



## **Discretionary Disclosure**

The Freedom of Information Act is an information disclosure statute designed to provide the public with a statutory right of access to agency records.<sup>1</sup> At the same time, the FOIA strikes a balance between the public's right to know about the workings of their government and the government's need to protect certain information,<sup>2</sup> with an emphasis on the "fullest responsible disclosure."<sup>3</sup> In administering the FOIA it is important to note that the President and Attorney General have issued memoranda to

---

<sup>1</sup> John Doe Agency v. John Doe Corp., 493 U.S. 146, 151 (1989) ("This Court repeatedly has stressed the fundamental principle of public access to Government documents that animates the FOIA.").

<sup>2</sup> See id. at 152 ("Congress sought 'to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence'" (citing H.R. Rep. No. 1497, at 6 (1966))); see also NARA v. Favish, 541 U.S. 157, 172 (2004) (observing that while under FOIA government information "belongs to citizens to do with as they choose," this is balanced against statutory "limitations that compete with the general interest in disclosure, and that, in appropriate cases, can overcome it").

<sup>3</sup> S. Rep. No. 89-813, at 3 (1965) (stating FOIA's statutory objective is that of achieving "the fullest responsible disclosure"); accord 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] (FOIA "should be administered with a clear presumption: [i]n the face of doubt, openness prevails"); Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 51879 (Oct. 8, 2009) [hereinafter Attorney General Holder's FOIA Guidelines], ("strongly encourag[ing] agencies to make discretionary disclosures of information"); see also Favish, 541 U.S. at 171-72 (emphasizing FOIA's underlying purpose of informing citizens about government actions as "structural necessity in a real democracy"); DOD v. FLRB, 510 U.S. 487, 494 (1996) (reiterating that FOIA reflects general philosophy of full agency disclosure); DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 754 (1989) (explaining that "statute known as the FOIA" is founded on general philosophy of full agency disclosure); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (describing principles of government openness and accountability underlying FOIA).

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."<sup>4</sup> (For a discussion of these memoranda, see [President Obama's FOIA Memorandum & Attorney General Holder's FOIA Guidelines](#).)

President Obama issued his FOIA Memorandum on January 21, 2009, his first full day in office.<sup>5</sup> He declared that the FOIA "encourages accountability through transparency" and further described the Act as "the most prominent expression of a profound national commitment to ensuring an open Government."<sup>6</sup> On March 19, 2009, Attorney General Holder issued FOIA Guidelines applicable to all agencies which were designed "to underscore" FOIA's "fundamental commitment to open government" and to "ensure that it is realized in practice."<sup>7</sup> Attorney General Holder stressed that "an agency should not withhold information simply because it may do so legally."<sup>8</sup> Moreover, the Attorney General instructed agencies to consider making partial disclosure of records when full disclosures are not possible.<sup>9</sup> As the Attorney General described, "[e]ven if some parts of a record must be withheld, other parts either may not be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure."<sup>10</sup>

Accordingly, and inasmuch as the FOIA's exemptions are themselves discretionary, not mandatory,<sup>11</sup> agencies may make "discretionary disclosures" of

---

<sup>4</sup> [President Obama's FOIA Memorandum](#), 74 Fed. Reg. at 4683; accord [Attorney General Holder's FOIA Guidelines](#), 74 Fed. Reg. at 51879-02; 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).

<sup>5</sup> [President Obama's FOIA Memorandum](#), 74 Fed. Reg. at 4683.

<sup>6</sup> [Id.](#)

<sup>7</sup> [Attorney General Holder's FOIA Guidelines](#), 74 Fed. Reg. at 51879-02.

<sup>8</sup> [Id.](#)

<sup>9</sup> [See id.](#)

<sup>10</sup> [Id.](#)

<sup>11</sup> See [Chrysler Corp. v. Brown](#), 441 U.S. 281, 293 (1979) (reasoning that application of agency FOIA policies may require "some balancing and accommodation," and noting that "Congress did not design the FOIA exemptions to be mandatory bars to disclosure"); [Bartholdi Cable Co. v. FCC](#), 114 F.3d 274, 282 (D.C. Cir. 1997) (observing that "FOIA's exemptions simply permit, but do not require, an agency to withhold exempted information").

exempt information, as a matter of their administrative discretion, where they are not otherwise prohibited from doing so.<sup>12</sup>

As a general rule, the ability to make a discretionary release will vary according to the exemption involved and whether the information is required to be protected by some other legal authority.<sup>13</sup> Some of the FOIA's exemptions such as Exemption 2<sup>14</sup> and Exemption 5,<sup>15</sup> protect a type of information that is not generally subject to a disclosure prohibition.<sup>16</sup> By contrast, the exemptions covering national security, commercial and financial information, personal privacy, and matters within the scope of nondisclosure statutes protect records that are also encompassed within other legal authorities that restrict their disclosure to the public.<sup>17</sup> Thus, agencies are constrained in their ability to make discretionary disclosures of records covered by the following exemptions:

- Exemption 1 of the FOIA protects from disclosure national security information, provided that it has been properly classified in accordance with both the substantive and procedural requirements of a governing executive order.<sup>18</sup> If information is properly classified, and therefore is exempt from disclosure under

---

<sup>12</sup> See *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1334 n.1 (D.C. Cir. 1987) (explaining that agency's FOIA disclosure decision can "be grounded either in its view that none of the FOIA exemptions applies, and thus that disclosure is mandatory, or in its belief that release is justified in the exercise of its discretion, even though the data fall within one or more of the statutory exemptions."); see also [Attorney General Holder's FOIA Guidelines](#), 74 Fed. Reg. at 51879-02-(encouraging agencies to make discretionary disclosures); *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 on making discretionary disclosures); *FOIA Update*, Vol. VI, No. 3, at 3 ("[OIP Guidance: Discretionary Disclosure and Exemption 4](#)") ("[A]gencies generally have discretion under the Freedom of Information Act to decide whether to invoke applicable FOIA exemptions.").

<sup>13</sup> 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) (describing exemptions where discretionary disclosure can most readily be made and those for which discretionary disclosure is not available).

<sup>14</sup> [5 U.S.C. § 552\(b\)\(2\) \(2006 & Supp. IV 2010\)](#).

<sup>15</sup> [5 U.S.C. § 552\(b\)\(5\)](#).

<sup>16</sup> 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).

<sup>17</sup> See *id.* (describing exemptions for which discretionary disclosure is not available).

<sup>18</sup> [5 U.S.C. § 552\(b\)\(1\)](#).

Exemption 1, it is not appropriate for discretionary FOIA disclosure.<sup>19</sup> (See the discussion of Exemption 1, above.)

- Exemption 3 incorporates into the FOIA nondisclosure provisions that are contained in a variety of other federal statutes.<sup>20</sup> Some of these statutory nondisclosure provisions, such as those pertaining to grand jury information<sup>21</sup> and census data,<sup>22</sup> establish absolute prohibitions on agency disclosure; others leave agencies with some discretion as to whether to disclose certain information, but such administrative discretion generally is exercised independently of the FOIA.<sup>23</sup> (See the discussion of Exemption 3, above.) Therefore, it is not appropriate for agencies to make discretionary disclosures under the FOIA of information that falls within the scope of Exemption 3.<sup>24</sup>
- Exemption 4 of the FOIA protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."<sup>25</sup> (See the discussions of Exemption 4, above, and Reverse FOIA, below.) Significantly, there is a specific criminal statute, the Trade Secrets Act,<sup>26</sup> that prohibits the unauthorized disclosure of most information falling within Exemption 4. Its practical effect is to constrain an agency's ability to make a discretionary

---

<sup>19</sup> 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).

<sup>20</sup> See [5 U.S.C. § 552\(b\)\(3\)](#); see also *FOIA Post*, "[Agencies Rely on Wide Range of Exemption 3 Statutes](#)" (posted 12/16/03).

<sup>21</sup> See Fed. R. Crim. P. 6(e) (enacted as statute in 1977).

<sup>22</sup> See 13 U.S.C. §§ 8(b), 9(a) (2006).

<sup>23</sup> See, e.g., *Aronson v. IRS*, 973 F.2d 962, 966 (1st Cir. 1992).

<sup>24</sup> See, e.g., *Ass'n of Retired R.R. Workers v. R.R. Ret. Bd.*, 830 F.2d 331, 335 (D.C. Cir. 1987) (deciding that FOIA jurisdiction does not extend to exercise of agency disclosure discretion within Exemption 3 statute); see also *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). But see *Palmer v. Derwinski*, No. 91-197, slip op. at 3-4 (E.D. Ky. June 10, 1992) (ordering VA to disclose existence of certain medical records, finding that public benefit of release outweighed privacy interest in disclosure, pursuant to discretionary terms of 38 U.S.C. § 7332(b) (2006)).

<sup>25</sup> [5 U.S.C. § 552\(b\)\(4\)](#).

<sup>26</sup> 18 U.S.C. § 1905 (2006).

disclosure of Exemption 4 information,<sup>27</sup> in the absence of an agency regulation (based upon federal statute) that expressly authorizes disclosure.<sup>28</sup> (See the discussion of this point under Reverse FOIA, below.)

- Exemptions 6<sup>29</sup> and 7(C)<sup>30</sup> of the FOIA protect personal privacy interests. As with private commercial information covered by Exemption 4, the personal information protected by Exemptions 6 and 7(C) is not the type of information ordinarily considered appropriate for discretionary FOIA disclosure. Significantly, with Exemptions 6 and 7(C), a balancing of public interest considerations is built into the determination of whether the information is exempt in the first place.<sup>31</sup> (See the discussions of this point under Exemption 6, above, and Exemption 7(C), above.) Moreover, personal information covered by Exemptions 6 and 7(C) in many cases falls within the protective coverage of the Privacy Act of 1974,<sup>32</sup> which mandates that any such information concerning U.S. citizens and permanent resident aliens that is maintained in a "system of records"<sup>33</sup> not be disclosed unless that disclosure is permitted under one of the specific exceptions to the Privacy Act's general disclosure prohibition.<sup>34</sup> Specifically, the Privacy Act contains a prohibition on disclosure of information not required to be released under the FOIA.<sup>35</sup> Thus, if Privacy Act-protected information falls within a FOIA exemption, a discretionary release of such information is not appropriate.<sup>36</sup>

---

<sup>27</sup> See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1144 (D.C. Cir. 1987); see also *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); *FOIA Update*, Vol. VI, No. 3, at 3 ("[OIP Guidance: Discretionary Disclosure and Exemption 4](#)").

<sup>28</sup> See Chrysler Corp. v. Brown, 441 U.S. 281, 295-96 (1979); see, e.g., St. Mary's Hosp., Inc. v. Harris, 604 F.2d 407, 409-10 (5th Cir. 1979); Honeywell Tech. Solutions, Inc. v. Dep't of Air Force, 779 F. Supp. 2d 14, 20 (D.D.C. 2011).

<sup>29</sup> [5 U.S.C. § 552\(b\)\(6\)](#).

<sup>30</sup> [Id. § 552\(b\)\(7\)\(C\)](#).

<sup>31</sup> See NARA v. Favish, 541 U.S. 157, 171 (2004) (holding that agency must balance privacy interests of persons affected by disclosure against public interest in disclosure).

<sup>32</sup> [5 U.S.C. § 552a \(2006 & Supp. IV 2010\)](#).

<sup>33</sup> [5 U.S.C. § 552a\(a\)\(5\)](#).

<sup>34</sup> [5 U.S.C. § 552a\(b\)\(1\)-\(12\)](#).

<sup>35</sup> [5 U.S.C. § 552a\(b\)\(2\)](#).

<sup>36</sup> See DOD v. FLRA, 964 F.2d 26, 30-31 n.6 (D.C. Cir. 1992) (discussing Privacy Act's limitations on discretionary FOIA disclosure); see also *FOIA Post*, "[OIP Guidance:](#)

By contrast, records protected by the remaining FOIA exemptions, Exemptions 2, 5, 7, 8, and 9, can be subjects of discretionary release.<sup>37</sup> Under the Attorney General's FOIA Guidelines, all agencies are encouraged to make discretionary releases and to withhold records only when they reasonably foresee that disclosure would harm an interest protected by one of the FOIA's exemptions or when disclosure is prohibited by law.<sup>38</sup> When considering whether to make a discretionary release, the two universal factors that will guide that process are the age of the record and the sensitivity of its contents.<sup>39</sup> Records covered by Exemption 2 are good candidates for discretionary release,<sup>40</sup> as are records protected by the deliberative process privilege under Exemption 5.<sup>41</sup> When deciding whether to make a discretionary release of records protected by the deliberative process privilege, in addition to considering the age and sensitivity of the record's contents, agencies should consider the nature of the decision at issue, the status of that decision, and the personnel involved.<sup>42</sup>

The potential to make a discretionary disclosure necessarily varies from exemption to exemption and from document to document -- but in all cases agencies should be guided by the "fundamental commitment to open government" that the Attorney

---

[President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government](#)" (posted 4/17/09).

<sup>37</sup> 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) (advising FOIA professionals to use their judgment in making such determinations for each document).

<sup>38</sup> [Attorney General Holder's FOIA Guidelines](#), 74 Fed. Reg. at 51879; see also *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) (explaining that the determination of whether the agency reasonably foresees harm goes "hand-in-hand" with the determination of whether to make a discretionary release).

<sup>39</sup> 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).

<sup>40</sup> See Office of Info. Policy, DOJ, FOIA Guidance: "[Exemption 2 After the Supreme Court's Ruling in Milner v. Department of the Navy](#)" (2011) (encouraging agencies to make discretionary releases of records that could be protected by Exemption 2 that would not cause reasonably foreseeable harm).

<sup>41</sup> 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).

<sup>42</sup> [Id.](#)

General has directed agencies to follow.<sup>43</sup> With this guidance in mind, agencies have been making discretionary releases of records and providing examples in their Chief FOIA Officer Reports.<sup>44</sup>

When reviewing records to determine if any discretionary disclosure is possible, agencies should keep in mind that the FOIA requires them to take reasonable steps to segregate and release nonexempt information.<sup>45</sup> (See discussions of this issue under Procedural Requirements, "Reasonably Segregable" Obligation, above, and Litigation Considerations, "Reasonably Segregable" Requirements, below.) This segregation obligation takes on added significance under Attorney General Holder's FOIA Guidelines in which he directed agencies to review records both to determine if there are reasonably segregable nonexempt portions, as well as any reasonably segregable portions that may be technically exempt, but which can be released as a matter of discretion.<sup>46</sup>

In a case addressing the issue of the impact of discretionary disclosures on the ability of an agency to protect other, similar documents, the Court of Appeals for the Ninth Circuit surveyed the law of waiver under the FOIA and found: "no case . . . in which the release of certain documents waived the exemption as to other documents. On the contrary, [courts] generally have found that the release of certain documents waives FOIA exemptions only for those documents released."<sup>47</sup>

---

<sup>43</sup> [Attorney General Holder's FOIA Guidelines](#), 74 Fed. Reg. at 51879-02; 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).

<sup>44</sup> See Office of Info. Policy, DOJ, Chief FOIA Officer Reports; see also Office of Info. Policy, Summaries of Agency Chief FOIA Officer Reports.

<sup>45</sup> See [5 U.S.C. § 552\(b\)](#) (sentence immediately following exemptions); see also [Attorney General Holder's FOIA Guidelines](#), 74 Fed. Reg. at 51879-02; [Elec. Frontier Found. v. DOJ](#), 739 F.3d 1, 12 (D.C. Cir. 2014) ("It is undisputed that under FOIA non-exempt information that is 'reasonably segregable' from exempt information must be disclosed."); [Stolt-Nielsen Transp. Group Ltd. v. United States](#), 534 F. 3d 728, 734 (D.C. Cir. 2008) (finding that "the established rule for FOIA" means that agencies cannot withhold entire documents simply because portions are exempt); [Sussman v. U.S. Marshals Serv.](#), 494 F. 3d 1106, 1116 (D.C. Cir. 2007) ("Even when FOIA exemptions apply, '[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt.'"); [Trans-Pac. Policing Agreement v. U.S. Customs Serv.](#), 177 F.3d 1022, 1028 (D.C. Cir. 1999) (holding that district courts have affirmative duty to consider issue of segregability sua sponte even if issue has not been specifically raised by plaintiff).

<sup>46</sup> [Attorney General Holder's FOIA Guidelines](#), 74 Fed. Reg. at 51879-02; see also *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).

<sup>47</sup> [Mobil Oil Corp. v. EPA](#), 879 F.2d 698, 701 (9th Cir. 1989); see also [Students Against Genocide v. Dep't of State](#), 257 F.3d 828, 835-36 (D.C. Cir. 2001) (explaining that "releasing

Such a general rule of nonwaiver through discretionary disclosure is supported by sound policy considerations, as the Ninth Circuit discussed at some length:

Implying such a waiver could tend to inhibit agencies from making any disclosures other than those explicitly required by law because voluntary release of documents exempt from disclosure requirements would expose other documents [of a related nature] to risk of disclosure. An agency would have an incentive to refuse to release all exempt documents if it wished to retain an exemption for any documents . . . [R]eadily finding waiver of confidentiality for exempt documents would tend to thwart the [FOIA's] underlying statutory purpose, which is to implement a policy of broad disclosure of government records.<sup>48</sup>

As the District Court for the District of Columbia has phrased it: "A contrary rule would create an incentive against voluntary disclosure of information."<sup>49</sup> To find

---

some photographs" does not mean government has waived its right to withhold other photographs); Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) ("[D]isclosure of a similar type of information in a different case does not mean that the agency must make its disclosure in every case."); Stein v. DOJ, 662 F.2d 1245, 1259 (7th Cir. 1981) (holding that exercise of discretion should waive no right to withhold records of "similar nature"); ACLU v. DOD, 752 F. Supp. 2d 361, 372-373 (S.D.N.Y. 2010) (concluding that "discretionary disclosure does not constitute a waiver for the rest of the requested information"); Ctr. for Biological Diversity v. OMB, No. 07-04997, 2009 WL 1246690, at \*11 (N.D. Cal. May 5, 2009) (finding that "'waiver of exemption for these documents based on the release of related documents . . . would be contrary to both the case law on waiver and to the policies underlying FOIA'" (quoting Mobil Oil, 879 F. 2d at 700)); Ctr. for Int'l Environmental Law v. Office of the U.S. Trade Representative, 505 F. Supp. 2d 150, 158-59 (D.D.C. 2007) (holding that prior disclosure of "similar information does not suffice" as waiver); Enviro Tech Int'l. Inc. v. EPA, No. 02-C-4650, slip op. at 15 (N.D. Ill. Mar. 11, 2003) (stating that "courts have refused to find that the discretionary disclosure of a document effectuates a waiver of other related documents").

<sup>48</sup> Mobil Oil, 879 F.2d at 701; see also Army Times v. Dep't of the Air Force, 998 F.2d 1067, 1068 (D.C. Cir. 1993) (articulating general principle of no waiver of exemption simply because agency released "information similar to that requested" in past).

<sup>49</sup> Mehl v. EPA, 797 F. Supp. 43, 47 (D.D.C. 1992); see also Williams & Connolly v. SEC, 662 F.3d 1240, 1245 (D.C. Cir. 2011) (holding that to uphold a waiver theory would "deter agencies from voluntarily honoring FOIA requests"); Military Audit Project v. Casey, 656 F.2d 724, 754 (D.C. Cir. 1981) (reasoning that agency should not be penalized for declassifying and releasing documents during litigation; otherwise, there would be "a disincentive for an agency to reappraise its position and, when appropriate, release documents previously withheld"); Schoenman v. FBI, No. 04-2202, 2006 WL 1126813, at \*19 (D.D.C. Mar. 31, 2006) ("Courts have refrained from accepting legal arguments that would create disincentives for agencies to take actions that would benefit requesters overall."); Greenberg v. U.S. Dep't of Treasury, 10 F. Supp. 2d 3, 23-24 (D.D.C. 1998)

otherwise "would create the untenable result of discouraging the government" from making such disclosures.<sup>50</sup> Nevertheless, the timing of any discretionary disclosure can be important. The District Court for the District of Columbia has ruled that a discretionary disclosure made during the course of litigation "plainly constitutes a 'voluntary or unilateral change in the position of the agency,'" which may make the plaintiff eligible for attorney fees.<sup>51</sup> (For a further discussion of this issue, see Attorney Fees, below.)

---

("Penalizing agencies by holding that they waive their exhaustion defense if they make a discretionary document release after the time for an administrative appeal had expired would not advance the underlying purpose of the FOIA -- the broadest possible responsible disclosure of government documents."); Shewchun v. INS, No. 95-1920, slip op. at 8 (D.D.C. Dec. 10, 1995) (explaining that to find agency bad faith after agency conducted new search and released more information "would create a disincentive for agencies to conduct reviews of their initial searches"), summary affirmance granted, No. 97-5044, 1997 WL 404711 (D.C. Cir. June 5, 1997); Berg v. DOE, No. 94-0488, slip op. at 8 (D.D.C. Nov. 7, 1994) (stating that release of information after initial search does not prove inadequacy of search and that to hold otherwise would end "laudable agency practice of updating and reconsidering the release of information after the completion of the initial FOIA search"); Gilmore v. NSA, No. 92-3646, 1993 U.S. Dist. LEXIS 22027, at \*29 (N.D. Cal. May 3, 1993) (following Military Audit and declining to penalize agency), aff'd on other grounds, 76 F.3d 386 (9th Cir. 1995) (unpublished table decision); Stone v. FBI, 727 F. Supp. 662, 666 (D.D.C. 1990) (reasoning that agencies should be free to make "voluntary" disclosures without concern that they "could come back to haunt" them in other cases).

<sup>50</sup> Ctr. for Biological Diversity, 2009 WL 1246690, at \*11.

<sup>51</sup> Judicial Watch, Inc. v. DOJ, No. 10-851, 2012 WL 2989945, at \*5 (D.D.C. July 23, 2012).