



## **Exclusions**

In amending the Freedom of Information Act in 1986, Congress created a novel mechanism for protecting certain especially sensitive law enforcement matters, under subsection (c) of the Act.<sup>1</sup> These three special protection provisions, referred to as record "exclusions," are reserved for certain specified circumstances. The record exclusions expressly authorize federal law enforcement agencies, under these exceptional circumstances, to "treat the records as not subject to the requirements of [the FOIA]."<sup>2</sup> Given their unique nature, any agency considering employing an exclusion or having a question as to their implementation should first consult with the Office of Information Policy, at (202) 514-3642.<sup>3</sup> Recently, the Department of Justice reviewed past agency practices with regard to implementation of the FOIA's exclusion provisions and has advised agencies to take a series of steps to bring about greater public awareness and understanding regarding the use of the FOIA's statutory exclusions, as explained in greater detail, below.<sup>4</sup>

At the outset, it is important to recognize the somewhat subtle, but very significant distinction between the result of employing a record exclusion and the

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<sup>1</sup> See [5 U.S.C. § 552\(c\)\(1\), \(c\)\(2\), \(c\)\(3\) \(2006 & Supp. IV 2010\)](#); see also DOJ, OIP Guidance: [Implementing FOIA's Statutory Exclusion Provisions](#) [hereinafter OIP Exclusion Guidance] (2012); [Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act](#) 18-30 (Dec. 1987) [hereinafter [Attorney General's 1986 Amendments Memorandum](#)]; cf. [NARA v. Favish](#), 541 U.S. 157, 169 (2004) (noting the Supreme Court's reliance on "the Attorney General's consistent interpretation of" the FOIA in successive such Attorney General memoranda).

<sup>2</sup> [5 U.S.C. § 552\(c\)\(1\), \(c\)\(2\), \(c\)\(3\)](#); see, e.g., [ACLU of Mich. v. FBI](#), 734 F.3d 460, 469 (6th Cir. 2013) (distinguishing "exclusions" from exemptions "since the requirements of the FOIA do not apply at all"); [Tanks v. Huff](#), No. 95-568, 1996 WL 293531, at \*5 (D.D.C. May 28, 1996), [appeal dismissed](#), No. 96-5180 (D.C. Cir. Aug. 13, 1996).

<sup>3</sup> See [OIP Exclusion Guidance](#).

<sup>4</sup> See [id.](#)

concept that is colloquially known as "Glomarization."<sup>5</sup> That latter term refers to the situation in which an agency expressly refuses to confirm or deny the existence of records responsive to a request.<sup>6</sup> (A more detailed discussion of "Glomarization" can be found under Exemption 1, above, and also under Exemption 7(C), above.) While "Glomarization" remains adequate to provide necessary protection in most situations, these special record exclusions are invaluable in addressing the exceptionally sensitive situations in which even "Glomarization" is inadequate to the task.<sup>7</sup> The Court of Appeals for the Sixth Circuit explained that the exclusion provisions were added to the FOIA because the "Glomar" response "was not well-suited to certain disclosure problems of law enforcement agencies."<sup>8</sup> The Sixth Circuit went on to explain why a "Glomar" response, which is tethered to an exemption, is not always sufficient protection, noting that in certain situations "if the FBI is required to identify a specific exemption for the withholding—even hypothetically—the criminal organization or terrorist may 'already have the information they want.'"<sup>9</sup>

As noted by the District Court for the District of Columbia, when an agency employs a "Glomar" response or otherwise withholds records on the basis of a FOIA exemption, "the agency must reveal the fact of and grounds for any withholdings," while the exclusions "permit the government to treat requests for records as falling outside the scope of the statute altogether."<sup>10</sup>

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<sup>5</sup> See [Attorney General's 1986 Amendments Memorandum](#) at 26 & n.47; see also [Benavides v. DEA](#), 968 F.2d 1243, 1246-48 (D.C. Cir. 1992) (initially confusing exclusion mechanism with "Glomarization"), [modified](#), 976 F.2d 751, 752-53 (D.C. Cir. 1992) (clarifying that earlier opinion was not intended to rule on proper response when exclusion mechanism is applied); [Memphis Publ'g Co. v. FBI](#), No. 10-1878, 2012 WL 269900, at \*6-7 (D.D.C. Jan. 31, 2012) (explaining distinction between "Glomar" responses and exclusions); [Valencia-Lucena v. DEA](#), No. 99-0633, slip op. at 8 (D.D.C. Feb. 8, 2000) (recognizing that [Benavides](#) "was subsequently clarified"), [summary affirmance granted sub nom. Lucena v. DEA](#), No. 00-5117, 2000 WL 1582743 (D.C. Cir. Sept. 7, 2000); cf. [ACLU of N.J. v. FBI](#), [733 F.3d 526](#), 534 & n.9 (3d Cir. 2013) (characterizing evidence that legislative history of exclusion provisions "evidences an intent to incorporate a 'Glomar-like procedure'" for litigating exclusion issues as "inconclusive at best"). [But see Light v. DOJ](#), No. 12-1660, [2013 WL 3742496](#), at \*11-12 (D.D.C. July 17, 2013) (characterizing government's alleged use of exclusion as "Glomar" response). See generally [OIP Exclusion Guidance](#) (explaining limitations on using Glomar response).

<sup>6</sup> See, e.g., [Gardels v. CIA](#), 689 F.2d 1100, 1103 (D.C. Cir. 1982); [Phillippi v. CIA](#), 546 F.2d 1009, 1013 (D.C. Cir. 1976).

<sup>7</sup> See [OIP Exclusion Guidance](#).

<sup>8</sup> [ACLU of Mich.](#), [734 F.3d at 469](#).

<sup>9</sup> [Id.](#) (quoting legislative history).

<sup>10</sup> [Memphis Publ'g Co.](#), 2012 WL 269900, at \*6-7.

### **The (c)(1) Exclusion**

The first of these novel provisions, known as the "(c)(1) exclusion," provides as follows:

Whenever a request is made which involves access to records described in subsection (b)(7)(A) and (A) the investigation or proceeding involves a possible violation of criminal law; and (B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.<sup>11</sup>

In most cases, Exemption 7(A) is sufficient to guard against any impairment of law enforcement investigations or proceedings through the FOIA.<sup>12</sup> To avail itself of Exemption 7(A), however, an agency must routinely specify that it is doing so -- first administratively and then, if sued, in court -- even when it is invoking the exemption to withhold all responsive records in their entirety.<sup>13</sup> Thus, in specific situations in which the very fact of an investigation's existence is yet unknown to the investigation's subject, invoking Exemption 7(A) in response to a FOIA request for pertinent records permits an investigation's subject to be alerted to its existence.<sup>14</sup> If the agency were to respond by using a "Glomar" response, "it would have to answer that way for all requests where someone asked for records on themselves, because a Glomar response is not effective unless it is used for all similar requests."<sup>15</sup> To avoid both of these scenarios, the first exclusion, (c)(1), authorizes the agency to "treat the records as not subject to the requirements of the FOIA."<sup>16</sup> "This permits an agency to respond to a request seeking excluded records without revealing their existence, while also allowing the agency to respond to the vast majority of requests in the traditional manner, i.e., by advising the

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<sup>11</sup> [5 U.S.C. § 552\(c\)\(1\) \(2006 & Supp. IV 2010\)](#).

<sup>12</sup> See [Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act](#) 18-22 (Dec. 1987) [hereinafter [Attorney General's 1986 Amendments Memorandum](#)].

<sup>13</sup> See [id.](#)

<sup>14</sup> See [id.](#); see also DOJ, OIP Guidance: [Implementing FOIA's Statutory Exclusion Provisions](#) [hereinafter OIP Exclusion Guidance] (2012).

<sup>15</sup> [OIP Exclusion Guidance](#) (stating that under such circumstances the "vast majority" of first-party requesters would receive "Glomar" responses even though the likelihood that a particular requester is the subject of an ongoing criminal investigation would be very remote).

<sup>16</sup> [Id.](#) (quoting [5 U.S.C. § 552\(c\)\(1\)](#)).

requester whether records exist, and if they do, by releasing any information that is not exempt and asserting exemptions for any material properly protected from disclosure."<sup>17</sup>

To qualify under the first exclusion from the FOIA, the records in question must otherwise be withholdable in their entirety under Exemption 7(A).<sup>18</sup> Further, they must relate to an "investigation or proceeding [that] involves a possible violation of criminal law."<sup>19</sup> Hence, any records pertaining to a purely civil law enforcement matter cannot be excluded from the FOIA under this provision, although they may qualify for ordinary Exemption 7(A) withholding. However, the statutory requirement that there be only a "possible violation of criminal law," by its very terms, admits a wide range of investigatory files maintained by more than just criminal law enforcement agencies.<sup>20</sup>

Next, the statute imposes two closely related requirements which go to the very heart of the particular harm addressed through this record exclusion. An agency determining whether it can employ (c)(1) protection must consider whether it has "reason to believe" that the investigation's subject is not aware of its pendency and that the agency's disclosure of the very existence of the records in question "could reasonably be expected to interfere with enforcement proceedings."<sup>21</sup>

Obviously, where all investigatory subjects are already aware of an investigation's pendency, the "tip off" harm sought to be prevented through this record exclusion is not of concern.<sup>22</sup> Accordingly, the language of this exclusion expressly obliges agencies contemplating its use to consider the level of awareness already possessed by the investigative subjects involved.<sup>23</sup> Agencies must make this determination according to a good-faith, "reason to believe" standard.<sup>24</sup>

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<sup>17</sup> [OIP Exclusion Guidance](#).

<sup>18</sup> See [5 U.S.C. § 552\(c\)\(1\)](#); see also [Attorney General's 1986 Amendments Memorandum](#) at 20.

<sup>19</sup> [5 U.S.C. § 552\(c\)\(1\)\(A\)](#).

<sup>20</sup> See [Attorney General's 1986 Amendments Memorandum](#) at 20 & n.37 (files of agencies that are not primarily engaged in criminal law enforcement activities may be eligible for protection if they contain information about potential criminal violations that are pursued with the possibility of referral to Department of Justice for further prosecution).

<sup>21</sup> [5 U.S.C. § 552\(c\)\(1\)\(B\)](#).

<sup>22</sup> See [Attorney General's 1986 Amendments Memorandum](#) at 21.

<sup>23</sup> See [id.](#)

<sup>24</sup> See [id.](#)

As the (c)(1) exclusion is phrased, this requirement is satisfied so long as an agency determines that it affirmatively has a "reason to believe" that the subject of the investigation does not, in fact, know of its existence.<sup>25</sup> While it is always possible that an agency might possess somewhat conflicting or even contradictory indications on such a point, unless an agency can resolve that a subject is aware of an investigation, it should not risk impairing that investigation through a telling FOIA disclosure.<sup>26</sup> Moreover, agencies are not obligated to accept any bald assertions by investigative subjects that they "know" of ongoing investigations against them; such assertions might well constitute no more than sheer speculation.<sup>27</sup> Because such speculation, if accepted, could defeat the exclusion's clear statutory purpose, agencies should rely upon their own objective indicia of subject awareness and consequent harm.<sup>28</sup>

In the great majority of cases, invoking Exemption 7(A) will protect the interests of law enforcement agencies in responding to FOIA requests for active law enforcement files. The (c)(1) exclusion should be employed only in the exceptional case in which an agency reaches the judgment that, given its belief of the subject's unawareness of the investigation, the mere invocation of Exemption 7(A) could reasonably be expected to cause harm -- a judgment that should be reached only after careful consideration of the expected harms.<sup>29</sup>

Finally, the clear language of this exclusion specifically restricts its applicability to "during only such time" as the above-required circumstances continue to exist.<sup>30</sup> This limitation comports with the extraordinary nature of the protection afforded by the exclusion, as well as with the basic temporal nature of Exemption 7(A) underlying it.<sup>31</sup> It means that an agency that has employed the exclusion in a particular case is obligated to cease doing so once the circumstances warranting its use cease to exist.<sup>32</sup>

Once a law enforcement matter reaches a stage at which all subjects are aware of its pendency, or at which the agency otherwise determines that the public disclosure of that pendency no longer could lead to harm, the exclusion should be regarded as no

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<sup>25</sup> See [id.](#)

<sup>26</sup> See [id.](#)

<sup>27</sup> See [id.](#) at n.38.

<sup>28</sup> See [id.](#)

<sup>29</sup> See [id.](#) at 21.

<sup>30</sup> [5 U.S.C. § 552\(c\)\(1\)\(B\)\(ii\).](#)

<sup>31</sup> See [Attorney General's 1986 Amendments Memorandum](#) at 21.

<sup>32</sup> See [id.](#) at 22.

longer applicable.<sup>33</sup> If the FOIA request that triggered the agency's use of the exclusion remains pending administratively at such time, the excluded records should be identified as responsive to that request and then processed in an ordinary fashion.<sup>34</sup> However, an agency is under no legal obligation to spontaneously reopen a closed FOIA request or a litigation case, even though records were excluded during its entire pendency: By operation of law, the records simply were not subject to the FOIA during the pendency of the request.<sup>35</sup>

When an agency reaches the judgment that it is necessary and appropriate that the (c)(1) exclusion be employed in connection with a request, before invoking the exclusion it should consult with the Office of Information Policy.<sup>36</sup> "This will help ensure that all aspects of the request and possible excludable records are reviewed and analyzed before determining whether use of an exclusion is warranted."<sup>37</sup> As discussed in greater detail below, (see Exclusions, "Procedural Considerations," below), the Department of Justice has issued new guidance detailing the procedures law enforcement components must follow in responding to FOIA requests, which bring greater awareness to the existence of exclusions in general, while not revealing in any particular case whether an exclusion was employed.<sup>38</sup> Agency components that maintain criminal law enforcement records should advise requesters in their FOIA responses that the statute excludes certain records, and that the response only pertains to those records that are subject to the requirements of the FOIA.<sup>39</sup> This notification should be included in all FOIA responses, regardless of whether an exclusion was invoked in a particular case.<sup>40</sup>

With any excluded records addressed by virtue of this notification, the component can then respond to the remainder of the request in the usual way, advising the requester of the handling of any records that exist that are subject to the requirements of the FOIA.<sup>41</sup>

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<sup>33</sup> See [id.](#)

<sup>34</sup> See [id.](#); see also [Barnard v. DHS](#), 598 F. Supp. 2d 1, 4 n.4 (D.D.C. 2009) (noting that agency initially applied (c)(1) exclusion, but then determined it was no longer applicable and asserted exemptions).

<sup>35</sup> See [Attorney General's 1986 Amendments Memorandum](#) at 22 n.39.

<sup>36</sup> See [OIP Exclusion Guidance](#).

<sup>37</sup> [Id.](#)

<sup>38</sup> See [id.](#)

<sup>39</sup> See [id.](#)

<sup>40</sup> See [id.](#)

<sup>41</sup> See [id.](#)

### **The (c)(2) Exclusion**

The second exclusion applies to a narrower situation, involving the threatened identification of confidential informants in criminal proceedings.<sup>42</sup> The "(c)(2) exclusion" provides as follows:

Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of [the FOIA] unless the informant's status as an informant has been officially confirmed.<sup>43</sup>

By its terms, the (c)(2) exclusion is limited to "informant records maintained by a criminal law enforcement agency."<sup>44</sup> This exclusion contemplates the situation in which a sophisticated requester could try to use the FOIA to identify an informant.<sup>45</sup> In the ordinary situation, Exemption 7(D) should adequately allow a law enforcement agency to withhold all items of information necessary to prevent the identification of any of its confidential sources.<sup>46</sup> That is because, in most instances, the assertion of Exemption 7(D) does not identify a particular individual as a source. It only tells the requester that source-derived information is contained within some portion of the withheld records. As with Exemption 7(A), under ordinary circumstances the disclosure of this fact poses no direct threat. But under certain extraordinary circumstances, this disclosure could result in devastating harms to the source and to the system of confidentiality existing between sources and criminal law enforcement agencies.<sup>47</sup>

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<sup>42</sup> See DOJ, OIP Guidance: [Implementing FOIA's Statutory Exclusion Provisions](#) [hereinafter OIP Exclusion Guidance] (2012); [Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act](#) 22-24 (Dec. 1987) [hereinafter [Attorney General's 1986 Amendments Memorandum](#)]; see also [Tanks v. Huff](#), No. 95-568, 1996 WL 293531, at \*5 (D.D.C. May 28, 1996), [appeal dismissed](#), No. 96-5180 (D.C. Cir. Aug. 13, 1996).

<sup>43</sup> [5 U.S.C. § 552\(c\)\(2\) \(2006 & Supp. IV 2010\)](#).

<sup>44</sup> [Id.](#)

<sup>45</sup> See [Attorney General's 1986 Amendments Memorandum](#) at 23.

<sup>46</sup> See, e.g., [Keys v. DOJ](#), 830 F.2d 337, 345-46 (D.C. Cir. 1987); see also [DOJ v. Landano](#), 508 U.S. 165, 179-81 (1993) (concluding that although "the Government is not entitled to a presumption that a source is confidential within the meaning of Exemption 7(D) whenever the source provides information to the FBI in the course of a criminal investigation," it should "often" be able to identify circumstances supporting an inference of confidentiality).

<sup>47</sup> See [Attorney General's 1986 Amendments Memorandum](#) at 23.

One scenario in which the exclusion is likely to be employed is one in which the ringleaders of a criminal enterprise suspect that they have been infiltrated by a source and attempt to use the FOIA to identify that person within their criminal organization by submitting targeted FOIA requests for the records of these suspected sources.<sup>48</sup> Such requests would normally trigger a "Glomar" response, in which the agency would advise the requester that it can neither confirm nor deny the existence of law enforcement records on third parties pursuant to Exemption 7(C) of the FOIA,<sup>49</sup> thus adequately protecting any of the third parties who may actually be confidential sources.<sup>50</sup> This response will not be available, however, if the ringleaders force all participants in the criminal venture to execute privacy waivers authorizing disclosure of their files in response to third-party requests.<sup>51</sup> Absent the (c)(2) exclusion, a law enforcement agency could effectively be forced to acknowledge that a third party is considered to be a confidential source through the very invocation of Exemption 7(D)).<sup>52</sup> Likewise, if a FOIA requester seeks informant records for a deceased person, Exemption 7(C) cannot be used to protect such records, but the (c)(2) exclusion could potentially be used to prevent the release of the existence of informant records about that deceased individual, although the two courts that have opined on this issue reached differing conclusions.<sup>53</sup>

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<sup>48</sup> See [id.](#)

<sup>49</sup> See [5 U.S.C. § 552\(b\)\(7\)\(C\)](#).

<sup>50</sup> See [Attorney General's 1986 Amendments Memorandum](#) at 23.

<sup>51</sup> See [id.](#)

<sup>52</sup> See [id.](#); [Tanks](#), 1996 WL 293531, at \*5-6 (noting that purpose of (c)(2) exclusion is to "protect against the possible use of the FOIA to discover the identities of confidential informants" by placing law enforcement agency in "untenable position of having to respond [with an assertion of Exemption 7(D)] to a valid FOIA request directly targeted at a named informant's files") (dictum).

<sup>53</sup> Compare [Memphis Publ'g Co. v. FBI](#), No. 10-1878, 2012 WL 269900, at \*8-9 (D.D.C. Jan. 31, 2012) (expressing skepticism with plaintiff's argument that the (c)(2) exclusion "applies only to a narrow set of circumstances involving living individuals, cooperating in narcotics or organized crime investigations," where compliance with a FOIA request for the informant records "could endanger the integrity of an investigation or the safety of an informant[,]") noting that "the (c)(2) exclusion as written does not contain any of the limitations that plaintiffs ask the court to read into the statute [and instead] it applies 'whenever' informant records are requested in a certain manner." (dictum), with [Tanks](#) 1996 WL 293531, at \*5-6 (noting that the (c)(2) exclusion "is reserved for circumstances in which a confidential source is compelled by the criminal organization with which he is associated to surrender his privacy interests [for purposes of making a first-party FOIA request]," placing a law enforcement agency "in the untenable position of having to respond to a valid FOIA request directly targeted at a named informant's files") (dictum).



The (c)(2) exclusion is principally intended to permit an agency to escape the necessity of giving a response that would be tantamount to identifying a named party as a law enforcement source.<sup>54</sup> Any criminal law enforcement agency is authorized to treat such requested records, within the extraordinary context of such a FOIA request, as "not subject to the requirements of [the FOIA]."<sup>55</sup> As with the (c)(1) exclusion, the agency would have "no obligation to acknowledge the existence of such records in response to such request."<sup>56</sup>

By its terms, the exclusion simply becomes inapplicable if and when the individual's status as a source has been officially confirmed.<sup>57</sup> In one recent decision, the District Court for the District of Columbia found that the agency "officially confirmed" an individual's status as an informant for purposes of the (c)(2) exclusion even though the disclosure of that fact was inadvertent.<sup>58</sup> In so holding, the court expressly stated that its ruling was based on the unique circumstances of the case,<sup>59</sup> and

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<sup>54</sup> See [Attorney General's 1986 Amendments Memorandum](#) at 23-24; [Tanks](#), 1996 WL 293531, at \*6 (stating that "[t]he (c)(2) exclusion is principally intended to permit an agency to avoid giving a response that would identify a named party as a source" (citing [Attorney General's 1986 Amendments Memorandum](#) at 23)).

<sup>55</sup> See [5 U.S.C. § 552\(c\)\(2\)](#).

<sup>56</sup> S. Rep. No. 98-221, at 25 (1983).

<sup>57</sup> See [5 U.S.C. § 552\(c\)\(2\)](#); [ACLU of Mich. v. FBI](#), 734 F.3d 460, 471 (6th Cir. 2013) (dictum) (stating that "Congress intended that agencies must acknowledge the existence of documents responsive to a request about an 'officially confirmed' informant, although ultimately disclosure may be precluded by [particular FOIA exemptions]"); [Gonzalez v. FBI](#), No. 99-5789, slip op. at 18 (E.D. Cal. Aug. 11, 2000) (recognizing that subsection (c)(2) "requires an agency to treat the records as subject to the requirements of [the FOIA] if the informant's status as an informant has been officially confirmed"), *aff'd*, 14 F. App'x 916 (9th Cir. 2001); [Valencia-Lucena v. DEA](#), No. 99-0633, slip op. at 8 (D.D.C. Feb. 8, 2000) (concluding that "[s]ubsection (c)(2) is irrelevant to the resolution of this action" because the subject's status as an informant was "officially confirmed at [the requester's] criminal trial"); [Tanks](#), 1996 WL 293531, at \*5 (holding that "given the fact that the status of [the subjects] as government informants in Plaintiff's case is confirmed, the (c)(2) exclusion simply has no bearing on the instant case").

<sup>58</sup> See [Memphis Publ'g Co.](#), 2012 WL 269900, at \*9 (noting that, despite agency's claim of inadvertence, records were released as part of agency's official response to FOIA request, and were released again when they were filed as exhibits with court).

<sup>59</sup> See *id.* at 10-13 (observing that even if release was inadvertent, release involved matters of great historical public interest where harm from official confirmation would not be bodily harm but embarrassment or stigma to surviving family; further noting agency's lack of care in processing documents, failure to attempt to remedy inadvertent disclosure, and failure to file in camera declaration with court when plaintiff first raised exclusion issue).

cautioned that its ruling should not be construed as "establish[ing] a general principle that inadvertent disclosure will always constitute official confirmation."<sup>60</sup> Conversely, in a recent decision by the District Court for the Eastern District of Louisiana, the court found that an individual had not been "officially confirmed" as a source for purposes of the (c)(2) exclusion.<sup>61</sup> The court found that "official confirmation" of a source's status in a different case is not relevant to whether the (c)(2) exclusion can be applied in the case before it.<sup>62</sup>

Courts have held that even when a source has been "officially confirmed," a law enforcement agency is not thereby obligated to confirm the existence of any specific records regarding that source.<sup>63</sup> Thus, courts have not viewed the (c)(2) exclusion as automatically requiring disclosure of source-related information once a source has been

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<sup>60</sup> *Id.* at 13.

<sup>61</sup> See [Rahim v. FBI, No. 11-2850, 2013 U.S. Dist. LEXIS 76818](#), at \*40 (E.D. La. May 31, 2013) (finding that plaintiff failed to present any evidence that alleged source's status as an informant was "officially confirmed").

<sup>62</sup> *Id.* ("Any purported confirmation of [the subject's] status as an informant as to [a different] case is of no moment as to this case.").

<sup>63</sup> See [Gonzalez](#), No. 99-5789, slip op. at 18 (E.D. Cal. Aug. 11, 2000) (finding that "nowhere within [subsection (c)(2)] does it state that the privacy exemptions found at subsections (b)(6) and (b)(7) are invalidated because a person is a confirmed informant"); [Valencia-Lucena](#), No. 99-0633, slip op. at 8 (D.D.C. Feb. 8, 2000) (rejecting plaintiff's argument that when subsection (c)(2) does not apply, because subject is known DEA informant, FBI is barred from asserting "Glomar" response for any FBI records); [Tanks](#), 1996 WL 293531, at \*5-6 (holding that because "it is undisputed that the two subjects" of request were government informants in plaintiff's trial, no claim of subsection (c)(2) would have been appropriate, and yet, it still was appropriate to assert "Glomar" response for any possible unrelated law enforcement records).

officially confirmed,<sup>64</sup> so long as such information may properly be protected under a FOIA exemption.<sup>65</sup>

When a criminal law enforcement agency determines that the (c)(2) exclusion applies, it should consult with the Office of Information Policy to ensure that all aspects of the request, the potentially excludable records, and the relevant legal standards are fully analyzed before the agency invokes the (c)(2) exclusion.<sup>66</sup> As discussed below, any agency component that maintains criminal law enforcement records should have a standard notification about the existence of exclusions in all of their response letters and can respond to the remainder of the request in the usual way.<sup>67</sup>

### **The (c)(3) Exclusion**

The third of these special record exclusions pertains only to certain law enforcement records that are maintained by the FBI.<sup>68</sup> The "(c)(3) exclusion" provides as follows:

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<sup>64</sup> See [Benavides v. DEA](#), 968 F.2d 1243, 1248 (D.C. Cir. 1992) ("There is no evidence that Congress intended subsection (c)(2) to repeal or supersede the other enumerated FOIA exemptions or to require disclosure whenever the informant's status has been officially confirmed."), modified on other grounds, 976 F.2d 751, 753 (D.C. Cir. 1992); [Memphis Publ'g Co.](#), 2012 WL 269900, at \*13 (clarifying that court's determination that exclusion is inapplicable does not mean that agency must produce records, but merely that agency must review informant file and then withhold or release records as appropriate under FOIA); cf. [Valencia-Lucena](#), No. 99-0633, slip op. at 8-9 (D.D.C. Feb. 8, 2000) (holding that once subsection (c)(2) was rendered inapplicable by official confirmation of source's status as DEA source, FBI appropriately relied on Exemptions 6 and 7(C) to "Glomar" existence of any FBI records).

<sup>65</sup> [ACLU of Mich.](#), [734 F.3d](#) at 471 ("[C]ourts have concluded that Congress intended that agencies must acknowledge the existence of documents responsive to a request about an 'officially confirmed' informant, although ultimately disclosure may be precluded by [particular FOIA exemptions]"); [Benavides](#), 968 F.2d at 1248 ("The legislative history suggests, in fact, that Congress intended to permit the DEA to withhold documents under 7(C) and 7(D), even if the agency must, under subsection (c)(2), acknowledge their existence."); [Tanks](#), 1996 WL 293531, at \*6 ("Accepting the status of [two named individuals] as government informants, the FBI explained why disclosure of any information in its files unrelated to the Plaintiff and his prosecution would constitute an unwarranted invasion of personal privacy pursuant to Exemption 7(C), [5 U.S.C. § 552\(b\)\(7\)\(C\)](#).").

<sup>66</sup> See [OIP Exclusion Guidance](#).

<sup>67</sup> See [id.](#)

<sup>68</sup> See [Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act](#) 24-27 (Dec. 1987) [hereinafter [Attorney General's 1986 Amendments Memorandum](#)].

Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in [Exemption 1], the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of [the FOIA].<sup>69</sup>

This exclusion recognizes the exceptional sensitivity of the FBI's activities in the areas of foreign intelligence, counterintelligence, and international terrorism, as well as the fact that the classified files of these activities can be particularly vulnerable to targeted FOIA requests.<sup>70</sup> Sometimes, within the context of a particular FOIA request, the very fact that the FBI does or does not hold any records on a specified person or subject can itself be a sensitive fact, properly classified in accordance with the applicable executive order on the protection of national security information<sup>71</sup> and protectible under FOIA Exemption 1.<sup>72</sup> There can be situations, however, where the mere invocation of Exemption 1 to withhold such information can provide information to the requester which would have an extremely adverse effect on the government's interests.<sup>73</sup>

Congress took cognizance of this through the (c)(3) exclusion, in which it authorizes the FBI to protect itself against such harm in connection with any of its records pertaining to "foreign intelligence, or counterintelligence, or international terrorism."<sup>74</sup> The third exclusion applies to those situations where, in the context of a particular request, the very existence or nonexistence of responsive records is itself a classified fact.<sup>75</sup> By the terms of this provision, the excluded records may be treated as "not subject to the requirements of [the FOIA]" so long as their existence, within the context of the request, "remains classified information."<sup>76</sup>

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<sup>69</sup> [5 U.S.C. § 552\(c\)\(3\) \(2006 & Supp. IV 2010\)](#).

<sup>70</sup> See [Attorney General's 1986 Amendments Memorandum](#) at 25.

<sup>71</sup> See [Exec. Order No. 13,526](#), 3 C.F.R. 298 (2010).

<sup>72</sup> See [5 U.S.C. § 552\(b\)\(1\)](#); see also [Attorney General's 1986 Amendments Memorandum](#) at 25.

<sup>73</sup> See [Attorney General's 1986 Amendments Memorandum](#) at 25.

<sup>74</sup> [5 U.S.C. § 552\(c\)\(3\)](#).

<sup>75</sup> See [id.](#); see also [Attorney General's 1986 Amendments Memorandum](#) at 25 n.44 (addressing overlap with subsection (c)(1)).

<sup>76</sup> [5 U.S.C. § 552\(c\)\(3\)](#).

Additionally, it should be noted that while the statute refers to records maintained by the FBI, exceptional circumstances could possibly arise in which it would be appropriate for another component of the Department of Justice or another federal agency to invoke this exclusion jointly on a derivative basis as well.<sup>77</sup> Such a situation could occur where information in records of another component or agency is derived from FBI records which fully qualify for (c)(3) exclusion protection.<sup>78</sup> In such extraordinary circumstances, the agency processing the derivative information should consult with the FBI regarding the possible joint invocation of the exclusion in order to avoid a potentially damaging inconsistent response.<sup>79</sup>

Notably, in the single reported case in which a plaintiff alleged that an agency improperly excluded records on the basis of the (c)(3) exclusion, the court upheld the agency's action without confirming whether the exclusion was used or not.<sup>80</sup>

### **Procedural Considerations**

Several procedural considerations regarding the implementation and operation of these special record exclusions should be noted. When an agency reaches the judgment that it is necessary to employ an exclusion, it should do so as a specific official determination that is reviewed carefully by appropriate supervisory agency officials.<sup>81</sup> In addition, as noted above, the Department of Justice's recently issued guidance on implementation of the exclusion provisions states that agencies contemplating the possible use of an exclusion "should consult first with the Office of Information Policy."<sup>82</sup> Furthermore, the particular records covered by an exclusion action should be concretely and carefully identified and segregated from any responsive records that are to be processed according to ordinary procedures.<sup>83</sup>

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<sup>77</sup> See [Attorney General's 1986 Amendments Memorandum](#) at 25 n.45 (explaining that although this exclusion was created primarily for use by the FBI, "it is conceivable that records derived from such FBI records might be maintained elsewhere, potentially in contexts in which the harm sought to be prevented by this exclusion is no less threatened").

<sup>78</sup> See [id.](#)

<sup>79</sup> See [id.](#)

<sup>80</sup> See [ACLU of Mich. v. FBI, 734 F.3d 460, 472](#) (6th Cir. 2013) (affirming district court's finding that, if agency used (c)(3) exclusion, its use "was and remains amply justified," but refusing to confirm or deny whether in fact such exclusion was used).

<sup>81</sup> See [Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act](#) 27 (Dec. 1987) [hereinafter [Attorney General's 1986 Amendments Memorandum](#)].

<sup>82</sup> See DOJ, OIP Guidance: [Implementing FOIA's Statutory Exclusion Provisions](#) [hereinafter OIP Exclusion Guidance] (2012).

<sup>83</sup> See [Attorney General's 1986 Amendments Memorandum](#) at 27.

In an effort "to bring greater accountability and transparency" to this process, the Department of Justice's newly issued exclusion guidance requires that any FOIA response made by an agency component that maintains criminal law enforcement records should specifically advise the requester that the FOIA excludes certain categories of records from its provisions.<sup>84</sup> It should further advise the requester that the response only addresses those records that are subject to the FOIA.<sup>85</sup> To prevent disclosure of the fact that an exclusion was invoked in any particular case while ensuring that requesters are made aware of the exclusions generally, this notification should be provided in every FOIA response made by the agency component, whether or not an exclusion was actually invoked in a particular instance.<sup>86</sup> The text of this newly required notification is as follows: "For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist."<sup>87</sup>

This new notification requirement will place requesters on notice regarding three important facts: 1) the existence of the three statutory exclusions; 2) the fact that excluded records are not subject to the FOIA's requirements; and 3) the fact that any excluded records "are not part of the response being provided by the agency."<sup>88</sup>

The new exclusion guidance also requires that agencies publicly report the number of times that exclusions were employed by the agency during each fiscal year.<sup>89</sup> This new reporting requirement is part of the Chief FOIA Officer submitted annually by each agency.<sup>90</sup>

Lastly, the new exclusion guidance requires agencies to provide greater transparency regarding the government's use of exclusions by ensuring that all agency websites contain a description of each of the three statutory exclusions.<sup>91</sup> This ensures

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<sup>84</sup> See [OIP Exclusion Guidance](#).

<sup>85</sup> See [id.](#)

<sup>86</sup> See [id.](#)

<sup>87</sup> [Id.](#)

<sup>88</sup> [Id.](#)

<sup>89</sup> [Id.](#)

<sup>90</sup> [Id.](#)

<sup>91</sup> [Id.](#)

that any requester who reviews an agency's website before making a FOIA request will be placed on notice regarding the existence of the statutory exclusions.<sup>92</sup>

Agencies should prepare in advance a uniform procedure to handle administrative appeals and court challenges that seek review of the possibility that an exclusion was employed in a given case.<sup>93</sup> In responding to administrative appeals, agencies should accept any clear request for administrative appellate review of the possible use of an exclusion and specifically address it in evaluating and responding to the appeal.<sup>94</sup>

In the exceptional case in which an exclusion was in fact invoked, the appellate review authority should examine the correctness of that action and come to a judgment as to the exclusion's continued applicability as of that time.<sup>95</sup> In the event that an exclusion is found to have been improperly employed or to be no longer applicable, the appeal should be remanded for prompt conventional processing of all formerly excluded records, with the requester advised accordingly.<sup>96</sup> When it is determined either that an exclusion was properly employed or that, as in the overwhelming bulk of cases, no exclusion was used, the result of the administrative appeal should be, by all appearances, the same: The requester should be specifically advised that this aspect of his appeal was reviewed and found to be without merit.<sup>97</sup>

Such administrative appeal responses, of course, necessarily must be stated in such a way that does not indicate whether an exclusion was in fact invoked.<sup>98</sup> Moreover, in order to preserve the exclusion mechanism's effectiveness, requesters who inquire in any way whether an exclusion has been used should routinely be advised that it is the

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<sup>92</sup> [Id.](#)

<sup>93</sup> See generally [Attorney General's 1986 Amendments Memorandum](#) at 27-29.

<sup>94</sup> See [Attorney General's 1986 Amendments Memorandum](#) at 29 (superseded in part by [FOIA Update, Vol. XII, No. 2](#), at 5 (noting that in wake of [Oglesby](#) decision "no records" responses constitute adverse determinations for which agencies must provide administrative appeal rights)).

<sup>95</sup> See [id.](#) at 28.

<sup>96</sup> See [id.](#); see also [Barnard v. DHS](#), 598 F. Supp. 2d 1, 4 n.4 (D.D.C. 2009) (noting that agency initially applied (c)(1) exclusion, but then determined it was no longer applicable and asserted exemptions).

<sup>97</sup> See [Attorney General's 1986 Amendments Memorandum](#) at 28-29.

<sup>98</sup> See [id.](#) at 29.

agency's standard policy to refuse to confirm or deny that an exclusion was employed in any particular case.<sup>99</sup>

Exclusion issues in court actions must be handled with similarly careful and thoughtful preparation.<sup>100</sup> First, it need be recognized that any judicial review of a suspected exclusion determination must of course be conducted *ex parte*, based upon an *in camera* court filing submitted directly to the judge.<sup>101</sup> Second, it is essential to the integrity of the exclusion mechanism that requesters not be able to determine whether an exclusion was employed at all in a given case based upon how any case is handled in court.<sup>102</sup> Thus, it is critical that the *in camera* defenses of exclusion issues raised in FOIA cases occur not merely in those cases in which an exclusion actually was employed and is in fact being defended.<sup>103</sup>

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<sup>99</sup> See [id.](#) at 29 & n.52; [Steinberg v. DOJ](#), No. 93-2409, 1997 WL 349997, at \*1 (D.D.C. June 18, 1997) (refusing to "confirm[] or deny[] the existence of any exclusion . . . and conclud[ing] that if an exclusion was invoked, it was and remains amply justified").

<sup>100</sup> See [Attorney General's 1986 Amendments Memorandum](#) at 29.

<sup>101</sup> See [id.](#); see also, e.g., [Light v. DOJ](#), No. 12-1660, 2013 WL 3742496, at \*12 (D.D.C. July 17, 2013) (noting that agency properly complied with its exclusion policy by filing *ex parte* *in camera* declaration in response to plaintiff's allegation that agency employed exclusion to withhold records from plaintiff); [Rahim v. FBI](#), No. 11-2850, 2013 U.S. Dist. LEXIS 76818, at \*38-39 (E.D. La. May 31, 2013) (stating that agency "is permitted to file an *in camera* declaration, which explains either that no exclusion was invoked or that the exclusion was invoked appropriately"); [ACLU of N.J. v. DOJ](#), No. 11-2553, 2012 WL 4660515, at \*5 (D.N.J. Oct. 2, 2012) (noting that if plaintiff alleges that agency invoked exclusion, agency may file *in camera* declaration explaining that exclusion was properly invoked or was not invoked at all), [aff'd](#), 733 F.3d 526 (3d Cir. 2013); [Steinberg](#), 1997 WL 349997, at \*1 (approving use of agency *in camera* declaration where plaintiff "alleged that certain requested information may have been excluded pursuant to [sub]section 552(c)"); cf. [Islamic Shura Council of S. Cal. v. FBI](#), 779 F. Supp. 2d 1114, 1124-25 (C.D. Cal. 2011) (finding that while exclusion provisions allow agencies to withhold records from FOIA requesters without disclosing basis for doing so, agencies cannot withhold such information from courts).

<sup>102</sup> See [Attorney General's 1986 Amendments Memorandum](#) at 29.

<sup>103</sup> See [id.](#); see also [ACLU of Mich. v. FBI](#), 734 F.3d 460, 470-71 (6th Cir. 2013) (explaining government's standard litigation practice of using *in camera* declarations to address allegations of use of FOIA exclusions and importance of handling such claims consistently whether or not agency actually invoked exclusion so that information sought to be protected by exclusion is not inadvertently revealed (citing [Attorney General's 1986 Amendments Memorandum](#))); [Light](#), 2013 WL 3742496, at \*12 ("[I]t is vital to the integrity of the application of exclusions that requesters not be able to deduce whether an exclusion was or was not employed at all in any given case." (quoting agency declaration)).



Accordingly, it is the government's standard litigation policy in the defense of FOIA lawsuits that, whenever a FOIA plaintiff raises a distinct claim regarding the suspected use of an exclusion, the government will routinely submit an in camera declaration addressing that claim, one way or the other.<sup>104</sup> When an exclusion was in fact employed, the correctness of that action will be justified to the court.<sup>105</sup> When an exclusion was not in fact employed, the in camera declaration will state simply that it is being submitted to the court so as to mask whether or not an exclusion is being employed, thus preserving the integrity of the exclusion process overall.<sup>106</sup> In either case, the government will of course urge the court to issue a public decision which does not indicate whether it is or is not an actual exclusion case.<sup>107</sup> Such a public decision, like an administrative appeal determination of an exclusion-related request for review, should specify only that a full review of the claim was had and that, if an exclusion was in fact employed, it was, and remains, amply justified.<sup>108</sup> In a recently decided case, the

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<sup>104</sup> See [Attorney General's 1986 Amendments Memorandum](#) at 30; see also, e.g., [ACLU of N.J. v. FBI, 733 F.3d 526](#), 534 (3d Cir. 2013) (observing that courts have "generally approved" government's practice of filing in camera declaration to address allegation that it employed exclusion in particular case); [ACLU of Mich., 734 F.3d](#) at 470-71 (observing that "'government's standard litigation policy'" is to submit in camera declaration when plaintiff asserts that exclusion was used (quoting [Attorney General's 1986 Amendments Memorandum](#))); [Light, 2013 WL 3742496](#), at \*12 (citing [Attorney General's 1986 Amendments Memorandum](#)); [Steinberg v. DOJ](#), No. 91-2740, 1993 WL 524528, at \*2 (D.D.C. Dec. 2, 1993) (noting that agency "volunteered an in camera submission related to the allegation of covert reliance on § 552(c)").

<sup>105</sup> See [Attorney General's 1986 Amendments Memorandum](#) at 30; see also [ACLU of Mich., 734 F.3d](#) at 470-71 (noting that agency's standard practice is to use in camera declaration to address plaintiff's claim that exclusion was used (citing [Attorney General's 1986 Amendments Memorandum](#))); [Light, 2013 WL 3742496](#), at \*12 (noting that when exclusion has been used, in camera declaration should state that it was justifiably used).

<sup>106</sup> See [Attorney General's 1986 Amendments Memorandum](#) at 30; see also [Light, 2013 WL 3742496](#), at \*12 (referencing DOJ policy and noting that "where a § 552(c) exclusion is used, the in camera declaration asserts that it was justified; where a § 552(c) exclusion is not used, the in camera declaration states that fact").

<sup>107</sup> See [Attorney General's 1986 Amendments Memorandum](#) at 30; see also [ACLU of Mich., 734 F.3d](#) at 471 (recognizing that court's public decision should not reveal whether exclusion was used (citing [Attorney General's 1986 Amendments Memorandum](#))).

<sup>108</sup> See [Attorney General's 1986 Amendments Memorandum](#) at 30; see also, e.g., [ACLU of Mich., 734 F.3d](#) at 472; [Light, 2013 WL 3742496](#), at \*12 (finding that "any . . . exclusion, if employed, was amply justified"); [Rahim, 2013 U.S. Dist. LEXIS 76818](#), at \*43 (finding that "if an exclusion was in fact employed, it was, and continues to remain, amply justified"); [ACLU of N.J., 2012 WL 4660515](#), at \*5 (concluding, based on the agency's in camera declaration, that "without confirming or denying the existence of any exclusion . . . if an exclusion was invoked, it was and remains amply justified"); [Steinberg, 1997 WL 349997](#), at \*1 (where plaintiff alleged possible use of exclusion, "without confirming or denying the

Court of Appeals for the Sixth Circuit noted that if an agency has invoked an exclusion and the court does not find the agency's declaration to be adequate, the court may then order in camera inspection of the underlying documents at issue.<sup>109</sup> The Sixth Circuit noted that "[a]s public recognition of [such an] order would reveal that an exclusion was invoked, its existence [would be] kept secret from the public."<sup>110</sup>

In that case, the Sixth Circuit rejected plaintiff's proposal that, rather than the government filing an in camera declaration, both parties should file public declarations addressing the hypothetical question of whether any excluded records existed, and if so, whether they would properly fall under the FOIA's exclusion provisions.<sup>111</sup> The court observed that such a procedure "is neither workable nor protective of government secrets, and would provide less effective review than does the district judge's in camera review."<sup>112</sup> The Court of Appeals for the Third Circuit recently agreed with the Sixth Circuit, finding that no legal authority compelled such a procedure for the litigation of exclusion matters.<sup>113</sup> The Third Circuit also opined that it was not "convinced that adopting" the proposed procedure "would be wise from a policy perspective," observing that "this procedure would do little to facilitate judicial review."<sup>114</sup> The court explained that the government's long-standing in camera review procedure provides for "more meaningful judicial review" because the court reviews the actual excluded information (if any) rather than "adjudicating [o]pen ended hypothetical questions."<sup>115</sup>

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existence of any exclusion, the Court finds and concludes [after review of agency's in camera declaration] that if an exclusion was invoked, it was and remains amply justified").

<sup>109</sup> See [ACLU of Mich.](#), 734 F.3d at 471.

<sup>110</sup> See *id.*

<sup>111</sup> See *id.* at 9-10.

<sup>112</sup> *Id.* at 9.

<sup>113</sup> See [ACLU of N.J.](#), 733 F.3d at 534 (agreeing with government's long-standing litigation practice of filing in camera declarations to address allegations of use of exclusions, noting that courts have "generally approved" this practice and rejecting argument that legislative history supported proposed approach, finding evidence for that claim to be "inconclusive at best" (citing [ACLU of Mich.](#), 734 F.3d at 471-72)).

<sup>114</sup> *Id.* at 534-35 (reciting concerns articulated by Sixth Circuit regarding plaintiff's proposed "Glomar-like" procedure including fact that such litigation "will consist of little more than speculation," with the agency "then tasked with responding to these shots in the dark, a strange and difficult task given that few are likely to be tethered to reality, and fashioning a response is fraught with concerns of accidentally disclosing the existence or nonexistence of secret information" (citing [ACLU of Mich.](#), 734 F.3d at 472)).

<sup>115</sup> *Id.* at 535 (quoting [ACLU of Mich.](#), 734 F.3d at 472).