## 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 the new executive order on the FOIA, Executive Order 13,392,[2] 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 Executive Order 13,392's reminder that "FOIA requesters are seeking a

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"Improving Agency Disclosure of Information," 8, 12 (Oct. 16, 2006), available at http://www.usdoj.gov/oip/ag_report_to_president_13392.pdf (emphasizing "particular[] importan[ce]" of FOIA Web sites and also agency use of "FOIA Intranet site[s]" for more efficient FOIA administration); *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (advising that overall FOIA Web site improvement is "particularly worthwhile area for agency attention"); *FOIA Post*, "Electronic Compilation of E-FOIA Implementation Guidance" (posted 2/28/03) (urging agencies to "redouble their efforts to ensure complete E-FOIA compliance"); *FOIA Post*, "Follow-Up Report on E-FOIA Implementation Issued" (posted 9/27/02) (discussing continued congressional focus on governmentwide implementation of FOIA's electronic availability requirements); *FOIA Post*, "FOIA Officers Conference Scheduled" (posted 9/17/02) (scheduling governmentwide FOIA officers conference to focus on 2002 GAO Report as "basis for all agencies to review and improve wherever necessary their compliance with E-FOIA's requirements"); *FOIA Post*, "GAO E-FOIA Implementation Report Issued" (posted 3/23/01) (advising that agencies must take all steps necessary to "both attain[] and maintain[] proper compliance with all of [the FOIA's] electronic availability requirements"); *FOIA Post*, "Agencies Continue E-FOIA Implementation" (posted 3/14/01) (identifying prospective GAO report as "excellent basis upon which all agencies can review their E-FOIA implementation compliance").

[1] 5 U.S.C. § 552(a)(3)(A) (2000 & Supp. IV 2004) (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, as of 2002, certain agency FOIA disclosures to foreign governments or representatives of such governments); see also *FOIA Post*, "FOIA Amended by Intelligence Authorization Act" (posted 12/23/02) (advising on 2002 FOIA amendments' implementation).

[2] Exec. Order No. 13,392, 70 Fed. Reg. 75,373 (Dec. 14, 2005).

service from the Federal Government and should be treated as such."[3] Accordingly, agencies should strive to "carefully consider [all] FOIA requests"[4] and handle them "courteously and appropriately."[5]

Executive Order 13,392

On December 14, 2005, the President issued Executive Order 13,392, entitled "Improving Agency Disclosure of Information," which contains several statements of governmentwide FOIA policy as well as many specific requirements in the areas of customer service, planning, and reporting that affect all federal agencies in their administration of the Act.[6] This first-of-its-kind FOIA executive order established a "citizen-centered"[7] and "results-oriented"[8] policy for improving the Act's administration throughout the executive branch; it draws new attention to the difficulties presented by agency backlogs of pending FOIA requests;[9] and it places new obligations

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[3] Id. at Sec. 1(b).

[4] Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), reprinted in *FOIA Post* (posted 10/15/01) (Attorney General FOIA policy memorandum encouraging all federal agencies to make "careful[] . . . disclosure determinations under the FOIA" and also to "consult with the Department of Justice's Office of Information and Privacy when significant FOIA issues arise").

[5] Exec. Order No. 13,392, Sec. 1(b); see also id. at Sec. 2(c) (establishing FOIA Requester Service Centers and FOIA Public Liaisons in order to "ensure appropriate communication with FOIA requesters"); id. at Sec. 2(c)(ii) (directing that FOIA Public Liaisons must seek to ensure service-oriented responses to FOIA requests and FOIA-related inquiries); *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (Part I.13.) (advising that politeness and courtesy are "integral to the overall 'customer-service' policy of the executive order"); id. at (Part IV.8.) (encouraging agencies to include in their improvement plans even "seemingly small or slight improvements" in areas such as politeness and courtesy); Presidential Memorandum for Heads of Departments and Agencies Regarding the Freedom of Information Act, 29 Weekly Comp. Pres. Doc. 1999 (Oct. 4, 1993), reprinted in FOIA Update, Vol. XIV, No. 3, at 3.

[6] Exec. Order No. 13,392, 70 Fed. Reg. 75,373 (Dec. 14, 2005).

[7] Id. at Sec. 1(b), (d).

[8] Id. at Sec. 1(c), (d).

[9] See id. at Sec. 3(a)(i) (instructing the newly appointed Chief FOIA Officer of each agency to conduct a review of FOIA operations in order to evaluate "the extent to which . . . requests for records have not been responded to within the statutory time limit"); id. at Sec. 3(a)(v) (instructing
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on all agencies to be met by specified deadlines.[10]

Most fundamentally, Executive Order 13,392 emphasizes the importance of the Freedom of Information Act to "[t]he effective functioning of our constitutional democracy"[11] and reminds all agencies that "FOIA requesters are seeking a service from the Federal Government and should be treated as such."[12] Accordingly, it states an overall policy of responding to FOIA requests "courteously and appropriately" and in ways that permit FOIA requesters to "learn about the FOIA process" -- most particularly, "about the status of a person's FOIA request."[13] It calls upon all federal agencies to discharge their FOIA responsibilities in an efficient as well as "results-oriented" manner and to "achieve tangible, measurable improvements in FOIA processing."[14] Its goal is to "improve service and performance" and "increase efficiency" in agency FOIA operations, "thereby strengthening compliance with the FOIA" and minimizing both "disputes and related litigation" arising under it.[15]

Toward that end, Executive Order 13,392 directed all federal agencies subject to the FOIA to, among other things, take the following basic steps:

(1) Designate within thirty days a senior official of each agency (at the Assistant Secretary or equivalent level), to serve as the Chief FOIA

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[9](...continued)
each Chief FOIA Officer to "identify ways to eliminate or reduce [agency's] backlog"); id. at Sec. 3(b)(ii) (requiring that Chief FOIA Officer's improvement plan include "specific activities that the agency will implement to eliminate or reduce" its backlog); see also *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (Part I.12.) (stating that backlog reduction/elimination "should be a major underpinning of the implementation plans" of all agencies with backlogs).

[10] See, e.g., Exec. Order No. 13,392, Sec. 2(a) (requiring designation of Chief FOIA Officer in each agency); id. at Sec. 3(c)(i) (requiring development of individual agency FOIA Improvement Plans); id. at Sec. 4(a) (requiring Attorney General report to President on agency FOIA implementation).

[11] Id. at Sec. 1(a).

[12] Id. at Sec. 1(b).

[13] Id.; see also *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (Part I.4.) (stating that agencies should ensure that FOIA Reference Guides "remain comprehensive and up to date" in light of effectiveness of guides in increasing public awareness of FOIA).

[14] Exec. Order No. 13,392, Sec. 1(c).

[15] Id. at Sec. 1(c), (d).

Officer of that agency.[16]

(2) Establish one or more FOIA Requester Service Centers (Center), as appropriate, to serve as the first place that FOIA requesters can contact in order to seek information concerning the status of their FOIA requests and appropriate information about the agency's FOIA responses. The Center must include appropriate staff to receive and respond to inquiries from FOIA requesters.[17]

(3) Designate one or more agency officials, as appropriate, as FOIA Public Liaisons, who may serve in the Center or who may serve in a separate office. FOIA Public Liaisons serve as supervisory officials to whom a FOIA requester can raise concerns about the service the FOIA requester received from the Center, following an initial response from the Center staff.[18]

(4) Conduct a review of the agency's FOIA operations in order to determine whether agency practices are consistent with the policies set forth in the Executive Order.[19]

(5) Develop, in consultation as appropriate with the staff of the agency (including the FOIA Public Liaisons), the Attorney General, and the OMB Director, an agency-specific plan to ensure that the agency's administration of the FOIA is in accordance with applicable law and the policies set forth in the Executive Order.[20]

(6) Submit a report to the Attorney General and the OMB Director that summarizes the results of the agency's review and encloses a copy of the agency's FOIA Improvement Plan under the Executive Order.[21]

(7) Include in the agency's annual FOIA reports for fiscal years 2006 and 2007 a report on the agency's development and implementation of its FOIA Improvement Plan and on the agency's performance in meeting the milestones set forth in that plan, consistent with Department of Justice guidance.[22]

To facilitate the reviews, the development of FOIA Improvement

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[16] Id. at 2(a).

[17] Id. at 2(c)(i).

[18] Id. at 2(c)(ii).

[19] See id. at 3(a).

[20] See id. at 3(b)(i).

[21] See id. at 3(c)(i).

[22] See id. at 3(c)(ii).

Plans, and other implementation efforts required under Executive Order 13,392, the Department of Justice conducted several governmentwide conferences for Chief FOIA Officers and key FOIA personnel.[23] The Department of Justice also provided extensive written guidance to all agencies on their implementation of Executive Order 13,392, in the further exercise of the Attorney General's guidance authority under it.[24] This formal guidance, which was issued on April 26, 2006, was distributed to all agencies at one of the earliest guidance conferences and also is widely available on the Justice Department's FOIA Web site.[25] It contained discussions of more than two dozen potential improvement areas for possible inclusion in agency plans, set forth a standard template for the uniform development and presentation of all plans, included supplemental guidelines on the use of agency annual FOIA reports for reporting the results of Executive Order 13,392's implementation, and also addressed a breadth of questions and guidance points in further aid of the executive order's implementation.[26]

Under Executive Order 13,392, an agency's Chief FOIA Officer holds "agency-wide responsibility for efficient and appropriate compliance with the FOIA."[27] The Department of Justice maintains a comprehensive list of all Chief FOIA Officers on its FOIA Web site.[28] Each agency also must have established one or more operating groups or units (depending upon agency size and degree of decentralization), called "FOIA Requester Service Centers," for the purpose of facilitating better agency communications with

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[23] See Implementing FOIA [Freedom of Information Act] - Assessing Agency Efforts to meet FOIA Requirements: Hearing Before the Subcomm. on Information Policy, Census, and National Archives of the Comm. on Oversight and Government Reform, 110th Cong. (2007) (statement of Melanie Ann Pustay, Acting Director, Office of Information and Privacy), available at http://www.usdoj.gov/oip /foia30.pdf (discussing extensive Department of Justice executive order coordination efforts); Implementing FOIA [Freedom of Information Act] - Does the Bush Administration Executive Order Improve Processing?: Hearing Before the Subcomm. on Government Management, Finance and Accountability of the Comm. on Government Reform, 109th Cong. (2006), available at http://www.usdoj.gov/oip/ metcalfe_foia_ testimony07252006.pdf (same)

[24] See id. at Sec. 4(b); see also id. at Sec. 3(b)(i).

[25] See *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (containing potential improvement areas for possible inclusion in FOIA Improvement Plans).

[26] See id.

[27] Exec. Order No. 13,392, Sec. 2(b)(i).

[28] See http://www.usdoj.gov/04foia/chieffoiaofficers.html.

FOIA requesters.[29] Under Executive Order 13,392, each such Center "shall serve as the first place that a FOIA requester can contact to seek information concerning the status of the person's FOIA request."[30] Executive Order 13,392 emphasizes that all such FOIA Centers must have "appropriate staff to receive and respond to inquiries from FOIA requesters."[31]

In addition to the basic staff to be made available to respond to FOIA requesters' inquiries about their requests in these new FOIA Requester Service Centers, each agency also must designate one or more supervisory-level employees to serve as "FOIA Public Liaisons" either inside or outside of its FOIA Requester Service Center.[32] Executive Order 13,392 states that in establishing and maintaining these FOIA positions, agencies "shall use, as appropriate, existing agency staff and resources."[33] As further specified by Executive Order 13,392, FOIA Public Liaisons must among other things serve as "supervisory officials to whom a FOIA requester can raise concerns about the service the FOIA requester has received from the FOIA Requester Service Center, following an initial response from the FOIA Requester Service Center staff."[34] Furthermore, the Department of Justice has called upon all FOIA Public Liaisons to take responsibility for ensuring that absolutely all personnel at their agencies who work with the FOIA (i.e., even "program personnel" whose primary job responsibilities are not FOIA-related) have been fully educated about Executive Order 13,392's policies and customer-service principles.[35] Both agencies and requesters should

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[29] See Exec. Order No. 13,392, Sec. 2(c)(i); see also *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (observing that FOIA Requester Service Center will perform "customer feedback" function).

[30] Exec. Order No. 13,392, Sec. 2(c)(i); see also *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (recognizing that a FOIA Requester Service Center may answer questions other than those relating to the status of a FOIA request "where appropriate as a matter of discretion").

[31] Exec. Order No. 13,392, Sec. 2(c)(i); see also id. at Sec. 2(c)(iv) (placing emphasis on staffing requirement).

[32] See id. at Sec. 2(c)(ii) (noting that FOIA Public Liaisons "may serve in a separate office").

[33] Id. at Sec. 2(c)(iv).

[34] Id. at Sec. 2(c)(ii).

[35] See *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (stressing that the Office of Information and Privacy would be "urging any agency that has not already done so to conduct an in-house training session on the policies of Executive Order 13,392 for all of its FOIA personnel"); Implementing FOIA [Freedom of Information Act] - Assessing Agency Efforts to meet FOIA Requirements: Hearing Before the Subcomm.
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bear in mind that neither the FOIA Requester Service Centers nor the FOIA Public Liaisons are avenues of administrative appeal.[36]

Most significantly, Executive Order 13,392 required each Chief FOIA Officer to "conduct a review of the agency's FOIA operations to determine whether agency practices are consistent with the policies" that it set forth.[37] Each Chief FOIA Officer was required to examine and evaluate a range of the agency's FOIA-related activities, including "ways to eliminate or reduce its FOIA backlog" where applicable.[38]

Executive Order 13,392 next required all agencies, based upon the reviews conducted by their new Chief FOIA Officers, to prepare "agency-specific plan[s]" for improvement of their administration of the Act.[39] Each agency's plan was required to be sent to both the Justice Department and OMB, together with a report that "summarizes the results of" the agency's FOIA review, by June 14, 2006.[40] The Department of Justice has received those reports and has made them available at a single location on its FOIA Web site for convenient reference as well.[41]

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[35](...continued)
on Information Policy, Census, and National Archives of the Comm. on Oversight and Government Reform, 110th Cong. (2007) (statement of Melanie Ann Pustay, Acting Director, Office of Information and Privacy), available at http://www.usdoj.gov/oip /foia30.pdf (describing special training conference conducted by OIP for FOIA Public Liaisons at all federal agencies).

[36] See Exec. Order No. 13,392, Sec. 7(b)(iii) (emphasizing that Executive Order 13,392 "is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity").

[37] Id. at Sec. 3(a).

[38] Id. at Sec. 3(a)(v); see also id. at Sec. 3(a)(i)-(v) (specifying range of matters to be reviewed).

[39] Id. at Sec. 3(b)(i); see also *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (listing twenty-seven possible areas of improvement).

[40] Exec. Order No. 13,392, Sec. 3(c)(i) (requiring head of each agency to submit FOIA Improvement Plans "no later than 6 months from the date of this order [December 14, 2005]"); see also *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (urging all agencies to submit improvement plans by "no later than" June 14).

[41] See U.S. Department of Justice, "Agency FOIA Improvement Plans Under E.O. 13,392," available at http://www.usdoj.gov/04foia/agency_ improvement.html; see also Attorney General's Report to the President Pursuant to Executive Order 13,392, Entitled "Improving Agency Disclosure
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Under Executive Order 13,392, each agency then was required to report on the results it had achieved under its plan in a new section of its regular annual FOIA report.[42] The new Section XII for Fiscal Year 2006 contained a narrative description of each agency's progress in meeting its milestones and goals under its FOIA Improvement Plan, as well as a description of any failure to meet a milestone or goal.[43] These annual reports have been posted on the Department of Justice's Web site.[44]

Notably, Executive Order 13,392 provides for specific consequences and corrective actions in the event that a milestone in an agency's plan is not met.[45] For any agency that does not meet a milestone set forth in its FOIA Improvement Plan, "the head of the agency shall: (A) identify this deficiency in the annual FOIA report to the Attorney General; (B) explain in the annual report the reasons for the agency's failure to meet the milestone; (C) outline in the annual report the steps that the agency has already taken, and will be taking, to address the deficiency; and (D) report this deficiency to the President's Management Council."[46]

Lastly, Executive Order 13,392 authorized the Attorney General to review these agency FOIA Improvement Plans in order to provide to the President "appropriate recommendations on administrative or other agency actions" for purposes of future governmentwide FOIA administration.[47] Under the Executive Order, the Attorney General timely submitted his first such report and recommendations to the President on October 16, 2006.[48]

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[41](...continued)
of Information," 6 & n.14 (Oct. 16, 2006), available at http://www.usdoj.gov/oip/ag_report_ to_president_13392.pdf (describing "ease of reference" afforded).

[42] Exec. Order No. 13,392, Sec. 3(c)(ii); see also 5 U.S.C. § 552(e)(1) (2000 & Supp. IV 2004) (establishing February 1 of each year as deadline for filing annual FOIA reports).

[43] See Annual FOIA Reports, available at http://www.usdoj.gov/oip /fy06.html.

[44] Id.

[45] See Exec. Order No. 13,392, Sec. 3(c)(iii)(A)-(D).

[46] Id.; see also *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (emphasizing that notwithstanding consequences contemplated in order for any deficiency, agencies should strive to set "reasonably aggressive goals").

[47] Id. at Sec. 4(a).

[48] See Attorney General's Report to the President Pursuant to Executive Order 13,392, Entitled "Improving Agency Disclosure of Information," 15-16
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Executive Order 13,392 provides for two further such Attorney General reports to the President, first on June 1, 2007 and again on June 1, 2008.[49] These reports will be based on a comprehensive review of each agency's implementation activities as reflected in the new Section XII of their annual FOIA reports.[50]

## Entities Subject to the FOIA

Agencies within the executive branch of the federal government, including the Executive Office of the President and independent regulatory agencies, are subject to the provisions of the FOIA.[51] However, the FOIA does not apply to entities that "are neither chartered by the federal government [n]or controlled by it."[52] Thus, it is settled that state, local, and for-

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(Oct. 16, 2006), available at http://www.usdoj.gov/oip/ag_report_to_ president_13392.pdf (recommending governmentwide general FOIA administration improvements in areas of acknowledgment letters, FOIA form reviews, and technology initiatives).

[49] See Exec. Order No. 13,392, Sec. 4(a).

[50] Id.

[51] 5 U.S.C. § 552(f)(1) (2000 & Supp. IV 2004).

[52] 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) ("The 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 op. at 8 (N.D. Ala. June 30, 2005) (concluding that American National Red Cross is not federal agency under FOIA (citing Irwin Mem'l Blood Bank, 640 F. Supp. 2d 1051)); Gilmore v. U.S. Dep't of Energy, 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
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eign governments,[53] municipal corporations,[54] the courts,[55] Congress,[56]

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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"); see also FOIA Update, Vol. XIX, No. 4, at 2 (noting the FOIA's applicability to certain research data generated by private grantees of federal agencies, pursuant to the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998), as implemented by 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)). 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) (Although [defendant] Amtrak is not a federal agency, it must comply with FOIA" (citing 49 U.S.C. § 24301(e) (2000))); Cotton v. Adams, 798 F. Supp. 22, 24 (D.D.C. 1992) (holding that the Smithsonian Institution is an agency under the 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"), holding questioned on appeal of award of attorney fees sub nom. Cotton v. Heyman, 63 F.3d 1115, 1123 (D.C. Cir. 1995) (noting that the Smithsonian Institution could "reasonably interpret our precedent to support its position that it is not an agency under FOIA"); Ass'n of Cmty. Orgs. for Reform Now v. Barclay, No. 3-89-409T, slip op. at 8 (N.D. Tex. June 9, 1989) (holding that federal home loan banks are agencies under FOIA); cf. Dong v. Smithsonian Inst., 125 F.3d 877, 879 (D.C. Cir. 1997) (holding that the Smithsonian Institution is not an agency for purposes of the Privacy Act of 1974 (5 U.S.C. § 552a (2000 & Supp. IV 2004)), as it is neither an "establishment of the executive branch" nor a "government-controlled corporation").

[53] See, e.g., Blankenship v. Claus, 149 F. App'x 897, 898 (11th Cir. Sept. 7, 2005); Wright v. Curry, 122 F. App'x 724, 725 (5th Cir. 2004) (explaining that state agencies are "expressly exclude[d]" from scope of FOIA); 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"); Lau v. Sullivan County Dist. Att'y, No. 99-7341, 1999 WL 1069966, at *2 (2d Cir. Nov. 12, 1999); Martinson v. DEA, No. 96-5262, 1997 WL 634559, at *1 (D.C. Cir. July 3, 1997); Ortez v. Wash. County, 88 F.3d 804, 811 (9th Cir. 1996); Davidson v. Georgia, 622 F.2d 895, 897 (5th Cir. 1980); see also Foley v. Village of Weston, No. 06-350, 2006 WL 3449414, at *5 (W.D. Wis. Nov. 28, 2006) (holding that local county government, sheriff's department, and sheriff are not agencies under FOIA); Moreno v. Curry, No. 06-238, 2006 U.S. Dist. LEXIS 81416, at *6 (N.D. Tex. Nov. 7, 2006) (stating that FOIA
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[53](...continued)
does not apply to state or municipal agencies); Conlin v. Davis, No. 06-3305, 2006 U.S. Dist. LEXIS 76975, at *4 (S.D. Tex. Oct. 23, 2006) (FOIA claim against state officials is "patently frivolous" because only federal agencies are subject to FOIA); Brown v. City of Detroit, No. 05-60162, 2006 WL 3196297, at *1 (E.D. Mich. Sept. 11, 2006) (magistrate's recommendation) (stating that FOIA "does not apply to state or local governments or agencies"), adopted 2006 WL 3086909 (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) (FOIA does not apply to state or local agencies); Nnabuihe v. Dallas County Criminal Courts, No. 05-2115, slip op. at 2 (N.D. Tex. Jan. 25, 2006) (magistrate's recommendation) (finding no jurisdiction as FOIA does not apply to request for state records), adopted, 2006 U.S. Dist. LEXIS 2716, at *1 (N.D. Tex. Jan. 25, 2006) (dismissing case "for want of jurisdiction"); Davis v. Johnson, No. 05-2060, 2005 U.S. Dist. LEXIS 12475, at *1 (N.D. Cal. June 20, 2005) (stating that a requester seeking state public defender records cannot use the FOIA because the Act "does not apply to the records of an individual attorney, or of a state or county agency"); Dipietro v. Executive Office for U.S. Attorneys, 357 F. Supp. 2d 177, 182 (D.D.C. 2004) (finding that county sheriff's department is not agency subject to FOIA (citing Beard v. Dep't of Justice, 917 F. Supp. 61, 63 (D.D.C. 1996))); Mount of Olives Paralegals v. Bush, No. 04-C-620, 2004 U.S. Dist. LEXIS 8085, at *6 (N.D. Ill. May 6, 2004) ("[T]he federal FOIA statute may not be used against state agencies."); Rodgers v. Texas, No. 03-2015, 2004 WL 764946, at *2 n.1 (N.D. Tex. Apr. 7, 2004) ("FOIA does not apply to state agencies.") (non-FOIA case); Daniel v. Safir, 175 F. Supp. 2d 474, 481 (E.D.N.Y. 2001) ("[T]here is no right of action under FOIA against state actors or officials."), aff'd, 42 F. App'x 528 (2d Cir. 2002); Ali v. Przbyl, No. 04-03459E, 2004 WL 1682774, at *2 (W.D.N.Y. July 26, 2004) ("FOIA does not apply to state or local agencies or state or local individuals."); McClain v. U.S. Dep't of Justice, No. 97-C-0385, 1999 WL 759505, at *2 (N.D. Ill. Sept. 1, 1999) (dismissing FOIA claims against state attorney general because "[p]laintiff may assert Privacy Act and Freedom of Information Act claims against . . . federal defendants only"), aff'd, 17 F. App'x 471 (7th Cir. 2001); Beard, 917 F. Supp. at 63 (holding District of Columbia Police Department to be "local" law enforcement agency not subject to FOIA); Gillard v. U.S. Marshals Serv., No. 87-0689, 1987 WL 11218, at *1 (D.D.C. May 11, 1987) (holding that District of Columbia Government records are not covered by FOIA).

[54] See Lau, 1999 WL 1069966, at *2 (affirming dismissal of FOIA claims against county officials); Cruz v. Superior Court Judges, No. 04-1103, 2006 WL 547930, at *1 (D. Conn. Mar. 1, 2006) (noting that "[a] municipal police department is not a federal agency"); Jones v. City of Indianapolis, 216 F.R.D. 440, 443 (S.D. Ind. 2003) ("The term 'agency' in the FOIA does not apply to municipal agencies."); Essily v. Giuliani, No. 00-5271, 2000 WL 1154313, at *1 (S.D.N.Y. Aug. 14, 2000) ("FOIA does not apply to city agencies."), aff'd, 22 F. App'x 77 (2d Cir. 2001); McClain, 1999 WL 759505, at *2
(continued...)

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[54](...continued)
(dismissing plaintiff's FOIA claims against county attorney).

[55] 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 United States 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) (affirming district court holding that FOIA does not apply to federal courts); United States v. Mitchell, No. 03-6938, 2003 WL 22999456, at *1 (4th Cir. Dec. 23, 2003) ("[F]ederal courts do not fall within the definition of 'agency' under FOIA.") (non-FOIA case); United States v. Alcorn, 6 F. App'x 315, 317 (6th Cir. 2001) (holding that "the federal courts are specifically excluded from FOIA's definition of 'agency'") (non-FOIA case); Gaydos v. Mansmann, No. 98-5002, 1998 WL 389104, at *1 (D.C. Cir. June 24, 1998) (per curiam); Warth v. Dep't of Justice, 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 are not agencies under FOIA); Scott v. United States, No. 98-CR-00079, 2006 WL 4031428, at *1 (E.D.N.C. May 9, 2006) (federal courts are not agencies under FOIA), aff'd, No. 06-7197, 2006 WL 2852999 (4th Cir. Oct. 3, 2006); Benjamin v. U.S. Dist. Court, No. 05-941, 2005 WL 1136864, at *1 (M.D. Pa. May 13, 2005) (explaining that United States courts are not "agencies" under FOIA); see also 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); United States v. Richardson, No. 2001-10, 2007 U.S. Dist. LEXIS 77, at *3 (W.D. Pa. Jan. 3, 2007) (federal grand jury is not agency under FOIA); Carter v. U.S. 6th Circuit of Appeal, No. 05-134, 2005 WL 1138828, at *1 (E.D. Tenn. May 12, 2005); 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. 2003); Maydak v. U.S. Dep't of Justice, 254 F. Supp. 2d 23, 40 (D.D.C. 2003) ("[A] United States probation office is not subject to the FOIA's disclosure requirements because it is an arm of the federal courts."); United States v. Ford, No. 96-00271-01, 1998 U.S. Dist. LEXIS 16438, 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."); cf. 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.").

[56] 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. Dep't of Justice, 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 U.S. Dist. LEXIS 715, at *3
(continued...)

and private citizens[57] are not subject to the FOIA. Nor does the FOIA apply to a presidential transition team.[58]

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[56](...continued)
(D.D.C. Jan. 8, 2007) (ruling that United States 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).

[57] See, e.g., Henderson v. Office & Prof'l Employees Int'l Union, 143 F. App'x 741, 744 (9th Cir. 2005) (finding that the "district court properly dismissed [the 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) (finding that the "district court properly dismissed [a FOIA claim] because the defendants are not 'agencies' and therefore cannot be held liable under the FOIA"); Mitchell, 2003 WL 22999456, at *1 ("[P]rivate counsel and law firms are not subject to FOIA."); In re Olsen, No. UT-98-088, 1999 Bankr. LEXIS 791, at *11 (B.A.P. 10th Cir. June 24, 1999) (holding that chapter seven bankruptcy trustee is not an agency under FOIA); Buemi v. Lewis, No. 94-4156, 1995 WL 149107, at *2 (6th Cir. Apr. 4, 1995) (concluding that the FOIA applies only to federal agencies and not to private individuals); Furlong v. Cochran, No. 06-05443, 2006 WL 3254505, at *1 (W.D. Wash. Nov. 9, 2006) (ruling that lawyer and law firm are not agencies under FOIA); Torres v. Howell, No. 03-2227, 2004 U.S. Dist. LEXIS, at *8 (D. Conn. Dec. 6, 2004) (concluding that plaintiff cannot state FOIA claim against private business and nonfederal attorney); BDX Inc. v. U.S. Dep't of Justice, No. 02-0826, slip op. at 17-18 (N.D. Ind. June 2, 2004) (concluding that because a private trustee was "neither a Department employee nor its agent" his records were not agency records); Allnutt v. U.S. Dep't of Justice, 99 F. Supp. 2d 673, 678 (D. Md. 2000) (holding that records possessed by private trustee acting as agent of United States Trustee are not "agency records" subject to FOIA), aff'd 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) (stating that a communications company "is not subject to the FOIA") (appeal pending); Germosen v. Cox, No. 98 Civ. 1294, 1999 WL 1021559, at *20 (S.D.N.Y. Nov. 9, 1999) (noting that "there is no authority in the FOIA or Privacy Act obligating . . . private individuals to maintain or make available documents to the public"); 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 juris., No. 99-5410 (D.C. Cir. Feb. 2, 2000).

[58] See Ill. Inst. for Continuing Legal Educ. v. U.S. Dep't of Labor, 545 F.
(continued...)

Offices within the Executive Office of the President whose functions are limited to advising and assisting the President also do not fall within the definition of "agency";[59] such offices include the Offices of the President and of the Vice President, as well as their respective staffs.[60] 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

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[58](...continued)
Supp. 1229, 1231-33 (N.D. Ill. 1982); see also FOIA Update, Vol. IX, No. 4, at 3-4 ("FOIA Counselor: Transition Team FOIA Issues"); cf. Wolfe v. HHS, 711 F.2d 1077, 1079 (D.C. Cir. 1983) (treating presidential transition team as not agency subject to FOIA and citing with approval Ill. Inst., 545 F. Supp. at 1231-33) (dicta).

[59] S. Conf. Rep. No. 93-1200, at 14 (1974), reprinted in 1974 U.S.C.C.A.N. 6285, 6293; see, e.g., Judicial Watch, Inc. v. Dep't of Energy, 412 F.3d 125, 127 (D.C. Cir. 2005) (concluding that the National Energy Policy Development Group was not an agency subject to the 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); see also FOIA Update, Vol. XIV, No. 3, at 6-8 (Department of Justice memorandum specifying consultation process for agencies possessing White House-originated records or White House-originated information located in response to FOIA requests).

[60] See 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.") (non-FOIA case); 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 v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 150-55 (1980))), aff'd, 132 F.3d 1481 (D.C. Cir. 1997) (unpublished table decision); cf. Sweetland v. Walters, 60 F.3d 852, 855-56 (D.C. Cir. 1995) (finding that the 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 the FOIA).

cabinet members acted not as heads of their departments "but rather as the functional equivalents of assistants to the President."[61]

Under this functional definition of "agency," however, executive branch entities whose responsibilities exceed merely advising and assisting the President generally are considered "agencies" under the FOIA.[62] 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.[63] On the other hand, 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.[64]

Finally, it should be noted that Congress has removed from the scope of the FOIA certain parts of the operations of some intelligence agencies. Most recently, through the National Defense Authorization Act for Fiscal Year 2006,[65] Congress placed the "operational files" of the Defense Intelligence Agency beyond the scope of the FOIA.[66] Section 933(a) of that Act adds a new 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 De-

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[61] Meyer v. Bush, 981 F.2d 1288, 1294 (D.C. Cir. 1993); cf. Judicial Watch, Inc. v. Clinton, 76 F.3d 1232, 1234 (D.C. Cir. 1996) (holding that trust established to assist President Clinton with personal legal expenses is not subject to Federal Advisory Committee Act, 5 U.S.C. app. 2 (2000), because "[a]dvice on the legal or ethical implications of presidential fund-raising for personal purposes . . . does not involve 'policy'"); Ass'n of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898, 911 (D.C. Cir. 1993) (declaring that President's Task Force on National Health Care Reform, composed of cabinet officials and chaired by First Lady, was not subject to Federal Advisory Committee Act).

[62] See Soucie v. David, 448 F.2d 1067, 1075 (D.C. Cir. 1971); see also Ryan v. Dep't of Justice, 617 F.2d 781, 784-89 (D.C. Cir. 1980).

[63] Pac. Legal Found. v. Council on Envtl. Quality, 636 F.2d 1259, 1263 (D.C. Cir. 1980) (holding that Council on Environmental Quality is an agency under FOIA); cf. 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 of its multiple functions).

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

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

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

fense Intelligence Agency from the provisions of [the FOIA], which require publication, disclosure, search, or review in connection therewith."[67]

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).[68] In fact, it was more than two decades ago that 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.[69] Under these unique "operational file" protective aspects of FOIA administration, these specific intelligence agencies, once any regulatory implementation is conducted, are not subject to the FOIA for these areas of their operations. (For further discussions of this subject, see Exemption 1, "Operational Files" Statutes, below, and Exemption 3, "Operational Files" Provisions, below.)

## "Agency Records"

The Supreme Court has articulated a basic, 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.[70] Inasmuch as the "agency record" analysis usually hinges upon whether an agency has sufficient "control" over a record,[71] courts have identified four relevant fac-

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[67] 50 U.S.C.A. § 432c (West Supp. 2006).

[68] See 50 U.S.C.A. §§ 403-5b, 403-5d (2000 & Supp. III 2003); 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).

[69] 50 U.S.C.A. § 431 (2003 & West Supp. 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).

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

[71] See, e.g., Int'l Bhd. of Teamsters v. Nat'l Mediation Bd., 712 F.2d 1495, 1496 (D.C. Cir. 1983) (determining that submission of gummed-label mail-

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tors for an agency to consider when making such a determination:

(1) the intent of the record's creator to retain or relinquish control over the record;[72]

(2) the ability of the agency to use and dispose of the record as it sees fit;[73]

(3) the extent to which agency personnel have read or relied upon the record;[74] and

(4) the degree to which the record was integrated into the agency's

[71](...continued)
ing list as required by court were not sufficient to give "control" over record to agency); McErlean v. U.S. Dep't of Justice, 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 assented 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 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).

[72] Burka v. HHS, 87 F.3d 508, 515 (D.C. Cir. 1996) (quoting Tax Analysts v. U.S. Dep't of Justice, 845 F.2d 1060, 1069 (D.C. Cir. 1988)).

[73] Id.

[74] Id.

record systems or files.[75]

Agency "control" is also the predominant consideration in determining the "agency record" status of records that are either generated[76] or main-

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[75] Id.; 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, Inc. v. Dep't of Energy, 412 F.3d 125, 127 (D.C. Cir. 2005) (holding that "records created or obtained by employees detailed from an agency to the NEPDG [an advisory group within the 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 an agency office by an agency employee who was acting as the full-time coordinator of a nonprofit organization that had a "cooperative" relationship with the agency were not "agency records," because they were not integrated into agency files and were not used by the agency in the 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); 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); 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. v. Mathews, 542 F.2d 1116, 1120 (9th Cir. 1976)).

[76] See Hercules, Inc. v. Marsh, 839 F.2d 1027, 1029 (4th Cir. 1988) (hold-
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tained[77] by a government contractor.

Another important consideration in the "agency record" analysis sometimes is whether Congress, whose records are not subject to the FOIA,[78] has manifested an intent to exert control over certain records in an

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[76](...continued)
ing that an army ammunition plant telephone directory prepared by a contractor at government expense, bearing a "property of the U.S." legend, is an agency record); Gilmore v. U.S. Dep't of Energy, 4 F. Supp. 2d 912, 922 (N.D. Cal. 1998) (finding that video conferencing software created by privately owned laboratory is not an agency record); Tax Analysts v. U.S. Dep't of Justice, 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); Lewisburg Prison Project, Inc. v. Fed. Bureau of Prisons, No. 86-1339, slip op. at 4-5 (M.D. Pa. Dec. 16, 1986) (holding that training videotape provided by contractor is not an agency record).

[77] See, e.g., 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"); Los Alamos Study Group v. Dep't of Energy, 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 [the agency] intends to exercise control over the material"); Chi. Tribune Co. v. HHS, No. 95-C-3917, 1997 U.S. Dist. LEXIS 2308, at *33 (N.D. Ill. Feb. 26, 1997) (magistrate's recommendation) (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 maintained "effective control" over them), adopted (N.D. Ill. Mar. 28, 1997); 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 also Sangre de Cristo Animal Prot., Inc. v. U.S. Dep't of Energy, 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 2006), that specifically provided for public availability of contractor records).

[78] 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").

agency's possession.[79] "Congressional records" may include records received by an agency from Congress,[80] or records generated by an agency in response to a confidential congressional inquiry,[81] and their status will depend on the particular contours of the congressional reservation of control over those records.[82] In all such cases, Congress's manifestation of its intent to control such records cannot be accomplished on a "post hoc" basis "long after the original creation [or] transfer of the requested documents."[83] Instead, Congress's intent to exert control over the records must be evident from the circumstances surrounding their creation or transmittal.[84] Other-

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

[80] See, e.g., Goland v. CIA, 607 F.2d 339, 347 (D.C. Cir. 1978) (holding that the agency was acting merely "as a 'trustee' for Congress" in retaining a copy of a hearing transcript over which Congress "plainly" manifested an 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).

[81] 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. 1, 12 (D.D.C. 1995) ("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).

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

[83] 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 the requested records, was "insufficient evidence of Congress'[s] intent to retain control over th[o]se records").

[84] 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
(continued...)

wise, the records may not be considered to be "congressional records" beyond the reach of the FOIA.[85]

In a similar vein, agencies should take care to distinguish "agency records" from "personal records," which are maintained by agency employees but are not subject to the FOIA.[86] In determining the "personal record" status of a record, an agency should examine "the totality of the circumstances surrounding the creation, maintenance, and use" of the record.[87] Factors relevant to this inquiry include the purpose for which the document was created, the degree of integration of the record into the agency's filing system, and the extent to which the record's author or other employ-

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[84](...continued)
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'[s] 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'[s] intent to retain control of the document is clear").

[85] 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.").

[86] 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 distributed to other staff for business use, but that calendar of sixth official was personal record created and used for sixth official's convenience where it was distributed only to his secretarial staff); Bureau of Nat'l Affairs, Inc. v. U.S. Dep't of Justice, 742 F.2d 1484, 1488-96 (D.C. Cir. 1984) (holding that uncirculated appointment calendars and telephone message slips of agency official were not agency records); Spannaus v. U.S. Dep't of Justice, 942 F. Supp. 656, 658 (D.D.C. 1996) (finding that "'personal' files" of attorney no longer employed with agency were "beyond the reach of FOIA" if they were not turned over to agency at end of employment); Forman v. Chapotan, No. 88-1151, slip op. at 14 (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); see also FOIA Update, Vol. IX, No. 4, at 3-4 (discussing circumstances under which presidential transition team documents can be regarded as "personal records" when brought into federal agency); FOIA Update, Vol. V, No. 4, at 3-4 ("OIP Guidance: 'Agency Records' vs. 'Personal Records'").

[87] Bureau of Nat'l Affairs, 742 F.2d at 1492; see also Consumer Fed'n of Am., 455 F.3d at 287-88 (deciding case by using "totality" test articulated in, and "template" provided by, Bureau of Nat'l Affairs, 742 F.2d at 1488-96).

ees used the record to conduct agency business.[88]

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[88] Consumer Fed'n of Am., 455 F.3d at 287 (citing Bureau of Nat'l Affairs, 742 F.2d at 1490)); Bureau of Nat'l Affairs, 742 F.2d at 1492-93; FOIA Update, Vol. V, No. 4, at 3-4; see, e.g., 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); 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 U.S. Dist. LEXIS 15333, at *17 (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, 880 F. Supp. at 11 (concluding that "telephone logs, calendar markings, [and] personal staff notes" not incorporated into agency recordkeeping system are not agency records); Dow Jones & Co. v. GSA, 714 F. Supp. 35, 39 (D.D.C. 1989) (determining that agency head's recusal list, shared only with personal secretary and chief of staff, is not an agency record); AFGE v. U.S. Dep't of Commerce, 632 F. Supp. 1272, 1277 (D.D.C. 1986) (finding that employee logs created voluntarily to facilitate work are not agency records even though they contained substantive information), aff'd, 907 F.2d 203 (D.C. Cir. 1990). But cf. Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 481 (2d Cir. 1999) (rejecting agency affidavit concerning "personal" records as insufficient and remanding case for further development through affidavits by records' authors explaining their intended use of records in question); Ethyl Corp. v. EPA, 25 F.3d 1241, 1247-48 (4th Cir. 1994) (finding record search inadequate because employees were "not properly instructed on how to distinguish personal records from agency records").

While courts continue to apply longstanding precedent regarding the kinds of records considered to be "personal records" in nature,[89] recent case law in this area indicates that some courts are holding agencies to closer scrutiny regarding "personal record" determinations.[90] Any agency engaging in an analysis to distinguish "agency records" from "personal records" should therefore carefully consider all criteria appropriate to reaching a conclusion[91] and should memorialize the careful consideration given to such issues by agency personnel with knowledge of the requisite considerations involved in such determinations.[92]

Agencies also should be mindful of the "agency record" status of research data generated through federal grants. The Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999,[93] which partly overruled the longstanding Supreme Court precedent of Forsham v. Harris,[94] made certain research data generated through federal grants subject to the FOIA.[95] In Forsham, the Supreme Court held that data generated and maintained by private research institutions receiving federal grants are not "agency records" subject to the FOIA, and that a grantor agency is not obligated to demand such data in order to respond to any

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[89] See, e.g., Consumer Fed'n of Am., 455 F.3d at 287-88 (relying on Bureau of Nat'l Affairs, 742 F.2d 1484).

[90] See Ethyl Corp., 25 F.3d at 1247 (stating that agency "employees were not properly instructed on how to distinguish personal records from agency records" because agency provided guidance to employees on only some considerations necessary for such analysis); Kempker-Cloyd v. U.S. Dep't of Justice, No. 5:97-253, 1999 U.S. Dist. LEXIS 4813, at *12, *24 (W.D. Mich. Mar. 12, 1999) (finding that agency's "initial search efforts . . . were incomplete and untimely," in part, because FOIA office did not actually review documents that field employee asserted were personal records in order to determine whether assertion was correct).

[91] See Ethyl Corp., 25 F.3d at 1247-48 (finding that agency did not demonstrate adequate search when, inter alia, "employees were not properly instructed on how to distinguish personal records from agency records" when agency provided guidance to employees on only some considerations necessary for such analysis); see also FOIA Update, Vol. V, No. 4, at 1-4 ("OIP Guidance: 'Agency Records' vs. 'Personal Records'") (advising of ten criteria "that should be evaluated by agencies in making all 'agency record/personal record' determinations").

[92] See, e.g., Ethyl Corp., 25 F.3d at 1247-48 (questioning agency's methodology where agency provided instructions to employees on only four out of ten criteria appropriate to "agency record/personal record" analysis).

[93] Pub. L. No. 105-277, 112 Stat. 2681 (1998).

[94] 445 U.S. 169 (1980).

[95] See FOIA Update, Vol. XIX, No. 4, at 2 (describing legislative change).

FOIA request for them.[96] This statutory provision, however, 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."[97] The final 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.[98] (In accordance with OMB's statutory authority over such matters, questions concerning the processing of FOIA requests for grantee research data should be directed to OMB's Office of Information and Regulatory Affairs, Information Policy and Technology Branch, at (202) 395-3052.)

At a more fundamental level, the FOIA applies only to "records," not to tangible, evidentiary objects.[99] The courts initially defined "record" by relying on the traditional dictionary meaning of the term.[100] However, the Supreme Court subsequently broadened the meaning of "record" by incorporating the more modern record media referenced in the Records Disposal

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[96] 445 U.S. at 178-81.

[97] Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

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

[99] See Matthews v. U.S. Postal Serv., No. 92-1208, slip op. at 4 n.3 (W.D. Mo. Apr. 14, 1994) (holding that computer hardware is not "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); see also FOIA Update, Vol. XIV, No. 1, at 1 (discussing implementation of President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. § 2107 note (2000)); cf. FOIA Update, Vol. XIX, No. 4, at 2 (discussing provisions of "somewhat akin" FOIA-related statute, Nazi War Crimes Disclosure Act, 5 U.S.C. § 552 note (2000 & Supp. IV 2004).

[100] 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 "placed on a dictionary of respected ancestry [(i.e., Webster's)]").

Act[101] into its definition of the term.[102] As information technology evolved, computer software increasingly could be considered as generally within the definition of "record."[103] With the passage of the Electronic Freedom of Information Act Amendments of 1996,[104] the FOIA now defines the term "record" as simply "includ[ing] any information that would be an agency record . . . when maintained by an agency in any format, including an electronic format."[105]

FOIA Requesters

A FOIA request can be made by "any person," a broad term that encompasses individuals (including foreign citizens), partnerships, corporations, associations, and foreign or domestic governments.[106] Requests may

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[101] 44 U.S.C. § 3301 (2000).

[102] See Forsham, 445 U.S. at 183 (treating "record" as including "'machine readable materials . . . regardless of physical form or characteristics'" (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 "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 "record" for purposes of FOIA).

[103] Cleary, Gottlieb, Steen & Hamilton v. HHS, 844 F. Supp. 770, 782 (D.D.C. 1993) ("These [computer] programs preserve information and 'perpetuate knowledge.'" (quoting DiViaio, 571 F.2d at 542)); see also FOIA Update, Vol. XV, No. 4, at 4-5 (proposed electronic record FOIA principles); Department of Justice "Electronic Record" Report, reprinted in abridged form in FOIA Update, Vol. XI, No. 3, at 6-12 (discussing issue of "record" status of computer software). But see Gilmore, 4 F. Supp. 2d at 919-20 (holding alternatively that video conferencing software developed by privately owned laboratory may not be regarded as "record" on basis that such software "does not illuminate the structure, operation, or decisionmaking structure" of agency); Essential Info., Inc. v. USIA, 134 F.3d 1165, 1166 n.3 (D.C. Cir. 1998) (dictum) (suggesting, without authority, that Internet addresses "seem to be" not records, but "simply 'a means to access' records").

[104] Pub. L. No. 104-231, § 3, 110 Stat. 3048, 3049 (codified as amended at 5 U.S.C. § 552(f)(2) (2000 & Supp. IV 2004)).

[105] 5 U.S.C. § 552(f)(2); see FOIA Update, Vol. XVII, No. 4, at 2 (discussing statutory amendment); 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).

[106] 5 U.S.C. § 551(2) (2000); cf. Judicial Watch v. U.S. Dep't of Justice, 102 (continued...)

also be made through an attorney or other representative on behalf of "any person."[107] Individual members of Congress possess the same rights of access as those guaranteed to "any person."[108] Although the statute

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[106](...continued)
F. Supp. 2d 6, 10 (D.D.C. 2000) (holding that because two related organizations "are separate corporations, . . . each is entitled to request documents under FOIA in its own right").

[107] See, e.g., Constangy, Brooks & Smith v. NLRB, 851 F.2d 839, 840 n.2 (6th Cir. 1988) (recognizing standing of attorney to request documents on behalf of client); see also Doherty v. U.S. Dep't of Justice, 596 F. Supp. 423, 427 n.4 (S.D.N.Y. 1984) (reviewing legislative history), aff'd on other grounds, 775 F.2d 49 (2d Cir. 1985). See generally Burka v. HHS, 142 F.3d 1286, 1290 (D.C. Cir. 1998) (holding that when an attorney makes a request in his own name without disclosing that he is acting on behalf of a client, he may not later seek attorney fees for his legal work); McDonnell v. United States, 4 F.3d 1227, 1237-38 (3d Cir. 1993) (holding that person whose name does not appear on request does not have standing); Brown v. EPA, 384 F. Supp. 2d 271, 276-78 (D.D.C. 2005) (finding that plaintiff has standing where request stated that attorney was making request on behalf of client, and where "other correspondence . . . confirm[ed]" that all parties understood attorney to be acting on behalf of client); Mahtesian v. OPM, 388 F. Supp. 2d 1047, 1050 (N.D. Cal. 2005) (finding that a lawyer's "reference to an anonymous client in a FOIA request, can not [sic], alone, confer standing on that client"); Hall v. CIA, No. 04-00814, 2005 WL 850379, at *4 (D.D.C. Apr. 13, 2005) (finding that requester organization was party to request where request letter stated that organization was "joining" request, even though organization's attorney did not sign letter); Three Forks Ranch Corp. v. Bureau of Land Mgmt., 358 F. Supp. 2d 1, 3 (D.D.C. 2005) (finding that corporation lacked standing to pursue FOIA action where its attorney did not indicate specifically that he was making FOIA request "on behalf of" corporation); Scaife v. IRS, No. 02-1805, 2003 U.S. Dist. LEXIS 22661, at *5 (D.D.C. Nov. 20, 2003) (finding that powers-of-attorney submitted with FOIA request were insufficient to vest requester with right to receive requested records); Archibald v. Roche, No. 01-1492, slip op. at 1-2 (D.D.C. Mar. 29, 2002) (concluding that the request "appears to [have been] filed on behalf of the attorney" who signed the request, rather than on behalf of the client, because "nowhere in [the request] does [the attorney] ever state that he [was] filing this request on behalf of" the client); Dale v. IRS, 238 F. Supp. 2d 99, 107 (D.D.C. 2002) ("A party's counsel is not the 'requester' for purposes of a fee waiver."); MAXXAM, Inc. v. FDIC, 1999 WL 33912624, at *2 (D.D.C. Jan. 29, 1999) (finding that a corporate plaintiff whose name did not appear on a FOIA request made by its attorney "'has not administratively asserted a right to receive [the requested records] in the first place'" (quoting McDonnell, 4 F.3d at 1237)).

[108] See FOIA Update, Vol. V, No. 1, at 3-4 (distinguishing between individual Members of Congress and Congress as an institutional entity, which (continued...)

specifically excludes federal agencies from the definition of a "person,"[109] states and state agencies can make FOIA requests.[110]

There are two narrow, noteworthy exceptions to this broad "any person" standard, however. First, courts have denied relief under the FOIA to fugitives from justice if the requested records relate to the requester's fugitive status.[111] This holds true also when the FOIA plaintiff is an agent act-

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[108](...continued)
exercises its authority through its committee chairs); see also Congressional Oversight Manual, T.J. Halstead, Frederick M. Kaiser, Walter J. Oleszek, Morton Rosenberg, Todd B. Tatelman, Congressional Research Service, Report RL30240, Sec. III.G., at CRS-56 ("Role of Minority-Party Members in the Investigative Process") (Jan. 3, 2007) (discussing, inter alia, minority-party avenues of information access); Application of Privacy Act Congressional-Disclosure Exception to Disclosures to Ranking Minority Members, Op. Off. Legal Counsel (Dec. 5, 2001), available at http://www.usdoj.gov/olc/2001/privacy_act_opinion.pdf (discussing congressional access under the Privacy Act).

[109] 5 U.S.C. § 551(2); see also FOIA Update, Vol. VI, No. 1, at 6 (advising that information requests from agencies within executive branch of federal government cannot be considered FOIA requests).

[110] See, e.g., Texas v. ICC, 935 F.2d 728, 728 (5th Cir. 1991); Massachusetts v. HHS, 727 F. Supp. 35, 35 (D. Mass. 1989).

[111] See Maydak v. U.S. Dep't of Educ., 150 F. App'x 136, 138 (3d Cir. 2005) (affirming the district court's dismissal with prejudice as "there was enough of a connection between Maydak's fugitive status and his FOIA case"); Maydak v. United States, No. 02-5168, slip op. at 1 (D.C. Cir. Dec. 11, 2003) (refusing to dismiss the case because "[t]here is no substantial connection between [the requester's] alleged fugitive status and his current [FOIA] action," which was filed four years before the requester became a fugitive) (citing Daccarett-Ghia v. IRS, 70 F.3d 621, 626 (D.C. Cir. 1995)); Doyle v. U.S. Dep't of Justice, 668 F.2d 1365, 1365-66 (D.C. Cir. 1981) (holding that fugitive is not entitled to enforcement of FOIA's access provisions because he cannot expect judicial aid in obtaining government records related to sentence that he was evading); Meddah v. Reno, No. 98-1444, slip op. at 2 (E.D. Pa. Dec. 3, 1998) (dismissing escapee's FOIA claim because escapee "request[ed] documents which were used to determine that he should be detained"); see also Daccarett-Ghia, 70 F.3d at 626 n.4 (limiting the applicability of the "fugitive disentitlement doctrine" generally, but explaining that the "holding in this case does not disturb that aspect of Doyle" in which the court "recognize[d] one universally applied constraint on the fugitive disentitlement doctrine" -- namely, that "[d]ismissal was appropriate in part because the fugitive's [FOIA] suit sought records that were 'not devoid of a relationship' to the criminal charges pending against him") (non-FOIA case). But cf. O'Rourke v. U.S. Dep't of Justice, 684 F.
(continued...)

ing on behalf of a fugitive.[112]

Second, the Intelligence Authorization Act of 2003[113] amended the FOIA to now preclude agencies of the intelligence community[114] from disclosing records in response to any FOIA request that is made by any foreign government or international governmental organization, either directly or through a representative.[115] This means that agencies such as the CIA, the NSA, and even some parts of the FBI and the DHS may refuse to process such requests.[116]

Inasmuch as FOIA requests can be made for any reason whatsoever, FOIA requesters generally do not have to justify or explain their reasons for making requests.[117] Consistent with this, the Supreme Court has stated that a FOIA requester's basic access rights are neither increased nor decreased because the requester claims to have a particular interest in the records sought.[118] Yet despite repeated Supreme Court admonitions for re-

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[111](...continued)
Supp. 716, 718 (D.D.C. 1988) (holding that convicted criminal, fugitive from his home country and undergoing U.S. deportation proceedings, qualified as "any person" for purpose of making FOIA request); Doherty, 596 F. Supp. at 424-29 (same).

[112] See Javelin Int'l, Ltd. v. U.S. Dep't of Justice, 2 Gov't Disclosure Serv. (P-H) ¶ 82,141, at 82,479 (D.D.C. Dec. 9, 1981).

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

[114] See 50 U.S.C.A. § 401a(4) (2003 & West Supp. 2006) (provision of the National Security Act of 1947, as amended, that specifies the federal agencies and agency subparts that are deemed "elements of the intelligence community").

[115] Pub. L. No. 107-306, 116 Stat. 2383, § 312 (codified at 5 U.S.C. § 552(a)(3)(A), (E) (2000 & Supp. IV 2004)).

[116] See *FOIA Post*, "FOIA Amended by Intelligence Authorization Act" (posted 12/23/02) (advising that "for any FOIA request that by its nature appears as if it might have been made by or on behalf of a non-U.S. governmental entity, a covered agency may inquire into the particular circumstances of the requester in order to properly implement this new FOIA provision").

[117] See, e.g., NARA v. Favish, 541 U.S. 157, 172 ("[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."), reh'g denied, 541 U.S. 1057 (2004).

[118] 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
(continued...)

straint,[119] requesters have invoked the FOIA successfully as a substitute for, or a supplement to, document discovery in the contexts of both civil[120]

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[118](...continued)
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 U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771 (1989) ("As we have repeatedly stated, Congress 'clearly intended' the FOIA 'to give any member of the public as much right to disclosure as one with a special interest [in a particular document].'" (quoting Sears, 421 U.S. at 149)); EPA v. Mink, 410 U.S. 73, 86 (1973) (declaring that the FOIA "is largely indifferent to the intensity of a particular requester's need"); cf. Parsons v. Freedom of Info. Act Officer, No. 96-4128, 1997 WL 461320, at *1 (6th Cir. Aug. 12, 1997) (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, [the FOIA requester's] need or intended use for the documents is irrelevant."); Ctr. for Individual Rights v. U.S. Dep't of Justice, No. 03-1706, slip op. at 5-6 (D.D.C. June 29, 2004) (stating that requester's rights under FOIA are not affected by his involvement in other cases in litigation, even where discovery process would not provide access to requested documents).

[119] See United States v. Weber Aircraft Corp., 465 U.S. 792, 801-02 (1984); Baldrige v. Shapiro, 455 U.S. 345, 360 n.14 (1982); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978); Sears, 421 U.S. at 143 n.10; Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974).

[120] See, e.g., Jackson v. First Fed. Sav., 709 F. Supp. 887, 889 (E.D. Ark. 1989); see also In re F&H Barge Corp., 46 F. Supp. 2d 453, 454-55 (E.D. Va. 1998) (noting that "courts have allowed private litigants to obtain documents in discovery via the FOIA"); FOIA Update, Vol. III, No. 1, at 10 (acknowledging that "[u]nder present law there is no statutory prohibition to the use of FOIA as a discovery tool"). But see also Martinez v. EEOC, No. 04-0391, 2004 WL 2359895, at *6 (W.D. Tex. Oct. 19, 2004) (concluding that a requester "may not use the FOIA to circumvent the discovery process and thereby frustrate the investigative procedures of the EEOC"); Cantres v. FBI, No. 01-1115, slip op. at 5 (D. Minn. June 21, 2002) (magistrate's recommendation) (avouching that "[a] FOIA request is not a substitute for discovery in a habeas case," nor was the FOIA "designed to supplement the rules of civil discovery"), adopted (D. Minn. July 16, 2002); Comer v. IRS, No. 97-76329, 2000 WL 1566279, at *2 (E.D. Mich. Aug. 17, 2000) (opining that "while documents obtained through FOIA requests may ultimately prove helpful in litigation by permitting a citizen to more precisely target his discovery requests, FOIA is not intended to be a substitute for discovery"); Envtl. Crimes Project v. EPA, 928 F. Supp. 1, 2 (D.D.C. 1995) (ordering a stay of a FOIA case "pending the resolution of the discovery disputes" in the parties' related lawsuit in order to foreclose the requester's attempt to "end run" or interfere with discovery); cf. Injex Indus. v. NLRB, 699 F. Supp.
(continued...)

and criminal[121] litigation.

Nevertheless, there are two types of circumstances in which a requester's reason for making a FOIA request can properly affect the manner in which it is processed, either procedurally or substantively. First, the resolution of certain procedural issues -- i.e., expedited access, the assessment or waiver of fees, and the award of attorney fees and costs to a successful FOIA plaintiff -- can depend upon the reason for which the request was made.[122] Second, a requester's reason for making a FOIA request -- as it is reflected in an evidentiary showing of "public interest" -- can substantively affect the agency's decision to disclose or withhold information that is potentially subject to the FOIA's privacy exemptions.[123] (For discussions

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[120](...continued)
1417, 1419 (N.D. Cal. 1986) (holding that FOIA cannot be used to circumvent nonreviewable decision to impound requested documents); Morrison-Knudsen Co. v. Dep't of the Army of the United States, 595 F. Supp. 352, 356 (D.D.C. 1984) ("[T]he use of FOIA to unsettle well established procedures governed by a comprehensive regulatory scheme must be . . . viewed not only 'with caution' but with concern."), aff'd, 762 F.2d 138 (D.C. Cir. 1985) (unpublished table decision).

[121] See, e.g., North, 881 F.2d at 1096; Bright v. Attorney Gen. John Ashcroft, 259 F. Supp. 2d 502, 503 & n.1 (E.D. La. 2003) (concluding erroneously that Brady v. Maryland "demands" that information withheld under Exemption 7(D) of FOIA be released to plaintiff). But see United States v. U.S. Dist. Court, Cent. Dist. of Cal., 717 F.2d 478, 480 (9th Cir. 1983) (holding that FOIA does not expand scope of criminal discovery permitted under Rule 16 of Federal Rules of Criminal Procedure); United States v. Agunbiade, No. 90-CR-610, 1995 WL 351058, at *7 (E.D.N.Y. May 10, 1995) (stating that a FOIA requester "cannot employ the statute as a means to enlarge his right to discovery" in his criminal case); Johnson v. U.S. Dep't of Justice, 758 F. Supp. 2, 5 (D.D.C. 1991) ("Resort to Brady v. Maryland as grounds for waiving confidentiality is . . . outside the proper role of FOIA."); Stimac v. U.S. Dep't of Justice, 620 F. Supp. 212, 213 (D.D.C. 1985) ("Brady v. Maryland . . . provides no authority for releasing material under FOIA."); cf. Jones v. FBI, 41 F.3d 238, 250 (6th Cir. 1994) ("FOIA's scheme of exemptions does not curtail a plaintiff's right to discovery in related non-FOIA litigation; but neither does that right entitle a FOIA plaintiff to circumvent the rules limiting release of documents under FOIA.").

[122] Cf. Forsham v. Califano, 587 F.2d 1128, 1134 (D.C. Cir. 1978) (recognizing that "considerations such as need, interest, or public interest may bear on the agency's determination" to process pending FOIA requests in a certain order), aff'd on other grounds sub nom. Forsham v. Harris, 445 U.S. 169 (1980).

[123] See Favish, 541 U.S. at 172 (declaring that "[w]here the privacy concerns addressed by Exemption 7(C) are present, the exemption requires
(continued...)

of the proper application of those exemptions, see Exemption 6, below, and Exemption 7(C), below.)

On a related note, the Supreme Court has observed that a FOIA requester's identity generally "has no bearing on the merits of his or her FOIA request."[124] However, the Court has recognized an exception to this general rule by noting that the requester's identity can be significant in one substantive respect: "The fact that no one need show a particular need for information in order to qualify for disclosure under the FOIA does not mean

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[123](...continued)
the person requesting the information to establish a sufficient reason for the disclosure" by showing that "the public interest sought to be advanced [by the requested disclosure] is a significant one" and that disclosure of "the information is likely to advance that interest"); see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) ("Favish thus stands as a reminder to all agencies that their consideration of potential privacy invasions must include . . . what the requester might do with the information at hand.").

[124] Reporters Comm., 489 U.S. at 771; 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, 1997 WL 461320, at *1 ("[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. Bureau of Prisons, 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. Calder v. IRS, 890 F.2d 781, 783 (5th Cir. 1989) (holding that historian denied access under FOIA also has no "constitutional right of access" to Al Capone's tax records); 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).

that in no situation whatever will there be valid reasons for treating [an exemption] differently as to one class of those who make requests than as to another class."[125] In short, this means that an agency should not invoke a FOIA exemption to protect a requester from himself.[126]

Finally, the Court of Appeals for the District of Columbia Circuit has held that under some circumstances a FOIA claim in litigation may survive even if the FOIA requester dies before the case is put to rest.[127]

Proper FOIA Requests

The FOIA specifies only two requirements for an access request: It must "reasonably describe" the records sought[128] and it must be made in accordance with the agency's published FOIA regulations.[129] Because "a

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[125] U.S. Dep't of Justice v. Julian, 486 U.S. 1, 14 (1988); accord Reporters Comm., 489 U.S. at 771 (recognizing single exception to general FOIA-disclosure rule in case of "first-party" requester).

[126] See FOIA Update, Vol. X, No. 2, at 5 (advising agencies to treat first-party FOIA requesters in accordance with protectible interests that requesters can have in their own information, such as personal privacy information, and to treat third-party FOIA requesters differently).

[127] See Sinito v. U.S. Dep't of Justice, 176 F.3d 512, 513 (D.C. Cir. 1999) (holding that FOIA claim can survive death of original requester and remanding case for determination regarding who could properly be substituted for decedent); see also D'Aleo v. Dep't of the Navy, No. 89-2347, 1991 U.S. Dist. LEXIS 3884, at *4 (D.D.C. Mar. 21, 1991) (allowing decedent's executrix to be substituted as plaintiff). But see Hayles v. U.S. Dep't of Justice, No. H-79-1599, slip op. at 3 (S.D. Tex. Nov. 2, 1982) (dismissing case upon death of plaintiff because no timely motion for substitution was filed).

[128] 5 U.S.C. § 552(a)(3)(A) (2000 & Supp. IV 2004).

[129] Id. § 552(a)(3)(A)(ii); see, e.g., Maxwell v. Snow, 409 F.3d 354, 358-59 (D.C. Cir. 2005) (affirming district court's holding that "FOIA procedures should apply to requests for [tax] return information under 26 U.S.C. § 6103"); Borden v. FBI, No. 94-1029, slip op. at 2 (1st Cir. June 28, 1994) (per curiam) (affirming dismissal of case because requester failed to comply with agency's published regulations); McDonnell v. United States, 4 F.3d 1227, 1236-37 (3d Cir. 1993) ("[A] person whose name does not appear on [FOIA] request [as required by agency regulations] . . . has not made a formal request for documents within the meaning of the statute [and therefore] has no right to [the documents or to] sue in district court when the agency refuses to release requested documents."); Church of Scientology v. IRS, 792 F.2d 146, 150 (D.C. Cir. 1986) (stating that requesters must follow "the statutory command that requests be made in accordance with published rules"); Harris v. Freedom of Info. Unit, DEA, No. 06-00176, slip op. at

(continued...)

person need not title a request for government records a 'FOIA request,'"[130] agencies should use sound administrative discretion when determining the nature of an access request.[131] For example, a first-party access request that cites only the Privacy Act of 1974[132] should be processed under both that statute and the FOIA.[133]

The legislative history of the 1974 FOIA amendments indicates that a description of a requested record that enables a professional agency em-

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[129](...continued)
10 (N.D. Tex. Oct. 3, 2006) (magistrate's recommendation) (finding that plaintiff failed to exhaust administrative remedies where request did not comply with agency's regulations), adopted, 2006 WL 3342598 (N.D. Tex. Nov. 17, 2006) (appeal pending); Smith v. FBI, No. 06-1026, slip op. at 7 n.5 (D.D.C. Sept. 19, 2006) (recognizing that the FBI's Headquarters "lacks the regulatory authority to search field office records" in light of 28 C.F.R. § 16.3(a) (2006), which requires requesters to submit field office requests directly to field offices); Antonelli v. ATF, No. 04-1180, 2006 WL 141732, at *2 (D.D.C. Mar. 17, 2006) (granting agency's motion for summary judgment, because requester failed to exhaust administrative remedies when he refused to identify which of more than 100 systems of records his request concerned); Duggan v. U.S. Dep't of Justice, No. 03-10260, slip op. at 2 (D. Mass. Jan. 28, 2004) (stating that "FOIA does not entitle the plaintiff to direct the Criminal Division to search the records of other agencies and agency components; and [that] the plaintiff must exhaust his administrative remedies by directing his requests to the agencies that possess the records he seeks"), aff'd per curiam, No. 04-1455, slip op. at 2 (1st Cir. Sept. 29, 2004). But see Summers v. U.S. Dep't of Justice, 999 F.2d 570, 572-73 (D.C. Cir. 1993) (holding that 28 U.S.C. § 1746 (2000) -- which requires that unsworn declarations be treated with "like force and effect" as sworn declarations -- can be used in place of notarized-signature requirement of agency regulation for verification of FOIA privacy waivers); Kennedy v. U.S. Dep't of Justice, No. 03-CV-6077, 2004 WL 2284691, at *4 (W.D.N.Y. Oct. 8, 2004) (ruling that search was inadequate when it did not include field office, even though request was not sent to field office).

[130] Newman v. Legal Servs. Corp., 628 F. Supp. 535, 543 (D.D.C. 1986). But see Blackwell v. EEOC, No. 2:98-38, 1999 U.S. Dist. LEXIS 3708, at *5 (E.D.N.C. Feb. 12, 1999) (finding that request was not properly made because plaintiff failed to follow agency regulation requiring that request be denominated explicitly as request for information under FOIA).

[131] See FOIA Update, Vol. VII, No. 1, at 6 (advising that "agencies are expected to honor a requester's obvious intent").

[132] 5 U.S.C. § 552a (2000 & Supp. IV 2004).

[133] See FOIA Update, Vol. VII, No. 1, at 6 (advising that it is "good policy for agencies to treat all first-party access requests as FOIA requests" regardless of whether FOIA is cited by requester).

ployee familiar with the subject area to locate the record with a "reasonable amount of effort" is sufficient.[134] Courts have explained that "[t]he rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters,"[135] or to allow requesters to conduct "fishing expeditions" through agency files.[136] Accord-

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[134] H.R. Rep. No. 93-876, at 6 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6271; see, e.g., Truitt v. Dep't of State, 897 F.2d 540, 544-45 (D.C. Cir. 1990) (discussing legislative history of 1974 FOIA amendments as related to requirements for describing requested records); Gaunce v. Burnette, 849 F.2d 1475, 1475 (9th Cir. 1988) (affirming the lower court's grant of summary judgment, and stating that the request did not reasonably describe the records sought, where the request sought "'every scrap of paper wherever located within the agency'" related to the requester's aviation activities (citing Marks v. U.S. Dep't of Justice, 578 F.2d 261, 263 (9th Cir. 1978))); Goland v. CIA, 607 F.2d 339, 353 (D.C. Cir. 1978); Marks v. U.S. Dep't of Justice, 578 F.2d 261, 263 (9th Cir. 1978); Mason v. Callaway, 554 F.2d 129, 131 (4th Cir. 1977) (affirming lower court finding that request did not reasonably describe records sought); Stuler v. IRS, No. 06-2251, 2007 WL 485230, at *2 (3d Cir. Feb. 15, 2007) (per curiam) (affirming district court's grant of summary judgment, where requester failed to comply with agency regulations requiring "reasonably described" requests); Ferri v. U.S. Dep't of Justice, 573 F. Supp. 852, 859 (W.D. Pa. 1983) (granting summary judgment where the plaintiff failed to provide sufficient information to allow the agency to retrieve the requested information "with a reasonable amount of effort" (citing Marks, 578 F.2d at 263)).

[135] Assassination Archives & Research Ctr. v. CIA, 720 F. Supp. 217, 219 (D.D.C. 1989), aff'd in pertinent part, No. 89-5414 (D.C. Cir. Aug. 13, 1990); Nurse v. Sec'y of the Air Force, 231 F. Supp 2d 323, 329 (D.D.C. 2002) (quoting Assassination Archives & Research Ctr., 720 F. Supp. at 219); see Frank v. U.S. Dep't of Justice, 941 F. Supp. 4, 5 (D.D.C. 1996) (stating that an agency is not required to "dig out all the information that might exist, in whatever form or place it might be found, and to create a document that answers plaintiff's questions"); Blakey v. Dep't of Justice, 549 F. Supp. 362, 366-67 (D.D.C. 1982) ("The FOIA was not intended to compel agencies to become ad hoc investigators for requesters whose requests are not compatible with their own information retrieval systems."), aff'd, 720 F.2d 215 (D.C. Cir. 1983) (unpublished table decision); see also Trenerry v. Dep't of the Treasury, No. 92-5053, 1993 WL 26813, at *3 (10th Cir. Feb. 5, 1993) (holding that agency not required to provide personal services such as legal research); Satterlee v. IRS, No. 05-3181, 2006 U.S. Dist. LEXIS 78775, at *9 (W.D. Mo. Oct. 30, 2006) (finding that request was improper where it would require agency to "conduct legal research" and answer questions "disguised as . . . FOIA request"); Lamb v. IRS, 871 F. Supp. 301, 304 (E.D. Mich. 1994) (finding requests outside scope of FOIA when they require legal research, are unspecific, or seek answers to interrogatories).

[136] Immanuel v. Sec'y of the Treasury, No. 94-884, 1995 WL 464141, at *1

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ingly, one FOIA request was held invalid because it required an agency's FOIA staff either to have "clairvoyant capabilities" to discern the requester's needs or to spend "countless numbers of personnel hours seeking needles in bureaucratic haystacks."[137]

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[136](...continued)
(D. Md. Apr. 4, 1995), aff'd, 81 F.3d 150 (4th Cir. 1996) (unpublished table decision); see also Dale v. IRS, 238 F. Supp. 2d 99, 104-05 (D.D.C. 2002) (concluding that a request that sought "'any and all documents . . . that refer or relate in any way'" to the requester failed to reasonably describe the records sought and "amounted to an all-encompassing fishing expedition of files at [the agency's] offices across the country, at taxpayer expense"); Freeman v. U.S. Dep't of Justice, No. 90-2754, slip op. at 3 (D.D.C. Oct. 16, 1991) ("The FOIA does not require that the government go fishing in the ocean for fresh water fish.").

[137] Devine v. Marsh, 2 Gov't Disclosure Serv. (P-H) ¶ 82,022, at 82,186 (E.D. Va. Aug. 27, 1981); see also Goldgar v. Office of Admin., 26 F.3d 32, 35 (5th Cir. 1994) (holding that the agency was not required to produce information sought by the requester -- "the identity of the government agency that is reading his mind" -- that does not exist in record form); Satterlee, 2006 U.S. Dist. LEXIS 78775, at *9 (finding that requester did not reasonably describe records sought where his request asked IRS to "prove that it has jurisdiction over him"); Segal v. Whitmyre, No. 04-809795, 2005 WL 1406171, at *2 (S.D. Fla. Apr. 6, 2005) (finding that court lacks jurisdiction under FOIA because request "failed to assert exactly what records/documents" requester sought, but instead asked for "proof/documentation" that requester was not entitled to IRS tax hearing), aff'd on other grounds sub nom. Segal v. Comm'r, No. 05-13278 (11th Cir. Apr. 13, 2006); Benneville v. U.S. Dep't of Justice, No. 98-6137, slip op. at 10 (D. Or. June 11, 2003) (rejecting plaintiff's contention that the agency should have provided him with information on all environmental groups, rather than just the single group specifically named in his request letter, because "the government should not be expected to determine [the unnamed groups'] identit[ies] and determine if they should be involved in the search"); Malak v. Tenet, No. 01-3996, 2001 WL 664451, at *1 (N.D. Ill. June 12, 2001) (concluding that request's "discursive narrative doesn't even begin to approach the necessary job to permit performance of [agency's] FOIA responsibilities"); Judicial Watch v. Exp.-Imp. Bank, 108 F. Supp. 2d 19, 27-28 (D.D.C. 2000) (ruling that a request did not reasonably describe the records sought because the plaintiff "fail[ed] to state its request with sufficient particularity, [and] it also declined [the agency's] repeated attempts to clarify the request"); Keenan v. U.S. Dep't of Justice, No. 94-1909, slip op. at 1 (D.D.C. Nov. 12, 1996) ("Plaintiff can not [sic] place a request for one search and then, when nothing is found, convert that request into a different search."); Graphics of Key W. v. United States, 1996 WL 167861, at *7 (D. Nev. 1996) (finding plaintiff's request letters to be "more arguments than clear requests for information"); Kubany v. Bd. of Governors of the Fed. Reserve Sys., No. 93-1428, slip op. at 6-8 (D.D.C. July 19, 1994) (holding that request relying on exhibits contain-
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Depending upon the particular type of FOIA activity that is involved, an agency might be required to make translations of requests or records that are written in a language other than English.[138] When reading a request not written in English, an agency may attempt to translate the request; but an agency unable to make such a translation should, at a minimum, attempt to contact the requester in order to "clarify" the request -- i.e., to obtain from the requester a translation of the request.[139] Further, in processing non-English records in response to a FOIA request, an agency should make all "scoping" and disclosure determinations with great care so that it is able to fulfill its obligations under the Act.[140] When processing non-English responsive records, agencies should not run the risk of disclosing sensitive information that should be withheld.[141] Rather, an agency in such a situation should bear the burden of translation so that it can properly determine exemption applicability, and so that it can fairly defend such determinations should litigation arise.[142] Finally, while agencies might

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[137](...continued)
ing "multiple, unexplained references to hundreds of accounts, and various flowcharts, and schematics" is "entirely unreasonable"). But cf. Doolittle v. U.S. Dep't of Justice, 142 F. Supp. 2d 281, 285 (N.D.N.Y. 2001) (concluding that so long as description of records sought is otherwise reasonable, agency cannot refuse to search for records simply because requester did not also identify them by the date on which they were created).

[138] See *FOIA Post*, "The Limits of Agency Translation Obligations Under the FOIA" (posted 12/1/04) (discussing agency translation obligations in determining responsiveness of records, determining applicability of exemptions, and providing records in response to FOIA requests).

[139] Cf. Ruotolo v. Dep't of Justice, 53 F.3d 4, 10 (2d Cir. 1995) (concluding that agency failed to perform its "duty" to assist requester in reformulating request); Exec. Order No. 13,392, Sec. 1(b), 70 Fed. Reg. 75,373 (Dec. 14, 2005) (directing that agencies respond to FOIA requesters "courteously and appropriately"); id. at Sec. 2(c) (establishing FOIA Requester Service Center and FOIA Public Liaison in order to "ensure appropriate communication with FOIA requesters"); id. at Sec. 2(c)(ii) (directing that FOIA Public Liaisons must seek to ensure service-oriented response to FOIA requests and FOIA-related inquiries).

[140] See *FOIA Post*, "The Limits of Agency Translation Obligations Under the FOIA" (posted 12/1/04) (discussing the importance of understanding the contents of records believed to be responsive, and advising agencies to obtain translations of responsive records rather than making disclosure determinations "in the dark").

[141] See id.

[142] See id. (stating that "if a FOIA request were to proceed to litigation in a case in which records were withheld without the agency's knowledge of their contents, then that case could not properly be defended" (citing Lion
(continued...)

translate releasable records when making a response as a matter of administrative discretion, nothing in the FOIA requires such action.[143]

The fact that a FOIA request is very broad or "burdensome" in its magnitude does not, in and of itself, entitle an agency to deny that request on the basis that it does not "reasonably describe" the records sought.[144] The key factor is the ability of an agency's staff to reasonably ascertain exactly which records are being requested and then locate them.[145] The

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[142](...continued)
Raisins Inc. v. USDA, 354 F.3d 1072, 1082 n.10 (9th Cir. 2004) (finding it "perplexing that the government would choose to assign counsel to defend its position on appeal . . . who is totally unfamiliar with (and, presumably, denied access to) the facts upon which the government bases its claim" to exemption))).

[143] See *FOIA Post*, "The Limits of Agency Translation Obligations Under the FOIA" (posted 12/1/04) (advising that agencies have no obligation to "provide a requester with more than what the requested record contains on its face").

[144] See 53 F.3d at 10 (finding that request that required 803 files to be searched was not "unreasonably burdensome"); 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)."). But see Domingues v. FBI, No. 98-74612, slip op. at 11 (E.D. Mich. July 24, 1999) (magistrate's recommendation) (determining that "a request directed to an agency's headquarters which does not request a search of its field offices, or which requests a blanket search of all field offices without specifying which offices should be searched, does not 'reasonably describe' any records which may be in those field offices, and an agency's search of just the headquarters records complies with the FOIA"), adopted (E.D. Mich. July 29, 1999), aff'd, 229 F.3d 1151 (6th Cir. 2000) (unpublished table decision); Massachusetts v. HHS, 727 F. Supp. 35, 36 n.2 (D. Mass. 1989) (holding that a request for all records "relating to" a particular subject is overbroad, "thus unfairly plac[ing] the onus of non-production on the recipient of the request and not where it belongs -- upon the person who drafted such a sloppy request").

[145] 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)); 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"). But see AFGE v. U.S. Dep't of Commerce, 907 F.2d 203, 209
(continued...)

courts have held only that agencies are not required to conduct wide-ranging, "unreasonably burdensome" searches for records.[146] An agency in re-

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[145](...continued)
(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 the agency would have "to locate, review, redact, and arrange for inspection a vast quantity of material").

[146] See Solar Sources, Inc. v. United States, 142 F.3d 1033, 1039 (7th Cir. 1998) (refusing to order agency to identify and segregate nonexempt documents from millions of pages of files in light of government's estimate that doing so would take eight work-years); Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 892 (D.C. Cir. 1995) (agreeing that search which would require 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); Van Strum v. EPA, No. 91-35404, 1992 WL 197660, at *1 (9th Cir. Aug. 17, 1992) (accepting agency justification in denying or seeking clarification of overly broad requests which would place inordinate search burden on agency resources); Marks, 578 F.2d at 263 (ruling that FBI is not required to search every one of its field offices); Ray v. FBI, 441 F. Supp. 2d 27, 32 (D.D.C. 2006) (stating that the "FBI is not obligated to undertake a search of its field offices' records when a requester submits his request only to its headquarters" (citing Oglesby, 920 F.2d at 68)); Schrecker v. U.S. Dep't of Justice, 217 F. Supp. 2d 29, 35 (D.D.C. 2002) (finding "that to require an agency to hand search through millions of documents is not reasonable and therefore not necessary," as the agency already had searched "the most likely place responsive documents would be located"), aff'd, 349 F.3d 657 (D.C. Cir. 2003); Burns v. U.S. Dep't of Justice, No. 99-3173, slip op. at 2 (D.D.C. Feb. 5, 2001) (concluding that "given the capacity of the reels and the absence of any index," a request for specific telephone conversations recorded on reel-to-reel tapes was "unreasonably burdensome" because "it would take an inordinate [amount of] time to listen to the reels in order to locate any requested conversations that might exist"); Blackman v. U.S. Dep't of Justice, No. 00-3004, slip op. at 5 (D.D.C. July 5, 2001) (declaring request that would require a manual search through 37 million pages to be "unreasonable in light of the resources needed" to process it), appeal dismissed for lack of prosecution, No. 01-5431 (D.C. Cir. Jan. 2, 2003); Peyton v. Reno, No. 98-1457, 1999 U.S. Dist. LEXIS 12125, at *4-5 (D.D.C. July 19, 1999) (finding that request for all records indexed under subject's name reasonably described records sought because agency failed to demonstrate that name search would be unduly burdensome); O'Harvey v. Office of Workers' Comp. Programs, No. 95-0187, slip op. at 3 (E.D. Wash. Dec. 29, 1997) (finding a request to be unreasonably burdensome because a search would require the agency "to review all of the case files maintained by the agency" and "would entail review of millions of pages of hard copies"), aff'd sub
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ceipt of a request that it deems burdensome may contact the requester in an attempt to clarify or narrow the breadth of the request[147] -- and it should do so of course whenever such action is required by agency regulations.[148]

By the same token, an agency should "carefully consider" the nature of each FOIA request[149] and give reasonable import to its terms and full content overall, even if the request "is not a model of clarity."[150] Likewise,

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[146](...continued)
nom. O'Harvey v. Comp. Programs Workers, 188 F.3d 514 (9th Cir. 1999) (unpublished table decision); Spannaus v. U.S. Dep't of Justice, No. 92-372, slip op. at 6 (D.D.C. June 20, 1995) (finding that agency is not required to determine all persons having ties to associations targeted in bankruptcy proceedings "and then search any and all civil or criminal files relating to those persons"), summary affirmance granted in pertinent part, No. 95-5267 (D.C. Cir. Aug. 16, 1996).

[147] Accord Pub. L. No. 104-231, § 4, 110 Stat. 3048, 3050-51 (1996) (codified as amended at 5 U.S.C. § 552(a)(6)(B) (amending Act to provide for agency invocation of ten working-day extension to response time for "unusual circumstances" in tandem with agency providing requester with full opportunity to narrow request).

[148] See, e.g., Ruotolo, 53 F.3d at 10 (stating that agency failed to perform its "duty" to assist requester in reformulating request); Pub. Citizen Health Research Group v. FDA, 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).

[149] Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), reprinted in *FOIA Post* (posted 10/15/01); see also Presidential Memorandum for Heads of Departments and Agencies Regarding the Freedom of Information Act, 29 Weekly Comp. Pres. Doc. 1999 (Oct. 4, 1993), reprinted in FOIA Update, Vol. XIV, No. 3, at 3 (encouraging agencies to handle FOIA requests "in a customer-friendly manner").

[150] LaCedra v. Executive Office for U.S. Attorneys, 317 F.3d 345, 347-48 (D.C. Cir. 2003) (concluding that the agency failed to "liberally construe" a request for "all documents pertaining to [plaintiff's] case" when it limited that request's scope to only those records specifically and individually listed in the request letter, because "[t]he drafter of a FOIA request might reasonably seek all of a certain set of documents while nonetheless evincing a heightened interest in a specific subset thereof" (citing Nation Magazine, 71 F.3d at 890)); see Horsehead Indus. v. EPA, No. 94-1299, slip op. at 4 n.2 (D.D.C. Jan. 3, 1997) (ruling that "[b]y construing the FOIA request narrowly, [the agency] seeks to avoid disclosing information"); FOIA Update, Vol. XVI, No. 3, at 3 (advising agencies on interpretation of terms of FOIA re-
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an agency "must be careful not to read [a] request so strictly that the requester is denied information the agency well knows exists in its files, albeit in a different form from that anticipated by the requester."[151] Specifically, agencies should be careful to undertake any "scoping" of documents found in response to a request only with full communication with the FOIA requester.[152]

Although the scope of a FOIA request is most commonly thought of

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[150](...continued)
quests); see also Miller v. Casey, 730 F.2d 773, 777 (D.C. Cir. 1984) (emphasizing that an agency is required to read a FOIA request as drafted, "not as either [an] agency official or [the requester] might wish it was drafted"); Landes v. Yost, No. 89-6338, slip op. at 4-5 (E.D. Pa. Apr. 11, 1990) (finding that request was "reasonably descriptive" when it relied on agency's own outdated identification code), aff'd, 922 F.2d 832 (3d Cir. 1990) (unpublished table decision).

[151] Hemenway v. Hughes, 601 F. Supp. 1002, 1005 (D.D.C. 1985); see Allen v. Fed. Bureau of Prisons, No. 00-342, slip op. at 7-9 (D.D.C. Mar. 1, 2001) (concluding that the agency took "an extremely constricted view" of plaintiff's FOIA request for all "records or transcripts" of intercepted phone calls by failing to construe audiotape recordings of those calls as being within the request's scope), aff'd, 89 F. App'x 276 (D.C. Cir. 2004). But see also Judicial Watch, Inc. v. DOD, No. 05-00390, 2006 WL 1793297, at *3 (D.D.C. June 28, 2006) (concluding that agency need not construe request for names of corporations related to particular subject to be request for all records related to that subject); Nat'l Ass'n of Criminal Def. Lawyers v. U.S. Dep't of Justice, No. 04-0697, 2006 WL 666938, at *2 (D.D.C. Mar. 15, 2006) (concluding that agency "reasonably" read request as seeking "'any reports or studies'" and that requester's attempt to narrow request resulted in request that is "substantially different" from original request).

[152] See FOIA Update, Vol. XVI, No. 3, at 3-5 ("OIP Guidance: Determining the Scope of a FOIA Request") (advising of procedures and underlying considerations for document "scoping"), supplemented by *FOIA Post*, "FOIA Counselor Q&A" (posted 1/24/06) (addressing "scoping" in context of, e.g., "lengthy chains of 'electronic mail'" (citing St. Andrews Park, Inc. v. U.S. Dep't of the Army Corps of Eng'rs, 299 F. Supp. 2d 1264, 1271 (S.D. Fla. 2003))); see also Halpern v. FBI, 181 F.3d 279, 289 (2d Cir. 1999) (holding cross-referenced files to be beyond the scope of a request because once the agency "had requested clarification [about the requester's interest in receiving such records], it could then in good faith ignore the cross-referenced files until it received an affirmative response" from the requester); Hamilton Sec. Group v. HUD, 106 F. Supp. 2d 23, 27 (D.D.C. 2000) ("Given the exchange of correspondence between counsel and the agency relating to the scope of the request, there is no basis for plaintiff's claim that defendant should have understood that the request for a [single, specific record] was meant to include additional [records]."), aff'd per curiam, No. 00-5331, 2001 WL 238162 (D.C. Cir. Feb. 23, 2001).

as being defined by the subject matter of the records that it seeks, a request's scope also depends on the time frame in which the requested records were created.[153] The temporal scope of a FOIA request typically is defined through the agency's use of a "cut-off" date, meaning that records created after that date are treated as not responsive to the request.[154] Generally speaking, an agency should use as its "cut-off" date the date that the search for records begins (i.e., a "date-of-search cut-off")[155] -- which courts have favored because it "results in a much fuller search and disclosure" than the use of a less inclusive "cut-off," such as one based on the date of the request or of its receipt by the agency.[156] While an agency may choose not to use a "date-of-search cut-off" if "specific circumstances" warrant,[157] it

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[153] See *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"); see also 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).

[154] 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" an agency's "cut-off" date are not included within the temporal scope of a request).

[155] See *FOIA Post*, "Use of 'Cut-Off' Dates for FOIA Searches" (posted 5/6/04) (explaining practical reasons for using date that agency's search begins as"cut-off" date for request).

[156] McGehee v. CIA, 697 F.2d 1095, 1104 (D.C. Cir.), vacated on other grounds on panel reh'g & reh'g en banc denied, 711 F.2d 1076 (D.C. Cir. 1983); see Pub. Citizen v. Dep't of State, 276 F.3d 634, 644 (D.C. Cir. 2002) (favoring a "date-of-search cut-off" because its use "might . . . result[] in the retrieval of more [responsive] documents" than would a cut-off based on the date of the request); Van Strum v. EPA, No. 91-35404, 1992 WL 197660, at *2 (9th Cir. Aug. 17, 1992) (agreeing that a date-of-search "cut-off" date is "the most reasonable date for setting the temporal cut-off in this case"); Edmonds Inst. v. U.S. Dep't of the Interior, 383 F. Supp. 2d 105, 110-11 (D.D.C. 2005) (rejecting requester's call for use of date-of-release "cut-off" date in favor of date-of-search "cut-off" date, in accordance with agency's regulations).

[157] Pub. Citizen, 276 F.3d at 643; see *FOIA Post*, "Use of 'Cut-Off' Dates for FOIA Searches" (posted 5/6/04) (describing circumstances under which use of different "cut-off" dates may be reasonable); see also, e.g., Blazy v. Tenet, 979 F. Supp. 10, 17 (D.D.C. 1997) (concluding that it was "reasonable under the circumstances" for the agency to apply a date-of-request "cut-off" to a request that sought records concerning events that already had oc-

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may be required to articulate a "compelling justification" for doing so if challenged in court.[158]

No matter which type of "cut-off" date an agency adopts and ordinarily uses, it is obliged to inform FOIA requesters of that date.[159] The most efficient way in which an agency can give such notice is through "constructive notice" in its published FOIA regulations[160] and/or through its FOIA Reference Guide on its FOIA Web site.[161] Alternatively, an agency can give actual notice of its "cut-off" date policy in its correspondence with each FOIA requester individually.[162] An agency also can use such a letter whenever it departs from its ordinary practice for some reason, lest the request-

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[157](...continued)
curred (and records that already had been created) by the time the request was made), summary affirmance granted, No. 97-5330, 1998 WL 315583 (D.C. Cir. May 12, 1998). But see Or. Natural Desert Ass'n v. Gutierrez, 419 F. Supp. 2d 1284, 1288 (D. Or. Mar. 2, 2006) (concluding that agency's date-of-request "cut-off" date regulation "is not reasonable on its face and violates FOIA").

[158] Pub. Citizen, 276 F.3d at 644; cf. McGehee, 647 F.2d at 1103-04 (rejecting agency's arguments that use of date-of-search cut-off would be "unduly burdensome, expensive, or productive of 'administrative chaos'" as lacking any "detailed substantiation").

[159] See, e.g., Judicial Watch, Inc. v. U.S. Dep't of Energy, No. 01-0981, 2004 WL 635180, at *21 (D.D.C. Mar. 31, 2004) ("Because the [agency] imposed the . . . cut-off date without informing [the requester] of its intention to do so, the court must conclude that [the agency's] search was inadequate."); see also FOIA Update, Vol. IV, No. 4, at 14 (advising more than two decades ago that "agencies should give requesters notice of the 'cut-off' dates they use"); cf. McGehee, 697 F.2d at 1105 (expressing doubt that the agency could establish that "it may 'reasonably' use any 'cut-off' date without so informing the requester").

[160] See, e.g., 28 C.F.R. § 16.4(a) (2006) (Department of Justice FOIA regulation notifying requesters of its "cut-off" date).

[161] See 5 U.S.C. § 552(g) (requiring each agency to prepare and make publicly available (including electronically) its own guide for ready use by FOIA requesters in making requests to it); see also FOIA Update, Vol. XIX, No. 3, at 4 (advising that "[a]n agency's FOIA Web site is an excellent means of affording widespread public availability to its FOIA and Privacy Act regulations").

[162] See, e.g., Pub. Citizen, 276 F.3d at 634 (noting that State Department provided notice of its "cut-off" date policy in letters sent to all requesters acknowledging receipt of their requests); cf. McGehee, 697 F.2d at 1105 (suggesting that actual notice of an agency's "cut-off" policy might be given where such notice "would involve an insignificant expenditure of time and effort on the part of the agency").

er mistakenly be on "constructive notice" to the contrary.[163] Simply put, a FOIA requester should know what "cut-off" date is being applied to his request, if for no other reason than to minimize the chance of any inefficient misunderstanding about its scope.[164] (For further discussions of search requirements, see Procedural Requirements, Searching for Responsive Records, below, and Litigation Considerations, Adequacy of Search, below.)

When determining the scope of a FOIA request, however, agencies should remember that they are not required to answer questions posed as FOIA requests.[165] Nor does the FOIA require agencies to respond to re-

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[163] See, e.g., 28 C.F.R. § 16.4(a) (providing notice of the "cut-off" date that the Justice Department "ordinarily" uses, and specifying that "if any other date is used, the [Department] shall inform the requester of that date").

[164] See FOIA Update, Vol. XVI, No. 3, at 3 (reminding agencies of importance of FOIA requesters "being fully informed of all such scope matters").

[165] See, e.g., Zemansky v. EPA, 767 F.2d 569, 574 (9th Cir. 1985); DiViaio v. Kelley, 571 F.2d 538, 542-43 (10th Cir. 1978); Ivey v. U.S. Office of Special Counsel, No. 05-0176, 2005 U.S. Dist. LEXIS 18874, at *8 (D.D.C. Aug. 31, 2005) (finding that agency is not required to answer questions in response to request seeking reasons for closure of agency investigation); Stuler v. U.S. Dep't of Justice, No. 03-1525, 2004 WL 1304040, at *3 (W.D. Pa. June 30, 2004) (concluding that FOIA does not give requester "opportunity to relitigate his criminal case," and that agency was not obligated to answer requester's questions), aff'd, No. 06-2251, 2007 WL 485230, at *2 (3d Cir. Feb. 15, 2007) (per curiam); Barber v. Office of Info. & Privacy, No. 02-1748, slip op. at 4 (D.D.C. Sept. 4, 2003) (holding that the agency "had no duty to conduct research or to answer questions" that addressed the "'authentic[ity]' of federal jurisdiction over the location of his criminal prosecution"), aff'd per curiam, No. 03-5266 (D.C. Cir. Feb. 20, 2004); Gillin v. Dep't of the Army, No. 92-325, slip op. at 10 (D.N.H. May 28, 1993) ("FOIA creates only a right of access to records, not a right to require an agency to disclose its collective reasoning behind agency actions, nor does FOIA provide a mechanism to challenge the wisdom of substantive agency decisions."), aff'd, 21 F.3d 419 (1st Cir. 1994) (unpublished table decision); Patton v. U.S. R.R. Ret. Bd., No. ST-C-91-04, slip op. at 3 (W.D.N.C. Apr. 26, 1991) (stating that the FOIA "provides a means for access to existing documents and is not a way to interrogate an agency"), aff'd, 940 F.2d 652 (4th Cir. 1991) (unpublished table decision); Hudgins, 620 F. Supp. at 21 ("[The] FOIA creates only a right of access to records, not a right to personal services."); cf. Flowers v. IRS, 307 F. Supp. 2d 60, 71 (D.D.C. 2004) (declaring that the plaintiff "cannot use FOIA discovery to conduct an investigation into the [agency's] rationale" for auditing her). But see also Ferri v. Bell, 645 F.2d 1213, 1220 (3d Cir. 1981) (declaring that a request "inartfully presented in the form of questions" could not be dismissed, partly because the agency conceded that it could provide the requester with records containing the information he sought); FOIA Update, Vol. V, No. 1, at 5 (advising that "while agencies do

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quests by creating records,[166] such as by modifying exempt information in order to make it disclosable.[167] Likewise, agencies need not add explana-

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[165](...continued)
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)).

[166] See, e.g., 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 the FOIA does not require an 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. Dep't of Justice, 628 F.2d 195, 197-98 (D.C. Cir. 1980) (finding that agency "cannot be compelled to create the [intermediary records] necessary to produce" the information sought); 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"); Sakamoto v. EPA, 443 F. Supp. 2d 1182, 1189 (N.D. Cal. 2006) (granting summary judgment because, inter alia, the "FOIA does not require an agency to create records in response to a request"); 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. U.S. Dep't of Justice, 867 F. Supp. 314, 316 (E.D. Pa. 1994) (ruling that agency is not required to create handwriting analysis); see also FOIA Update, Vol. V, No. 1, at 5; cf. De Luca v. INS, No. 95-6240, 1996 U.S. Dist. LEXIS 2696, at *2 (E.D. Pa. Mar. 7, 1996) (noting that agency offered -- purely as matter of administrative discretion -- to create certification that it had no record that requester was naturalized citizen). But cf. Schladetsch v. HUD, No. 99-0175, 2000 WL 33372125, at *3 (D.D.C. Apr. 4, 2000) ("Because [the 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, 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); FOIA Update, Vol. XVIII, No. 1, at 5-6 (advising of particular statutory obligations regarding electronic record searches and format of disclosure).

[167] See FlightSafety Servs. Corp. v. Dep't of Labor, 326 F.3d 607, 613 (5th Cir. 2003) (per curiam) (recognizing that plaintiff's demand that the 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
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tory materials to any records disclosed in response to a FOIA request.[168] Agencies also cannot be required by FOIA requesters to seek the return of records over which they retain no "control"[169] (even records that were wrongfully removed from their possession);[170] to re-create records properly disposed of;[171] or to seek the delivery of records held by private entities.[172]

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[167](...continued) 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).

[168] See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 162 (1975) (holding that agency is not required to create explanatory materials); Jackman v. Dep't of Justice, 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"). But cf. McDonnell, 4 F.3d at 1261 n.21 (suggesting, in dictum, that agency might be compelled to create translation of any disclosable encoded information).

[169] See Steinberg v. U.S. Dep't of Justice, 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).

[170] See Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 150-55 (1980); cf. Spannaus v. U.S. Dep't of Justice, 942 F. Supp. 656, 658 (D.D.C. 1996) (finding that "personal files" of attorney no longer employed with agency were "beyond the reach of FOIA" if they were not turned over to agency at end of employment).

[171] See, e.g., Jones v. FBI, 41 F.3d 238, 249 (6th Cir. 1994); see also Robert (continued...)

[171](...continued)
v. HHS, 78 F. App'x 146, 147 (2d Cir. 2003) (finding no improper withholding of records that were destroyed in accordance with agency's record-retention schedule prior to agency's receipt of FOIA request); Flowers, 307 F. Supp. 2d at 71 (excusing agency's failure to locate file destroyed in accordance with published record- retention schedules); Laughlin v. Comm'r, 103 F. Supp. 2d 1219, 1224-25 (S.D. Cal. 1999) (refusing to order agency to re-create properly discarded document); Jones, 32 F. Supp. 2d at 875-76 (finding that agency did not improperly withhold requested report that was discarded in accordance with agency policies and practices); Rothschild v. Dep't of Energy, 6 F. Supp. 2d 38, 40 (D.D.C. 1998) (agreeing that because agency "is under no duty to disclose documents not in its possession," agency did not violate the FOIA by failing to provide discarded drafts of responsive documents); Green v. NARA, 992 F. Supp. 811, 817 (E.D. Va. 1998) (finding that agency met its FOIA obligation when it provided reasonable access to records sought by plaintiff prior to disposal of records under Records Disposal Act, 44 U.S.C. § 3301 (2000), and noting that "FOIA . . . does not obligate agencies to retain all records [in its possession], nor does it establish specified procedures designed to guide disposal determinations"); cf. Folstad v. Bd. of Governors of the Fed. Reserve Sys., No. 1:99-124, 1999 U.S. Dist. LEXIS 17852, at *5 (W.D. Mich. Nov. 16, 1999) (recognizing that "[e]ven if the agency failed to keep documents that it should have kept, that failure would create neither responsibility under the FOIA to reconstruct those documents nor liability for the lapse"), aff'd, 234 F.3d 1268 (6th Cir. 2000) (unpublished table decision); FOIA Update, Vol. XVIII, No. 1, at 5-6 (advising that FOIA does not govern agency records disposition practices). But cf. Schrecker v. U.S. Dep't of Justice, 254 F.3d 162, 165 (D.C. Cir. 2001) (holding that absent proof that requested records were destroyed, agency cannot refuse to search for such records simply because they were type of records not required to be retained); Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 328 (D.C. Cir. 1999) (rejecting agency's claim that it failed to locate requested records because they were type routinely destroyed, and declaring that "generalized claims of destruction or non-preservation cannot sustain summary judgment").

[172] See Folstad, 1999 U.S. Dist. LEXIS 17852, at *8 (finding that if agency "is no longer in possession of the documents, nothing in the FOIA requires the agency to obtain those documents from the private [banking] institution"); Rush Franklin Publ'g, Inc. v. NASA, No. 90-CV-2855, slip op. at 9-10 (E.D.N.Y. Apr. 13, 1993) (mailing list generated and held by federal contractor); Conservation Law Found. v. Dep't of the Air Force, No. 85-4377, 1986 U.S. Dist. LEXIS 24515, at *10 (D. Mass. June 6, 1986) (computer program generated and held by federal contractor); cf. U.S. v. Napper, 887 F.2d 1528, 1530 (11th Cir. 1989) (concluding that FBI was entitled to return of documents loaned to city law enforcement officials, notwithstanding fact that copies of some documents had been disclosed) (non-FOIA case). But see Chi. Tribune Co. v. HHS, No. 95 C 3917, 1999 WL 299875, at *3 (N.D. Ill. May 4, 1999) (ordering nonparty government contractor to disclose audit
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Requesters also cannot use the FOIA as an "enforcement mechanism" to compel agencies to perform their missions.[173] Neither may requesters compel agencies to make automatic releases of records as they are created,[174] which means that requests cannot properly be made for "future"

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[172](...continued)
data because "the government whole-handedly controls and blatantly influences [the contractor's] action with respect to disclosure of the documents"), emergency stay denied, No. 99-2162 (7th Cir. June 9, 1999); Cal-Almond, Inc. v. USDA, No. 89-574, slip op. at 3-4 (E.D. Cal. Mar. 17, 1993) (ordering agency to reacquire records that mistakenly were returned to submitter upon closing of administrative appeal), appeal dismissed per stipulation, No. 93-16727 (9th Cir. Oct. 26, 1994); see also FOIA Update, Vol. XIX, No. 4, at 2 (discussing private grantee records that are uniquely made subject to FOIA under 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 (1999)); cf. Nw. Coal. for Alternatives to Pesticides v. EPA, 254 F. Supp. 2d 125, 131 (D.D.C. 2003) (noting that a private entity's "voluntary provision" of a requested record to plaintiff "does not relieve the [agency] of [its] obligation to respond to plaintiff's [FOIA] request" for an identical record maintained in the agency's files).

[173] See, e.g., Niagara Mohawk Power Corp. v. U.S. Dep't of Energy, No. 95-0952, transcript at 10 (D.D.C. Feb. 23, 1996) (bench order) (admonishing that FOIA is not to be used to force agency to obtain information from another agency), vacated & remanded on other grounds, 169 F.3d 16 (D.C. Cir. 1999); Gillin, No. 92-325, slip op. at 5 (D.N.H. May 28, 1993) (The "[r]equest focused primarily upon the decisions made by the [agency] in granting [the administrative permit], rather than the documentation upon which the [agency] relied."). But cf. Nat'l Ass'n of Criminal Def. Lawyers v. U.S. Dep't of Justice, No. 97-372, slip op. at 8-10 (D.D.C. June 26, 1998) (concluding that plaintiff's FOIA suit caused agency to issue revised criminal prosecution policy and awarding interim attorney fees partly on such basis), interlocutory appeal dismissed for lack of juris., 182 F.3d 981 (D.C. Cir. 1999).

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

records not yet created.[175]

Likewise, both agencies and requesters alike should remember to distinguish between records that may be sought through FOIA requests[176] and records that are required to be made available in agency reading rooms (both conventional and "electronic") under subsection (a)(2) of the Act.[177] Agencies are not required to provide FOIA requesters with records that fall within subsection (a)(2) and are already available for "reading room" inspection and copying.[178] (For a discussion of "reading room" rec-

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[174](...continued)
Update, Vol. VI, No. 2, at 6 ("[I]n the few cases to have raised the issue of 'prospective' FOIA requests the courts have uniformly held that such requests are not proper.").

[175] See, e.g., Tax Analysts v. IRS, No. 94-923, 1998 WL 419755, at *4 (D.D.C. May 1, 1998) (recognizing that court could not order relief concerning documents not yet created and "for which a request for release has not even been made and for which administrative remedies have not been exhausted"); cf. FOIA Update, Vol. XVI, No. 1, at 1 (citing OMB Circular A-130, "Management of Federal Information Resources," 59 Fed. Reg. 37,905 (1994) (prescribing policies to encourage agencies to affirmatively disseminate government information independent of FOIA context)). But cf. Nat'l Ass'n of Criminal Def. Lawyers, No. 97-372, slip op. at 17 (D.D.C. June 26, 1998) (granting interim attorney fees based in part upon novel finding that plaintiff prevailed when, during litigation, agency released report which was not yet in existence at time of plaintiff's request).

[176] See 5 U.S.C. § 552(a)(3) (generally excluding "reading room" records from Act's basic "FOIA request" provisions).

[177] Id. § 552(a)(2); see also *FOIA Post*, "GAO E-FOIA Implementation Report Issued" (posted 3/23/01) (outlining categories of records required to be affirmatively disclosed in "electronic" reading rooms); FOIA Update, Vol. XVII, No. 3, at 1-2 (discussing maintenance of both conventional and "electronic" reading rooms under Electronic FOIA amendments).

[178] See Schwarz v. U.S. Patent & Trademark Office, No. 95-5349, 1996 U.S. App. LEXIS 4609, at *2-3 (D.C. Cir. Feb. 22, 1996) (per curiam); Crews v. Internal Revenue, No. 99-8388, 2000 WL 900800, at *6 (C.D. Cal. Apr. 26, 2000) (holding that "documents that are publicly available either in the [agency's FOIA] reading room or on the [I]nternet" are "not subject to production via FOIA requests"); cf. Perales v. DEA, 21 F. App'x 473, 474-75 (7th Cir. 2001) (recognizing that under subsection (a)(3), agencies are not required to disclose in response to FOIA requests records already made available under subsection (a)(1) through publication in the Federal Register). But see also FOIA Update, Vol. XVIII, No. 1, at 3 (advising that Congress made clear that newly established "reading room" category of FOIA-processed records would stand as exception to general rule and be subject (continued...)

ords, see FOIA Reading Rooms and Web Sites, FOIA Reading Rooms, above.)

In addition to reasonably describing the records sought, a FOIA requester must follow an agency's regulations in making a request.[179] Each federal agency must publish in the Federal Register its procedural regulations governing access to its records under the FOIA.[180] These regulations must inform the public of where and how to address requests; its schedule of fees for search, review, and duplication; its fee waiver criteria; and its administrative appeal procedures.[181] The Electronic Freedom of Information Act Amendments of 1996[182] affected several procedural aspects of FOIA administration[183] (including matters concerning the timing of processing FOIA requests, which are discussed below).[184] Each federal agency is required to have implementing regulations published in the Federal

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[178](...continued)
to regular FOIA requests as well); FOIA Update, Vol. XVI, No. 1, at 2 (reminding that "an agency cannot convert a subsection (a)(3) record into a subsection (a)(2) record . . . just by voluntarily placing it into its reading room").

[179] 5 U.S.C. § 552(a)(3)(A); see, e.g., Ivey v. Snow, No. 05-1095, 2006 WL 2051339, at *4 (D.D.C. 2006) (granting summary judgment to agency because plaintiff failed to exhaust administrative remedies when requests failed to comply with agency regulations); Wicks v. Coffrey, No. 01-3664, 2002 WL 1000975, at *2 (E.D. La. May 14, 2002) ("The first step in exhausting administrative remedies under the FOIA is filing a proper FOIA request."); Blackwell v. EEOC, No. 2:98-38, 1999 U.S. Dist. LEXIS 3708, at *5 (E.D.N.C. Feb. 12, 1999) (finding that request was not properly made because plaintiff failed to follow specific agency regulation requiring that request be denominated explicitly as request for information under FOIA).

[180] See 5 U.S.C. § 552(a)(4)(A), (a)(6)(A), (a)(6)(D), (a)(6)(E); see also id. § 552(g) (requiring agencies to make available "reference material or a guide for requesting records or information from the agency"); FOIA Update, Vol. XIX, No. 3, at 3 (discussing availability of agency FOIA reference guides through agency FOIA sites on World Wide Web); FOIA Update, Vol. XVIII, No. 2, at 1 (discussing electronic availability of Justice Department's FOIA Reference Guide).

[181] See, e.g., Department of Justice FOIA Regulations, 28 C.F.R. pt. 16 (2006).

[182] Pub. L. No. 104-231, 110 Stat. 3048 (codified as amended at 5 U.S.C. § 552).

[183] See FOIA Update, Vol. XIX, No. 1, at 3-5 ("OIP Guidance: Electronic FOIA Amendments Implementation Guidance Outline").

[184] See FOIA Update, Vol. XVII, No. 4, at 1-2, 10-11 (discussing statutory changes).

Register that address these matters as well.[185]

Although an agency occasionally may waive some of its published procedures for reasons of public interest, speed, or simplicity, all agencies should remember that any "unnecessary bureaucratic hurdle has no place in [the Act's] implementation."[186] Accordingly, an agency may not impose any additional requirements on a requester beyond those prescribed in its regulations.[187] Of course, agencies should adhere strictly to their own regulations, especially when doing so would benefit the FOIA requester.[188]

Conversely, a requester's failure to comply with an agency's procedural regulations governing access to records -- such as those concerning

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[185] 5 U.S.C. § 552(a)(6)(D), (a)(6)(E); see, e.g., 28 C.F.R. pt. 16; see also *FOIA Post*, "GAO E-FOIA Implementation Report Issued" (posted 3/23/01) (reminding agencies of their electronic access obligations for regulations); FOIA Update, Vol. XIX, No. 3, at 4 (discussing availability of agency regulations, including proposed regulations, through agency FOIA Web sites).

[186] Presidential FOIA Memorandum, reprinted in FOIA Update, Vol. XIV, No. 3, at 3; see, e.g., FOIA Update, Vol. XV, No. 3, at 6 (cautioning against practices that would cause unwarranted disadvantages to requesters in record-referral processes).

[187] See Zemansky, 767 F.2d at 574; see also FOIA Update, Vol. X, No. 3, at 5 (addressing submission of FOIA requests by "fax" in relation to agency regulation); cf. *FOIA Post*, "Anthrax Mail Emergency Delays FOIA Correspondence" (posted 11/30/01) (noting that agencies can mitigate the effects of anthrax-related mail disruption by "allow[ing] FOIA requesters to submit new requests by fax, or even electronically if they have established that capability"); FOIA Update, Vol. XIX, No. 1, at 6 (encouraging agencies to consider as matter of administrative discretion establishing capability to receive FOIA requests via World Wide Web).

[188] See, e.g., Ruotolo, 53 F.3d at 10 (charging that agency failed to comply with its own regulation requiring it to assist requesters in reformulating requests determined not to reasonably describe records sought); Pub. Citizen v. FDA, No. 94-0018, slip op. at 2 (D.D.C. Feb. 9, 1996) (criticizing agency for asserting that request did not reasonably describe "records which could be located in the FDA's record keeping system without an unduly burdensome search," and ignoring plaintiff's concession to limit scope of request, concluding that agency violated its own regulatory requirement to seek more specific information and to narrow scope of request); see also *FOIA Post*, "FOIA Counselor Q&A" (posted 1/24/06) (advising that agency FOIA regulations "creat[e] an expectation on the FOIA requester's part"); cf. FOIA Update, Vol. XIX, No. 1, at 5 (advising agencies to implement statutory provisions of Electronic FOIA amendments "without any disadvantage to FOIA requesters," regardless of status of implementing regulations).

properly addressed requests,[189] fees and fee waivers,[190] proof of identity,[191]

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[189] See Thomas v. FAA, No. 05-2391, 2007 U.S. Dist. LEXIS 5260, at *12-14 (D.D.C. Jan. 25, 2007) (ruling that plaintiff has not exhausted administrative remedies where agency has not received FOIA request); West v. Jackson, No. 05-1441, 2006 WL 2660610, at *3-4 (D.D.C. Sept. 15, 2006) (finding that requester failed to exhaust administrative remedies where he could not show that agency received request letter and where purported request letter was addressed to incorrect address); Thorn v. Soc. Sec. Admin., No. 04-1282, 2005 WL 1398605, at *3 (D.D.C. June 11, 2005) (finding failure to exhaust where requester did not submit his requests to proper address); Thomas v. IRS, No. 03-2080, 2004 WL 3185316, at *2 (M.D. Pa. Nov. 2, 2004) (finding failure to exhaust where requester did not file proper request when he addressed his purported request to non-FOIA officer employee in incorrect state), aff'd, 153 F. App'x 89 (3d Cir. 2005); Maydak v. U.S. Dep't of Justice, 254 F. Supp. 2d 23, 40 (D.D.C. 2003) (ruling that because the agency's "regulations require FOIA requesters seeking records from field offices to write directly to the respective field office," the agency "had no statutory obligation to proceed with a search of all of its field offices"); Stanley v. DOD, No. 93-4247, slip op. at 10 (S.D. Ill. July 28, 1998) (holding that a request was not properly received when the agency returned -- unopened -- an improperly addressed request); Smith, 1996 U.S. Dist. LEXIS 5594, at *9 (N.D. Cal. Apr. 23, 1996) (stating that "National Records Administration is not a HUD information center," and holding that by directing FOIA request to wrong agency plaintiff failed to exhaust administrative remedies); Sands v. United States, No. 94-0537, 1995 U.S. Dist. LEXIS 9252, at *10-12 (S.D. Fla. June 16, 1995) (noting, in light of agency's clear rules and reasonable treatment of misdirected request, that plaintiff failed to exhaust administrative remedies by not directing request to appropriate office); United States v. Agunbiade, No. 90-CR-610, 1995 WL 351058, at *6 (E.D.N.Y. May 10, 1995) (ruling that plaintiff who did not direct request to "appropriate parties and agencies" in accordance with agency-specific rules failed to exhaust administrative remedies), aff'd sub nom. United States v. Osinowo, 100 F.3d 942 (2d Cir. 1996) (unpublished table decision). But see Coolman v. IRS, No. 98-6149, 1999 WL 675319, at *4 (W.D. Mo. July 12, 1999) (finding administrative remedies exhausted because "it cannot be said . . . that plaintiff's failure to use the address provided in [agency's] regulations prevented his request from arriving at the correct destination"), summary affirmance granted, No. 99-3963, 1999 WL 1419039 (8th Cir. Dec. 6, 1999); Raulerson v. Reno, No. 96-120, slip op. at 5 (D.D.C. Feb. 26, 1999) (finding search inadequate -- notwithstanding agency regulations requiring that requests be addressed to individual offices maintaining records sought -- because not all offices likely to contain responsive records were searched), summary affirmance granted, No. 99-5257, 1999 WL 1215968 (D.C. Cir. Nov. 23, 1999).

[190] See Pietrangelo v. Dep't of the Army, 155 F. App'x 526, 526 (2d Cir. 2005) (affirming district court decision which found that requester could not seek judicial review when he failed to meet fee-related exhaustion re-

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[190](...continued)
quirements); Pollack v. Dep't of Justice, 49 F.3d 115, 119 (4th Cir. 1995) (concluding that plaintiff's refusal to pay anticipated fees constitutes failure to exhaust administrative remedies); Kumar v. U.S. Dep't of Justice, No. 06-714, 2007 U.S. Dist. LEXIS 11144, at *11-12 (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))); Judicial Watch v. FBI, 190 F. Supp. 2d 29, 33 (D.D.C. 2002) ("The D.C. Circuit has held that failure to pay FOIA fees constitutes a failure to exhaust administrative remedies"); Thorn v. United States, No. 04-1185, 2005 WL 3276285, at *3 (D.D.C. Aug. 11, 2005) (finding failure to exhaust when requester did not pay fees); Schwarz v. U.S. Dep't of Treasury, 131 F. Supp. 2d 142, 148 (D.D.C. 2000) ("Exhaustion of administrative remedies . . . includes payment of required fees or an appeal within the agency from a decision refusing to waive fees."); Grecco v. Dep't of Justice, No. 97-0419, slip op. at 5 (D.D.C. Apr. 1, 1999) (recognizing that requester's failure to pay fees or ask for fee waiver constitutes failure to exhaust administrative remedies); Smith v. IRS, No. 2:94-989, 1999 WL 357935, at *1 (D. Utah Mar. 24, 1999) (finding that plaintiff "failed to exhaust his administrative remedies in that he failed to pay the fees and costs in order to process his claims"); Stanley, No. 93-4247, slip op. at 9 (S.D. Ill. July 28, 1998) (finding request not properly received also because requester failed to follow agency regulations requiring agreement to pay fees); cf. Pub. Citizen, Inc. v. Dep't of Educ., 292 F. Supp. 2d 1, 4-5 & n.4 (D.D.C. 2003) (concluding that because the agency "failed to [respond] to plaintiff's fee waiver request when it was required by statute to do so," and then "proceed[ed] with a search without notifying plaintiff of the cost of that search," the agency could not subsequently in litigation demand payment of fees from plaintiff, which "had no reason to assume it would be required to pay fees . . . in view of [the agency's] silence in the face of plaintiff's specific fee waiver request").

[191] See Schwarz v. FBI, 31 F. Supp. 2d 540, 542 (N.D. W. Va. 1998) (recognizing that first-party requester's failure to follow agency regulations requiring her to submit fingerprints for positive identification constituted failure to exhaust administrative remedies), aff'd, 166 F.3d 334 (4th Cir. 1998) (unpublished table decision); cf. Martin v. U.S. Dep't of Justice, No. 96-2866, slip op. at 7-8 (D.D.C. Dec. 16, 1999) (ruling that requester who seeks law enforcement information about living third party and fails to provide subject's written authorization permitting disclosure of records has not failed to exhaust administrative remedies because agency regulations stated only that such authorization "will help the processing of [the] request"), rev'd & remanded in part on other grounds, No. 00-5389 (D.C. Cir. Apr. 23, 2002). But cf. Pusa v. FBI, No. 99-04603, slip op. at 5 (C.D. Cal. Aug. 3, 1999) (holding that plaintiff who failed to submit third party's privacy waiver "has
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and administrative appeals[192] -- may be held to constitute a failure to prop-

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[191](...continued)
failed to exhaust administrative remedies under the FOIA by failing to comply with the agency's published procedures for obtaining third-party information").

[192] See, e.g., Lumarse v. HHS, No. 98-55880, 1999 WL 644355, at *5 (9th Cir. Aug. 24, 1999) (affirming dismissal of plaintiff's FOIA claim for failure to exhaust administrative remedies because plaintiff "does not allege that it [administratively] appealed the denials of its FOIA requests"); Teplitsky v. Dep't of Justice, No. 96-36208, 1997 WL 665705, at *1 (9th Cir. Oct. 24, 1997) (holding plaintiff had not exhausted administrative remedies when he did not administratively appeal denial of FOIA request even though agency notified him of procedure); RNR Enters. v. SEC, 122 F.3d 93, 98 (2d Cir. 1997) (ruling plaintiff had not exhausted his administrative remedies when he failed to appeal agency denial even though he was advised of his right to appeal and denial was issued during requisite time period); Dunnington v. DOD, No. 06-0925, 2007 U.S. Dist. LEXIS 715, at *4-5 (D.D.C. Jan. 8, 2007) (holding that requester failed to exhaust administrative remedies where he failed to perfect request or file administrative appeal); Ctr. for Biological Diversity v. Gutierrez, No. 05-1045, 2006 WL 2329330, at *6-8 (D.D.C. Aug. 10, 2006) (concluding that requester failed to exhaust administrative remedies when electronically submitted appeal was received twelve minutes after expiration of agency's regulatory appeal deadline); Fulton v. Executive Office for U.S. Attorneys, No. 05-1530, 2006 WL 1663526, at *3 (D.D.C. June 15, 2006) (concluding that requester failed to exhaust administrative remedies because he did not administratively appeal denial of fee waiver request); Schoenman v. FBI, No. 04-2202, 2006 WL 1582253, at *12 (D.D.C. Mar. 31, 2006) (stating that the requester "cannot establish an essential element of the statutory requirement under FOIA requiring an agency's actual receipt of the appeal as a precursor to exhausting all administrative remedies"); Bernard v. DOD, 362 F. Supp. 2d 272, 281-82 (D.D.C. 2005) (dismissing FOIA claims where requester did not exhaust Army Privacy Program's administrative appeal remedies); Thorn, 2005 WL 3276285, at *2-3 (finding failure to exhaust because requester's letter to Attorney General is not proper administrative appeal under agency regulations); Thomas, 2004 WL 3185316, at *3 (finding that the plaintiff's letters were not appeals where "neither document contains the word appeal, or any reference to a prior request or proceeding," meaning that the plaintiff failed to exhaust administrative remedies), reconsideration denied, 95 A.F.T.R. 2d 2005-559 (M.D. Pa. Nov. 16, 2004), motion to vacate denied, 95 A.F.T.R. 2d 2005-562 (M.D. Pa. Dec. 16, 2004), aff'd, 153 F. App'x 89 (3d Cir. 2005); N.Y. Times Co. v. U.S. Dep't of Labor, 340 F. Supp. 2d 394, 399 (S.D.N.Y. 2004) (finding that exhaustion was achieved where on appeal agency did not give "explicit denial" but gave "practical" denial by offering no alternative for burdensome request); Coleman v. U.S. Dep't of Justice, No. 02-79, slip op. at 5 (E.D. Va. Oct. 7, 2002) (holding that plaintiff "has not exhausted his administrative remedies with regard to the particular issue
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erly exhaust administrative remedies. (For a further discussion of exhaustion of administrative remedies, see Litigation Considerations, Exhaustion of Administrative Remedies, below.)

## Time Limits

Until an agency (or the proper component of that agency) receives a FOIA request, it is not obligated to search for responsive records, meet time deadlines, or release any records.[193] Requests not filed in accordance

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[192](...continued)
of whether the [agency's] search was adequate," because plaintiff failed to raise that issue on administrative appeal); Coates v. Dep't of Labor, 138 F. Supp. 2d 663, 668 (E.D. Pa. 2001) (deeming administrative remedies not exhausted due to plaintiff's failure to "engage in [administrative appeal] process, regardless of how frivolous he may have believed [that process] to be"); Hamilton Sec. Group v. HUD, 106 F. Supp. 2d 23, 29 (D.D.C. 2000) (holding that plaintiff failed to exhaust administrative remedies because it filed its administrative appeal one day after regulatory deadline for filing such appeals had passed), aff'd per curiam, No. 00-5331, 2001 WL 238162 (D.C. Cir. Feb. 23, 2001); Comer v. IRS, No. 97-76329, 1999 U.S. Dist. LEXIS 16268, at *11 (E.D. Mich. Sept. 30, 1999) (finding that although plaintiff previously appealed agency's failure to promptly respond to his request, "[u]pon receiving the documents and the bill, and prior to filing suit, plaintiff was [again] obliged to administratively appeal whatever dissatisfactions he may have had with that result"); Patterson, No. 96-0095, slip op. at 1 (D.D.C. Mar. 23, 1999) (dismissing case because plaintiff failed to exhaust administrative remedies by not administratively appealing denial of fee waiver request); Thomas v. Office of U.S. Attorney, 171 F.R.D. 53, 54 (E.D.N.Y. 1997) (ruling that administrative remedies were not exhausted when plaintiff made further request for documents in appeal of agency's denial of plaintiff's initial request). But cf. Wilbur v. CIA, 355 F.3d 675, 677 (D.C. Cir. 2004) (noting that "the policies underlying the exhaustion requirement have been served" when the agency "accepted" and then adjudicated an administrative appeal received four years after the regulatory deadline for its submission had passed); Jennings v. FBI, No. 03-1651, slip op. at 10-11 (D.D.C. May 6, 2004) (rejecting agency's failure-to-exhaust argument where, inter alia, requester produced appeal letter, even though agency attested that it did not receive that letter).

[193] See Brumley v. U.S. Dep't of Labor, 767 F.2d 444, 445 (8th Cir. 1985) (determining that agency complied with "FOIA's response time provisions" after advising plaintiff that routing of his request to appropriate office within agency would result in short delay "before the ten working day response period would begin running"); Blackwell v. EEOC, No. 2:98-38, 1999 U.S. Dist. LEXIS 3708, at *6 (E.D.N.C. Feb. 12, 1999) ("The time period for responding to a FOIA request . . . does not begin to run until the request is received by the appropriate office and officer in the agency, as set forth in the agency's published regulations."); see also Judicial Watch, Inc. v. U.S.
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with published regulations are not deemed to have been received until they are identified as proper FOIA requests by agency personnel.[194] For example, under Department of Justice regulations,[195] a request is not considered received until the requester has promised to pay fees (above a minimum amount) or the receiving component has decided to waive all fees.[196] Moreover, if a requester agrees to pay properly assessed search, review, and/or duplication fees but later fails to pay those fees, an agency may refuse to process that requester's subsequent requests until the amount owed is paid.[197] (For a discussion of the assessment of fees, see Fees and Fee Waivers, below.)

Once an agency properly receives a FOIA request,[198] it has twenty

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[193](...continued)
Dep't of Justice, No. 97-2089, slip op. at 10-11 (D.D.C. July 14, 1998) (finding that the court was without jurisdiction when plaintiff filed Complaint prior to lapse of statutory time limit); cf. Soghomonian v. United States, 82 F. Supp. 2d 1134, 1138 (E.D. Cal. 1999) (holding that twenty-day time period for responding to administrative appeal begins when agency receives appeal, not when requester mails it).

[194] See, e.g., Lykins v. U.S. Dep't of Justice, 3 Gov't Disclosure Serv. (P-H) ¶ 83,092, at 83,637 (D.D.C. Feb. 28, 1983).

[195] 28 C.F.R. § 16.11(e) (2006).

[196] See Irons v. FBI, 571 F. Supp. 1241, 1243 (D. Mass. 1983), rev'd on other grounds, 811 F.2d 681 (1987); see also Pollack v. Dep't of Justice, 49 F.3d 115, 120 (4th Cir. 1995); cf. Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 66 (D.C. Cir. 1990); Loomis v. Dep't of Energy, No. 96-149, 1999 WL 33541935, at *3-4 (N.D.N.Y. Mar. 9, 1999) (finding that plaintiff's request was properly received when he agreed to pay estimated fee that agency later revised upward), aff'd, 21 F. App'x 80 (2d Cir. 2001).

[197] See Trenerry v. IRS, No. 95-5150, 1996 WL 88459, at *2 (10th Cir. Mar. 1, 1996); Atkin v. EEOC, No. 92-3275, slip op. at 5 (D.N.J. June 24, 1993); Crooker v. U.S. Secret Serv., 577 F. Supp. 1218, 1219-20 (D.D.C. 1983); FOIA Update, Vol. VII, No. 2, at 2; see also 5 U.S.C. § 552(a)(4)(A)(v).

[198] See Dunnington v. DOD, No. 06-0925, 2007 U.S. Dist. LEXIS 715, at *5 (D.D.C. Jan. 8, 2007) (finding failure to state claim where plaintiff presented no evidence he submitted FOIA request to agency); Schoenman v. FBI, No. 04-2202, 2006 WL 1126813, at *13 (D.D.C. Mar. 31, 2006) (stating that an agency's FOIA obligations do not commence with the "averred mailing of a FOIA request," and dismissing counts where the plaintiff did not establish that the agency received the request); Carbe v. ATF, 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); see also *FOIA Post*, "Anthrax Mail Emergency Delays FOIA Corres-
(continued...)

working days in which to make a determination on the request.[199] Previously, once an agency was in receipt of a proper FOIA request, it was required to inform the requester of its decision to grant or deny access to the requested records within ten working days, but the Electronic Freedom of Information Act Amendments of 1996 increased the Act's basic time limit for agency responses, lengthening it from ten to twenty working days.[200] Agencies are not necessarily required to release the records within the statutory time limit, but access to releasable records should, at a minimum, be granted promptly thereafter.[201]

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.[202] The FOIA defines "unusual circumstances" as: (1) the need to search for and collect records from separate offices; (2) the need to examine a voluminous amount of records required by the request; and (3) the

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[198](...continued)
pondence" (posted 11/30/01) (noting that "[t]he processing of a FOIA request, with all applicable statutory deadlines, is triggered by an agency's 'receipt of . . . such request'" (quoting 5 U.S.C. § 552(a)(6)(A)(i))).

[199] 5 U.S.C. § 552(a)(6)(A)(i) (2000 & Supp. IV 2004); see FOIA Update, Vol. XVII, No. 4, at 2, 10 (discussing Electronic FOIA amendments' modifications to FOIA's time-limit provisions); FOIA Update, Vol. XIII, No. 3, at 5 (advising that merely acknowledging request within statutory time period is simply insufficient); cf. Judicial Watch, 880 F. Supp. at 10 (rejecting requester's preposterous claim that response in less than ten working days is evidence of "bad faith").

[200] Pub. L. No. 104-231, § 8(b), 110 Stat. 3048, 3052 (codified as amended at 5 U.S.C. § 552(a)(6)(A)(i)).

[201] See 5 U.S.C. § 552(a)(6)(C)(i) (requiring that records be made available "promptly"); see also Larson v. IRS, No. 85-3076, slip op. at 2-3 (D.D.C. Dec. 11, 1985) (finding that the FOIA "does not require that the person requesting records be informed of the agency's decision within ten days, it only demands that the government make [and mail] its decision within that time"). 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 ten-day period was not sufficient and that requester must actually receive response within ten-day period).

[202] 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 provisions of subsection (a)(6)(B)(i) are permissive rather than mandatory, agency is not obliged to send such notice, although such nonaction certainly will not extend time for making determination on request).

need to consult with another agency or agency component.[203] If the required extension exceeds ten days, the agency must allow the requester an opportunity to modify his or her request, or to arrange for an alternative time frame for completion of the agency's processing.[204]

In many instances, though, agencies cannot meet these time limits due to limitations on their resources,[205] or for other reasons.[206] Agencies therefore have adopted the court-sanctioned practice of generally handling backlogged FOIA requests on a "first-in, first-out" basis.[207] The Electronic

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[203] 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 the "onerous request" and the 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").

[204] 5 U.S.C. § 552(a)(6)(B)(ii); see, e.g., 28 C.F.R. § 16.5(c) (Department of Justice FOIA regulation); cf. Al-Fayed, No. 00-2092, slip op. at 6 (D.D.C. Jan. 16, 2001) (observing that the Act "places the onus of modification [of a request's scope] squarely upon the requester, and does not indicate that an equal burden rests with the agency to 'negotiate' an agreeable 'deadline'").

[205] See, e.g., Zuckerman v. FBI, No. 94-6315, slip op. at 8 (D.N.J. Dec. 6, 1995) (noting effects of resource limitations on complying with statutory time limits); see also FOIA Update, Vol. XV, No. 2, at 2; FOIA Update, Vol. XIV, No. 3, at 5, 8-9; FOIA Update, Vol. XIII, No. 2, at 8-10; FOIA Update, Vol. XI, No. 1, at 1-2; cf. FOIA Update, Vol. XVI, No. 1, at 1-2 (promoting practice of making agency records "affirmatively" available to public, rather than providing them only in response to particular FOIA requests, in order to benefit overall process of FOIA administration).

[206] See, e.g., Tri-Valley Cares v. U.S. Dep't of Energy, No. 03-3926, 2004 WL 2043034, at *20 (N.D. Cal. Sept. 10, 2004) (recognizing that because requested FOIA response required "review from [Department of] Homeland Security," delay was not indication of bad faith), aff'd in pertinent part & rev'd on other grounds, No. 04-17232, 2006 WL 2971651, at *2-3 (9th Cir. Oct. 16, 2006).

[207] See Open Am. v. Watergate Special Prosecution Force, 547 F.2d 605, 614-16 (D.C. Cir. 1976) (citing 5 U.S.C. § 552(a)(6)(C)). But cf. Al-Fayed, No. 00-2092, slip op. at 9 n.5 (D.D.C. Jan. 16, 2001) (noting that "even if the (continued...)

FOIA amendments expressly authorized agencies to promulgate regulations providing for "multitrack processing" of their FOIA requests -- which allows agencies to process requests on a first-in, first-out basis within each track, but also permits them to respond to relatively simple requests more quickly than requests involving complex and/or voluminous records.[208] (For a further discussion of these points, see Litigation Considerations, "Open America" Stays of Proceedings, below.)

An agency's failure to comply with the time limits for either an initial request or an administrative appeal may be treated as a "constructive exhaustion" of administrative remedies.[209] A requester may immediately thereafter seek judicial review if he or she wishes to do so.[210] However, the

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[207](...continued)
[agency] did not adhere strictly to first-in, first-out processing, there is little support that Open America requires such a system" so long as the agency's processing system is fair overall); Summers v. CIA, No. 98-1682, slip op. at 4 (D.D.C. July 26, 1999) (recognizing that agency need not adhere strictly to "first-in, first-out process[ing]" so long as "it is proceeding in a manner designed to be fair and expeditious").

[208] Pub. L. No. 104-231, § 7(a), 110 Stat. 3048, 3050 (codified as amended at 5 U.S.C. § 552(a)(6)(D)); see, e.g., 28 C.F.R. § 16.5(b) (Department of Justice implementing regulation); see also FOIA Update, Vol. XVIII, No. 1, at 6 (discussing multitrack processing for agencies with decentralized FOIA operations); FOIA Update, Vol. XVII, No. 4, at 10 (discussing implementing regulations); cf. *FOIA Post*, "Supplemental Guidance on Annual FOIA Reports" (posted 8/13/01) (noting that agencies' annual FOIA reports must include "the number of requests that were accorded expedited processing . . . [and] should to the extent practicable also report the number of requests for expedited processing that are received each year"); FOIA Update, Vol. XVIII, No. 3, at 3-7 (advising agencies regarding reporting of multitrack-processing information in annual FOIA reports).

[209] See 5 U.S.C. § 552(a)(6)(C); Thomas v. FAA, No. 05-2391, 2007 U.S. Dist. LEXIS 5260, at *12 (D.D.C. Jan. 25, 2007) (stating that agency's failure to respond to FOIA request within twenty days constitutes constructive exhaustion of administrative remedies). But cf. Judicial Watch v. U.S. Naval Observatory, 160 F. Supp. 2d 111, 113 (D.D.C. 2001) (concluding that agency's "failure to timely respond to [a] request for expedited processing is not equivalent to constructive exhaustion of administrative remedies as to the request for documents").

[210] See, e.g., Spannaus v. U.S. Dep't of Justice, 824 F.2d 52, 58 (D.C. Cir. 1987); Perdue Farms v. NLRB, 927 F. Supp. 897, 904 (E.D.N.C. 1996), vacated on other grounds, 108 F.3d 519 (4th Cir. 1997); see also Walsh v. VA, No. 03-C-0225, slip op. at 3-4 (E.D. Wis. Feb. 10, 2004) ("The failure of an agency to comply with the [FOIA's] statutory time limits . . . constitutes constructive exhaustion of administrative remedies, thereby permitting the
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D.C. Circuit has interpreted this rule of constructive exhaustion by requiring that once the agency responds to the FOIA request -- after the statutory time limit but before the requester has filed suit -- the requester must administratively appeal the denial before proceeding to court.[211] (For a

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[210](...continued)
requestor to seek relief in court."); McCall v. U.S. Marshals Serv., 36 F. Supp. 2d 3, 5 (D.D.C. 1999) (finding that plaintiff constructively exhausted his administrative remedies when court "provisionally filed" his FOIA complaint and application to proceed in forma pauperis before agency responded to his request, even though agency responded before court granted plaintiff's motion to proceed in forma pauperis); FOIA Update, Vol. IV, No. 1, at 6 (superseded in part). But cf. Pollack, 49 F.3d at 119 (holding that constructive exhaustion provision does not relieve requester of statutory obligation to pay fees that agency is authorized to collect).

[211] See Oglesby, 920 F.2d at 61-65; accord Hidalgo v. FBI, 344 F.3d 1256, 1259-60 (D.C. Cir. 2003) (ruling that plaintiff failed to exhaust his administrative remedies because his prematurely filed administrative appeal of the agency's failure to comply with the FOIA's time limits "did not promote the purposes of the exhaustion doctrine" with respect to the "substance" of the agency's ultimately timely response to his request); Teplitsky v. Dep't of Justice, No. 96-36208, 1997 WL 665705, at *1 (9th Cir. Oct. 24, 1997) (holding that plaintiff had not exhausted administrative remedies when he did not appeal denial of FOIA request even though agency notified him of procedure); RNR Enters. v. SEC, 122 F.3d 93, 98 (2d Cir. 1997) (ruling that plaintiff had not exhausted his administrative remedies when he failed to appeal agency denial even though he was advised of his right to appeal and denial was issued during requisite time period); Ruotolo v. Dep't of Justice, 53 F.3d 4, 9 (2d Cir. 1995) (finding administrative remedies exhausted when agency did not include notification of right to appeal its determination that request not reasonably described); Taylor v. Appleton, 30 F.3d 1365, 1370 (11th Cir. 1994) (stating that once party has waited for response from agency, actual exhaustion must occur before court has jurisdiction to review challenges); McDonnell v. United States, 4 F.3d 1227, 1240 (3d Cir. 1993) (upholding dismissal of claim as proper when plaintiff filed suit before filing appeal of denial received after exhaustion of statutory response period); see also Amaya-Flores v. DHS, No. 06-225, 2006 U.S. Dist. LEXIS 78735, at *7-8 (W.D. Tex. Oct. 30, 2006) (magistrate's recommendation) (recommending dismissal of FOIA claim as moot in light of agency's disclosure of documents); Lowry v. Soc. Sec. Admin., No. 00-1616, slip op. at 9-10 (D. Or. Aug. 29, 2001) (holding that requester had not constructively exhausted administrative remedies when he filed suit on day after agency mailed its denial letter, despite fact that he did not receive letter until several days thereafter); Bryce v. Overseas Private Inv. Corp., No. A-96-595, slip op. at 12 (W.D. Tex. Sept. 28, 1998) (recognizing that although agency's failure to respond within statutory time limit constitutes constructive exhaustion, "if the agency responds with a determination prior to the requester filing suit, then the requirement to exhaust administrative
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discussion of this aspect of FOIA litigation, see Litigation Considerations, Exhaustion of Administrative Remedies, below.)

Under the law existing prior to the enactment of the Electronic FOIA amendments, an agency sued for not responding to a FOIA request could receive additional time to process that request if it could show that its failure to meet the statutory time limits resulted from "exceptional circumstances" and that it was applying "due diligence" in processing the request.[212] Previously, the need to process an extremely large volume of requests constituted "exceptional circumstances," and the commitment of large amounts of resources to process requests on a first-come, first-served basis was considered "due diligence."[213] The Electronic FOIA amendments, however, explicitly excluded "a predictable agency workload" of FOIA requests

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[211](...continued)
review is revived"), appeal dismissed voluntarily, No. 99-50893 (5th Cir. Oct. 11, 1999); FOIA Update, Vol. XII, No. 2, at 3-4 ("OIP Guidance: Procedural Rules Under the D.C. Circuit's Oglesby Decision"). But see Mieras v. U.S. Forest Serv., No. 93-CV-74552, slip op. at 3 (E.D. Mich. Feb. 14, 1995) (misapplying D.C. Circuit rules on constructive exhaustion in declaring that plaintiff had not exhausted administrative remedies as he failed to file administrative appeal after agency response, even though he initiated lawsuit before agency response was made).

[212] See 5 U.S.C. § 552(a)(6)(C); see also FOIA Update, Vol. IX, No. 4, at 5.

[213] See Open Am. v. Watergate Special Prosecution Force, 547 F.2d 605, 615-16 (D.C. Cir. 1976); see also Gilmore v. NSA, No. 94-16165, 1995 WL 792079, at *1 (9th Cir. Dec. 11, 1995) (noting that even after agency's internal review of its FOIA operations to identify and correct deficiencies resulted in staff increase and implementation of "first-in/first-out" procedure, court determined it "unlikely that [agency] could process requests more quickly given that it must undertake a painstaking review of voluminous sensitive documents before disclosing requested information"); Jimenez v. FBI, 938 F. Supp. 21, 31 (D.D.C. 1996) ("In view of [the agency's] two-track system and the large volume of documents expected to be responsive to plaintiff's request, the Court finds that [the agency] has met the due diligence requirements for a stay."); Gilmore v. U.S. Dep't of State, No. 95-1098, slip op. at 27 (N.D. Cal. Feb. 9, 1996) (finding that in addition to other factors, "the recent and prolonged government shutdown provides a sufficient showing of exceptional circumstances"). But see 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'"). See generally FOIA Update, Vol. XIV, No. 3, at 8-9 (discussing possible solutions to backlog problem); FOIA Update, Vol. XII, No. 2, at 8-10 (discussing agency difficulties with FOIA time limits and administrative backlogs); FOIA Update, Vol. XI, No. 1, at 1-2 (discussing effects of budgetary constraints upon agency FOIA operations).

as "exceptional circumstances . . . unless the agency demonstrates reasonable progress in reducing its backlog of pending requests."[214] Nevertheless, a FOIA requester's refusal "to reasonably modify the scope of a request or arrange for an alternative time frame for processing the request," may be used as evidence of "exceptional circumstances."[215] (For a discussion of the litigation aspects of the FOIA's "exceptional circumstances" provision, see Litigation Considerations, "Open America" Stays of Proceedings, below.)

## Expedited Processing

Prior to the enactment of the Electronic Freedom of Information Act Amendments of 1996,[216] a FOIA request could have received "expedited"

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[214] Pub. L. No. 104-231, § 7(c), 110 Stat. 3048, 3051 (codified as amended at 5 U.S.C. § 552(a)(6)(C)(ii)); see, e.g., Fiduccia, 185 F.3d at 1042 (finding no exceptional circumstances when only "a slight upward creep in the caseload" caused a backlog that the agency claimed resulted from employee cutbacks and rejection of its budget requests); Peltier v. FBI, No. 02-4328, slip op. at 8-10 (D. Minn. Aug. 15, 2003) (finding that agency made "reasonable progress in reducing its backlog" through additional staffing and technological enhancements to searching and processing functions); Appleton v. FDA, 254 F. Supp. 2d 6, 9-10 & n.4 (D.D.C. 2003) (declaring, despite the fact that the agency's "annual backlog reductions [were not] uniform," that the agency had demonstrated "reasonable progress in reducing its backlog" by committing additional resources and personnel and by implementing new electronic filing and redaction systems); Emerson v. CIA, No. 99-0274, 1999 U.S. Dist. LEXIS 19511, at *3 (D.D.C. Dec. 16, 1999) (finding that agency was exercising due diligence in reducing backlog through use of new FOIA task force, new databases, and new document-scanning mechanisms); Judicial Watch of Fla., Inc. v. U.S. Dep't of Justice, No. 97-cv-2869, slip op. at 6 (D.D.C. Aug. 25, 1998) (granting three-year stay of proceedings in light of agency's processing of FOIA requests on a "first-in/first out" basis, hiring of additional employees to handle requests, and reduction of backlog by twenty-five percent); Narducci v. FBI, No. 98-0130, slip op. at 1 (D.D.C. July 17, 1998) (observing that agency is "deluged with a volume of requests for information vastly in excess of that anticipated by Congress," and noting agency's "reasonable progress in reducing its backlog" of pending requests; granting agency request to stay proceedings for thirty-four months); see also FOIA Update, Vol. XVIII, No. 3, at 3-7 (advising agencies regarding reporting of backlog-related information in annual FOIA reports, beginning with annual report for Fiscal Year 1998).

[215] 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, 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").

[216] Pub. L. No. 104-231, 110 Stat. 3048 (codified as amended at 5 U.S.C.
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treatment and be processed out of sequence if the requester could show an "exceptional need or urgency."[217] Courts granted expedited access when requests involved exceptional factors, such as jeopardy to life or personal safety,[218] or a threatened loss of substantial due process rights,[219] and

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[216](...continued)
§ 552 (2000 & Supp. IV 2004)).

[217] Open Am., 547 F.2d at 616 (D.C. Cir. 1976) (citing 5 U.S.C. § 552(a)(6)(C) (1976)); see also Whitehurst v. FBI, No. 96-572, slip op. at 5 (D.D.C. Feb. 5, 1997) (finding that expedited processing is warranted where plaintiff's allegations regarding FBI crime laboratory potentially impact upon other criminal matters, where more than three years have elapsed, and where the agency has failed to release numerous documents it has already received and cleared for release to others); Schweihs v. FBI, 933 F. Supp. 719, 723 (N.D. Ill. 1996) (finding "no legal precedent or statutory or regulatory authority for prioritizing FOIA applicants by age or health status"); Gilmore v. FBI, No. 93-2117, slip op. at 3 (N.D. Cal. July 27, 1994) (ordering that request for information concerning government's key encryption and digital telephony initiative be expedited because material sought will "become less valuable if the FBI processes . . . on a first in-first out basis"); FOIA Update, Vol. IV, No. 3, at 3 ("OIP Guidance: When to Expedite FOIA Requests"); see also FOIA Update, Vol. XII, No. 3, at 5 (emphasizing need to promptly determine whether to expedite processing of request); cf. Fox v. U.S. Dep't of Justice, No. 94-4622, 1994 WL 923072, at *3 (C.D. Cal. Dec. 16, 1994) (ruling that agency is not required to disrupt its administrative routine unless requester has shown strong justification for obtaining documents in expedited manner), appeal dismissed, No. 94-56788 (9th Cir. Feb. 21, 1995).

[218] See, e.g., Exner v. FBI, 443 F. Supp. 1349, 1353 (S.D. Cal. 1978) (holding that plaintiff was entitled to expedited access after leak of information exposed her to harm from organized crime figures), aff'd, 612 F.2d 1202 (9th Cir. 1980); Cleaver v. Kelley, 427 F. Supp. 80, 81 (D.D.C. 1976) (determining that exceptional circumstances existed when plaintiff faced multiple criminal charges carrying possible death penalty in state court).

[219] See, e.g., Neely v. FBI, No. 7:97-0786, slip op. at 9 (W.D. Va. July 27, 1998) (granting expedited processing of FOIA request for plaintiff who had motion for new criminal trial pending and had made specific allegations related to agency documents); Ferguson v. FBI, 722 F. Supp. 1137, 1141-43 (S.D.N.Y. 1989) (noting that "due process interest must be substantial," and holding that plaintiff's request for information regarding his particular post-conviction proceeding required expedition); see also, e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 & n.23 (1978) (making clear that FOIA is not intended to function as discovery tool); cf. Fiduccia v. U.S. Dep't of Justice, 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"); Ruiz v. U.S. Dep't of
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thereby warranted such treatment.

Now the FOIA requires agencies to promulgate regulations providing for the expedited processing of requests if the requester demonstrates a "compelling need" (as defined by the amended statute), or in any other case the agency deems appropriate under its regulations.[220] Under the amended statute, a requester can show "compelling need" in one of two ways: 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"; or, if the requester is a "person primarily engaged in disseminating information,"[221] by demonstrating that an "urgency to inform the public concerning actual or alleged Federal Government activity" exists.[222] At their discretion, agencies may grant expedited treat-

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[219](...continued)
Justice, No. 00-0105, slip op. at 3 (D.D.C. Sept. 27, 2001) ("To the extent that [the requested] records are intended for use in an attack on plaintiff's criminal conviction, this situation does not constitute an exceptional need."); Raulerson v. Reno, 95-cv-2053, slip op. at 4-6 (D.D.C. Mar. 30, 1998) (denying FBI's motion to stay proceedings for nearly three years when plaintiff had asserted he had only two years to appeal criminal conviction and requested documents may aid in preparation of appeal), plaintiff's appeal dismissed, No. 98-5112 (D.C. Cir. May 5, 1998); Edmond v. U.S. Attorney, 959 F. Supp. 1, 6 (D.D.C. 1997) ("In the absence of some other urgency, Plaintiff cannot meet his burden by merely making a naked assertion that the Government is withholding Brady material in order to accelerate his FOIA processing.").

[220] Pub. L. No. 104-231, § 8(a), 110 Stat. 3048, 3051-52 (codified as amended at 5 U.S.C. § 552(a)(6)(E)); see 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 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); see also FOIA Update, Vol. XIX, No. 1, at 5 (discussing significance of implementing regulations); FOIA Update, Vol. XVII, No. 4, at 10 (discussing statutory provision).

[221] See, 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.").

[222] 5 U.S.C. § 552(a)(6)(E)(v); see, e.g., 28 C.F.R. § 16.5(d)(ii) (2006) (Justice Department implementing regulation); see also Al-Fayed v. CIA, 254 (continued...)

ment under additional circumstances as well.[223]

In this regard, agencies should keep in mind the logical distinction between the 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 that are at hand in that particular FOIA request.[224] For example, the District Court for the District of Columbia, in

[222](...continued)
F.3d at 310 (holding that to determine if an "urgency to inform" exists, a court must consider whether the request concerns a "matter of current exigency to the American public," whether the consequences of delaying the response would "compromise a significant recognized interest," whether the request concerns "federal government activity," and "credibility of [the] requester"); 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 the requesters established a "public's need to know" as well as "urgency of the news" related to a Pentagon intelligence program, and stating that "extensive media interest usually is a fact supporting not negating urgency"); IEEE Spectrum v. Dep't of Justice, No. 05-0865, slip op. at 2 (D.D.C. Feb. 16, 2006) (finding that the requester failed to establish a "'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 the issue of re-authorization of provisions of the 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 (2000 & Supp. IV 2004), 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' 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)).

[223] See, e.g., 22 C.F.R. § 171.12(b)(1) (2006) (Department of State regulation under which expedited processing may be granted if "[f]ailure to obtain requested information on an expedited basis could reasonably be expected to . . . harm substantial humanitarian interests").

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

Electronic Privacy Information Center v. Department of Defense,[225] recently 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."[226] Ruling against the FOIA requester, the court 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."[227] 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."[228]

Agencies must determine whether to grant a request for expedited access within ten calendar days of its receipt by the proper FOIA office.[229] This is an important obligation that agencies must be sure to bear in mind.[230] Of course, agencies also should make their administrative appeal mechanism available to requesters whenever requests for expedited processing are denied and then act on those administrative appeals in a timely fashion commensurate with the nature of such matters.[231] (For a further

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[225] 355 F. Supp. 2d 98 (D.D.C. 2004).

[226] Id. at 102.

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

[228] 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 a relatively new one that has been used by agencies and courts alike to make important distinctions when considering public interest issues" in FOIA decisionmaking).

[229] 5 U.S.C. § 552(a)(6)(C)(i); see, e.g., 28 C.F.R. § 16.5(d)(ii)(4) (Department of Justice implementing regulation).

[230] *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (Part I.11.) (advising that agencies should review their expedited processing practices in order "to ensure that they are fully in compliance with the law and sound policy in this area").

[231] See 28 C.F.R. § 16.6(c) (Department of Justice regulation listing the types of "adverse determinations," including "a denial of a request for expedited treatment," for which the Department's appeal mechanism is made available). But cf. ACLU v. U.S. Dep't of Justice, 321 F. Supp. 2d 24, 29 (D.D.C. 2004) (stating that the requester's failure to appeal an agency's decision denying expedited processing "does not preclude judicial review

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discussion of expedited access, see Litigation Considerations, "Open America" Stays of Proceedings, below.)

Searching for Responsive Records

The adequacy of an agency's search under the FOIA is determined by a test of "reasonableness," which may vary from case to case.[232] As a general rule, an agency must undertake a search that is "reasonably calculated to uncover all relevant documents."[233] The reasonableness of an agency's

[231](...continued)
of the decision").

[232] See Zemansky v. EPA, 767 F.2d 569, 571-73 (9th Cir. 1985) (observing that reasonableness of agency search depends upon facts of each case (citing Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983))).

[233] Weisberg, 705 F.2d at 1351; see, e.g., Williams v. U.S. Dep't of Justice, 177 F. App'x 231, 233 (3d Cir. 2006) (recognizing that an agency "has a duty to conduct a reasonable search for responsive records" (citing Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990))); Johnston v. U.S. Dep't of Justice, No. 97-2173, 1998 WL 518529, at *1 (8th Cir. Aug. 10, 1998) (concluding that agency demonstrated that it conducted search reasonably calculated to uncover all responsive documents); Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 27 (D.C. Cir. 1998) (noting that an agency must search "'using methods which can be reasonably expected to produce the information requested'" (quoting Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990))); Miller v. U.S. Dep't of State, 779 F.2d 1378, 1383 (8th Cir. 1985) (recognizing that search must be "'reasonably calculated to uncover all relevant documents'" (quoting Weisberg, 705 F.2d at 1351)); Corbeil v. U.S. Dep't of Justice, No. 04-2265, 2005 WL 3275910, at *3 (D.D.C. Sept. 26, 2005) (declaring that "an agency's prompt report of the discovery of additional responsive materials may be viewed as evidence of its good faith efforts to comply with its obligations under the FOIA"); Friends of Blackwater v. U.S. Dep't of the Interior, 391 F. Supp. 2d 115, 121 (D.D.C. 2005) (finding that agency's search was inadequate where its declaration did not describe specific search terms used, where agency had evidence that documents existed that originated in leadership office, and where agency did not forward request to leadership office in accordance with agency's regulations requiring such forwarding); Nat'l Inst. of Military Justice v. DOD, 404 F. Supp. 2d 325, 333-34 (D.D.C. 2005) (stating that, standing alone, agency's initial lack of diligence does not rise to level of bad faith, especially given that agency engaged in subsequent search efforts); Van Mechelen v. U.S. Dep't of the Interior, No. 05-5393, 2005 WL 3007121, at *2 (W.D. Wash. Nov. 9, 2005) (recognizing that an "agency must show . . . that it has conducted a search reasonably calculated to uncover all relevant documents" (citing Weisberg, 705 F.2d at 1351)); Jackson v. U.S. Attorney's Office, Dist. of N.J., 362 F. Supp. 2d 39, 42 (D.D.C. 2005) (concluding that agency's search was inadequate where, inter alia, it sought records per-
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search depends, in part, on how the agency conducted its search in light of the scope of the request[234] and the requester's description of the records

[233](...continued)
taining to requester instead of records pertaining to investigation that requester wanted initiated); Allen v. U.S. Secret Serv., 335 F. Supp. 2d 95, 99 (D.D.C. 2004) (concluding that the agency's search of its "comprehensive [Master Central Index] system is a search method that could be 'reasonably expected to produce the information requested'" (citing Ogelsby, 920 F.2d at 68)); 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"); cf. Comer v. IRS, No. 97-76329, 2000 WL 1566279, at *2 (E.D. Mich. Aug. 17, 2000) ("[T]he government is not required to expend the same efforts under FOIA that it would in response to a litigation-specific document request."). But see Al Najjar v. Ashcroft, No. 00-1472, slip op. at 4-5 (D.D.C. July 22, 2003) (acknowledging that the agency's "affidavit on its face tends to establish the adequacy of the search," yet nonetheless requiring the agency to conduct a further search "in the interest of ensuring a complete resolution of this matter" and in light of the "limited burden" that the further search ostensibly would impose), motion to dismiss or for summary judgment granted as to some agencies (D.D.C. June 28, 2004), case dismissed with prejudice by stipulation (D.D.C. Mar. 31, 2005).

[234] See, e.g., Negley v. FBI, 169 F. App'x 591, 595 (D.C. Cir. 2006) (reversing and remanding because agency did not "clarify whether . . . [pertinent] file references are synonymous, and more important, whether it actually searched" particular file requested); Hayden v. Dep't of Justice, No. 03-5078, 2003 WL 22305071, at *1 (D.C. Cir. Oct. 6, 2003) (per curiam) (rejecting plaintiff's argument that the agency should have searched for records about him in the case file of another individual who was mentioned during his criminal trial, because "[b]ased on [plaintiff's] FOIA requests, the [agency] reasonably limited the scope of its search to [his own] criminal case file"); Coal. on Political Assassinations v. DOD, 12 F. App'x 13, 14 (D.C. Cir. 2001) (recognizing that search conducted using terms derived from "appellant's limited request" obviously would not have produced records that lacked any "apparent connection" to such a narrowly defined request); Voinche v. FBI, No. 96-5304, 1997 U.S. App. LEXIS 19089, at *3 (D.C. Cir. June 19, 1997) (ruling that agency was not obliged to "search for records beyond the scope of the request"); Maynard v. CIA, 986 F.2d 547, 560 (1st Cir. 1993) (finding that agency's search was properly limited to scope of FOIA request, with no requirement that secondary references or variant spellings be checked); Meeropol v. Meese, 790 F.2d 942, 956 (D.C. Cir. 1986) ("[A] search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request."); 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 re-
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sought[235] -- particularly if the description includes specific details about the

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[234](...continued)
sponsive 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); Gilchrest v. Dep't of Justice, No. 05-1540, 2006 U.S. Dist. LEXIS 78706, at *10 (D.D.C. Oct. 30, 2006) (stating that it is "not unreasonable" for agency to limit search to record specifically requested where requester sought only one record); Trentadue v. FBI, No. 04-772, slip op. at 20 (D. Utah Mar. 29, 2006) (ordering additional "limited searches" because, in part, agency failed to conduct search using particular acronym "often used" for subject organization); Reyes v. U.S. Customs Serv., No. 05-173, 2006 WL 123928, at *3 (D.D.C. Jan. 17, 2006) (finding that search was adequate where agency searched two systems likely to have responsive records); Wilderness Soc'y v. U.S. Dep't of the Interior, 344 F. Supp. 2d 1, 21 (D.D.C. 2004) (concluding that agency's search was inadequate when agency failed to search Office of Solicitor in response to request for lawsuit and settlement records); Wilderness Soc'y v. U.S. Bureau of Land Mgmt., No. 01-2210, 2003 WL 255971, at *5 (D.D.C. Jan. 15, 2003) (concluding that the agency's search was inadequate because "responsive documents [possibly maintained] in the locations searched may not have been produced as a result of the [agency's] narrow interpretation of plaintiffs' request"); Adams v. FBI, No. 97-2861, slip op. at 7 (D.D.C. Mar. 3, 1999) (finding that requester cannot object to agency's failure to search under aliases not mentioned in request); Rothschild v. Dep't of Energy, 6 F. Supp. 2d 38, 39 (D.D.C. 1998) (declaring that agency is not required to search for records that "do not mention or specifically discuss" subject of request); cf. Russell v. Barr, No. 92-2546, slip op. at 4 (D.D.C. Aug. 28, 1998) (determining that agency searched "all reasonable terms" and "exceeded the call of duty" when "out of an abundance of caution" it searched using subject's maiden name, which was not provided in request). But see Jefferson v. Bureau of Prisons, No. 05-00848, 2006 WL 3208666, at *6 (D.D.C. Nov. 7, 2006) (finding search not reasonable when agency searched only its Central Records System database, but breadth of request warranted search of "I" drive database); Summers v. U.S. Dep't of Justice, 934 F. Supp. 458, 461 (D.D.C. 1996) (notwithstanding fact that plaintiff's request specifically sought access to former FBI Director J. Edgar Hoover's "commitment calendars," finding agency's search inadequate, as agency did not use additional search terms such as "appointment" or "diary" to locate responsive records); Canning v. U.S. Dep't of Justice, 919 F. Supp. 451, 460-61 (D.D.C. 1994) (indicating that when agency was aware that subject of request used two names, it should have conducted search under both names).

[235] See 5 U.S.C. § 552(a)(3)(A) (2000 & Supp. IV 2004) (statutory provision requiring that a FOIA request "reasonably describe[]" the records sought); see also, e.g., Ledesma v. U.S. Marshals Serv., No. 05-5150, 2006 U.S. App. LEXIS 11218, at *2 (D.C. Cir. Apr. 19, 2006) (finding that search was adequate where requester did not "specifically mention" cellblock video and
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circumstances surrounding the agency's creation or maintenance of the records.[236] The reasonableness of an agency's search also can depend on

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[235](...continued)
agency did not conduct search for video); Domingues v. FBI, No. 98-74612, slip op. at 11 (E.D. Mich. July 24, 1999) (magistrate's recommendation) (determining that "a request directed to an agency's headquarters which does not request a search of its field offices, or which requests a blanket search of all field offices without specifying which offices should be searched, does not 'reasonably describe' any records which may be in those field offices, and an agency's search of just the headquarters records complies with the FOIA"), adopted (E.D. Mich. July 29, 1999), aff'd, 229 F.3d 1151 (6th Cir. 2000) (unpublished table decision); Murphy v. IRS, 79 F. Supp. 2d 1180, 1185-86 (D. Haw. 1999) (holding that the agency "conducted a reasonable search in light of the fact that Plaintiff gave no indication as to what types of files could possibly contain documents responsive to this request or where they might be located"); Bricker v. FBI, No. 97-2742, slip op. at 7 (D.D.C. Mar. 26, 1999) (approving agency search of "files where responsive information would likely be located," given limited information that requester provided about subject of request); Greenberg v. Dep't of Treasury, 10 F. Supp. 2d 3, 13 (D.D.C. 1998) (excusing agency's inability to locate materials "as written" in request because agency records systems "are not indexed in a manner such that responsive records could have been located"); see also Citizens Against UFO Secrecy v. DOD, 21 F. App'x 774, 776 (9th Cir. 2001) (rejecting plaintiff's contention that search using additional terms not found within request was inadequate because agency's use of "extra terms [made] it more likely that responsive documents [would] be located"); cf. Truitt v. Dep't of State, 897 F.2d 540, 544-46 (D.C. Cir. 1990) (stating that when request was "reasonably clear as to the materials desired," agency failed to conduct adequate search as it did not include file likely to contain responsive records); Davidson v. EPA, 121 F. Supp. 2d 38, 39 (D.D.C. 2000) ("Because plaintiff is searching for a specific [record], defendant must, at minimum, explain its procedure for issuing and retaining [such records] and by what reasonable methods it used to locate the one requested by plaintiff."); cf. Kowalczyk v. Dep't of Justice, 73 F.3d 386, 389 (D.C. Cir. 1996) (finding search limited to agency headquarters files reasonable because plaintiff directed his request there).

[236] Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 328 (D.C. Cir. 1999) (finding that because requester provided agency with name of agency employee who possessed requested records during requester's criminal trial, "[w]hen all other sources fail to provide leads to the missing records, agency personnel should be contacted if there is a close nexus, as here, between the person and the particular record"); Afshari v. HHS, No. 05-0826, slip op. at 3 (D.D.C. May 2, 2006) (finding that agency affidavits failed to demonstrate adequate search where they contained no indication of contacting appropriate agency personnel in effort to find missing records); Hardy v. DOD, No. 99-523, 2001 WL 34354945, at *5 (D. Ariz. Aug. 27, 2001) (requiring the agency "to locate the presumably few witnesses who were
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the standards that the agency applied in determining where responsive records were likely to be found,[237] especially if the agency fails to locate

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[236](...continued)
responsible for operating the closed circuit television system, the robots, and any other video sources" that might have created the requested tapes); Comer v. IRS, No. 97-76329, 1999 U.S. Dist. LEXIS 16268, at *3 (E.D. Mich. Sept. 30, 1999) (rejecting agency's assertion that it conducted a reasonable search when plaintiff "listed a small number of specific persons who might have knowledge of [the requested documents] and specific places where they might be found" and the agency did not indicate that it searched there); see also Gilliland v. Bureau of Prisons, No. 03-5251, 2004 WL 885222, at *1 (D.C. Cir. Apr. 23, 2004) (rejecting the requester's claim that the agency "should have contacted the federal officials connected with [the] allegedly missing documents," because his FOIA requests "did not specify these officials or otherwise indicate that they might have responsive records"); Rugerio v. U.S. Dep't of Justice, 257 F.3d 534, 547-48 (6th Cir. 2001) (rejecting plaintiff's contention that the "agent [who] testified against him at trial" must have records about him because agency established that employee who testified had no such records), cert. denied, 534 U.S. 1134 (2002); 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), adopted (D.R.I. Sept. 9, 1999); cf. Doolittle v. U.S. Dep't of Justice, 142 F. Supp. 2d 281, 285 (N.D.N.Y. 2001) (concluding that so long as description of records sought is otherwise reasonable, agency cannot refuse to search for records simply because requester did not also identify them by the date on which they were created). But see Blanton v. U.S. Dep't of Justice, 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, No. 02-5115, 2003 U.S. App. LEXIS 8429 (D.C. Cir. May 1, 2003); 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)).

[237] See Jones-Edwards v. NSA, No. 05-0962, 2006 WL 2620313, at *2 (2d Cir. Sept. 12, 2006) (stating that an "agency is not obliged to conduct a search of records outside its possession or control"); Lechliter v. Rumsfeld, 182 F. App'x 113, 115 (3d Cir. 2006) (stating that an agency "has a duty to conduct a reasonable search for responsive records," and concluding that the agency fulfilled that duty when it searched the two offices that it "determined to be the only ones likely to possess responsive documents" (cit-
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records that it has reason to know might well exist,[238] or if the search re-

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[237](...continued)
ing Oglesby, 920 F.2d at 68)); Jefferson v. Dep't of Justice, 168 F. App'x 448, 450 (D.C. Cir. 2005) (reversing district court's finding of reasonable search when agency "offered no plausible justification" for searching only its investigative database and agency "essentially acknowledged" that responsive files might exist in separate database); Juda v. U.S. Customs Serv., No. 00-5399, 2000 U.S. App. LEXIS 17985, at *2-3 (D.C. Cir. June 19, 2000) (concluding that the agency improperly limited its search to a single database when "the agency itself has identified at least one other record system . . . that is likely to produce the information [plaintiff] requests"); Oglesby, 920 F.2d at 68 (holding that agency may not limit search to one record system if others are likely to contain responsive records); 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); 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. U.S. Dep't of Justice, 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. U.S. Dep't of Justice, 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); Iacoe v. IRS, No. 98-C-0466, 1999 U.S. Dist. LEXIS 12809, at *11 (E.D. Wis. July 23, 1999) (recognizing that the agency "diligently searched for the records requested in those places where [the 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. Bennett v. DEA, 55 F. Supp. 2d 36, 39-40 (D.D.C. 1999) (holding search inadequate when agency failed to search investigatory files for cases in which subject of request acted as informant, even though agency did not track informant activity by case name, number, or judicial district), appeal dismissed voluntarily, No. 99-5300 (D.C. Cir. Dec. 23, 1999).

[238] Campbell, 164 F.3d at 27 (concluding that a search limited to the
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quires the agency's FOIA personnel to distinguish any "personal" records from "agency" records.[239] Nevertheless, an agency's inability to locate every

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[238](...continued)
agency's central records system was unreasonable because during the search the agency "discovered information suggesting the existence of documents that it could not locate without expanding the scope of its search"); NYC Apparel FZE v. U.S. Customs & Border Prot., No. 02-5130, 2006 WL 167833, at *7 (D.D.C. Jan. 23, 2006) (concluding that the agency must conduct a new search or "submit a supplemental declaration describing in substantially greater detail the procedure by which the FOIA processor" responded to the request); Natural Res. Def. Council, Inc. v. DOD, 388 F. Supp. 2d 1086, 1100-03 (C.D. Cal. 2005) (ordering new search where agency searched only one office and did not forward request to another office that agency knew to be lead office in subject area); Trentadue v. FBI, No. 04-772, slip op. at 5-6 (D. Utah May 5, 2005) (ordering additional search because, in part, agency conducted computer search only, even though agency previously limited ability of field offices to upload documents into computer database); Wolf v. CIA, 357 F. Supp. 2d 112, 119 (D.D.C. 2004) (ordering agency to conduct additional search of broader scope because agency failed to do that even though first search yielded indications that responsive records could be in another file) (appeal pending); Ctr. for Nat'l Security Studies v. U.S. Dep't of Justice, 215 F. Supp. 2d 94, 110 (D.D.C. 2002) (holding that the discovery of a document that "clearly indicates the existence of [other] relevant documents" creates an "obligation" on the agency to conduct a further search for those additional documents), aff'd in part, rev'd in part & remanded on other grounds, 331 F.3d 918 (D.C. Cir. 2003); Tarullo v. DOD, 170 F. Supp. 2d 271, 275 (D. Conn. 2001) (declaring the agency's search inadequate because "[w]hile hypothetical assertions as to the existence of unproduced responsive documents are insufficient to create a dispute of material fact as to the reasonableness of the search, plaintiff here has [himself provided a copy of an agency record] which appears to be responsive to the request"); Loomis v. Dep't of Energy, No. 96-149, 1999 WL 33541935, at *5 (N.D.N.Y. Mar. 9, 1999) (determining search inadequate in light of agency's admission that additional responsive records may exist in location not searched), aff'd, 199 F.3d 1322 (2d Cir. 1999) (unpublished table decision); Kronberg v. U.S. Dep't of Justice, 875 F. Supp. 861, 870-71 (D.D.C. 1995) (holding that search was inadequate when agency did not find records required to be maintained and plaintiff produced documents obtained by other FOIA requesters demonstrating that agency possessed files which may contain records sought); cf. Grace v. Dep't of the Navy, No. 99-4306, 2001 WL 940908, at *5 (N.D. Cal. Aug. 13, 2001) (concluding that although the agency apparently had misplaced the records requested under FOIA, "[d]efendants have discharged their burden [by] making a good faith attempt to locate the missing files"), aff'd, 43 F. App'x 76 (9th Cir. 2002).

[239] See Ethyl Corp. v. EPA, 25 F.3d 1241, 1247-48 (4th Cir. 1994) (citing agency's failure to follow Department of Justice guidance concerning "per-
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single responsive record does not undermine an otherwise reasonable search.[240]

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[239](...continued)
sonal record" considerations in FOIA Update, Vol. V, No. 4, at 3-4); see also Kempker-Cloyd v. U.S. Dep't of Justice, No. 5:97-253, 1999 U.S. Dist. LEXIS 4813, at *12-13 (W.D. Mich. Mar. 12, 1999) (determining that agency acted in bad faith because it failed to review responsive records that agency official asserted were "personal"); cf. Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 481 (2d Cir. 1999) (rejecting agency affidavit concerning "personal" records as insufficient, and remanding case for further development through affidavits by records' authors explaining their intended use of records in question).

[240] See Duenas Iturralde v. Comptroller of the Currency, 315 F.3d 311, 315 (D.C. Cir. 2003) ("[I]t is long settled that the failure of an agency to turn up one specific document in its search does not alone render a search inadequate . . . . After all, particular documents may have been accidentally lost or destroyed, or a reasonable and thorough search may have missed them."); Grand Cent. P'ship, 166 F.3d at 489 (declaring that the fact that "some documents were not discovered until a second, more exhaustive, search was conducted does not warrant overturning the district court's ruling" that the agency conducted a reasonable search); Schwarz v. FBI, No. 98-4036, 1998 WL 667643, at *2 (10th Cir. Nov. 5, 1998) (concluding that "the fact that the [agency's] search failed to turn up three documents is not sufficient to contradict the reasonableness of the FBI's search without evidence of bad faith"); Campbell, 164 F.3d at 28 n.6 (holding that "the inadvertent omission of three documents does not render a search inadequate when the search produced hundreds of pages that had been buried in archives for decades"); Citizens Comm'n on Human Rights v. FDA, 45 F.3d 1325, 1328 (9th Cir. 1995) (determining that search was adequate when agency spent 140 hours reviewing relevant files, notwithstanding fact that agency was unable to locate 137 of 1000 volumes of records); Manchester v. FBI, No. 96-0137, 2005 WL 3275802, at *3 (D.D.C. Aug. 9, 2005) (concluding that a "speculative allegation as to the existence of [a record] does not cast doubt on the adequacy of" the search); Campaign for Responsible Transplantation v. FDA, 219 F. Supp. 2d 106, 111 (D.D.C. 2002) (upholding the adequacy of the agency's search by declaring that the agency's belated production of fifty-five additional documents that it located using information contained in plaintiff's summary judgment motion "is a proverbial 'drop in the bucket'" relative to the 27,000 documents that the agency already had provided to plaintiff); cf. W. Ctr. for Journalism v. IRS, 116 F. Supp. 2d 1, 10 (D.D.C. 2000) (concluding that agency conducted reasonable search and acted in good faith by locating and releasing additional responsive records mistakenly omitted from its initial response, because "it is unreasonable to expect even the most exhaustive search to uncover every responsive file; what is expected of a law-abiding agency is that the agency admit and correct error when error is revealed"), aff'd, 22 F. App'x 14 (D.C. Cir. 2001). But see Oglesby v. U.S. Dep't of the Army, 79 F.3d 1172, 1185
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Prior to the enactment of the Electronic FOIA amendments, several courts held that agencies do not have to organize or reorganize file systems in order to respond to particular FOIA requests,[241] to write new computer programs to search for "electronic" data not already compiled for agency purposes,[242] or to aggregate computerized data files so as to effectively create new, releasable records.[243] More than one court ruled, though, that agencies may be required to perform relatively simple computer searches to locate requested records, or to demonstrate why such searches are unreasonable in a given case.[244]

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[240](...continued)
(D.C. Cir. 1996) (acknowledging plaintiff's assertion that search was inadequate because of previous FOIA requester's claim that agency provided her with "well over a thousand documents," and holding that claim raises enough doubt to preclude summary judgment in absence of agency affidavit further describing its search); Accuracy in Media v. FBI, No. 97-2107, slip op. at 12 (D.D.C. Mar. 31, 1999) (directing agency to conduct further search for two unaccounted-for documents referenced in documents located by agency's otherwise reasonable search).

[241] See, e.g., Church of Scientology v. IRS, 792 F.2d 146, 150-51 (D.C. Cir. 1986); Miller v. U.S. Dep't of State, 779 F.2d 1378, 1385 (8th Cir. 1986).

[242] See Burlington N. R.R. v. EPA, No. 91-1636, slip op. at 4 (D.D.C. June 15, 1992); Clarke v. U.S. Dep't of the Treasury, No. 84-1873, 1986 WL 1234, at *1 (E.D. Pa. Jan. 24, 1986); see also FOIA Update, Vol. XIII, No. 2, at 3-7 (congressional testimony discussing "electronic record" FOIA issues).

[243] See Yeager v. DEA, 678 F.2d 315, 324 (D.C. Cir. 1982); see also "Department of Justice Report on 'Electronic Record' FOIA Issues" [hereinafter Department of Justice "Electronic Record" Report], reprinted in abridged form in FOIA Update, Vol. XI, No. 2, at 8-21 (discussing use of "computer programming" for FOIA search and processing purposes). But cf. Int'l Diatomite Producers Ass'n v. U.S. Soc. Sec. Admin., 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).

[244] See 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'"); Belvy v. U.S. Dep't of Justice, No. 94-923, slip op. at 7-9 (S.D. Fla. Dec. 15, 1994) (magistrate's recommendation) (rejecting agency's claim that it did not have to undertake computer search because it failed "to establish that the creation of such a [computer] program would be unreasonable"), adopted (S.D. Fla. Jan. 27, 1995); see also Department of Justice "Electronic Record" Report, reprinted in abridged form in FOIA Update, Vol. XI, No. 2, at 8-17 (discuss-
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Consistent with these latter cases, and to promote electronic database searches, the Electronic FOIA amendments now require agencies to make "reasonable efforts" to search for requested records in electronic form or format "except when such efforts would significantly interfere with the operation of the agency's automated information system."[245] The Electronic

[244](...continued)
ing issue of computer programming for search purposes).

[245] Pub. L. No. 104-231, § 5, 110 Stat. 3048, 3050 (codified as amended at 5 U.S.C. § 552(a)(3)(c)); Sun-Sentinel Co. v. DHS, 431 F. Supp. 2d 1258, 1276 (S.D. Fla. 2006) (stating that subsection (a)(3)(C) "addresses problems with searching for records as opposed to producing records," and deciding that evidentiary hearing is needed to determine whether agency's claim of significant interference relates to agency's "inability . . . to search for these records or to produce these records"); see Baker & Hostetler LLP v. U.S. Dep't of Commerce, No. 02-2522, slip op. at 10-11 (D.D.C. Mar. 31, 2004) (finding database restoration would "significantly interfere with the operation of the agency's automated information system" where it would render servers unusable for other functions, and where database restoration attempts could fail due to absence of certain backup tapes), aff'd in pertinent part, No. 05-5185, 2006 WL 3751451 (D.C. Cir. Dec. 22, 2006); Albino v. USPS, No. 01-C-563-C, 2002 WL 32345674, at *7 (W.D. Wis. May 20, 2002) (declaring a search for responsive e-mail messages spanning five years to be inadequate because the agency "did not enlist the help of information technology personnel . . . [who] . . . would have access to e-mail message archives" possibly containing requested records"); Schladetsch v. HUD, No. 99-0175, 2000 WL 33372125, at *5 (D.D.C. Apr. 4, 2000) (rejecting as insufficient agency affidavit that failed to show how creation and use of computer program to perform electronic database search for responsive information would require "unreasonable efforts" or would "substantially interfere" with agency's computer system), appeal dismissed voluntarily, No. 00-5220 (D.C. Cir. Oct. 12, 2000); see also FOIA Update, Vol. XVII, No. 4, at 2 (discussing current electronic search requirements); cf. Hoffman v. U.S. Dep't of Justice, No. 98-1733-A, slip op. at 10-11 (W.D. Okla. Dec. 15, 1999) (finding that an agency is not required to conduct a 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."); cf. Davis v. Dep't of Justice, 460 F.3d 92, 105 (D.C. Cir. 2006) (remanding case "to provide the agency an opportunity to evaluate [search] alternatives" including nonagency Internet search tools); People for the Am. Way Found. v. U.S. Dep't of Justice, No. 04-1421, 2006 WL 2035656, at *8 (D.D.C. July 18, 2006) (ordering an agency to search a nonagency database because that database is "simply a tool to aid in identifying responsive records from [the agency's]
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FOIA amendments expressly define the term "search" as meaning "to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request."[246] (For a discussion of the litigation aspects of adequacy of search, see Litigation Considerations, Adequacy of Search, below.)

## "Reasonably Segregable" Obligation

The FOIA requires that "any reasonably segregable portion of a record" must be released after appropriate application of the Act's nine exemptions.[247] Agencies should pay particularly close attention to this "reasonably segregable" requirement because courts may closely examine the

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[245](...continued)
database of case files"); Peltier v. FBI, No. 02-4328, 2005 WL 1009595, at *2 (D. Minn. Apr. 26, 2005) (finding it "inexcusable" that an agency withheld trial transcripts without first placing "a quick phone call to the Clerk's office" to determine whether the documents were publicly available).

[246] Pub. L. No. 104-231, § 5, 110 Stat. 3048, 3050 (codified as amended at 5 U.S.C. § 552(a)(3)(D)); see 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 the FOIA's presumption favoring disclosure); see also Schladetsch, No. 99-0175, 2000 WL 33372125, at *5 (D.D.C. Apr. 4, 2000) ("The programming necessary to conduct the [electronic database] search is a search tool and not the creation of a new record."); FOIA Update, Vol. XVIII, No. 1, at 6 (advising that search provisions of Electronic FOIA amendments do not involve record "creation" in Congress's eyes); cf. *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). But cf. 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 v. U.S. Dep't of Justice, 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 the agency is "not required to obtain new equipment to process [p]laintiff's FOIA request"); Lepelletier v. FDIC, No. 96-1363, transcript at 8 (D.D.C. Mar. 3, 2000) (refusing to require agency to undertake "an enormous effort that may not even work to try to convert [obsolete] computer files that nobody knows how to read now to provide information that [plaintiff] would like to have"), appeal dismissed as moot, 23 F. App'x 4 (D.C. Cir. 2001).

[247] 5 U.S.C. § 552(b) (2000 & Supp. IV 2004) (sentence immediately following exemptions).

propriety of agency segregability determinations,[248] even if the requester does not raise the issue of segregability at the administrative level or before the court.[249] Accordingly, an agency must adequately demonstrate to

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[248] See, e.g., Patterson v. IRS, 56 F.3d 832, 840 (7th Cir. 1995) (finding that an agency is certainly not entitled to withhold an entire document if only "portions" contain exempt information); Wightman v. ATF, 755 F.2d 979, 983 (1st Cir. 1985) (holding that detailed "process of segregation" is not unreasonable for request involving thirty-six document pages); Bristol-Myers Co. v. FTC, 424 F.2d 935, 938 (D.C. Cir. 1970) (stating that the "statutory scheme does not permit a bare claim of confidentiality to immunize agency [records] from scrutiny" in their entireties); ACLU v. FBI, 429 F. Supp. 2d 179, 193 (D.D.C. 2006) (finding that agency did not establish that factual portions of e-mail messages were inextricably intertwined with material exempt as deliberative); Dean v. FDIC, 389 F. Supp. 2d 780, 793 (E.D. Ky. 2005) (finding that agency failed to meet segregability burden when it withheld documents in entirety and it then declared that documents would be "unintelligible" if disclosed after redaction); Perry-Torres v. U.S. Dep't of State, 404 F. Supp. 2d 140, 144-45 (D.D.C. 2005) (ordering the agency to submit a renewed motion for summary judgment and an affidavit that includes a segregability explanation that "[a]t a minimum . . . should state that a line-by-line analysis of [the documents' ten pages] was conducted and that no information can reasonably be segregated"); Dorsett v. U.S. Dep't of the Treasury, No. 00-1730, slip op. at 25-26 (D.D.C. Mar. 10, 2004) (finding that agency's segregability demonstration was "wholly insufficient" as it failed to include descriptions of line-by-line or even page-by-page segregability reviews); see also FOIA Update, Vol. XIV, No. 3, at 11-12 ("OIP Guidance: The 'Reasonable Segregation' Obligation" (citing, e.g., Schiller v. NLRB, 964 F.2d 1205 (D.C. Cir 1992))).

[249] See, e.g., Trans-Pac. Policing Agreement v. U.S. Customs Serv., 177 F.3d 1022, 1028 (D.C. Cir. 1999) (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. Executive Office for U.S. Attorneys, 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); see also Kimberlin v. Dep't of Justice, 139 F.3d 944, 951 (D.C. Cir. 1998) (affirming application of exemption but nevertheless remanding case to district court for finding on segregability); Krikorian v. Dep't of State, 984 F.2d 461, 467 (D.C. Cir. 1993) (affirming general application of exemption but nevertheless remanding to district court for finding as to segregability); Schreibman v. U.S. Dep't of Commerce, 785 F. Supp. 164, 166 (D.D.C. 1991) (holding that segregation required for computer vulnerability assessment withheld under Exemption 2). 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"); cf. Becker v. IRS, 34 F.3d 398, 406 (7th Cir. 1994) (noting that the district court's

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the court that all reasonably segregable, nonexempt information -- perhaps even including individual numbers contained within multiple-digit codes[250] -- was disclosed.[251] If, however, an agency determines that nonexempt ma-

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[249](...continued)
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").

[250] See Trans-Pac., 177 F.3d at 1027-28 (going so far as to remand case to district court for determination of releasability of "four or six digits" of ten-digit numbers withheld in full). But see Aftergood v. CIA, No. 02-1146, slip op. at 4 n.1 (D.D.C. Feb. 6, 2004) ("Because the plaintiff seeks the disclosure of a single [budget] number, the court concludes that it would be impossible to segregate information from this request."), motion to alter or amend judgment denied, 2004 U.S. Dist. LEXIS 27035, at *8 (D.D.C. Sept. 29, 2004); cf. Students Against Genocide v. Dep't of State, 257 F.3d 828, 837 (D.C. Cir. 2001) (declaring that an agency is not obligated to segregate and release images from classified photographs by "produc[ing] new photographs at a different resolution in order to mask the [classified] capabilities of the reconnaissance systems that took them"); Ho v. Dir., Executive Office for U.S. Attorneys, No. 00-1759, slip op. at 2 (D.D.C. Sept. 17, 2001) (concluding that it was not reasonable to segregate and release to first-party requester any portion of privacy-protected records that did not mention him); Emerson v. CIA, No. 99-0274, slip op. at 13-14 (D.D.C. May 8, 2000) ("Plaintiff's request [for records about three individuals] is not one for which redacted responses would adequately protect th[ose] individuals' privacy."); Schrecker v. U.S. Dep't of Justice, 74 F. Supp. 2d 26, 32 (D.D.C. 1999) (finding that confidential informant "source codes and symbols are assigned in such a specific manner that no portion of the code is reasonably segregable"), rev'd & remanded in part on other grounds, 254 F.3d 162 (D.C. Cir. 2001); Rockwell Int'l Corp. v. U.S. Dep't of Justice, No. 98-761, slip op. at 15-16 (D.D.C. Mar. 24, 1999) (rejecting plaintiff's unsupported assertion that documents withheld by defendant agency in full "must" contain segregable information, because "the documents at issue here are not of the type that are likely to contain" such information), aff'd, 235 F.3d 598 (D.C. Cir. 2001).

[251] See Judicial Watch, Inc. v. Dep't of Justice, 432 F.3d 366, 371-72 (D.C. Cir. 2005) (holding that Exemption 5 protects from disclosure attorney work-product documents in full, including factual portions, and that factual portions are not subject to segregability); Davin v. U.S. Dep't of Justice, 60 F.3d 1043, 1052 (3d Cir. 1995) ("The statements regarding segregability are wholly conclusory, providing no information that would enable [plaintiff] to evaluate the FBI's decisions to withhold."); Schiller v. NLRB, 964 F.2d 1205, 1209-10 (D.C. Cir. 1992) (noting that agency's affidavit referred to withholding of "documents, not information," and remanding for specific finding as to segregability); Geronimo v. Executive Office for U.S. Attorneys, No. 05-1057, 2006 WL 1992625, at *7 (D.D.C. July 14, 2006) (concluding that "categorical treatment" of document withheld in full under Exemption 7(C)
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terial is so "inextricably intertwined" that disclosure of it would "leave only essentially meaningless words and phrases," then the entire record may be withheld.[252]

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[251](...continued)
"raises doubt as to whether . . . document was properly reviewed for segregability"); Nat'l Sec. Archive Fund, Inc. v. CIA, 402 F. Supp. 2d 211, 221-22 (D.D.C. 2005) (concluding that agency's declaration "[t]aken in its entirety" shows that 2004 National Intelligence Estimate (NIE) on Iraq is summarization of classified material, and that the NIE contains no "segregable portions that might sensibly be released"); Manchester, 2005 WL 3275802, at *4 (finding that agency's declarations describing "extensive efforts" and its declarations' coded attachments show that agency met segregability obligations); Mokhiber v. U.S. Dep't of the Treasury, 335 F. Supp. 2d 65, 70 (D.D.C. 2004) (granting plaintiff's motion for summary judgment when agency declarations failed to show that agency "even attempted" to meet segregability obligations); Shacket v. United States, 339 F. Supp. 2d 1092, 1095-96 (S.D. Cal. 2004) (concluding that agency need not segregate factual material from records of nonattorney investigator that are exempt from disclosure under attorney work-product privilege); Neely v. FBI, No. 7:97-0786, Order at 1 (W.D. Va. Jan. 25, 1999) (finding that agency applied exemptions "in a wholesale fashion" and without adequate explanation), vacated & remanded on other grounds, 208 F.3d 461 (4th Cir. 2000); Carlton v. Dep't of the Interior, No. 97-2105, slip op. at 12 (D.D.C. Sept. 3, 1998) (requiring defendant agencies to provide further explanation of exemptions applied because agencies made "only a general statement that the withheld documents do not contain segregable portions"), appeal dismissed voluntarily, No. 98-5518 (D.C. Cir. Nov. 18, 1998); Church of Scientology v. IRS, 816 F. Supp. 1138, 1162 (W.D. Tex. 1993) ("The burden is on the agency to prove the document cannot be segregated for partial release."); cf. Anderson v. CIA, 63 F. Supp. 2d 28, 30 (D.D.C. 1999) (declining, "especially in the highly classified context of this case," to "infer from the absence of the word 'segregable' [in the agency's affidavit] that segregability was possible").

[252] Neufeld v. IRS, 646 F.2d 661, 663 (D.C. Cir. 1981); see, e.g., Local 3, Int'l Bhd. of Elec. Workers v. NLRB, 845 F.2d 1177, 1179 (2d Cir. 1988); Mead Data Cent., Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 261 (D.C. Cir. 1977); see also Yeager v. DEA, 678 F.2d 315, 322 n.16 (D.C. Cir. 1982) (concluding that it was appropriate to consider "intelligibility" of document and burden imposed by editing and segregation of nonexempt matters); Swope v. U.S. Dep't of Justice, 439 F. Supp. 2d 1, 7 (D.D.C. 2006) (concluding that the requester's portion of recorded telephone calls "could not be reasonably segregated" where the agency "lacks the technical capability" to segregate information that is digitally recorded); Berman v. CIA, 378 F. Supp. 2d 1209, 1222 (E.D. Cal. 2005) (finding that Presidential Daily Briefs (PDBs) do not contain reasonably segregable information, as "the PDB is itself an intelligence method" because intelligible but unclassified information in the PDB "is part of a mosaic of PDB information that could provide
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It is important to remember that while the FOIA's segregability requirement applies to all FOIA exemptions generally, it certainly does not apply to the factual portions of records that are wholly exempt under the attorney work-product privilege of Exemption 5.[253] The Court of Appeals for the D.C. Circuit recently reiterated "clear" and longstanding case law in stating that "factual material is itself privileged when it appears within documents that are attorney work product."[254] The D.C. Circuit's opinion reversed a district court order that had directed the Department of Justice to conduct a segregability analysis of documents that the district court it-

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[252](...continued)
damaging insight" into intelligence practices and "the presidential communications privilege applies to documents in their entireties"); Jones v. DEA, No. 04-1690, 2005 WL 1902880, at *4 (D.D.C. July 13, 2005) (concluding that court could not make finding regarding segregability where record was not clear as to what exemptions agency was invoking); Pendergrass v. U.S. Dep't of Justice, No. 04-112, 2005 WL 1378724, at *6 (D.D.C. June 7, 2005) (finding that requester's portion of recorded telephone conversation with attorney is inextricably intertwined with attorney's portion of conversation, which is exempt from disclosure); W & T Offshore, Inc. v. U.S. Dep't of Commerce, No. 03-2285, 2004 WL 2115418, at *3 (E.D. La. Sept. 21, 2004) (recognizing that "some factual materials will fall within the deliberative process exemption if the manner in which the facts were selected would reveal the deliberative process or if the facts are inextricably intertwined with the policy-making process"); Warren v. Soc. Sec. Admin., No. 98-0116, 2000 WL 1209383, at *5 (W.D.N.Y. Aug. 22, 2000) (refusing to order segregation of standard forms containing personal information because "if the [agency] were to redact the requested documents in a manner that would remove all exempted . . . information, the resulting materials would be little more than templates"), aff'd in pertinent part, 10 F. App'x 20 (2d Cir. 2001); Eagle Horse v. FBI, No. 92-2357, slip op. at 5-6 (D.D.C. July 28, 1995) (finding disclosure of polygraph examination -- after protecting sensitive structure, pattern, and sequence of questions -- was not feasible without reducing product to "unintelligible gibberish").

[253] Judicial Watch, Inc. v. Dep't of Justice, 432 F.3d 366, 371-72 (D.C. Cir. 2005) (holding that Exemption 5 protects from disclosure attorney work-product documents in full, including factual portions, and that such portions are not subject to segregability); Shacket, 339 F. Supp. 2d at 1095-96 (concluding that agency need not segregate factual material from records of nonattorney investigator that are exempt from disclosure under attorney work-product privilege); see also FOIA Update, Vol. V, No. 4 ("FOIA Counselor: The Breadth of Work-Product Protection"). But cf. Mone v. Dep't of the Navy, 353 F. Supp. 2d 193, 196 (D. Mass. 2005) (ordering in camera review of work-product document, mistakenly, to determine if it contained segregable material).

[254] Judicial Watch, Inc., 432 F.3d at 371 (distilling quotations from Tax Analysts v. IRS, 117 F.3d 607, 620 (D.C. Cir. 1997), and Martin v. Office of Special Counsel, 819 F.2d 1181, 1187 (D.C. Cir. 1987)).

self found were properly exempt under Exemption 5 through the attorney work-product privilege.[255] In reversing this case, the D.C. Circuit stated that "the District Court's principal error was in conflating the deliberative process privilege and the attorney work-product doctrine."[256] This D.C. Circuit ruling makes it clear that an agency need not segregate factual portions from documents that are entirely exempt from disclosure under the attorney work-product privilege.[257] (For a further discussion of the applicability of protections under the attorney work-product privilege, see Exemption 5, Attorney Work-Product Privilege, below.)

In cases involving a large amount of records or an unreasonably high-cost, "line-by-line" review, agencies may withhold small segments of non-exempt data "if the proportion of nonexempt factual material is relatively small and is so interspersed with exempt material that separation by the agency and policing by the courts would impose an inordinate burden."[258]

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[255] See Judicial Watch, Inc., 432 F.3d at 372.

[256] Id. at 371-72.

[257] See id.

[258] Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 86 (2d Cir. 1979); see, e.g., FlightSafety Servs. Corp. v. Dep't of Labor, 326 F.3d 607, 613 (5th Cir. 2003) (per curiam) (reasoning that further segregation was not reasonable because "any disclosable information is so inextricably intertwined with the exempt, confidential information that producing it would require substantial agency resources and produce a document of little informational value"); Solar Sources, Inc. v. United States, 142 F.3d 1033, 1039 (7th Cir. 1998) (finding that because agency would require eight work-years to identify all nonexempt documents in millions of pages of files, the very small percentage of documents that could be released were not "reasonably segregable"); Doherty v. U.S. Dep't of Justice, 775 F.2d 49, 53 (2d Cir. 1985) ("The fact that there may be some nonexempt matter in documents which are predominantly exempt does not require the district court to undertake the burdensome task of analyzing approximately 300 pages of documents, line-by-line."); Neufeld, 646 F.2d at 666 (holding that segregation is not required when it "would impose significant costs on the agency and produce an edited document of little informational value"); Wilson v. DEA, 414 F. Supp. 2d 5, 15 (D.D.C. 2006) (finding without explanation that the agency "fulfilled its segregability obligation" even when it withheld in full one document rather than "undergo the time and expense of redacting all the information on that page except the [requester's] name"); Assassination Archives & Research Ctr. v. CIA, 177 F. Supp. 2d 1, 9 (D.D.C. Oct. 24, 2001) (declining to order the agency to segregate nonexempt information from documents withheld in full, because "[t]he necessary redaction would require the agency to commit significant time and resources to a task that would yield a product with little, if any, informational value"), aff'd, 334 F.3d 55 (D.C. Cir. 2003); Journal of Commerce v. U.S. Dep't of the Treasury, No. 86-1075, 1988 U.S.
(continued...)

Agencies nonetheless may make discretionary disclosures of exempt information, but should do so only upon "full and deliberate consideration of the . . . interests that could be implicated by disclosure of the information.[259] (For a discussion of discretionary disclosure, see Discretionary Disclosure and Waiver, below; for a further discussion of segregability, see Litigation Considerations, "Reasonably Segregable" Requirements, below.)

Referrals and Consultations

When an agency locates records responsive to a FOIA request, it should determine whether any of those records, or information contained in those records, originated with another agency or agency component.[260] As a matter of sound administrative practice, an agency should consult with any other agency or other agency component whose information appears in the responsive records, especially if that other agency or component is better able to determine whether the information is exempt from disclosure.[261] An agency may also consult with any other agency that holds an equity in, or special expertise or knowledge concerning, a particular type of information.[262] If the response to the consultation is delayed, the agency or compo

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[258](...continued)
Dist. LEXIS 17610, at *21 (D.D.C. Mar. 30, 1988) (finding that segregation was "neither useful, feasible nor desirable" when it would compel the agency "to pour through [literally millions of pages of documents] to segregate nonexempt material [and] would impose an immense administrative burden . . . that would in the end produce little in the way of useful nonexempt material"). But see Rugerio v. U.S. Dep't of Justice, 234 F. Supp. 2d 697, 707-09 (E.D. Mich. 2002) (concluding that "[i]n this case, the burden of segregation does not outweigh the significant value of the information to Plaintiff because it does not appear that the Government would have to expend a large amount of additional time and resources to provide Plaintiff with the segregable information" from 364 pages).

[259] Attorney General's Memorandum for Heads of All Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), reprinted in *FOIA Post* (posted 10/15/01).

[260] Accord 5 U.S.C. § 552(a)(6)(B)(iii) (2000 & Supp. IV 2004).

[261] See, e.g., 28 C.F.R. § 16.4(c)(1) (2006) (Department of Justice regulation concerning consultations).

[262] See, e.g., White House Memorandum for Heads of Executive Departments and Agencies Concerning Safeguarding Information Related to Homeland Security (Mar. 19, 2002), reprinted in *FOIA Post* (posted 3/21/02) (directing all federal departments and agencies, in accordance with accompanying memorandum from the Information Security Oversight Office and the Office of Information and Privacy, to "consult with . . . the Department of Energy's Office of Security if the [requested] information concerns
(continued...)

nent in receipt of the FOIA request should notify the requester that a supplemental response will follow when the consultation is completed.[263]

If an agency or component locates entire records originating with another agency or component, it should refer those records to their originator for its direct response to the requester.[264] The referring agency or component ordinarily should advise the requester of the referral and of the name of the agency FOIA office to which it was made.[265] Some agencies have streamlined their practices of continually referring certain routine records or classes of records to other agencies or components by establishing standard processing protocols and agreements between them.[266]

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[262](...continued)
nuclear or radiological weapons").

[263] See FOIA Update, Vol. XII, No. 3, at 3-4 ("OIP Guidance: Referral and Consultation Procedures"); see also FOIA Update, Vol. XIV, No. 3, at 6-8 (Department of Justice memorandum setting forth White House consultation process in which agency retains responsibility for responding to requester regarding any White House-originated records or White House-originated information located within scope of FOIA request that agency has received).

[264] See FOIA Update, Vol. XII, No. 3, at 3-4; FOIA Update, Vol. IV, No. 3, at 5; see also, e.g., Rzeslawski v. U.S. Dep't of Justice, No. 97-1156, slip op. at 6 (D.D.C. July 23, 1998) (observing that an agency's "referral procedure is generally faster than attempting to make an independent determination regarding disclosure" and that "by placing the request in the hands of the originating agency, discretionary disclosure is more likely"), aff'd, No. 00-5029, 2000 WL 621299 (D.C. Cir. Apr. 4, 2000); Stone v. Def. Investigative Serv., No. 91-2013, 1992 WL 52560, at *1 (D.D.C. Feb. 24, 1992) (recognizing that agencies may refer responsive records to originating agencies in responding to FOIA requests), aff'd, 978 F.2d 744 (D.C. Cir. 1992) (unpublished table decision); 28 C.F.R. § 16.4(c)(2) (Department of Justice regulation containing referral and consultation procedures). But cf. Maydak v. U.S. Dep't of Justice, 254 F. Supp. 2d 23, 40 (D.D.C. 2003) (noting that the 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 the agency's action).

[265] See FOIA Update, Vol. XII, No. 2, at 6. But see id. (warning agencies not to notify requesters of identities of other agencies to which record referrals are made, in any exceptional case in which so doing would reveal sensitive abstract fact about record's existence).

[266] See, e.g., 28 C.F.R. § 16.4(h) (Department of Justice regulation authorizing its components to make agreements with other components or agencies to eliminate need for consultations or referrals for particular types of records).

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.[267] Additionally, agencies receiving referrals should handle them on a "first-in, first-out" basis among their other FOIA requests -- but they should be sure to do so according to the date of the request's initial receipt at the referring agency, lest FOIA requesters be placed at an unfair timing disadvantage through agency referral practices.[268]

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[267] 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 Executive Office for United States Attorneys' 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); Hronek v. DEA, 16 F. Supp. 2d 1260, 1272 (D. Or. 1998) (noting that with respect to records referred to nonparty agencies "the ultimate responsibility for a full response lies with the [referring] agencies"), aff'd, 7 F. App'x 591 (9th Cir. 2001); see also FOIA Update, Vol. XV, No. 3, at 6 (advising on proper litigation practice for defending referrals of records to other agencies); cf. Goldstein v. Office of Indep. Counsel, No. 87-2028, 1999 WL 570862, at *14 (D.D.C. July 29, 1999) (magistrate's recommendation) (requiring referring agency to ask agency receiving referral to provide court with its position concerning releasability of records referred); Grove v. Dep't of Justice, 802 F. Supp. 506, 518 (D.D.C. 1992) (declaring that agency may not use "'consultation' as its reason for a deletion, without asserting a valid exemption").

[268] See FOIA Update, Vol. XV, No. 3, at 6 (observing that a requester should "receive her rightful place in line as of the date upon which her request was received," and advising likewise regarding "consultation" practices (citing Freeman v. Dep't of Justice, 822 F. Supp. 1064, 1067 (S.D.N.Y. 1993))); cf. Or. Natural Desert Ass'n v. Gutierrez, 409 F. Supp. 2d 1237, 1250 (D. Or. 2006) (concluding that the agency's referral regulation "does not significantly impair the ability to get records" and that that regulation is "reasonable"); Snyder v. CIA, 230 F. Supp. 2d 17, 26 (D.D.C. 2002) (concluding that the delayed response to plaintiff's request, which was caused by the agency's referral of records to another agency, did not constitute an improper withholding of the referred records); Boyd v. U.S. Marshals Serv., No. 99-2712, slip op. at 5-6 (D.D.C. Mar. 30, 2001) (approving agency's referral of records to originating agencies, because that referral "was done in accordance with agency regulation . . . and does not appear to have impaired plaintiff's ability to gain access to these records"), appeal dismissed for lack of juris., No. 01-5306, 2001 WL 1488181 (D.C. Cir. Oct. 10, 2001); Williams v. United States, 932 F. Supp. 354, 357 & n.7 (D.D.C. 1996) (urging the agency to set up an "express lane" for referred records so as to not "tie up other agencies by taking an inordinate period of time to review referred records [and] unnecessarily inhibit the smooth functioning of the [other]

(continued...)

It should be noted that if an agency or component determines that it does not maintain any record responsive to a particular FOIA request, that agency generally is under no obligation to "forward" that request to any other agency or component where such records might be located.[269] An agency must, however, undertake such a step of request "forwarding" (which is distinct from record "referral") if it has obligated itself to do so by creating such a required practice through its own FOIA regulations.[270] As a matter of administrative discretion, though, the agency may advise the requester of the name and address of such other agency.[271] Finally, as a matter of sound administrative practice, agencies should ensure that their referral and consultation procedures and practices are in keeping with Executive Order 13,392's mandate that agencies administer the FOIA with a "citizen-centered and results-oriented approach."[272]

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[268](...continued)
agencies' well oiled FOIA processing systems").

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

[270] See Friends of Blackwater v. U.S. Dep't of the Interior, 391 F. Supp. 2d 115, 122 (D.D.C. 2005); see also *FOIA Post*, "FOIA Counselor Q&A" (posted 1/24/06) (discussing referral obligations in light of Friends of Blackwater, and also emphasizing explicitly that "[t]he 'forwarding' of a FOIA request . . . involves nothing more than the discretionary transmittal of the request . . . [whereas a] 'referral' under the FOIA . . . involves the transfer of responsibility for processing certain requested records to an agency that originated those particular records, which usually involves only part of the responsibility for an entire FOIA request").

[271] Accord Presidential Memorandum for Heads of Departments and Agencies Regarding the Freedom of Information Act, 29 Weekly Comp. Pres. Doc. 1999 (Oct. 4, 1993) [hereinafter Presidential FOIA Memorandum], reprinted in FOIA Update, Vol. XIV, No. 3, at 3 ("[A]gencies should handle requests for information in a customer-friendly manner."); cf. Conteh v. FBI, No. 01-1330, slip op. at 4-5 (D.D.C. Apr. 1, 2002) (concluding that the response of an agency whose regulations require a requester to send separate requests to each individual field office that is believed to maintain responsive records was inadequate because the agency could have informed the requester of the existence and location of records maintained by two of its field offices "so that [the] plaintiff could direct his request to [those] offices pursuant to the [agency's] regulations"). But see also FOIA Update, Vol. XII, No. 2, at 6 (advising that in undertaking such requester communications agencies must take care not to compromise special secrecy interests and concerns held by law enforcement and intelligence agencies).

[272] Exec. Order No. 13,392, Sec. 1(d), 70 Fed. Reg. 75,373 (Dec. 14, 2005)
(continued...)

Responding to FOIA Requests

The FOIA provides that each agency "shall make [its disclosable] records promptly available" upon request.[273] Although the D.C. Circuit has suggested that an agency is not required to make requested records available by mailing copies of them to a FOIA requester if the agency prefers to make the "responsive records available in one central location for [the requester's] perusal," such as in a "reading room,"[274] the Department of Justice strongly advises agencies to decline to follow such a practice unless the requester prefers it as well.[275] However, agencies certainly may require

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[272](...continued)
(stating that "[a] citizen-centered and results-oriented approach will improve service and performance, thereby strengthening compliance with the FOIA, and will help avoid disputes and related litigation"); see also *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (Part I.16.) (stating that record-referral area of FOIA administration "warrants careful consideration" by agencies); id. (Part I.17.) (stating that administrative FOIA practice of consulting with other agencies is "deserving of considerable remedial attention" as "consultations have been known to consume large amounts of time and to contribute to agency backlogs of pending requests").

[273] 5 U.S.C. § 552(a)(3)(A) (2000 & Supp. IV 2004).

[274] Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 70 (D.C. Cir. 1990); cf. Chamberlain v. U.S. Dep't of Justice, 957 F. Supp. 292, 296 (D.D.C.) (holding that FBI's offer to make "visicorder charts" available to requester for review at FBI Headquarters met FOIA requirements due to exceptional fact that charts could be damaged if photocopied), summary affirmance granted, 124 F.3d 1309 (D.C. Cir. 1997) (unpublished table decision); Antonelli v. ATF, No. 04-1180, 2006 WL 3147675, at *2 (D.D.C. Nov. 1, 2006) (finding that agency satisfied FOIA's requirements by making available for viewing inmate requester's presentence report).

[275] See FOIA Update, Vol. XII, No. 2, at 5 ("OIP Guidance: Procedural Rules Under the D.C. Circuit's Oglesby Decision") (recognizing that "the effective administration of the FOIA relies quite heavily upon agency transmittal of disclosable record copies to FOIA requesters by mail"); see also Comer v. IRS, No. 97-76329, 1999 U.S. Dist. LEXIS 16268, at *3 (E.D. Mich. Sept. 30, 1999) (observing that although "FOIA does not require agencies to provide members of the public with information they can access themselves . . . [t]he Court is perplexed . . . why [defendant] refuses to simply copy this information and send it to plaintiff so long as he is willing to pay for the copies"); accord Presidential FOIA Memorandum, reprinted in FOIA Update, Vol. XIV, No. 3, at 3 ("[A]gencies should handle requests for information . . . [with no] unnecessary bureaucratic hurdles."); cf. Defenders of Wildlife v. U.S. Dep't of the Interior, 314 F. Supp. 2d 1, 10 (D.D.C. 2004) (opining that if an agency maintains duplicate copies of a document re-
(continued...)

requesters to pay any fees owed before releasing the processed records; otherwise, agencies "would effectively be bankrolling search and review, and duplicating expenses because there would never be any assurance whatsoever that payment would ever be made once the requesters had the documents in their hands."[276]

The FOIA does not provide for limited disclosure; rather, it "speaks in terms of disclosure and nondisclosure [and] ordinarily does not recognize degrees of disclosure, such as permitting viewing, but not copying, of documents."[277] Moreover, "[t]here is no mechanism under FOIA for a protective order allowing only the requester to see [the requested information] or for proscribing its general dissemination."[278] In short, "once there is disclosure,

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[275](...continued)
quested under the FOIA, then the agency need only provide one such copy in its response to the request, because "it would be illogical and wasteful to require an agency to produce multiple copies of the exact same document").

[276] Strout v. U.S. Parole Comm'n, 842 F. Supp. 948, 951 (E.D. Mich.), 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 U.S. Dist. LEXIS 19909, at *5 (W.D. Tex. Dec. 17, 1996); Trueblood v. U.S. Dep't of the Treasury, 943 F. Supp. 64, 68 (D.D.C. 1996) (recognizing that agency may require payment before sending processed records); Putnam v. U.S. Dep't of Justice, 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 an agency chooses to distribute through the National Technical Information Service will be subject to that entity's statutorily based fee schedule, which "supersedes" the FOIA's fee provisions pursuant to 5 U.S.C. § 552(a)(4)(A)(vi)).

[277] Julian v. U.S. Dep't of Justice, 806 F.2d 1411, 1419 n.7 (9th Cir. 1986), aff'd, 486 U.S. 1 (1988); see NARA v. Favish, 541 U.S. 157, 172 (recognizing that information disclosed under FOIA "belongs to citizens to do with as they choose"), reh'g denied, 541 U.S. 1057 (2004); Berry v. Dep't of Justice, 733 F.2d 1343, 1355 n.19 (9th Cir. 1984); see also Seawell, Dalton, Hughes & Timms v. Exp.-Imp. Bank, No. 84-241-N, slip op. at 2 (E.D. Va. July 27, 1984) (stating that there is no "middle ground between disclosure and nondisclosure"); cf. *FOIA Post*, "Critical Infrastructure Information Regulations Issued by DHS" (posted 2/27/04) (emphasizing the critical distinction between "protecting information from public disclosure" and "the safeguarding of federal information").

[278] Favish, 541 U.S. at 174; see Maricopa Audobon Soc'y v. U.S. Forest Serv., 108 F.3d 1082, 1088-89 (9th Cir. 1997) (rejecting the plaintiff's offer to
(continued...)

the information belongs to the general public."[279]

An agency must "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 "make reasonable efforts to maintain its records in forms or formats that are reproducible" for such purposes.[280] Together, these two provisions require agencies to honor a requester's specific choice among existing forms of a requested record (assuming no exceptional difficulty in reproducing an existing record form)[281] and to make "rea-

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[278](...continued)
receive the requested documents under a confidentiality agreement because of the rule that "FOIA does not permit selective disclosure of information to only certain parties, and that once the information is disclosed to [the 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, lest anyone think that "even in the process of sustaining an exemption the secrets to which it pertains will be compromised").

[279] 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.").

[280] 5 U.S.C. § 552(a)(3)(B); see also FOIA Update, Vol. XVII, No. 4, at 2 (discussing statutory provisions); cf. Department of Justice "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"). But see also Landmark Legal Found. v. EPA, 272 F. Supp. 2d 59, 63 (D.D.C. 2003) (concluding that the agency had not violated the FOIA's "readily reproducible" provision by failing to retain electronic copies of e-mails that were retained in paper form only, because "the agency may keep its files in a manner that best suits its needs"); cf. Martin & Merrell, Inc. v. U.S. Customs Serv., 657 F. Supp. 733, 734 (S.D. Fla. 1986) ("The [FOIA] in no way contemplates that agencies, in providing information to the public, should invest in the most sophisticated and expensive form of technology.") (pre-1996 FOIA amendment case).

[281] See, e.g., Lepelletier v. FDIC, No. 96-1363, transcript at 9 (D.D.C. Mar. 3, 2000) (refusing, with regard to information "maintained on an [agency] database incapable of being printed," to order agency "to render or attempt to render that database operational"), appeal dismissed as moot, 23 F.
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sonable efforts" to disclose a record in a different form or format when that is requested, if the record is "readily reproducible" in that new form or format.[282]

Given "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,"[283] agencies should endeavor to use advanced technology to satisfy existing or potential FOIA demands most efficiently -- including through "affirmative" electronic disclosures.[284] To do so, and

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[281](...continued)
App'x 4 (D.C. Cir. 2001); Chamberlain, 957 F. Supp. at 296 ("The substantial expense of reproducing the visicorder charts, as well as the possibility that the visicorder charts might be damaged if photocopied, make the Government's proposed form of disclosure [i.e., inspection] even more compelling.").

[282] See TPS, Inc. v. DOD, 330 F.3d 1191, 1195 (9th Cir. 2003) (stating, in light of a particular agency regulation, that the FOIA "requires that the agency satisfy a FOIA request [for the production of records in a certain format] when it has the capability to readily reproduce documents in the requested format"); see also Sample v. Bureau of Prisons, No. 05-5038, 2006 WL 3103009, at *1, *3 (D.C. Cir. Nov. 3, 2006) (finding that the statutory language "unambiguously requires" the agency to disclose records in the requested electronic format even though the agency's regulations prohibit an inmate from possessing such electronically formatted material, without making any finding with respect to inmate "access or possession" of such records, as those questions were "not before the court"); FOIA Update, Vol. XVIII, No. 1, at 5 (discussing agency obligations to produce records in requested forms or formats (citing H.R. Rep. No. 104-795, at 18, 21 (1996) (noting that amendments overrule Dismukes v. Dep't of the Interior, 603 F. Supp. 760, 761-63 (D.D.C. 1984), which previously allowed agency to chose format of disclosure if it chose "reasonably"))); see also FOIA Update, Vol. XIX, No. 1, at 6 (encouraging agencies to consider providing records in multiple forms as matter of administrative discretion if requested to do so).

[283] 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. XVII, No. 4, at 2 (citing 5 U.S.C. § 552(f), as amended); FOIA Update, Vol. XI, No. 2, at 4 n.1.

[284] See FOIA Update, Vol. XIX, No. 3, at 1 (stressing congressional interest in "affirmative disclosures" of government information); id. at 5-6 (Department of Justice congressional testimony emphasizing same); FOIA Update, Vol. XIX, No. 1, at 1 (discussing Department of the Air Force affirmative electronic information disclosure program); FOIA Update, Vol. XVIII, No. 1, at 3 (advising that agencies may choose to meet their "paper" reading room responsibilities through placement of computer terminals in their "conventional" reading rooms); FOIA Update, Vol. XVI, No. 1, at 1-2 (promoting efficient agency disclosure through early Internet activity and other
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also to meet their "electronic reading room" obligations under the Electronic FOIA amendments as well,[285] all federal agencies must pay increasing attention to the design and development of their sites on the World Wide Web for purposes of FOIA administration.[286] (For a discussion of "electronic reading rooms," see FOIA Reading Rooms and Web Sites, FOIA Reading Rooms, above.)

When an agency denies an initial request in full or in part, it must provide the requester with certain specific administrative information about the action taken on the request.[287] Pursuant to the requirements of the Electronic FOIA amendments, such information should include an estimate of the amount of denied information, unless doing so would undermine the protection provided by an exemption.[288] The Electronic FOIA

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[284](...continued)
electronic means); FOIA Update, Vol. XV, No. 4, at 3 (proposed electronic record FOIA principles); see also FOIA Update, Vol. XVII, No. 1, at 1-2 (describing use of document imaging in automated FOIA processing).

[285] Pub. L. No. 104-231, § 4, 110 Stat. 3048, 3049 (codified as amended at 5 U.S.C. § 552(a)(2), (e)(2)); see also FOIA Update, Vol. XIX, No. 1, at 3-5 ("OIP Guidance: Electronic FOIA Amendments Implementation Guidance Outline").

[286] See Presidential FOIA Memorandum, reprinted in FOIA Update, Vol. XIV, No. 3, at 3 (noting that agencies have the responsibility "to enhance public access [to information] through the use of electronic information systems"); FOIA Update, Vol. XIX, No. 3, at 3-4 ("OIP Guidance: Recommendations for FOIA Web Sites"); FOIA Update, Vol. XIX, No. 2, at 2 ("Web Site Watch" discussion of agency FOIA Web sites); FOIA Update, Vol. XIX, No. 1, at 2 (same); FOIA Update, Vol. XVIII, No. 3, at 1-2 (describing early agency development of World Wide Web sites for FOIA purposes); see also *FOIA Post*, "GAO E-FOIA Implementation Report Issued" (posted 3/23/01) ("This [GAO] report provides an excellent basis for all agencies -- whether they were among the agencies examined by GAO as part of its study or not -- to review their current state of compliance with E-FOIA's requirements and to make any and all improvements that are needed."); FOIA Update, Vol. XIX, No. 3, at 2 (advising agencies on proper FOIA Web site treatment for annual FOIA reports, in compliance with newly enacted electronic availability requirements of 5 U.S.C. § 552(e)(2)-(3), including through agency identification of URL (Uniform Resource Locator) for each report).

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

[288] See 5 U.S.C. § 552(a)(6)(F); see, e.g., 28 C.F.R. § 16.6(c)(3) (2006); see
(continued...)

amendments require agencies to also indicate the deletion of information at the point in the record where the deletion was made, wherever it is "technically feasible" to do so.[289]

While "[t]here is no requirement that administrative responses to FOIA requests contain the same documentation necessary in litigation,"[290] a decision to deny an initial request must inform the requester of the reasons for denial; of the right to appeal; and of the name and title of each person responsible for the denial.[291] Agencies also must include administra-

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[288](...continued)
also FOIA Update, Vol. XVIII, No. 2, at 2 (discussing alternative methods of satisfying obligation to estimate volume of deleted or withheld information, including "forms of measurement" to be used); FOIA Update, Vol. XVII, No. 4, at 10-11 (discussing requirements of Electronic FOIA amendments).

[289] Pub. L. No. 104-231, § 4, 110 Stat. 3048, 3049 (codified as amended at 5 U.S.C. § 552(b) (2000 & Supp. IV 2004) (concluding sentences)); see, e.g., 28 C.F.R. § 16.6(c)(3); see also FOIA Update, Vol. XVIII, No. 1, at 6 (discussing use of "electronic markings to show the locations of electronic record deletions"); FOIA Update, Vol. XVII, No. 4, at 10 (advising that the statutory obligation "also codifies the sound administrative practice of marking records to show all deletions when records are disclosed in conventional paper form"); cf. 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").

[290] Crooker v. CIA, No. 83-1426, 1984 U.S. Dist. LEXIS 23177, at *3-4 (D.D.C. Sept. 28, 1984); see Sakamoto v. EPA, 443 F. Supp. 2d 1182, 1189 (N.D. Cal. 2006) (granting summary judgment because, inter alia, "[i]nitial agency responses to FOIA requests are not required to contain a Vaughn index"); Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 11-12 (D.D.C. 1995) (finding that agencies need not provide Vaughn Index until ordered by court after plaintiff has exhausted administrative process); Schaake v. IRS, No. 91-958, 1991 U.S. Dist. LEXIS 9418, at *9-10 (S.D. Ill. June 3, 1991) (ruling that court "lacks jurisdiction" to require agency to provide Vaughn Index at either initial request or administrative appeal stages); SafeCard Servs. v. SEC, No. 84-3073, 1986 U.S. Dist. LEXIS 26467, at *5 (D.D.C. Apr. 21, 1986) (noting that requester has no right to Vaughn Index during administrative process), aff'd on other grounds, 926 F.2d 1197 (D.C. Cir. 1991); see also FOIA Update, Vol. VII, No. 3, at 6.

[291] 5 U.S.C. § 552(a)(6)(A)(i), (a)(6)(C)(i); see Stanley v. DOD, No. 93-4247, slip op. at 14-15 (S.D. Ill. July 28, 1998) (finding constructive exhaustion when agency failed to provide requester with notice of administrative appeal rights regarding disputed fee estimate); Mayock v. INS, 714 F. Supp. 1558, 1567 (N.D. Cal. 1989) (denying plaintiff's request for Vaughn Index at administrative level, but suggesting that agency regulations then in effect (continued...)

tive appeal notifications in all of their "no record" responses to FOIA requesters.[292]

Notifications to requesters should also contain other pertinent information: when and where records will be made available; what fees, if any, must be paid prior to the granting of access; what records are or are not responsive to the request; the date of receipt of the request or appeal; and the nature of the request or appeal and, when appropriate, the agency's interpretation of it.[293] Furthermore, because an agency is obligated to pro-

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[291](...continued)
required "more information than just the number of pages withheld and an unexplained citation to the exemptions"), rev'd & remanded on other grounds sub nom. Mayock v. Nelson, 938 F.2d 1006 (9th Cir. 1991); Hudgins v. IRS, 620 F. Supp. 19, 20-21 (D.D.C. 1985) (suggesting that statement of appellate rights should be provided even when request was interpreted by agency as not reasonably describing records), aff'd, 808 F.2d 137 (D.C. Cir. 1987); see also FOIA Update, Vol. VI, No. 4, at 6 (discussing significance of apprising requesters of their rights to file administrative appeals of adverse FOIA determinations); cf. Kay v. FCC, 884 F. Supp. 1, 2-3 (D.D.C. 1995) (upholding notification that appeals were to be filed with general counsel even though Commission took final action on them).

[292] See Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 67 (D.C. Cir. 1990) (holding that an agency's "no record" response constitutes an "adverse determination" and therefore requires notification of appeal rights under 5 U.S.C. § 552(a)(6)(A)(i)); Dinsio v. FBI, 445 F. Supp. 2d 305, 311 (W.D.N.Y. 2006) (finding constructive exhaustion when agency response did not include notice of administrative appeal rights) (appeal pending); see also FOIA Update, Vol. XII, No. 2, at 5 ("OIP Guidance: Procedural Rules Under the D.C. Circuit's Oglesby Decision") (superseding FOIA Update, Vol. V, No. 3, at 2). But see Dorn v. IRS, No. 03-539, 2005 WL 1126653, at *3 (M.D. Fla. May 12, 2005) (stating erroneously that agency's response was not "adverse," even though response stated that requested records "did not exist, must be requested from another office, or could not be created").

[293] See FOIA Update, Vol. XVI, No. 3, at 3-5 ("OIP Guidance: Determining the Scope of a FOIA Request") (emphasizing importance of communication with requester); see, e.g., Astley v. Lawson, No. 89-2806, 1991 WL 7162, at *2 (D.D.C. Jan. 11, 1991) (suggesting that the agency "might have been more helpful" to requester by "explaining why the information he sought would not be provided"); see also *FOIA Post*, "Anthrax Mail Emergency Delays FOIA Correspondence" (posted 11/30/01) (suggesting that agencies inform requesters of the delayed receipt of their FOIA requests due to anthrax-related mail disruptions "by sending acknowledgment letters in response to all delayed FOIA correspondence as promptly as possible upon ultimate receipt, taking pains to specify the length of the delay that was incurred in each case"); FOIA Update, Vol. XV, No. 2, at 1 (describing Department of Justice "FOIA Form Review" as example for other agencies to fol-

vide a FOIA requester with the "best copy available" of a record,[294] an agency should address in its correspondence any problem with the quality of its photocopy of a disclosed record.[295]

Finally, a requester has the right to administratively appeal any adverse determination an agency makes on his or her FOIA request.[296] Under Department of Justice 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 treatment.[297] An agency must make a determination on an administrative appeal within twenty working days after its receipt.[298] An administrative appeal decision upholding an adverse determination must also inform the requester of the provisions for judicial review of that determination in the federal courts.[299] (For discussions of the various aspects of judicial review of agency action under the FOIA, see Litigation Considerations, below.)

## FEES AND FEE WAIVERS

More than two decades ago, the Freedom of Information Reform Act of 1986[1] brought significant changes to the way in which fees are now assessed under the FOIA. A new fee structure was established, including a

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[293](...continued)
low).

[294] See McDonnell v. United States, 4 F.3d 1227, 1262 n.21 (3d Cir. 1993) ("Of course, we anticipate that [plaintiff] will receive the best possible reproduction of the documents to which he is entitled."); Giles v. U.S. Dep't of Justice, No. 00-1497, slip op. at 5 (D.D.C. June 4, 2001) (accepting that agency provided plaintiff with "best copies available" even though plaintiff asserted that they were "unreadable"); see also FOIA Update, Vol. XVI, No. 3, at 5 (advising agencies that "before providing a FOIA requester with a photocopy of a record that is a poor copy or is not entirely legible," they should "make reasonable efforts to check for any better copy of a record that could be used to make a better photocopy for the requester").

[295] See FOIA Update, Vol. XVI, No. 3, at 5 (advising of procedures to be used in cases involving poor photocopies of records); cf. *FOIA Post*, "The Limits of Agency Translation Obligations Under the FOIA" (posted 12/1/04) (distinguishing "legibility" from "translatability" of disclosed records).

[296] 5 U.S.C. § 552(a)(6)(A); see Oglesby, 920 F.2d at 63-71.

[297] 28 C.F.R. § 16.6(c).

[298] 5 U.S.C. § 552(a)(6)(A)(ii).

[299] Id. § 552(a)(6)(A)(ii).

[1] Pub. L. No. 99-570, §§ 1801-04, 100 Stat. 3207.