even when agency interprets request as not reasonably describing records), aff'd, 808 F.2d 137 (D.C. Cir. 1987).

[276] See Oglesby v. Dep't of the Army, 920 F.2d 57, 67 (D.C. Cir. 1990) (finding that agency has a duty to notify appellant "'of the right . . . to appeal to the head of the agency,' in cases where no records are found in its response as well as those in which specific records are denied" because requester "may wish to challenge the adequacy of the agency's search" (citing 5 U.S.C. § 552(a)(6)(A)(i))); see also Dinsio v. FBI, 445 F. Supp. 2d 305, 311 (W.D.N.Y. 2006) (finding constructive exhaustion when agency response indicating that no additional responsive records exist other than those previously released to requester did not

Prior to transmitting responsive records to the requester, courts have recognized that an agency may collect any fees owed on the request.[277] Additionally, one court has directly addressed the proper handling of records not written in English, ruling that the agency should translate the responsive records for the court to review disclosure determinations.[278] Also, when responding to a request, courts have found that agencies

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

[277] See Farrugia v. EOUSA, 366 F. Supp. 2d 56, 57 (D.D.C. 2005) ("Where an agency already has processed a request, it is clear 'that the agency may require payment before sending the requested records.'" (quoting Trueblood v. Dep't of the Treasury, 943 F. Supp. 64, 68 (D.D.C. 1996))); Taylor v. Dep't of the Treasury, No. 96-933, 1996 WL 858481, at *2 (W.D. Tex. Dec. 17, 1996) (recognizing that agency may require payment before sending processed records); Putnam v. DOJ, 880 F. Supp. 40, 42 (D.D.C. 1995) (allowing agency to require payment of current and outstanding fees before releasing records); Crooker v. ATF, 882 F. Supp. 1158, 1162 (D. Mass. 1995) (finding no obligation to provide records until current and past-due fees are paid); Strout v. USPC, 842 F. Supp. 948, 951 (E.D. Mich. 1994), aff'd, 40 F.3d 136 (6th Cir. 1994) (granting defendant's motion for summary judgment after finding agency regulation requiring payment prior to releasing records to requester valid).

[278] See Laws.' Comm. for C.R. v. Dep't of the Treasury, No. 07-2590, 2009 WL 1299821, at *9 (N.D. Cal. May 11, 2009) (concluding that agency failed to demonstrate applicability of FOIA exemption because it "did not bother to translate [documents] into English for the court . . . so the court is unable to make a determination as to those [documents]"); see also OIP Guidance: The Limits of Agency Translation Obligations Under the FOIA (posted 12/1/2004, updated 12/19/2024) (discussing agency translation obligations in determining responsiveness of records, determining applicability of exemptions, and providing records in response to FOIA requests); cf. Essential Info., Inc. v. U.S. Info. Agency, 134 F.3d 1165, 1172 (D.C. Cir. 1998) (Tatel, J., dissenting) (observing that "FOIA contains no . . . translation requirement" regarding disclosure of records in a specific language); McDonnell v. United States, 4 F.3d 1227, 1244-45 (3d Cir. 1993) (confirming that agency should not be compelled to create translation of any disclosable encoded information because requiring translation could allow hostile entities to interpret other sensitive documents encoded by government).

are not required to add explanatory materials to any records disclosed,[279] to certify records,[280] or to Bates-stamp or number the records.[281]

As a matter of sound administrative policy, when an agency receives a request that involves voluminous records or requires searches in multiple locations, whenever feasible, the agency should provide interim releases to the requester instead of waiting until all records are located and processed.[282] As a further matter of administrative discretion in responding to requests, agencies should include any other helpful information such as, when appropriate, the agency's interpretation of the request.[283] Further, agencies are expected to provide requesters with the "best copy available" of a

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[279] See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 162 (1975) (holding that "insofar as the order of the court below requires the agency to create explanatory material, it is baseless"); Citizens Progressive All. v. U.S. Bureau of Indian Affs., 241 F. Supp. 2d 1342, 1365 (D.N.M. 2002) ("Defendants may be required to disclose material pursuant to FOIA, but Defendants are not required to . . . explain any records produced."); Tax Analysts v. IRS, No. 94-923, 1998 WL 419755, at *2 (D.D.C. May 1, 1998) (declaring that "an agency need not add explanatory material to a document to make it more understandable in light of the redactions"); Gabel v. Comm'r, 879 F. Supp. 1037, 1039 (N.D. Cal. 1994) (noting that FOIA does not require agency "to revamp documents or generate exegeses so as to make them comprehensible to a particular requestor").

[280] See Knittel v. IRS, No. 07-1213, 2009 WL 2163619 (W.D. Tenn. July 20, 2009) (concluding that agencies are not required to provide certified copies of agency records in response to FOIA request); Jackman v. DOJ, No. 05-1889, 2006 WL 2598054, at *2 (D.D.C. Sept. 11, 2006) (stating that "questions about the authenticity and correctness of the released records are beyond the scope of the court's FOIA jurisdiction").

[281] See Brown v. DOJ, 734 F. Supp. 2d 99, 104 (D.D.C. 2010) (declining to extend agency's obligation to make records available in readily reproducible format to include Bates-stamping records not already numbered).

[282] See OIP Guidance: The Importance of Good Communication with FOIA Requesters (posted 3/1/2010, updated 7/28/2021) (advising agencies to make interim releases when possible to facilitate access to requested material).

[283] See OIP Guidance: Applying a Presumption of Openness and the Foreseeable Harm Standard (posted 3/13/2023, updated 9/4/2024) (encouraging agencies to communicate with requesters when clarifying issues regarding the scope of the request); OIP Guidance: The Importance of Good Communication with FOIA Requesters (posted 3/1/2010, updated 7/28/2021) (advising agencies of benefits to both requesters and agencies to discuss scope of request and "ensure that they have a common understanding of what records are being sought"); FOIA Update, Vol. XVI, No. 3 ("OIP Guidance: Determining the Scope of a FOIA Request") (emphasizing importance of communication with requester); see, e.g., Astley v. Lawson, No. 89-2806, 1991 WL 7162, at *2 (D.D.C. Jan. 11, 1991) (suggesting that agency "might have been more helpful" to requester by "explaining why the information he sought would not be provided").

record,[284] and as a matter of good policy, should address any problems with the quality of disclosed records in the response.[285]

Administrative Appeals

Under the FOIA's administrative appeal provision, a requester has the right to administratively appeal any adverse determination an agency makes on their FOIA request.[286] Under DOJ regulations, for example, adverse determinations include denials of records in full or in part; "no records" responses; denials of requests for fee waivers; and denials of requests for expedited processing.[287] A requester's right to appeal an agency's full or partial withholdings includes the right to appeal an agency's foreseeable harm determinations.[288]

The administrative appeal process is important to both agencies and requesters.[289] The administrative appeal process provides an agency with an opportunity to review its initial action taken in response to a FOIA request and determine whether corrective steps

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[284] See McDonnell v. United States, 4 F.3d 1227, 1261 n.21 (3d Cir. 1993) ("Of course, we anticipate that [plaintiff] will receive the best possible reproduction of the documents to which he is entitled."); Crummey v. SSA, 794 F. Supp. 2d 46, 62 (D.D.C. 2011) (accepting that agency provided plaintiff with "best available records" even though plaintiff asserted that copies were illegible); see also FOIA Update, Vol. XVI, No. 3 ("FOIA Counselor: Questions & Answers") (advising agencies that, "before providing a FOIA requester with a photocopy of a record that is a poor copy or is not entirely legible," they should "make reasonable efforts to check for any better copy of a record that could be used to make a better photocopy for the requester").

[285] See FOIA Update, Vol. XVI, No. 3 ("FOIA Counselor: Questions & Answers") (advising of procedures to be used in cases involving poor photocopies of records).

[286] See 5 U.S.C. § 552(a)(6)(A) (2018); see also OIP Guidance: Adjudicating Administrative Appeals under the FOIA (posted 2/14/2019, updated 8/12/2021).

[287] See DOJ FOIA Regulations, 28 C.F.R. § 16.6(c) (2024).

[288] See 5 U.S.C. § 552(a)(8)(A)(i)(I); OIP Guidance: Applying a Presumption of Openness and the Foreseeable Harm Standard (posted 3/13/2023, updated 9/4/2024) (counseling that "[o]n appeal, agencies should take a fresh look at the initial application of exemptions and the foreseeable harm standard").

[289] OIP Guidance: Adjudicating Administrative Appeals Under the FOIA (posted 2/14/2019, updated 8/12/2021) ("The administrative appeal process offers the agency an opportunity to reevaluate its initial response to a request and identify any potential legal errors, and it increases requesters' confidence in the FOIA process by providing a second opportunity for the request to be reviewed.").

are necessary.[290] In addition, although failure to file an administrative appeal is not normally an absolute bar to judicial review, the Court of Appeals for the District of Columbia Circuit has held that exhaustion of the administrative appeal process is "'generally required before filing suit in federal court.'"[291]

Courts have found that a requester must submit an administrative appeal pursuant to an agency's regulations, including regulations governing deadlines and procedures for submission.[292] The FOIA Improvement Act of 2016 added a requirement that agencies

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[290] See Wilbur v. CIA, 355 F.3d 675, 677 (D.C. Cir. 2004) (noting that policies of exhaustion requirement are "to prevent premature interference with agency processes, to give the parties and the courts benefit of the agency's experience and expertise and to compile an adequate record for review"); Oglesby v. Dep't of the Army, 920 F.2d 57, 61 (D.C. Cir. 1990) (recognizing that exhaustion of the administrative appeal process "allows the top managers of an agency to correct mistakes made at lower levels and thereby obviates unnecessary judicial review" (citing McKart v. United States, 395 U.S. 185, 194 (1969) (non-FOIA case))); Sieverding v. DOJ, 910 F. Supp. 2d 149, 155 (D.D.C. 2012) (finding that, in absence of appeal, allowing plaintiff "to pursue her claim . . . in federal litigation would undermine [agency's] process for resolving such FOIA claims").

[291] Hidalgo v. FBI, 344 F.3d 1256, 1258 (D.C. Cir. 2003) (quoting Oglesby, 920 F.2d at 61); see also Lumarse v. HHS, 191 F.3d 460, 460 (9th Cir. 1999) (unpublished table opinion) (affirming dismissal of plaintiff's FOIA claim for failure to exhaust administrative remedies because plaintiff did not administratively appeal and therefore did not attempt to comply with agency procedures); ACLU of Mich. v. FBI, No. 11-13154, slip op. at *4 (E.D. Mich. Sept. 30, 2012) (finding that court does not have subject-matter jurisdiction over adequacy of agency's search because "nowhere in the Appeal [did] Plaintiff question or challenge the adequacy of Defendant's search"); Freedom Watch, Inc. v. CIA, 895 F. Supp. 2d 221, 228, n.2 (D.D.C. 2012) (denying plaintiff's request for futility exception to the exhaustion requirement and noting that "binding Circuit precedent could not be clearer: exhaustion of administrative remedies 'is a *mandatory prerequisite* to a lawsuit under the FOIA'" (quoting Wilbur, 355 F.3d at 676 (emphasis added, internal quotation marks and citation omitted))); Williams v. VA, 510 F. Supp. 2d 912, 921 (M.D. Fla. 2007) (finding that plaintiff's failure to administratively appeal precludes plaintiff from obtaining relief because "the requirement of exhaustion of administrative remedies prior to seeking redress in federal court, allows an agency to correct possible mistakes and alleviate the need for judicial review of the same").

[292] See, e.g., Thompson v. Dep't of the Navy, 491 F. App'x 46, 48 (11th Cir. 2012) (finding that plaintiff did not exhaust administrative remedies where plaintiff's appeal was untimely); Bonilla v. DOJ, No. 11-20450, 2012 WL 3759024, at *5 (S.D. Fla. Aug. 29, 2012) (finding that attempt to appeal was untimely and, therefore, plaintiff had not exhausted administrative remedies because regulatory language is not ambiguous and "agency's construction of its own regulations is entitled to substantial deference"); Ctr. for Biological Diversity v. Gutierrez, 451 F. Supp. 2d 57, 65-67 (D.D.C. Aug. 10, 2006) (concluding that requester failed to exhaust administrative remedies when electronically submitted appeal was received twelve minutes after expiration of agency's regulatory appeal deadline); Imamoto v. SSA, No. 08-00137, 2008 WL 5179104, at *5 (D. Haw. Dec. 9, 2008)

allow a minimum of ninety days for requesters to file an administrative appeal.[293] Although the FOIA has a "constructive exhaustion" provision,[294] once an agency responds to a request, courts have found that the requester is obligated at that time to submit an administrative appeal even if the agency's response was untimely.[295]

The FOIA requires an agency to make a determination on an administrative appeal within twenty working days after its receipt,[296] but that period may be extended by written

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(concluding that third party agency forwarding requester's letter to SSA is not valid administrative appeal of SSA's action); Sindram v. Fox, No. 07-0222, 2008 WL 2996047, at *5 (E.D. Pa. Aug. 5, 2008) (giving plaintiff thirty days to produce evidence that he exhausted administrative remedies in light of agency having no record of receiving administrative appeal); Fisher v. DOJ, No. 07-2273, 2008 WL 8683024, at *3 (D.N.J. May 9, 2008) (declining to exercise jurisdiction because plaintiff's appeal was received after sixty-day deadline established by agency regulation and rejecting prison mailbox rule where "'statutory or regulatory schemes . . . require[] actual receipt by a specific date'" (quoting Longenette v. Krusing, 322 F.3d 758, 764 (3d Cir. 2003))); cf. Corley v. DOJ, 998 F.3d 981, 988-89 (D.C. Cir. 2021) (in situation where DOJ had no record of receiving alleged underlying request, rejecting amicus argument that DOJ should have treated attempted appeal as a new request, reasoning that no legal authority imposes such a duty and "submission must be reasonably clear that its sender intends it to be a new request").

[293] See Pub. L. No. 114-185, 130 Stat. 538, Section 2 (codified at 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa)).

[294] See 5 U.S.C. § 552(a)(6)(C).

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

[296] See 5 U.S.C. § 552(a)(6)(A)(ii); see also Dennis v. CIA, Nos. 12-4207, 12-4208, 2012 WL 5493377, at *2 (E.D.N.Y. Nov. 13, 2012) (noting that "[u]nder FOIA, after an agency receives a FOIA request, it must 'determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) . . . whether or not to comply with such request,' and shall 'make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal.'" (quoting 5 U.S.C. § 552(a)(6)(B)(i), (ii))); Wildlands CPR v. U.S. Forest Serv., 558 F. Supp. 2d 1096, 1102-03 (D. Mont. 2008) (finding constructive exhaustion where agency did not timely adjudicate administrative appeal); Soghomonian v. United States, 82 F. Supp. 2d 1134, 1138 (E.D. Cal.

notice if "unusual circumstances," as defined by the FOIA, apply.[297] An administrative appeal decision upholding an adverse determination must inform the requester of the provisions for judicial review of that determination in the federal courts.[298] As a matter of sound administrative practice, DOJ has advised agencies that they should include, in their appeal determination letters, notification to the requester of the mediation services offered by the Office of Government Information Services at NARA.[299] (For discussions of the various aspects of judicial review of agency action under the FOIA, see Litigation Considerations.)

1999) (holding that twenty-day time period for responding to administrative appeal begins when agency receives appeal, not when requester mails it).

[297] See 5 U.S.C. § 552(a)(6)(B)(i), (iii).

[298] See 5 U.S.C. § 552(a)(6)(A)(ii).

[299] See OIP Guidance: Notifying Requesters of the Mediation Services Offered by OGIS (posted 7/9/2010, updated 7/22/2021).