Procedural Requirements

The Freedom of Information Act requires federal agencies to make their records promptly available to any person who makes a proper request for them.[1] To provide a general overview of the Act's procedural requirements, this section first will discuss President Obama's FOIA Memorandum,[2] Attorney General Holder's FOIA Guidelines,[3] and the OPEN Government Act of 2007[4] amendments to the FOIA, followed by a roughly chronological discussion of how a typical FOIA request is processed -- from the point of determining whether an entity in receipt of a request is subject to the FOIA in the first place to the review of an agency's initial decision regarding a FOIA request on administrative appeal. (The subject of fees under the Act is discussed more fully and separately under Fees and Fee Waivers, below.) In administering the Act's procedural requirements, agencies should remember President Obama's pronouncement that "[a] democracy requires accountability, and accountability requires transparency."[5] Accordingly, agencies should administer the FOIA "with a clear presumption: [i]n the face of doubt, openness prevails."[6]

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[1] 5 U.S.C. § 552(a)(3)(A) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (providing that "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person"). But see id. at § 552(a)(3)(E) (prohibiting certain agency FOIA disclosures to foreign governments or representatives of such governments); *FOIA Post*, "FOIA Amended by Intelligence Authorization Act" (posted 12/23/02) (advising on 2002 amendment of subsection (a)(3)).

[2] Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act [hereinafter President Obama's FOIA Memorandum], 74 Fed. Reg. 4683 (Jan. 21, 2009).

[3] Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009), available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf.

[4] Pub. L. No. 110-175, 121 Stat. 2524.

[5] President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683; see *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

[6] President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683.

President Obama's FOIA Memorandum
and Attorney General Holder's FOIA Guidelines

The President and Attorney General have issued memoranda to all agencies emphasizing that the FOIA reflects a "profound national commitment to ensuring an open Government" and directing agencies to "adopt a presumption in favor of disclosure."[7] On his first full day in office, President Obama called for federal executive departments and agencies to administer the FOIA so as to achieve an unprecedented level of openness and transparency in the work of the Executive Branch, stating that agencies should administer the FOIA with "a clear presumption: [i]n the face of doubt, openness prevails."[8] The President directed agencies not to withhold information "merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."[9] He instructed agencies to respond to requests "promptly and in a spirit of cooperation."[10] In addition, the President encouraged agencies to proactively release records, without waiting for specific requests, so that citizens can be informed "about what is known and done by their [g]overnment."[11] The President directed the Attorney General to issue FOIA Guidelines for the Executive Branch that "reaffirm[] the commitment to accountability and transparency."[12]

On March 19, 2009, Attorney General Eric H. Holder, Jr. issued new FOIA guidelines for the Executive Branch.[13] The Attorney General's FOIA Guidelines renew the commitment to open government that the President proclaimed, and underscore the importance of effective FOIA administration.[14] Attorney General Holder reiterated that agencies should administer

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[7] Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) [hereinafter President Obama's FOIA Memorandum]; accord Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009) [hereinafter Attorney General Holder's FOIA Guidelines], available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf; see *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

[8] President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683.

[9] Id.

[10] Id.

[11] Id.

[12] Id.

[13] Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf.

[14] Id. at 1-2.

the FOIA with a presumption of openness.[15] He encouraged agencies to make discretionary releases when appropriate, and to make partial disclosures of records when full disclosures are not possible.[16] Significantly, he emphasized that "the responsibility for effective FOIA administration belongs to all of us – it is not merely a task assigned to an agency's FOIA staff," and he noted that "[i]mproving FOIA performance requires the active participation of agency Chief FOIA Officers."[17] The Attorney General stated that "[u]nnecessary bureaucratic hurdles have no place in the 'new era of open [g]overnment' that the President has proclaimed,"[18] and he noted that the "[t]imely disclosure of information is an essential component of transparency."[19] He also called on agencies to "readily and systematically post information online in advance of any public request."[20] To ensure effective FOIA administration, the Attorney General directed agency Chief FOIA Officers to report their improvement activity to the Department of Justice each year pursuant to forthcoming reporting guidelines from the Department's Office of Information Policy.[21]

In issuing these new guidelines, Attorney General Holder rescinded the October 12, 2001 Attorney General Memorandum on the FOIA,[22] and he established a new "foreseeable harm" standard for defending agency decisions to withhold information.[23] Under this new standard, the Department of Justice will defend an agency's denial of a FOIA request "only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."[24] In keeping with the President's commitment to openness and with the Attorney General's FOIA Guidelines, agencies must now include the "foreseeable harm" standard as part of the FOIA analysis at the initial request stage and the administrative appeal stage.[25]

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[15] Id.

[16] Id. at 1.

[17] Id. at 2.

[18] Id.

[19] Id. at 3.

[20] Id.

[21] Id.

[22] Id. at 1.

[23] Id. at 2.

[24] Id.

[25] See id. at 1(stating that "[a]n agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption"); *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (providing guidance to agencies on implementing new transparency standards).

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 practices that assist requesters and facilitate the processing of FOIA requests.[26] Among these practices, the Act requires that agencies assign request tracking numbers, provide request status information, and maintain a FOIA Public Liaison to assist requesters.[27]

Specifically, agencies must assign, and provide to requesters, an individualized tracking number for any request that will take longer than ten days to process.[28] 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.[29]

The OPEN Government Act statutorily mandated 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."[30] Likewise, the role of the Chief FOIA Officer is now statutorily mandated. 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.[31]

In addition, the OPEN Government Act established a new office within NARA to "offer mediation services" and it directed GAO to audit agencies on their implementation of the FOIA.[32] The OPEN Government Act set forth extensive new reporting requirements for agencies' annual FOIA reports[33] and established new reporting requirements for the Attorney

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[26] See OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also *FOIA Post*, "Congress Passes Amendments to the FOIA" (posted 1/9/08) (summarizing substantive sections of OPEN Government Act).

[27] OPEN Government Act §§ 6, 7, 10 (to be codified at 5 U.S.C. § 552(a)(6)(B)(ii), (a)(7), (l)).

[28] Id. § 7; see also *FOIA Post*, "OIP Guidance: Assigning Tracking Numbers and Providing Status Information for Requests" (posted 11/18/08).

[29] OPEN Government Act § 7; see also *FOIA Post*, "OIP Guidance: Assigning Tracking Numbers and Providing Status Information for Requests" (posted 11/18/08).

[30] OPEN Government Act § 10; see also id. § 6; *FOIA Post* "OIP Guidance: New Limitations on Assessing Fees" (posted 11/18/08).

[31] OPEN Government Act § 10.

[32] Id.

[33] Id. § 8 (to be codified at 5 U.S.C. § 552(e)); see also *FOIA Post* "2008 Guidelines for Agency Preparation of Annual FOIA Reports" (posted 5/22/08).

General and the Special Counsel concerning referrals to the Special Counsel.[34] (For a discussion of these Attorney General and Special Counsel reporting requirements, see Litigation Considerations, Referral to Special Counsel and Limitations on Filing Frivolous Suits, below).

The OPEN Government Act also amended the definition of agency records and established new rules concerning FOIA's time limits, routing of misdirected requests, assessment of fees, and document marking.[35] (For a discussion of these provisions, see Procedural Requirements, "Agency Records;" Procedural Requirements, Time Limits; and Procedural Requirements, "Reasonably Segregable" Obligation, below).

Finally, the Act statutorily mandated the definition of a "representative of the news media"[36] for fee purposes, and the definition of a "substantially prevail[ing]" party for attorney fees purposes.[37] (For a discussion of these provisions, see Fees and Fee Waivers, Fees, Requester Categories; and Attorney Fees, Eligibility, below).

Entities Subject to the FOIA

Agencies within the Executive Branch of the federal government, including independent regulatory agencies and some components within the Executive Office of the President, are subject to the provisions of the FOIA.[38] The FOIA does not, however, apply to entities that "are neither chartered by the federal government [n]or controlled by it."[39]

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[34] OPEN Government Act § 5 (to be codified at 5 U.S.C. § 552(a)(4)(F)).

[35] Id. §§ 6, 9, 12 (to be codified at 5 U.S.C. § 552(a)(6)(A), (b), (f)(2)).

[36] Id. § 3 (to be codified at 5 U.S.C. § 552(a)(4)(A)).

[37] Id. § 4 (to be codified at 5 U.S.C. § 552(a)(4)(E)).

[38] 5 U.S.C. § 552(f)(1) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see, e.g., Energy Research Found. v. Def. Nuclear Facilities Safety Bd., 917 F.2d 581, 584-85 (D.C. Cir. 1990) (determining that Defense Nuclear Facilities Safety Board is an agency because its functions include, inter alia, "investigat[ing], evaluat[ing] and recommend[ing]").

[39] H.R. Rep. No. 93-1380, at 14 (1974), 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) Source Book: Legislative History, Texts, and Other Documents at 231-32 (1975); see Forsham v. Harris, 445 U.S. 169, 179-80 (1980) (holding that private grantee of federal agency is not itself subject to FOIA); Missouri v. U.S. 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 Research Group v. HEW, 668 F.2d 537, 543-44 (D.C. Cir. 1981) (stating that medical peer review committees are not agencies 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 an agency under FOIA); Holland v. FBI, No. 04-2593, slip

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Accordingly, state and local governments,[40] foreign governments,[41] municipal entities,[42] the

[39](...continued)
op. at 8 (N.D. Ala. June 30, 2005) (citing Irwin Mem'l Blood Bank, 640 F. Supp. 2d 1051) (same); 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); Leytman v. N.Y. Stock Exch., No. 95 CV 902, 1995 WL 761843, at *2 (E.D.N.Y. Dec. 6, 1995) (relying on Indep. Investor Protective League v. N.Y. Stock Exch., 367 F. Supp. 1376, 1377 (S.D.N.Y. 1973), to find that although "[t]he Exchange is subject to significant federal regulation . . . it is not an agency of the federal government"); Rogers v. U.S. Nat'l Reconnaissance Office, No. 94-B-2934, slip op. at 7 (N.D. Ala. Sept. 13, 1995) (observing that "[t]he degree of government involvement and control over [private organizations which contracted with government to construct office facility is] insufficient to establish companies as federal agencies for purposes of the FOIA"). But see Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat'l R.R. Passenger Corp., 376 F.3d 1270, 1277 n.5 (11th Cir. 2004) (citing 49 U.S.C. § 24301(e) (2006)) (noting that "[a]lthough [defendant] Amtrak is not a federal agency, it must comply with FOIA's requirements"); Cotton v. Adams, 798 F. Supp. 22, 24 (D.D.C. 1992) (holding that Smithsonian Institution is agency under FOIA on basis that it "performs governmental functions as a center of scholarship and national museum responsible for the safe-keeping and maintenance of national treasures"), questioned on appeal of attorney fees award sub nom. Cotton v. Heyman, 63 F.3d 1115, 1119 & n.2, 1123 (D.C. Cir. 1995) (refusing to examine district court's agency status holding due to doctrine of direct estoppel but noting, in context of analyzing entitlement to attorney fees, 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 an agency for purposes of Privacy Act of 1974 (5 U.S.C. § 552a (2006)), as it is neither "establishment of the [E]xecutive [B]ranch" nor "government-controlled corporation").

[40] See, e.g., Moreno v. Curry, No. 06-11277, 2007 WL 4467580, at *1-2 (5th Cir. Dec. 20, 2007) (unpublished disposition) (affirming district court finding that FOIA does not apply to state or municipal agencies); Dunleavy v. New Jersey, 251 F. App'x 80, 83 (3d Cir. 2007) (unpublished disposition) (stating that FOIA does not impose obligations on state agencies), cert. denied, 128 S. Ct. 1483 (2008); Blankenship v. Claus, 149 F. App'x 897, 898 (11th Cir. Sept. 7, 2005); Lau v. Sullivan County Dist. Att'y, 201 F.3d 431 (2d Cir. Nov. 12, 1999) (unpublished disposition); Martinson v. DEA, No. 96-5262, 1997 WL 634559, at *1 (D.C. Cir. July 3, 1997); see also Willis v. DOJ, 581 F. Supp. 2d 57, 67-68 (D.D.C. 2008) (Missouri Police Department); Miller v. S.C. Dep't of Prob., Parole, and Pardon Servs., No. 08-3836, 2008 WL 5427754, at *3 (D.S.C. Dec. 31, 2008) (state agencies or departments); Rayyan v. Sharpe, No. 08-324, 2008 WL 4601427, at *3 (W.D. Mich. Oct. 15, 2008) (state agencies); Foley v. Village of Weston, No. 06-350, 2006 WL 3449414, at *5 (W.D. Wis. Nov. 28, 2006) (local county government, sheriff's department, and sheriff); Brown v. City of Detroit, No. 05-60162, 2006 WL 3196297, at *1 (E.D. Mich. Sept. 11, 2006) (magistrate's recommendation) (state or local governments), adopted, No. 05-60162, 2007 WL 1796228 (E.D. Mich. Oct. 30, 2006); Gabbard v. Hall County, Ga., No. 06-37, 2006 U.S. Dist. LEXIS 56662, at *4 (M.D. Ga. Aug. 14, 2006) (state or local agencies); (continued...)

courts,[43] other entities of the Judicial Branch,[44] Congress,[45] private citizens and corporations,[46]

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Davis v. Johnson, No. 05-2060, 2005 U.S. Dist. LEXIS 12475, at *1 (N.D. Cal. June 20, 2005) (state or county agency); Dipietro v. EOUSA, 357 F. Supp. 2d 177, 182 (D.D.C. 2004) (citing Beard v. DOJ, 917 F. Supp. 61, 63 (D.D.C. 1996)) (county sheriff's department); Mount of Olives Paralegals v. Bush, No. 04-C-620, 2004 U.S. Dist. LEXIS 8085, at *6 (N.D. Ill. May 6, 2004) (state agencies); McClain v. DOJ, No. 97-C-0385, 1999 WL 759505, at *2 (N.D. Ill. Sept. 1, 1999) (state attorney general), aff'd, 17 F. App'x 471 (7th Cir. 2001); Beard v. DOJ, 917 F. Supp. 61, 63 (D.D.C. 1996) (District of Columbia Police Department).

[41] Moore v. United Kingdom, 384 F.3d 1079, 1089-90 (9th Cir. 2004) (finding that "[n]o cause of action lies under FOIA against a foreign government").

[42] See Nelson v. City of Plano, No. 06-102, 2007 WL 1438694, at *2 (E.D. Tex. May 14, 2007) (dismissing FOIA claims against municipal corporation); Cruz v. Superior Court Judges, No. 04-1103, 2006 WL 547930, at *1 (D. Conn. Mar. 1, 2006) (municipal police department); Jones v. City of Indianapolis, 216 F.R.D. 440, 443 (S.D. Ind. 2003) (municipal agencies).

[43] See, e.g., Megibow v. Clerk of the U.S. Tax Court, 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 Freedom of Information Act"); United States v. Choate, 102 F. App'x 634, 635 (10th Cir. 2004) (federal courts); United States v. Mitchell, No. 03-6938, 2003 WL 22999456, at *1 (4th Cir. Dec. 23, 2003) (same) (non-FOIA case); United States v. Alcorn, 6 F. App'x 315, 317 (6th Cir. 2001) (same) (non-FOIA case); Gaydos v. Mansmann, No. 98-5002, 1998 WL 389104, at *1 (D.C. Cir. June 24, 1998) (per curiam); Warth v. DOJ, 595 F.2d 521, 523 (9th Cir. 1979); United States v. Neal, No. 90-0003, 2007 U.S. Dist. LEXIS 10176, at *2 (D. Ariz. Feb. 13, 2007) (federal district courts); Scott v. United States, No. 98-CR-00079, 2006 WL 4031428, at *1 (E.D.N.C. May 9, 2006) (federal courts), aff'd, 202 F. App'x. 623, 624 (4th Cir. Oct. 3, 2006) (unpublished disposition); Benjamin v. U.S. Dist. Court, No. 05-941, 2005 WL 1136864, at *1 (M.D. Pa. May 13, 2005) (same); Carter v. U.S. 6th Circuit of Appeal, No. 05-134, 2005 WL 1138828, at *1 (E.D. Tenn. May 12, 2005).

[44] See Andrade v. U.S. Sentencing Comm'n, 989 F.2d 308, 309-10 (9th Cir. 1993) (Sentencing Commission, as independent body within judicial branch, is not subject to FOIA.); Thornton-Bey v. Admin. Office of U.S. Courts, No. 09-0958, 2009 WL 1451571, at *1 (D.D.C. May 21, 2009) (finding that Administrative Office of U.S. Courts is part of judicial branch and not agency under FOIA); Banks v. DOJ, 538 F. Supp. 2d 228, 231-32 (D.D.C. Mar. 16, 2008) (U.S. Probation Office and Administrative Office of the U.S. Courts); 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) (federal grand jury); Woodruff v. Office of the Pub. Defender, No. 03-791, slip op. at 3 (N.D. Cal. June 3, 2004) (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.
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and presidential transition teams[47] are not subject to the FOIA.

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2003); United States v. Ford, No. 96-00271-01, 1998 WL 742174, at *1 (E.D. Pa. Oct. 21, 1998) ("The Clerk of Court, as 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.").

[45] See, e.g., United We Stand Am. v. IRS, 359 F.3d 595, 597 (D.C. Cir. 2004) ("The Freedom of Information Act does not cover congressional documents."); Dow Jones & Co. v. DOJ, 917 F.2d 571, 574 (D.C. Cir. 1990) (holding that Congress is not an agency for any purpose under FOIA); Dunnington v. DOD, No. 06-0925, 2007 WL 60902, at *1 (D.D.C. Jan. 8, 2007) (ruling that U.S. Senate and House of Representatives are not agencies under FOIA); see also Mayo v. U.S. Gov't Printing Office, 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); Owens v. Warner, No. 93-2195, slip op. at 1 (D.D.C. Nov. 24, 1993) (ruling that office of Senator John Warner is not subject to FOIA), summary affirmance granted, No. 93-5415, 1994 WL 541335 (D.C. Cir. May 25, 1994).

[46] See, e.g., Henderson v. Office & Prof'l Employees Int'l Union, 143 F. App'x 741, 744 (9th Cir. 2005) (finding that "district court properly dismissed [FOIA claim] because the defendants are not 'agencies' and therefore cannot be held liable under the FOIA"); Henderson v. Sony Pictures Entm't, Inc., 135 F. App'x 934, 935 (9th Cir. 2005) (same); Mitchell, 2003 WL 22999456, at *1 (private attorney and law firms); In re Olsen, No. UT-98-088, 1999 Bankr. LEXIS 791, at *11 (B.A.P. 10th Cir. June 24, 1999) (bankruptcy trustee); Buemi v. Lewis, No. 94-4156, 1995 WL 149107, at *2 (6th Cir. Apr. 4, 1995) (concluding that FOIA applies only to federal agencies and not to private individuals); Jackson v. Ferrell, No. 09-00025, 2009 U.S. Dist. LEXIS 24893, at *3 (E.D. Mo. Mar. 25, 2009) (finding that federal attorney is not an agency); Montgomery v. Sanders, No. 07-470, 2008 WL 5244758, at *6 (S.D. Ohio Dec. 15, 2008) (analyzing defense contractor's relationship with agency and finding that contractor is not "government-controlled corporation" subject to FOIA); Few v. Liberty Mut. Ins. Co., 498 F. Supp. 2d 441, 452 (D.N.H. 2007) (private corporations and individuals); Furlong v. Cochran, No. 06-05443, 2006 WL 3254505, at *1 (W.D. Wash. Nov. 9, 2006) (lawyer and law firm); Torres v. Howell, No. 03-2227, 2004 U.S. Dist. LEXIS, at *8 (D. Conn. Dec. 6, 2004) (private business and nonfederal attorney); Allnutt v. DOJ, 99 F. Supp. 2d 673, 678 (D. Md. 2000) (holding that records possessed by private trustee acting as agent of U.S. Trustee are not "agency records" subject to FOIA), aff'd per curiam sub nom. Allnut v. Handler, 8 F. App'x 225 (4th Cir. 2001); Simon v. Miami County Incarceration Facility, No. 05-191, 2006 WL 1663689, at *1 (S.D. Ohio May 5, 2006) (communications company); Germosen v. Cox, No. 98 Civ. 1294, 1999 WL 1021559, at *20 (S.D.N.Y. Nov. 9, 1999) (private individuals); Allnutt v. U.S. Trustee, Region Four, No. 97-02414, slip op. at 6 (D.D.C. July 31, 1999) (holding private trustee of bankruptcy estates is not subject to FOIA even though trustee "cooperates [with] and submits regular reports to the United States Trustee," who is subject to FOIA), appeal dismissed for lack of jurisdiction, No. 99-5410 (D.C. Cir. Feb. 2, 2000).

[47] See Ill. Inst. for Continuing Legal Educ. v. U.S. Dep't of Labor, 545 F. Supp. 1229, 1231-33 (N.D. Ill. 1982); cf. Wolfe v. HHS, 711 F.2d 1077, 1079, 1082 (D.C. Cir. 1983) (dictum) (treating presidential transition team as not agency subject to FOIA and citing with approval Ill. Inst., (continued...)

Offices within the Executive Office of the President that lack "substantial independent authority" and whose functions are limited to advising and assisting the President also do not fall within the definition of "agency."[48] Such offices include the Offices of the President and of the Vice President, as well as their respective staffs.[49] The Court of Appeals for the District of Columbia Circuit illustrated this functional definition of "agency" when it held that the former Presidential Task Force on Regulatory Relief -- chaired by the Vice President and composed of several cabinet members -- was not an agency subject to the FOIA because the cabinet members acted not as heads of their departments "but rather as the functional equivalents of assistants to the President."[50]

Under this functional definition of "agency," however, Executive Branch entities whose responsibilities exceed merely advising and assisting the President generally are considered

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[47](...continued)
545 F. Supp. at 1231-33).

[48] Citizens for Responsibility & Ethics in Washington v. Office of Administration, 566 F.3d 219, 221-24 (D.C. Cir. 2009) (citing Armstrong v. Executive Office of the President, 90 F.3d 553, 558 (D.C. Cir. 1996), and Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980)) (holding that Office of Administration is not an agency under FOIA as "everything [it] does is directly related to the operational and administrative support of the work of the President and his [Executive Office of the President] staff"); see S. Conf. Rep. No. 93-1200, at 14 (1974), reprinted in 1974 U.S.C.C.A.N. 6285, 6293; see also Judicial Watch, Inc. v. DOE, 412 F.3d 125, 127 (D.C. Cir. 2005) (concluding that National Energy Policy Development Group not agency subject to FOIA, because "its sole function [was] to advise and assist the President" (citing Meyer v. Bush, 981 F.2d 1288, 1292 (D.C. Cir. 1993))); Rushforth v. Council of Econ. Advisers, 762 F.2d 1038, 1042-43 (D.C. Cir. 1985) (ruling that Council of Economic Advisers is not an agency under FOIA); Nation Co. v. Archivist of the United States, No. 88-1939, slip op. at 5-6 (D.D.C. July 24, 1990) (finding that Tower Commission is not an agency under FOIA); Nat'l Sec. Archive v. Executive Office of the President, 688 F. Supp. 29, 31 (D.D.C. 1988) (concluding that Office of Counsel to President is not an agency under FOIA), aff'd sub nom. Nat'l Sec. Archive v. Archivist of the United States, 909 F.2d 541 (D.C. Cir. 1990).

[49] See Sweetland v. Walters, 60 F.3d 852, 855-56 (D.C. Cir. 1995) (finding Executive Residence staff, which is "exclusively dedicated to assisting the President in maintaining his home and carrying out his various ceremonial duties," is not an agency under FOIA); Nat'l Sec. Archive v. Archivist of the United States, 909 F.2d 541, 544 (D.C. Cir. 1990) ("The Supreme Court has made clear that the Office of the President is not an 'agency' for purposes of the FOIA." (citing Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980))); Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group, 219 F. Supp. 2d 20, 55 (D.D.C. 2002) ("[T]he Vice President and his staff are not 'agencies' for purposes of the FOIA."); McDonnell v. Clinton, No. 97-1535, 1997 WL 33321085, at *1 (D.D.C. July 3, 1997) (holding that "Office of the President, including its personal staff . . . whose sole function is to advise and assist the President, does not fall within the definition of agency" (citing Kissinger, 445 U.S. at 150-55)), aff'd, 132 F.3d 1481 (D.C. Cir. 1997) (unpublished table decision).

[50] Meyer v. Bush, 981 F.2d 1288, 1294 (D.C. Cir. 1993).

"agencies" under the FOIA.[51] For example, the D.C. Circuit concluded that the Council on Environmental Quality (a unit within the Executive Office of the President) was an agency subject to the FOIA because its investigatory, evaluative, and recommendatory functions exceeded merely advising the President.[52] Conversely, when the D.C. Circuit evaluated the structure of the NSC, its proximity to the President, and the nature of the authority delegated to it, the D.C. Circuit determined that the NSC is not an agency subject to the FOIA.[53]

Finally, it should be noted that Congress has removed from the scope of the FOIA certain parts of the operations of some intelligence agencies. The CIA became the first entity to obtain such special FOIA treatment for its "operational files" through the Central Intelligence Agency Information Act of 1984.[54] Through the National Defense Authorization Act for Fiscal Year 2006,[55] Congress placed the "operational files" of the Defense Intelligence Agency beyond the scope of the FOIA.[56] Section 933(a) of that Act added a section to the National Security Act of 1947 that provides that "[t]he Director of the Defense Intelligence Agency, in coordination with the Director of National Intelligence, may exempt operational files of the Defense Intelligence Agency from the provisions of [the FOIA], which require publication, disclosure, search, or review in connection therewith."[57] This special statutory protection is quite similar to counterpart Exemption 3 provisions that have been relied on by such other intelligence agencies as the CIA, the NSA, the National Reconnaissance Office, and the National Geospatial-Intelligence Agency (formerly the National Imaging and Mapping Agency and, before that, the Defense Mapping Agency).[58] (For further discussion of this subject, see Exemption 3, "Operational Files" Provisions, below.)

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[51] See Citizens for Responsibility & Ethics in Washington, 566 F.3d at 222-23 (declaring that "common to every case in which we have held that an [Executive Office of the President] unit is subject to FOIA has been a finding that the entity in question 'wielded substantial authority independently of the President'" (quoting Sweetland, 60 F.3d at 854)); Soucie v. David, 448 F.2d 1067, 1075 (D.C. Cir. 1971); see also Ryan v. DOJ, 617 F.2d 781, 784-89 (D.C. Cir. 1980).

[52] Pac. Legal Found. v. Council on Envtl. Quality, 636 F.2d 1259, 1263 (D.C. Cir. 1980).

[53] Armstrong v. Executive Office of the President, 90 F.3d 553, 559-65 (D.C. Cir. 1996).

[54] 50 U.S.C. § 431 (2006); see also FOIA Update, Vol. V, No. 4, at 1-2 (discussing statutory removal of CIA "operational files" from scope of FOIA as threshold matter).

[55] Pub. L. No. 109-163, § 933(a), 119 Stat. 34 (codified at 50 U.S.C. § 432c (2006)).

[56] Id.; see also 50 U.S.C. § 432b (2006) (providing same protective treatment to "operational files" of NSA).

[57] 50 U.S.C. § 432c.

[58] See 50 U.S.C. §§ 403-5b, 403-5d (2006); see also *FOIA Post*, "Agencies Rely on Wide Range of Exemption 3 Statutes" (posted 12/16/03) (observing that 2003 enactment regarding NSA parallels other Exemption 3 statutes that intelligence agencies such as CIA, National Reconnaissance Office, and National Geospatial-Intelligence Agency have relied on for number of years).

"Agency Records"

The FOIA applies to "records," not tangible, evidentiary objects,[59] and while courts initially construed the term "record" according to its traditional dictionary definition,[60] the Supreme Court subsequently broadened the term to include "'machine readable materials . . . regardless of physical form or characteristics,'" as defined in the Records Disposal Act.[61] Courts have recognized that "computer-stored records, whether stored in the central processing unit, on magnetic tape, or in some other form, are records for the purposes of the FOIA."[62] 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.[63] The statutory language of the FOIA itself defines the term "record" as including "any information that would be an agency record . . . when maintained by an agency in any format, including an electronic format."[64]

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[59] See Matthews v. USPS, No. 92-1208, slip op. at 4 n.3 (W.D. Mo. Apr. 14, 1994) (holding that computer hardware is not a "record"); Nichols v. United States, 325 F. Supp. 130, 135-36 (D. Kan. 1971) (holding that archival exhibits consisting of guns, bullets, and clothing pertaining to assassination of President Kennedy are not "records"), aff'd on other grounds, 460 F.2d 671 (10th Cir. 1972).

[60] See DiViaio v. Kelley, 571 F.2d 538, 542 (10th Cir. 1978) ("[R]eliance may be placed on the dictionary meaning . . . as that which is written or transcribed to perpetuate knowledge."); Nichols, 325 F. Supp. at 135 (stating that reliance may be "placed on a dictionary of respected ancestry [(i.e., Webster's)]").

[61] Forsham v. Harris, 445 U.S. 169, 183 (1980) (quoting Records Disposal Act, 44 U.S.C. § 3301 (1980)); see also N.Y. Times Co. v. NASA, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (holding that audiotape of Space Shuttle *Challenger* astronauts is a "record," as "FOIA makes no distinction between information in lexical and . . . non-lexical form"); Save the Dolphins v. U.S. Dep't of Commerce, 404 F. Supp. 407, 410-11 (N.D. Cal. 1975) (finding that motion picture film is a "record" for purposes of FOIA).

[62] Yeager v. DEA, 678 F.2d 315, 321 (D.C. Cir. 1982); see Long v. IRS, 596 F.2d 362, 364-65 (9th Cir. 1979); see also FOIA Update, Vol. XI, No. 2, at 4 n.1 ("Department of Justice Report on 'Electronic Record' FOIA Issues – Part I").

[63] Compare 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 decisionmaking process"), with 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, 571 F.2d at 542)). Cf. Essential Info., Inc. v. USIA, 134 F.3d 1165, 1166 n.3 (D.C. Cir. 1998) (dictum) (suggesting that internet addresses are not records but merely means to access records).

[64] 5 U.S.C. § 552(f)(2)(A) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-

(continued...)

The Supreme Court has articulated a two-part test for determining what constitutes "agency records" 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.[65] Inasmuch as the "agency record" analysis typically hinges upon whether an agency has "control" over a record,[66] courts have 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

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[64](...continued)
175, 121 Stat. 2524.

[65] DOJ v. Tax Analysts, 492 U.S. 136, 144-45 (1989) (holding that court opinions in agency files are agency records); see, e.g., Judicial Watch, Inc. v. DOE, 412 F.3d 125, 132 (D.C. Cir. 2005) (holding that records of agency employees detailed to National Energy Policy Development Group (NEPDG), chaired by the Vice President, were not agency records when "as a practical matter," detailees were employees of NEPDG, not of agency).

[66] See, e.g., Int'l Bhd. 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); Am. Small Bus. League v. SBA, No. 08-00829, 2008 WL 3977780 (N.D. Cal. Aug. 26, 2008) (concluding that records in procurement database maintained by GSA were under SBA "control" because, inter alia, SBA directed GSA to analyze database and extract information for SBA use, and because fact that "a list was never printed out . . . or never exported and saved as a separate electronic file apart from the raw database" does not mean records were not "created" at time of FOIA request); McErlean v. DOJ, No. 97-7831, 1999 WL 791680, at *11 (S.D.N.Y. Sept. 30, 1999) (finding that agency had no "control" over requested records because it agreed to restrictions on their dissemination and use that were requested by confidential source who provided them); 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 aircrash, although possessed by NTSB, is not under agency "control," because of restrictions on its dissemination imposed by 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 presubmission 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 them); McCullough v. FDIC, No. 79-1132, 1980 U.S. Dist. LEXIS 17685, at *6 (D.D.C. July 28, 1980) (concluding that state report transmitted to FDIC remains under control of state and is not agency record under FOIA in light of state confidentiality statute, but that other reports transmitted to agency by state regulatory authorities might be agency records because "it is questionable whether [state authorities] retained control" over them); see also *FOIA Post*, "FOIA Counselor Q&A" (posted 1/24/06) (advising that "electronic databases to which an agency has no more than 'read only' access" -- e.g., "LexisNexis, Westlaw, and other such data services" -- are not "agency records" under the FOIA); FOIA Update, Vol. XIII, No. 3, at 5 (advising that records subject to "protective order" issued by administrative law judge remain within agency control and are subject to FOIA).

(4) the degree to which the document was integrated into the agency's record systems or files.'"[67] Agency "control" is the predominant consideration in determining whether records generated or maintained by a government contractor are "agency records" under the FOIA.[68]

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[67] 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 Consumer Fed'n of Am. v. USDA, 455 F.3d 283, 288 n.7 (D.C. Cir. 2006) (noting four relevant factors discussed in Burka, 87 F.3d at 515); Judicial Watch, 412 F.3d at 127 (holding that "records created or obtained by employees detailed from an agency to the NEPDG [an advisory group within Office of the Vice President] are not 'agency records' subject to disclosure under the FOIA"); Missouri v. U.S. 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. NRC, 750 F.2d 1394, 1400-01 (7th Cir. 1984) (determining that agency "use" of internal report submitted in connection with licensing proceedings renders report an agency record); Wolfe v. HHS, 711 F.2d 1077, 1079-82 (D.C. Cir. 1983) (holding that transition team records, although physically maintained within "four walls" of agency, were not agency records under FOIA); Citizens for Responsibility & Ethics in Washington v. DHS, 527 F. Supp. 2d 76, 92-98 (D.D.C. 2007) (analyzing four "control" factors to find that agency controls White House visitor access records despite agency's stated intent otherwise, as "intent" factor is "substantially outweighed" by other three factors); Judicial 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 an agency record), aff'd on other grounds, 76 F.3d 1232 (D.C. Cir. 1996); Marzen v. HHS, 632 F. Supp. 785, 801 (N.D. Ill. 1985) (declaring that records created outside federal government which "agency in question obtained without legal authority" are not agency records), aff'd on other grounds, 825 F.2d 1148 (7th Cir. 1987); Ctr. for Nat'l Sec. Studies 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 an agency record, nor is duplicate copy of report maintained in agency's files); cf. SDC Dev. Corp. v. Mathews, 542 F.2d 1116, 1120 (9th Cir. 1976) (reaching "displacement-type" result for records governed by National Library of Medicine Act (last codified at 42 U.S.C. §§ 275-280a-1 (1982)); Baizer v. U.S. 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 an agency record); Waters v. Pan. Canal Comm'n, No. 85-2029, slip op. at 5-6 (D.D.C. Nov. 26, 1985) (finding that Internal Revenue Code is not an agency record); FOIA Update, Vol. XI, No. 3, at 7-8 n.32 (discussing "'displacement-type'" decision in SDC Dev. Corp.,542 F.2d at 1120).

[68] Compare Burka, 87 F.3d at 515 (finding data tapes created and possessed by contractor to be agency records because of extensive supervision exercised by agency, which evidenced "constructive control"), Hercules, Inc. v. Marsh, 839 F.2d 1027, 1029 (4th Cir. 1988) (holding that army ammunition plant telephone directory prepared by contractor at government expense, bearing "property of the U.S." legend, is an agency record), In Def. of Animals v. NIH, 543 F.

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On a related note, certain research data generated through federal grants are considered agency records and subject to the FOIA.[69] The Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, partly overruling longstanding Supreme Court precedent of Forsham v. Harris,[70] required OMB to revise its Circular A-110 (the regulatory publication by which OMB sets the rules governing grants from all federal agencies to institutions of higher education, hospitals, and nonprofit institutions) so that "all data produced under an award will be made available to the public through the procedures established under the Freedom of Information Act."[71] The revised version of Circular A-110 requires agencies to respond to FOIA requests for certain grantee research findings by obtaining the requested data from the grantee and processing it for release to the requester.[72] (In accordance with OMB's statutory authority over such matters, questions

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[68](...continued)
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), Los Alamos Study Group v. DOE, No. 97-1412, slip op. at 4 (D.N.M. July 22, 1998) (determining that records created by contractor are agency records within meaning of FOIA because government contract "establishes [agency] intent to retain control over the records and to use or dispose of them as they see fit" and agency regulation "reinforces the conclusion that [agency] intends to exercise control over the material"), and Chi. Tribune Co. v. HHS, No. 95-C-3917, 1997 WL 1137641, at *15-16 (N.D. Ill. Mar. 28, 1997) (finding that notes and audit analysis file created by independent contractor are agency records because they were created on behalf of (and at request of) agency and agency "effectively controls" them), with Tax Analysts v. DOJ, 913 F. Supp. 599, 607 (D.D.C. 1996) (finding that electronic legal research database contracted by agency is not an agency record because licensing provisions specifically precluded agency control), aff'd, 107 F.3d 923 (D.C. Cir. 1997) (unpublished table decision), and Rush Franklin Publ'g, Inc. v. NASA, No. 90-CV-2855, slip op. at 10 (E.D.N.Y. Apr. 13, 1993) (finding that computer tape maintained by contractor is not an agency record in absence of agency control). See generally Sangre de Cristo Animal Prot., Inc. v. DOE, No. 96-1059, slip op. at 3-6 (D.N.M. Mar. 10, 1998) (holding that records that agency neither possessed nor controlled and that were created by entity under contract with agency, although not agency records, were accessible under agency regulation, 10 C.F.R. § 1004.3 (currently 2009), that specifically provided for public availability of contractor records).

[69] See Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-495 (1998); see also FOIA Update, Vol. XIX, No. 4, at 2 (describing legislative provision).

[70] 445 U.S. 169.

[71] See Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, 112 Stat. at 2681-495.

[72] See 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 FOIA Update, Vol. XIX, No. 4, at 2 (continued...)

concerning the processing of FOIA requests for grantee research data should be directed to OMB's Office of Federal Financial Management at (202) 395-3993.)

Agencies should be mindful that agency records do not lose their "agency record" status when physically maintained by a government contractor for the purposes of records management.[73] The OPEN Government Act of 2007 clarified existing law on this point by amending the definition of "agency records" to expressly provide that such records remain subject to the FOIA.[74]

Unlike "agency records," which are subject to the FOIA, "congressional records" are not.[75] "Congressional records" may include records received by an agency from Congress,[76] or records generated by an agency in response to a confidential congressional inquiry.[77] Ascertaining whether records in an agency's possession are "agency records" or "congressional records" depends upon whether Congress manifested an intent to exert control over those

[72](...continued)
(discussing grantee records subject to FOIA under Circular A-110's definition of "research data").

[73] OPEN Government Act of 2007, Pub. L. No. 110-175, § 9, 121 Stat. 2524, 2529 (to be codified at 5 U.S.C. § 552(f)(2)(B)); see also *FOIA Post*, "Treatment of Agency Records Maintained for an Agency by a Government Contractor for Purposes of Records Management" (posted 9/09/08).

[74] OPEN Government Act § 9; see also *FOIA Post*, "Treatment of Agency Records Maintained for an Agency by a Government Contractor for Purposes of Records Management" (posted 9/09/08).

[75] 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").

[76] See, e.g., Goland v. CIA, 607 F.2d 339, 347 (D.C. Cir. 1978) (holding that agency was acting 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'"); Hall v. CIA, No. 98-1319, slip op. at 15 (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).

[77] See Holy Spirit Ass'n v. CIA, 636 F.2d 838, 842-43 (D.C. Cir. 1980) (recognizing that agency-created records can become "congressional records"), vacated in part on other grounds, 455 U.S. 997 (1982); Judicial Watch, Inc. v. Clinton, 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."), aff'd, 76 F.3d 1232 (D.C. Cir. 1996).

records[78] and on the particular contours of that reservation of control.[79] Congress's intent to exert control over particular records must be evident from the circumstances surrounding their creation or transmittal,[80] rather than accomplished on a "post hoc" basis "long after the original creation [or] transfer of the requested documents."[81] Absent evidence of such intent, the records may not be found to be "congressional records" and, accordingly, will be within the reach of the FOIA.[82]

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.[83] In determining whether a record is a "personal record," an agency

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[78] 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).

[79] 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).

[80] See United We Stand Am., 359 F.3d 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); see also 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, 636 F.2d at 842 ("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, 607 F.2d at 348 (holding that a congressional hearing transcript maintained by an 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").

[81] United We Stand Am., 359 F.3d at 602; see Holy Spirit Ass'n, 636 F.2d at 843 (concluding that Congress's "post hoc" assertion of control, which came about "as a result of . . . the FOIA request and this litigation long after the actual transfer" of requested records, was "insufficient evidence of Congress' intent to retain control over th[o]se records").

[82] 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.").

[83] See, e.g., Consumer Fed'n of Am., 455 F.3d at 288-93 (holding that calendar of official was personal record where it was created and used for personal convenience); Bureau of Nat'l Affairs, Inc. v. DOJ, 742 F.2d 1484, 1489-96 (D.C. Cir. 1984) (holding that officials' uncirculated appointment calendars and telephone message slips were personal records); Spannaus v. DOJ, 942 F. Supp. 656, 658 (D.D.C. 1996) (finding that "'personal' files" of attorney no longer

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should examine "the totality of the circumstances surrounding the creation, maintenance, and use" of the record.[84] Factors relevant to this 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.[85] Courts have sometimes rejected agency declarations

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[83](...continued)
employed with agency were "beyond the reach of FOIA" if they were not turned over to agency at end of employment); Forman v. Chapotan, No. 88-1151, 1988 WL 524934, at *6 (W.D. Okla. Dec. 12, 1988) (rejecting contention that materials distributed to agency officials at privately sponsored seminar are agency records), aff'd, No. 89-6035 (10th Cir. Oct. 31, 1989).

[84] Bureau of Nat'l Affairs, 742 F.2d at 1492; see also Consumer Fed'n of Am., 455 F.3d at 287-88 (considering "[record] creation, location/possession, control, and use" -- the "principal factors" identified in Bureau of Nat'l Affairs -- and deciding that "use [of the records] is the decisive factor here" (emphasis added)); FOIA Update, Vol. V, No. 4, at 3-4 ("OIP Guidance: 'Agency Records' vs. 'Personal Records'").

[85] See, e.g., Consumer Fed'n of Am., 455 F.3d at 288-93 (holding that calendars of five officials were agency records where calendars were electronically distributed to staff and relied upon for business use, but that calendar of sixth official was personal record where 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 on agency equipment by board member seeking renomination, which had been reviewed by other agency employees but not integrated into agency record system and over which author had not relinquished control, are not agency records); Bureau of Nat'l Affairs, 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); Fortson v. Harvey, 407 F. Supp. 2d 13, 16 (D.D.C. 2005) (finding that Army officer's notes of investigation 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), appeal dismissed, No. 05-5193, 2005 WL 3789054, at *1 (D.C. Cir. Oct. 31, 2005); Bloomberg, L.P. v. SEC, 357 F. Supp. 2d 156, 163-67 (D.D.C. 2004) (concluding that computer calendar, telephone logs, and message slips of SEC Chairman, 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); Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys., No. 98-4608, 1998 WL 690371, at *6 (S.D.N.Y. Sept. 30, 1998) (ruling that handwritten notes neither shared with other agency employees nor placed in agency files were not "agency records" even though they may have furthered their author's performance of his agency duties), aff'd, 182 F.3d 900 (2d Cir. 1999) (unpublished table decision); Clarkson v. Greenspan, No. 97-2035, slip op. at 14 (D.D.C. June 30, 1998) (holding that notes taken by Federal Reserve Banks' employees are "personal" because they were maintained by authors for their own use, were not intended to be shared with other employees, and were not made part of Banks' filing systems), summary affirmance granted, No. 98-5349, 1999 WL 229017 (D.C. Cir. Mar. 2, 1999); Judicial Watch, Inc. v. Clinton, (continued...)

In keeping with the broad "any person" standard, FOIA requesters generally do not have to justify or explain their reasons for making requests.[103] The Supreme Court has observed that a FOIA requester's identity generally "has no bearing on the merits of his or her FOIA request."[104] 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.[105] Although requesters have occasionally invoked the FOIA successfully as

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[103] 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.").

[104] DOJ v. Reporters 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) (upholding district court's decision to not consider identity of requester in determining whether records were properly withheld under Exemption 7(A)); Parsons v. Freedom of Info. Act Officer, No. 96-4128, 1997 WL 461320, at *1 (6th Cir. Aug. 12, 1997) ("[T]he identity of the requestor is irrelevant to the determination of whether an exemption applies."); 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"); Swan v. SEC, 96 F.3d 498, 499 (D.C. Cir. 1996) ("Whether [a particular exemption] protects against disclosure to 'any person' is a judgment to be made without regard to the particular requester's identity."); 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, at 5 ("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."); cf. Leach v. RTC, 860 F. Supp. 868, 871, 878-79 & n.13 (D.D.C. 1994) (recognizing, in dicta, that individual members of Congress are granted no greater access to agency records by virtue of their position than are other FOIA requesters), appeal dismissed per stipulation, No. 94-5279 (D.C. Cir. Dec. 22, 1994).

[105] 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 Reporters 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 FOIA "is largely indifferent to the intensity of a particular requester's need"); cf. Parsons, 1997 WL 461320, at *1 (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); North v. Walsh, 881 F.2d 1088, 1096 (D.C. Cir. 1989) ("In sum, [FOIA requester's] need or intended use for the documents is irrelevant.").

whether a request is or is not "reasonably described" is the ability of agency staff to reasonably ascertain exactly which records are being requested and to locate them.[121] In addition to the "reasonably described" inquiry, courts have held that agencies are not required to conduct wide-ranging, "unreasonably burdensome" searches for records.[122] (For a discussion of "unreasonably burdensome" searches, see Procedural Requirements, Searching for Responsive Records, below). Courts have also required agencies to clarify the scope of the request with the requester, particularly when doing so is required by the agency's regulations.[123]

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[120](...continued)
backward in time," it was "reasonably described" and not "unreasonably burdensome"); Pub. Citizen Health Research Group v. FDA, No. 94-0018, slip op. at 1-2 (D.D.C. Feb. 9, 1996) (rejecting agency's assertion that request was not "reasonably described" and criticizing agency for not consulting with requester to attempt to narrow request that agency claimed would require "unduly burdensome" search); see also FOIA Update, Vol. IV, No. 3, at 5 ("The sheer size or burdensomeness of a FOIA request, in and of itself, does not entitle an agency to deny that request on the ground that it does not 'reasonably describe' records within the meaning of 5 U.S.C. § 552(a)(3)(A).").

[121] See 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)); Marks, 578 F.2d at 263 (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); Weewee v. IRS, No. 99-475, 2001 WL 283801, at *12 (D. Ariz. Feb. 13, 2001) (finding that request for records related to each occurrence of specific actions related to requester's tax return "does not appear to be too broad" given that agency already had processed request that was "identically worded").

[122] See, e.g., Nation Magazine 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. U.S. Dep't of Commerce, 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").

[123] See, e.g., Ruotolo, 53 F.3d at 10 (stating that agency failed to perform its "duty" to assist requester in reformulating request); Stockton E. Water Dist. v. 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); Pub. Citizen Health Research Group, No. 94-0018, slip op. at 2-3 (D.D.C. Feb. 9, 1996) (criticizing agency for failing to seek narrowing of request as required by agency regulations, and ordering parties to "seek to agree" on search breadth).

required to respond to requests by creating records,[128] such as by modifying exempt information in order to make it disclosable.[129] Moreover, courts have found that agencies are

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[127](...continued)
that is reasonably within the scope of the request on the grounds that the record has not been specifically named by the requester"); FOIA Update, Vol. V, No. 1, at 5 (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., 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); Poll v. U.S. Office of Special Counsel, No. 99-4021, 2000 WL 14422, at *5 n.2 (10th Cir. Jan. 10, 2000) (recognizing that FOIA does not require agency "'to create documents or opinions in response to an individual's request for information'" (quoting Hudgins v. IRS, 620 F. Supp. 19, 21 (D.D.C. 1985))); Sorrells v. United States, No. 97-5586, 1998 WL 58080, at *1 (6th Cir. Feb. 6, 1998) (advising that agency is not required to compile document that "contain[s] a full, legible signature"); 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); Schoenman v. FBI, No. 04-2202, 2009 WL 763065, at *17-18 (D.D.C. Mar. 19, 2009) (rejecting plaintiff's request for search slips, created by agency after date-of-search cut-off date, holding that "FOIA 'does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created or retained'" (quoting Schoenman v. FBI, 573 F. Supp. 2d 119, 140 (D.D.C. 2008))); 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); Stuler v. IRS, No. 05-1717, 2006 WL 891073, at *3 (W.D. Pa. Mar. 31, 2006) (stating that agency "is not required to create documents that don't exist"); Jones v. Runyon, 32 F. Supp. 2d 873, 876 (N.D. W. Va. 1998) (concluding that "because the FOIA does not obligate the [agency] to create records," it "acted properly by providing access to those documents already created"), aff'd, 173 F.3d 850 (4th Cir. 1999) (unpublished table decision); Bartlett v. DOJ, 867 F. Supp. 314, 316 (E.D. Pa. 1994) (ruling that agency is not required to create handwriting analysis). But cf. Martinez, 2008 WL 486027, at *2-3 (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."), appeal dismissed voluntarily, No. 00-5220 (D.C. Cir. Oct. 12, 2000); 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), appeal dismissed, No. 93-16723 (9th Cir. Nov. 1, 1993).

[129] See FlightSafety Servs. Corp. v. Dep't of Labor, 326 F.3d 607, 613 (5th Cir. 2003) (per (continued...)

not required to add explanatory materials to any records disclosed in response to a FOIA request.[130] Agencies are also not typically obligated to seek the return of records over which they retain no "control"[131] (even records that were wrongfully removed from their

[129](...continued)
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 reconnaissance systems that took them"). But see Jones v. OSHA, No. 94-3225, 1995 WL 435320, at *4 (W.D. Mo. June 6, 1995) (stating that agency must "retype," not withhold in full, documents required to be released by its own regulation, in order to delete FOIA-exempt information).

[130] See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 162 (1975) (holding that agency is not required to create explanatory materials); 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"); Citizens Progressive Alliance v. U.S. Bureau of Indian Affairs, 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"); cf. Essential Info., Inc. v. USIA, 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). But cf. McDonnell v. United States, 4 F.3d 1227, 1261 n.21 (3d Cir. 1993) (suggesting, in dictum, that agency might be compelled to create translation of any disclosable encoded information).

[131] See Bonaparte v. DOJ, No. 07-0749, 2008 WL 2569379, at *1 (D.D.C. June 27, 2008) (finding search adequate where it revealed records had been transferred to component of NARA, stating that requester could request records from NARA); Anderson v. DOJ, 518 F. Supp. 2d 1, 10 (D.D.C. 2007) (stating agency not required to "retain or retrieve documents which previously had been in its possession"); Steinberg v. DOJ, 801 F. Supp. 800, 802 (D.D.C. 1992) (holding that agency is not obligated to retrieve law enforcement records transferred for use in criminal prosecutions to Commonwealth of Virginia); cf. Citizens for Responsibility & Ethics in Washington v. DHS, 592 F. Supp. 2d 111, 117-19 (D.D.C. 2009) (finding search inadequate where agency did not search class of records not "'currently retained'" by agency but still under agency control (citing "control" finding from Citizens for Responsibility & Ethics in Washington v. DHS, 527 F. Supp. 2d 76, 98 (D.D.C. 2007))). But see Pena v. BOP, No. 06-2480, 2007 WL 1434869, at *3 (E.D.N.Y. May 14, 2007) (finding, in case involving search that was initially done pursuant to subpoena during which NARA sent transferred records back to BOP and which BOP could not subsequently locate, that search would be deemed adequate "only if the BOP is unable to procure additional copies . . . [and that] if BOP can obtain [them]
(continued...)

Moreover, courts have found that a requester's failure to comply with certain procedural requirements may constitute a failure to exhaust administrative remedies, which precludes judicial review. This has occurred, for example, when a requester fails to reasonably describe the records sought or to comply with an agency's procedural regulations concerning, for example, properly submitting requests,[144] complying with fee and fee waiver requirements,[145]

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[143](...continued)
No. 03-1658, 2004 WL 2051359, at *8 (D.D.C. Aug. 12, 2004) (stating that agency "has no reason to search or produce records . . . and . . . has no basis to respond" if it does not receive FOIA request, even where requester claims to have submitted one); Wicks, 2002 WL 1000975, at *2 (dismissing case where requester "failed to comply with the published regulations governing proper FOIA requests").

[144] See Keys, 2009 WL 614755, at *5 (finding failure to exhaust where, inter alia, requester failed to reasonably describe records sought by not responding to agency's notice that he must specify which field offices he wanted agency to search); Banks v. Lappin, 539 F. Supp. 2d 228, 235 (D.D.C. 2008) (finding failure to exhaust and stating that "[t[he mailing of a FOIA request to a federal government agency does not constitute its receipt by the agency" even if mailed via prison mailbox); Banks v. DOJ, 538 F. Supp. 2d 228, 234 (D.D.C. Mar. 16, 2008) (finding that requester failed to exhaust administrative remedies when he failed to demonstrate that agencies received requests); Thomas v. FAA, No. 05-2391, 2007 WL 2020096, at *3-4 (D.D.C. July 12, 2007) (ruling that plaintiff has not exhausted administrative remedies where agency has not received FOIA request); Harris v. Freedom of Info. Unit, DEA, No. 06-00176, 2006 WL 3342598 (N.D. Tex. Nov. 17, 2006) (finding that plaintiff failed to exhaust administrative remedies where request did not comply with agency's regulations); Stanley v. DOD, No. 93-4247, slip op. at 10 (S.D. Ill. July 28, 1998) (holding that request was not proper where it was addressed to Air Force medical center where no FOIA Officer was located); Smith v. Reno, No. 93-1316, 1996 WL 224994, at *3 (N.D. Cal. Apr. 23, 1996) (stating that "[t]he National Records Administration is not an HUD information center," and holding that by directing FOIA request to wrong agency plaintiff failed to exhaust administrative remedies). See generally OPEN Government Act § 6 (requiring agencies to route misdirected FOIA requests to proper component within agency provided requests were received by a component of the agency that is authorized by agency regulations to receive requests).

[145] See Pietrangelo v. Dep't of the Army, 155 F. App'x 526, 526 (2d Cir. 2005) (affirming district court decision that found that requester could not seek judicial review when he failed to meet fee-related exhaustion requirements); Pollack v. DOJ, 49 F.3d 115, 119 (4th Cir. 1995) (concluding that plaintiff's refusal to pay anticipated fees constitutes failure to exhaust administrative remedies); County of Santa Cruz v. Ctrs. for Medicare and Medicaid Servs., No. 07-2889, 2009 WL 816633, at *1 (dismissing FOIA claims where requester failed to exhaust by not fully paying search fees); Banks, 538 F. Supp. 2d at 237 (finding that requester failed to exhaust administrative remedies by failing to pay assessed fees); Kumar v. DOJ, No. 06-714, 2007 WL 537723, at *3 (D.D.C. Feb. 16, 2007) (holding that failure to pay fees under FOIA constitutes failure to exhaust administrative remedies); Kemmerly v. U.S. Dep't of Interior, No. 06-2386, 2006 WL 2990122, at *2 (E.D. La. Oct. 17, 2006) (stating that "administrative exhaustion does not occur until the required fees are paid or an appeal is taken from the refusal to waive fees" (citing Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 66 (D.C. Cir. 1990))); cf. Pub. Citizen, Inc. v. Dep't of Educ., 292 F. Supp. 2d 1, 4-5 & n.4 (D.D.C. 2003) (continued...)

The OPEN Government Act of 2007 amended the time period provision by setting forth statutory rules regarding when the time period commences and when and how often it can be "tolled" (i.e., stopped).[151]

The FOIA now provides that the 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.[152] 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 that request, that receiving component is now obligated to "route" the "misdirected" request to the appropriate component within that agency within ten days of receiving the request.[153] 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).[154] This 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.[155]

The OPEN Government Act also provides limitations on when and how often an agency is allowed to toll the twenty-day time period (i.e., stop the clock), allowing tolling under two circumstances only: (1) one time to obtain information from the requester; and (2) as "necessary" to clarify fee-related issues with the requester.[156] 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.[157] While an agency may only toll once while seeking information from the requester, an agency is not prohibited from contacting a

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[150](...continued)
if necessary, as this respects statute's "prompt release" requirement). But see Manos v. U.S. Dep't of the Air Force, No. C-92-3986, 1993 U.S. Dist. LEXIS 1501, at *14-15 (N.D. Cal. Feb. 10, 1993) (ruling that even mailing response within statutory time limit was insufficient and that requester must actually receive response within time limit).

[151] OPEN Government Act § 6 (to be codified at 5 U.S.C. § 552(a)(6)(A)).

[152] Id.

[153] See id.; see also *FOIA Post*, "OIP Guidance: New Requirement to Route Misdirected FOIA Requests" (posted 11/18/08).

[154] See OPEN Government Act § 6; see also *FOIA Post*, "OIP Guidance: New Requirement to Route Misdirected FOIA Requests" (posted 11/18/08).

[155] See OPEN Government Act § 6; see also *FOIA Post*, "OIP Guidance: New Requirement to Route Misdirected FOIA Requests" (posted 11/18/08).

[156] OPEN Government Act § 6.

[157] Id.

requester as many times as needed to facilitate processing the request.[158]

An agency may also toll the time period "if necessary" to clarify with the requester issues pertaining to fee assessment.[159] Unlike the first circumstance, provided that tolling is necessary to clarify fee assessment issues, there is no statutory limit on the number of times an agency may toll for that purpose.[160] In either circumstance, the agency's receipt of the requester's response ends the tolling period and the response time clock resumes.[161]

In "unusual circumstances," an agency can extend the twenty-day time limit for processing a FOIA request if it tells the requester in writing why it needs the extension and when it will make a determination on the request.[162] The FOIA defines "unusual circumstances" as (1) the need to search for and collect records from separate offices; (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.[163] 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

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[158] Id.; see also *FOIA Post*, "OIP Guidance: New Limitations on Tolling the FOIA's Response Time" (posted 11/18/08) (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 in that event).

[159] OPEN Government Act § 6; see also *FOIA Post*, "OIP Guidance: New Limitations on Tolling the FOIA's Response Time" (posted 11/18/08).

[160] OPEN Government Act § 6; see also *FOIA Post*, "OIP Guidance: New Limitations on Tolling the FOIA's Response Time" (posted 11/18/08) (noting that fee issues may arise sequentially during processing of request and cannot always be resolved at one given point in time).

[161] OPEN Government Act § 6.

[162] 5 U.S.C. § 552(a)(6)(B)(i); see Pub. Citizen, Inc. v. Dep't of Educ., No. 01-2351, slip op. at 17-23 (D.D.C. June 17, 2002) (ruling that because agency has discretion whether to invoke extension, agency is not obliged to send such notice unless it invokes extension).

[163] 5 U.S.C. § 552(a)(6)(B)(iii); see also Al-Fayed v. CIA, No. 00-2092, slip op. at 5 (D.D.C. Jan. 16, 2001) (recognizing that circumstances "such as an agency's effort to reduce the number of pending requests, the amount of classified material, the size and complexity of other requests processed by the agency, the resources being devoted to the declassification of classified material of public interest, and the number of requests for records by courts or administrative tribunals are relevant to the Courts' determination as to whether [unusual] circumstances exist"), aff'd, 254 F.3d 300 (D.C. Cir. 2001); Sierra Club v. U.S. 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").

request.[172] Among other things, the need to process an extremely large volume of requests may constitute "exceptional circumstances," and the commitment of large amounts of resources to process requests on a first-come, first-served basis may be considered "due diligence."[173] A "predictable agency workload" of FOIA requests does not, however, qualify as "'exceptional circumstances' . . . unless the agency demonstrates reasonable progress in reducing its backlog of pending requests."[174] Nevertheless, a FOIA requester's refusal "to reasonably modify the scope of a request or arrange for an alternative time frame for

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[172] See 5 U.S.C. § 552(a)(6)(C).

[173] See Open Am., 547 F.2d at 615-16; see also Gilmore v. NSA, No. 94-16165, 1995 WL 792079, at *1 (9th Cir. Dec. 11, 1995) (stating that even with a staff increase and "first-in/first-out" procedure, it was "unlikely that [agency] could process requests more quickly given that it must undertake a painstaking review of voluminous sensitive documents before disclosing requested information"); Elec. Frontier Found. v. DOJ, 563 F. Supp. 2d 188, 194-95 (D.D.C. 2008) (holding that increased workload coupled with depleted workforce constituted exceptional circumstances, and new software, new facility, backlog reduction, and progress in processing plaintiff's request demonstrated due diligence); CareToLive v. FDA, No. 08-005, 2008 WL 2201973, at *4-7 (S.D. Ohio May 22, 2008) (finding exceptional circumstances and due diligence given high volume of requests, litigation demands, congressional requests and other tasks, despite increase in staff size, as well as reduction in backlog and "first-in/first-out" system); Edmonds v. FBI, No. 02-1294, 2002 WL 32539613, at *2 (D.D.C. Dec. 3, 2002) (finding that 1,300 incoming requests per month, litigation, administrative appeals and diversion of staff to other projects, while reducing backlog and making progress with plaintiff's request constituted exceptional circumstances and due diligence). But see Bloomberg, L.P. v. FDA, 500 F. Supp. 2d 371, 374-76 (S.D.N.Y. 2007) (rejecting claim of exceptional circumstances since there was "constant stream of new FOIA requests" and finding that agency's "pattern of unresponsiveness [to plaintiff], delays, and indecision" suggested lack of due diligence despite showing of "first-in," "first-out" and multitrack processing); Matlack, Inc. v. EPA, 868 F. Supp. 627, 633 (D. Del. 1994) (deciding that agency's response that it has a "'large docket of Freedom of Information Act appeals and [is] working as quickly as possible to resolve them,' without more, is simply insufficient to demonstrate 'exceptional circumstances'").

[174] 5 U.S.C. § 552(a)(6)(C)(ii); see, e.g., Fiduccia v. DOJ, 185 F.3d 1035, 1042 (9th Cir. 1999) (finding no exceptional circumstances when only "a slight upward creep in the caseload" caused backlog that agency claimed resulted from employee cutbacks and rejection of its budget requests); Gov't Accountability Project v. HHS, 568 F. Supp. 2d 55, 60-64 (D.D.C. 2008) (finding no exceptional circumstances because neither volume nor complexity of requests increased "unexpectedly" and staff size increased over time, and finding that backlog reduction might merely be result of decrease in incoming requests); Donham v. DOE, 192 F. Supp. 2d 877, 882-83 (S.D. Ill. 2002) (emphasizing that high volume of requests and inadequate resources do not evidence "exceptional circumstances" unless such circumstances are "not predictable," and finding, moreover, that agency had not reduced its backlog); see also *FOIA Post*, "Department of Justice Issues New Annual FOIA Report Guidance" (posted 5/22/08) (emphasizing importance of meaningful backlog reduction and requirement to report backlogged requests and appeals and yearly comparison figures).

processing the request," may be used as evidence of "exceptional circumstances."[175] (For a discussion of the litigation aspects of the FOIA's "exceptional circumstances" provision, see Litigation Considerations, "Open America" Stays of Proceedings, below.)

Finally, an agency's failure to comply with the statutory time limits may preclude the agency's ability to assess fees.[176] The OPEN Government Act provides that "[a]n agency shall not assess search fees (or in the case of a requester described under clause (ii)(II) [i.e., a requester who is an educational or noncommercial scientific institution or a representative of the news media], duplication fees[177]) . . . if the agency fails to comply with any time limit under paragraph (6) [of the FOIA], if no unusual or exceptional circumstances (as those terms are defined [under the FOIA]) apply to the processing of the request."[178] In other words, unless unusual or exceptional circumstances exist, as described above, an agency is prohibited from assessing search fees (or duplication fees if the requester is an educational or noncommercial scientific institution or a representative of the news media) if the agency fails to comply with the FOIA's time limits.[179] Conversely, for those requests for which unusual or exceptional circumstances do exist, agencies may assess appropriate fees.[180]

Expedited Processing

Agency regulations must provide for the expedited processing of FOIA requests for requesters who demonstrate "compelling need," or for any other case deemed appropriate under agency regulations.[181] Under the FOIA, a requester can show "compelling need" in one

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[175] 5 U.S.C. § 552(a)(6)(C)(iii); see also H.R. Rep. No. 104-795, at 24-25 (1996) (elaborating on circumstances); see, e.g., Peltier v. FBI, No. 02-4328, slip op. at 8-10 (D. Minn. Aug. 15, 2003) (finding exceptional circumstances due in large part to requester's "45,000 page large queue request").

[176] See OPEN Government Act § 6 (to be codified at 5 U.S.C. § 552(a)(4)(A)(viii)); see also *FOIA Post*, "OIP Guidance: New Limitations on Assessing Fees" (posted 11/18/08).

[177] 5 U.S.C. § 552(a)(4)(A)(ii)(II) (providing that only duplication fees may be charged to requester who qualifies as educational or noncommercial scientific institution, or as representative of the news media).

[178] OPEN Government Act § 6 (to be codified at 5 U.S.C. § 552(a)(4)(A)(viii)).

[179] OPEN Government Act § 6 (to be codified at 5 U.S.C. § 552(a)(4)(A)(viii)); see also *FOIA Post*, "OIP Guidance: New Limitations on Assessing Fees" (posted 11/18/08).

[180] OPEN Government Act § 6 (to be codified at 5 U.S.C. § 552(a)(4)(A)(viii)); see also *FOIA Post*, "OIP Guidance: New Limitations on Assessing Fees" (posted 11/18/08).

[181] 5 U.S.C. § 552(a)(6)(E) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also, e.g., Fiduccia v. DOJ, 185 F.3d 1035, 1041 (9th Cir. 1999) (rejecting argument that "requesters who sue agencies under the FOIA should have their requests handled before requesters who do not file lawsuits"); Judicial 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

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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;"[182] or, (2) if the requester is a "person primarily engaged in disseminating information,"[183] by demonstrating that an "urgency to inform the public concerning actual or alleged Federal Government activity" exists.[184] At their discretion, agencies may grant

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[181](...continued)
activity" and that "it would be unable to vindicate its rights without the requested documents . . . . do[] not meet the statutory definition of 'compelling need'"), aff'd sub nom. Judicial Watch, Inc. v. United States, 84 F. App'x 335 (4th Cir. 2004).

[182] 5 U.S.C. § 552(a)(6)(E)(v)(I).

[183] Id. § 552(a)(6)(E)(v)(II); see also, e.g., Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (concluding that "plaintiff is primarily engaged in disseminating information . . . regarding civil rights"), appeal dismissed, No. 06-5055 (D.C. Cir. Apr. 28, 2006); 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.").

[184] 5 U.S.C. § 552(a)(6)(E)(v)(II); see, e.g., DOJ FOIA Regulations, 28 C.F.R. § 16.5(d)(ii) (2008); see also Al-Fayed v. CIA, 254 F.3d 300, 310 (D.C. Cir. 2001) (holding that to determine if "urgency to inform" exists, a court must consider whether request concerns "matter of current exigency to the American public," whether consequences of delaying response would "compromise a significant recognized interest," whether request concerns "federal government activity," and "credibility of [the] requester"); 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"); IEEE Spectrum v. DOJ, No. 05-0865, slip op. at 2 (D.D.C. Feb. 16, 2006) (finding that requester failed to establish "'current exigency'" when it merely demonstrated its own desire to publish the requested information, "a self-serving assertion that carries very little weight"); Leadership Conference on Civil Rights, 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 re-authorization of provisions of Voting Rights Act); Elec. Privacy 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, at 2 (discussing Nazi War Crimes Disclosure Act, 5 U.S.C. § 552 note (2006), which does not directly amend the FOIA, but which does "impact[] directly on the FOIA [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'
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expedited treatment under additional circumstances as well.[185]

In this regard, agencies should keep in mind the distinction between the general public interest that can exist in the overall subject matter of a FOIA request (e.g., some matter of significant, perhaps even controversial, agency activity) and the public interest that might or might not be served by disclosure of the actual records sought or responsive to that particular FOIA request.[186] For example, the District Court for the District of Columbia, in Electronic Privacy Information Center v. DOD,[187] employed such an analysis when deciding whether a public interest organization was entitled to expedited processing, on a "media urgency" basis, of its FOIA request for records relating to the general subject of "data mining."[188] The court upheld the agency's denial of expedited processing and found that the requester had "failed to present the agency with evidence that there is a 'substantial interest' in the 'particular aspect' of [its] FOIA request."[189] In other words, the court said, "[t]he fact that [the requester] has provided evidence that there is 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."[190]

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[184](...continued)
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)).

[185] See 5 U.S.C. § 552(a)(6)(E)(i)(II); see also, e.g., DOJ FOIA Regulations, 28 C.F.R. § 16.5(d)(1)(iii), (iv) (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 Regulation, 22 C.F.R. § 171.12(b)(1) (2008) (providing for expedited processing if "[f]ailure to obtain requested information on an expedited basis could reasonably be expected to . . . harm substantial humanitarian interests").

[186] See *FOIA Post*, "FOIA Counselor Q&A" (posted 1/24/06).

[187] 355 F. Supp. 2d 98 (D.D.C. 2004).

[188] Id. at 102.

[189] Id.; see also ACLU of N. Cal. v. DOJ, No. 04-4447, 2005 WL 588354, at *13 (N.D. Cal. Mar. 11, 2005) (likewise ruling in "expedited processing" context that "it was not sufficient for the plaintiffs to show [public] interest in only the general subject area of the request").

[190] 355 F. Supp. 2d at 102 (emphasis added); see also *FOIA Post*, "FOIA Counselor Q&A" (posted 1/24/06) (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).

Agencies must determine whether to grant a request for expedited access within ten calendar days of its receipt.[191] This is an important obligation that agencies must heed because failure to timely inform requesters as to expedited processing determinations can result in judicial review without prior administrative appeal activity.[192]

An agency that grants expedited processing for a request must process it "as soon as practicable."[193] Although there is no set period of time designated to process expedited requests,[194] 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."[195]

Searching for Responsive Records

As a general rule, an agency must undertake a search that is "reasonably calculated to uncover all relevant documents."[196] The adequacy of an agency's search is judged by a test

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[191] 5 U.S.C. § 552(a)(6)(E)(ii)(I); see, e.g., DOJ FOIA Regulations, 28 C.F.R. § 16.5(d)(4).

[192] 5 U.S.C. § 552(a)(6)(E)(iii); see ACLU v. DOJ, 321 F. Supp. 2d 24, 29 (D.D.C. 2004) (stating that requester's failure to appeal an agency's decision denying expedited processing "does not preclude judicial review of the decision").

[193] 5 U.S.C. § 552(a)(6)(E)(iii).

[194] See Elec. Privacy 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"); 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)).

[195] See, e.g., Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence, 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. Privacy Info. Ctr. v. DOJ, 416 F. Supp. 2d at 37-39)); Elec. Privacy Info. Ctr. v. DOJ, 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").

[196] Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983); see, e.g., Radcliffe v. IRS, No. 08-1513, 2009 WL 1459449, at *1-2 (2d Cir. May 27, 2009) (concluding that "the search and the declarations were adequate, if barely so" after initial concern that declarations failed to fully explain why search was reasonably calculated to uncover all documents within scope of

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the agency improperly limited its search to certain record systems or otherwise failed to

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[200](...continued)
Pena v. 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 an agency is not required to "retain or retrieve documents which previously had been in its possession"); Knight v. NASA, No. 04-2054, 2006 WL 3780901, at *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"); Askew v. United States, No. 05-00200, 2006 WL 3307469, at *10 (E.D. Ky. Nov. 13, 2006) (rejecting plaintiff's contention that FOIA requires an agency to search another agency's files); Pac. Fisheries, Inc. v. IRS, No. 04-2436, 2006 WL 1635706, at *2-3 (W.D. Wash. June 1, 2006) (finding that agency's search was adequate when agency sent search queries to people "likely to have responsive documents," but did not ask people if they knew of others who might have responsive documents), aff'd in part, rev'd in part & remanded on other grounds, 539 F.3d 1143 (9th Cir. 2008); Williams v. U.S. Attorney's Office, No. 03-674, 2006 WL 717474, at *5 (N.D. Okla. Mar. 16, 2006) (stating that search obligations under FOIA require agency to search "its own records," not "records of third parties"); Sakamoto v. EPA, 443 F. Supp. 2d 1182, 1198 (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); Antonelli v. ATF, No. 04-1180, 2006 WL 367893, at *7 (D.D.C. Feb. 16, 2006) (concluding that FBI's search of Central Records System was reasonable and that FBI was not obliged under FOIA to search its computer hard drives for preliminary work product when requester did not specifically request search of FBI's "I" drives); 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."), aff'd on other grounds, 64 F. App'x 787 (D.C. Cir. 2003); Blanton v. DOJ, 63 F. Supp. 2d 35, 41 (D.D.C. 1999) (noting that even though agency did not search individual informant files for references to requester, any responsive information in such files would have been identified by agency's "cross-reference" search using requester's name); Hall v. DOJ, 63 F. Supp. 2d 14, 17-18 (D.D.C. 1999) (finding that agency need not search for records concerning subject's husband even though such records may have also included references to subject); Vigneau v. O'Brien, No. 99-37ML, slip op. at 5 (D.R.I. Aug. 3, 1999) (magistrate's recommendation) (finding search adequate when agency employee who plaintiff alleged wrote requested records provided affidavit stating that no such records ever existed); Iacoe v. IRS, No. 98-C-0466, 1999 WL 675322, at *4 (E.D. Wis. July 23, 1999) (recognizing that agency "diligently searched for the records requested in those places where [agency] expected they could be located"); Nation Magazine v. U.S. Customs Serv., No. 94-00808, slip op. at 8, 13-14 (D.D.C. Feb. 14, 1997) (stating that reasonable search did not require agency to search individual's personnel file in effort to locate substantive document drafted by him); cf. Chilingirian v. U.S. Attorney Executive Office, 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)).

or by automated means, agency records for the purpose of locating those records which are responsive to a request."[207]

A search for records has been found unnecessary when it was supported by an agency attestation that a person familiar with the records maintained by the agency had determined

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[206](...continued)
appeal dismissed voluntarily, No. 00-5220 (D.C. Cir. Oct. 12, 2000); see also FOIA Update, Vol. XVII, No. 4, at 2 (discussing electronic search requirements); cf. Hoffman v. DOJ, No. 98-1733-A, 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"). But see Pub. Citizen, Inc. v. Dep't of Educ., 292 F. Supp. 2d 1, 8 (D.D.C. 2003) ("While a computerized search may well be far more efficient and less costly than a manual search . . . it is apparent [under the facts of this particular case] that only the more cumbersome procedure is likely to turn up the requested information.").

[207] 5 U.S.C. § 552(a)(3)(D); see Amnesty Int'l, 2008 WL 2519908, at *14-15 (noting that electronic searches "designed to return documents containing [for example] the phrase 'CIA detainees' but not 'CIA detainee' or 'detainee of the CIA'" are unreasonable); Dayton Newspapers, Inc. v. Dep't of the Air Force, 35 F. Supp. 2d 1033, 1035 (S.D. Ohio 1998) (preliminary ruling without entry of judgment) (concluding that an estimated fifty-one hours required to "assemble" requested information from an agency database "is a small price to pay" in light of FOIA's presumption favoring disclosure); Thompson Publ'g Group, Inc. v. Health Care Fin. Admin., No. 92-2431, 1994 WL 116141, at *1 (D.D.C. Mar. 15, 1994) (finding that relatively simple computer searches and computer queries are reasonable for data that do not exist "in a single computer 'document' or 'file'"); Int'l Diatomite Producers Ass'n v. SSA, No. 92-1634, 1993 WL 137286, at *5 (N.D. Cal. Apr. 28, 1993) (ordering agency to respond to request for specific information, portions of which were maintained in four separate computerized listings, by either compiling new list or redacting existing lists), appeal dismissed, No. 93-16723 (9th Cir. Nov. 1, 1993); see also 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 (D.D.C. Feb. 5, 2001) (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," and agency is "not required to obtain new equipment to process [p]laintiff's FOIA request"); Schladetsch, 2000 WL 33372125, at *5 ("The programming necessary to conduct the [electronic database] search is a search tool and not the creation of a new record."); 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"), appeal dismissed as moot, 23 F. App'x 4 (D.C. Cir. 2001); *FOIA Post*, "FOIA Counselor Q&A" (posted 1/24/06) (advising that agencies have no obligation to search through "electronic databases [i.e., 'distributed data'] to which [they] have no more than 'read only'" access); FOIA Update, Vol. XVIII, No. 1, at 6 (advising that search provisions of Electronic FOIA amendments do not involve record "creation").

that no responsive records were, in fact, maintained.[208] A search has been required in the absence of such a showing.[209]

Courts have held that agencies responding to FOIA requests need not process and disclose non-responsive records or non-responsive portions of otherwise responsive records.[210] While the scope of a FOIA request is most commonly thought of in terms of the subject matter of the records sought, the scope of a request is also defined by when the requested records were created.[211] The temporal scope of a FOIA request is typically established through the agency's use of a "cut-off" date -- i.e., records created after that date are treated as not responsive to the request.[212] The Court of Appeals for the District of Columbia Circuit has declared that a cut-off date that is based on the date of the 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

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[208] See American-Arab Anti-Discrimination Comm. v. DHS, 516 F. Supp. 2d 83, 87-88 (D.D.C. 2007) (finding sufficient agency's statement that it "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").

[209] See 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 had sufficient knowledge of agency practices and procedures to make such assertion); Defenders of Wildlife v. USDA, 311 F. Supp. 2d 44, 55 (D.D.C. 2004) (stating that an 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").

[210] See Ctr. for Biological Diversity v. OMB, No. 07-04997, 2009 WL 1246690, at *5 (N.D. Cal. May 5, 2009) (finding that agency "is not required to produce information that is not responsive to a FOIA request"); Cal. ex rel. Brown v. NHTSA, No. 06-2654, 2007 WL 1342514, at *2 (N.D. Cal. May 8, 2007) (declining to order agency to disclose non-responsive information redacted from documents, and stating that "[a]n agency has no obligation to produce information that is not responsive to a FOIA request"); see also *FOIA Post*, "FOIA Counselor Q&A" (posted 1/24/06) (addressing document "scoping" in context of e-mail); cf. Islamic Shura Council of S. Cal., No. 07-01088, slip op. at 3-5 (C.D. Cal. Apr. 20, 2009) (requiring in camera review where agency withheld and redacted large amount of information as "outside the scope" of request but did not provide evidence explaining propriety of such action).

[211] See 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"), appeal dismissed by stipulation, No. 93-8431 (5th Cir. Oct. 21, 1993); see also *FOIA Post*, "Use of 'Cut-Off' Dates for FOIA Searches" (posted 5/6/04) (explaining that "[t]he scope of a FOIA request has both substantive and temporal aspects").

[212] See Defenders 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, at 14 (advising that records that "post-date" agency's "cut-off" date are not included within temporal scope of request).

administrative level, or before the court, and appellate courts will address the issue where lower courts have failed to do so, either by remanding the case or by making their own determination.[224]

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[223](...continued)
context of this case," to "infer from the absence of the word 'segregable' [in the agency's affidavit] that segregability was possible"); see also FOIA Update, Vol. XIV, No. 3, at 11-12 ("OIP Guidance: The 'Reasonable Segregation' Obligation").

[224] See, e.g., Missouri Coal. for the Env't Found. v. U.S. Army Corps of Eng'rs, 542 F.3d 1204, 1211-13 (8th Cir. 2008) (declining to affirm application of exemption to all documents in their entirety and remanding case for segregability analysis because district court made no segregability findings); Stolt-Nielsen Transp. Group, Ltd., 534 F.3d at 734 (remanding for failure to make specific findings of segregability regarding withheld documents and stating that "[w]hile . . . we could conduct a further review in this court under our de novo standard, in the interest of efficiency" we "'leave it to the district court to determine on remand whether more detailed affidavits are appropriate or whether an alternative such as in camera review'" is best (quoting Krikorian v. Dep't of State, 984 F.2d 461, 467 (D.C. Cir. 1993))); Juarez v. DOJ, 518 F.3d 54, 60-61 (D.C. Cir. 2008) (relying on affidavits to conduct segregability analysis itself, stating "we need not prolong the case further by remanding it . . . [a]s we have the same record before us as did the district court," and concluding that nothing was improperly withheld); Miccosukee Tribe of Indians of Fla. v. United States, 516 F.3d 1235, 1264-65 (11th Cir. 2008) (rejecting claim that court was obligated "to enunciate specific findings of segregability for each . . . withheld document[]," stating that "[i]n this Circuit, exacting requirements have not been placed on the district court's articulation of its reasons for sustaining a claim of exemption," and holding that in camera review, Vaughn Index, and affidavits provided adequate basis to determine propriety of Exemption 5 withholdings); 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); Trentadue v. Integrity Comm., 501 F.3d 1215, 1230-31 (10th Cir. 2007) (finding that district court "erred in refusing to conduct a severability analysis"); Abdelfattah v. DHS, 488 F.3d 178, 186-87 (3d Cir. 2007) (remanding case for segregability findings because agency failed to explain why material was not segregable and "'what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document'" (quoting Mead Data Cent., Inc., 566 F.2d at 261)); Trans-Pac. Policing Agreement, 177 F.3d at 1028 (indicating that district court had affirmative duty to consider reasonable segregability even though requester never sought segregability finding administratively or before district court); Isley v. EOUSA, No. 98-5098, 1999 WL 1021934, at *7 (D.C. Cir. Oct. 21, 1999) (remanding case to district court for segregability finding even though neither party raised segregability issue in district court); Becker v. IRS, 34 F.3d 398, 406 (7th Cir. 1994) (noting that district court's failure to make a segregability determination did not necessitate remand because it "did not simply rely on [agency] affidavits describing the documents, but conducted an in camera review"); cf. Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1117 (D.C. Cir. 2007) (affirming district court's initial segregability findings, and adding that district court must make new segregability findings if on remand additional disclosure is ordered). But see Nicolaus v. FBI, 24 F. App'x 807, 808 (9th Cir. 2001) (concluding that plaintiff's "argument that the district court failed to make adequate factual findings concerning the segregability of documents is waived for failure to present it in his opening brief").

referral and of the name of the agency FOIA office to which it was made.[233] In exceptional circumstances, to avoid compromising sensitive law enforcement or national security interests, a referring agency should not identify the agency to which the referral was made.[234] This should be done, for example, when identifying the agency to which the referral was made would reveal the existence of an investigation by that agency which is not yet publicly known.[235] In such circumstances, in order to avoid revealing the sensitive fact of that other agency's involvement, the referring agency should itself respond to the requester after coordinating with the agency where the records originated.[236]

All agencies should remember, however, that even after they make such record referrals in response to FOIA requests, they retain the responsibility of defending any agency action taken on those records if the matter proceeds to litigation.[237] Additionally, agencies receiving

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[232](...continued)
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); Maydak v. DOJ, 254 F. Supp. 2d 23, 40 (D.D.C. 2003) (noting that agency's referral of records requested under the FOIA to an entity that is not subject to the FOIA -- a United States Probation Office -- "raises a genuine legal issue about the propriety" of agency's action).

[233] See FOIA Update, Vol. XII, No. 3, at 3-4 (advising agencies, with exception for records pertaining to sensitive law enforcement or national security matters, to inform requester of identity of other agencies to which it referred records).

[234] See FOIA Update, Vol. XII, No. 3, at 3-4 (advising agencies not to inform requester of identity of other agencies to which it referred records when doing so "would itself disclose a sensitive, exempt fact"); FOIA Update, Vol. XII, No. 2, at 6 ("FOIA Counselor: Questions & Answers") (warning agencies not to notify requesters of identities of other agencies to which record referrals are made in cases in which doing so would reveal sensitive, abstract fact about record's existence).

[235] See FOIA Update, Vol. XII, No. 2, at 6.

[236] See id. (stating that in exceptional circumstances, agency in receipt of referral should contact referring agency to coordinate response).

[237] See, e.g., Peralta v. U.S. Attorney's Office, 136 F.3d 169, 175 (D.C. Cir. 1998) (remanding case for further consideration of whether referral of FBI documents to FBI resulted in "improper withholding" of documents), on remand, 69 F. Supp. 2d 21, 29 (D.D.C. 1999) (holding that EOUSA's referral of documents to FBI was not improper); Williams v. FBI, No. 92-5176, 1993 WL 157679, at *1 (D.C. Cir. May 7, 1993) (illustrating that in litigation referring agency is nevertheless required to justify withholding of record that was referred to another agency); 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 referee agency explained nature of pages withheld on referral,
(continued...)

would ever be made once the requesters had the documents in their hands."[246]

Because the FOIA 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 the requester to see [the information] or for proscribing its general dissemination."[247] In short, "once there is disclosure, the information belongs to the general public."[248]

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.[249] These statutory provisions require agencies to not only honor a requester's choice of format among existing formats of a record (assuming there is no exceptional difficulty in its reproduction)[250] but to also make "reasonable efforts" to disclose

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[246] Strout v. U.S. Parole Comm'n, 842 F. Supp. 948, 951 (E.D. Mich. 1994), aff'd, 40 F.3d 136 (6th Cir. 1994); see also Taylor v. U.S. Dep't of the Treasury, No. A-96-CA-933, 1996 WL 858481, at *2 (W.D. Tex. Dec. 17, 1996) (recognizing that agency may require payment before sending processed records); Trueblood v. U.S. Dep't of the Treasury, 943 F. Supp. 64, 68 (D.D.C. 1996) (same); 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); cf. *FOIA Post*, "NTIS: An Available Means of Record Disclosure" (posted 8/30/02; supplemented 9/23/02) (advising that records that agency chooses to distribute through National Technical Information Service will be subject to that entity's statutorily based fee schedule, which "supersedes" FOIA's fee provisions pursuant to 5 U.S.C. § 552(a)(4)(A)(vi)).

[247] Favish, 541 U.S. at 174; see 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 to only certain parties, and that once the information is disclosed to [plaintiff], it must 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 the 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. U.S. 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).

[248] Favish, 541 U.S. at 174; see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) ("The well-known maxim under the FOIA that 'release to one is release to all' was firmly reinforced in the Favish decision.").

[249] 5 U.S.C. § 552(a)(3)(B); see also FOIA Update, Vol. XVII, No. 4, at 2 (discussing statutory provisions); cf. DOJ "Electronic Record" Report, reprinted in abridged form in FOIA Update, Vol. XI, No. 3, at 3-6 (discussing "choice of format" issues regarding "electronic records").

[250] See, e.g., Chamberlain, 957 F. Supp. at 296 ("The substantial expense of reproducing the (continued...)

agencies should identify and post records in which they anticipate interest and should make improvements to their websites accordingly.[264] (For a discussion of proactive disclosures, see Proactive Disclosures, Disclosing Records Proactively to Achieve Transparency, above.)

Administrative Appeals

Under the FOIA's administrative appeal provision, a requester has the right to administratively appeal any adverse determination an agency makes on his or her FOIA request.[265] 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.[266]

The administrative appeal process is important to agencies and requesters for two reasons. First, the administrative appeal process provides an agency with an opportunity to review its initial action taken in response to a request to determine whether corrective steps are necessary.[267] Second, although failure to file an administrative appeal is not 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.'"[268]

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[262](...continued)
available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf; *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

[263] See 5 U.S.C. § 552(a)(2).

[264] See President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683 (directing all agencies to "take affirmative steps to make information public" and to "use modern technology to inform citizens about what is known and done by their Government"); accord Attorney General Holder's FOIA Guidelines, at 3, available at http://www.usdoj.gov/ag/foia-memo-march 2009.pdf (stating that "agencies should readily and systematically post information online in advance of any public request" because doing so "reduces the need for individualized requests and may help reduce existing backlogs"); *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (recognizing proactive disclosure as a "key area where agencies can make real improvements in increasing transparency").

[265] See 5 U.S.C. § 552(a)(6)(A) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

[266] See DOJ FOIA Regulations, 28 C.F.R. § 16.6(c) (2008).

[267] See Oglesby v. U.S. 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))).

[268] Hidalgo v. FBI, 344 F.3d 1256, 1258 (D.C. Cir. 2003) (quoting Oglesby, 920 F.2d at 61); (continued...)