ployed, thus preserving the integrity of the exclusion process overall.[58] In either case, the government will of course urge the court to issue a public decision which does not indicate whether it is or is not an actual exclusion case. Such a public decision, like an administrative appeal determination of an exclusion-related request for review, should specify only that a full review of the claim was had and that, if an exclusion was in fact employed, it was, and remains, amply justified.[59]

DISCRETIONARY DISCLOSURE AND WAIVER

The Freedom of Information Act is an information disclosure statute which, through its exemption structure, strikes a balance between information disclosure and nondisclosure,[1] with an emphasis on the "fullest responsible disclosure."[2] Inasmuch as the FOIA's exemptions are discretion-

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[58] See Attorney General's 1986 Amendments Memorandum at 30.

[59] See id.; see also, e.g., Steinberg, 1997 WL 349997, at *1 (where plaintiff alleged possible use of exclusion, "without confirming or denying the existence of any exclusion, the Court finds and concludes [after review of agency's in camera declaration] that if an exclusion was invoked, it was and remains amply justified"); Beauman v. FBI, No. CV-92-7603, slip op. at 2 (C.D. Cal. Apr. 12, 1993) ("'In response to the plaintiff's claim of the (c)(1) exclusion being utilized in this action, . . . [w]ithout confirming or denying that any such exclusion was actually invoked by the defendant, the Court finds and concludes [after review of an in camera declaration] that if an exclusion was in fact employed, it was, and remains, amply justified.'") (adopting agency's proposed conclusion of law).

[1] See John Doe Agency v. John Doe Corp., 493 U.S. 146, 153 (1989) ("Congress sought 'to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence'" (citing H.R. Rep. No. 1497, at 6 (1966))); see also NARA v. Favish, 541 U.S. 157, 172 (observing that while under the FOIA government information "belongs to citizens to do with as they choose," this is balanced against statutory "limitations that compete with the general interest in disclosure, and that, in appropriate cases, can overcome it"), reh'g denied, 541 U.S. 1057 (2004).

[2] S. Rep. No. 89-813, at 3 (1965) (stating the FOIA's statutory objective as that of achieving "the fullest responsible disclosure"); see also Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 30 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum] (same) (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979)); FOIA Update, Vol. IX, No. 3, at 14 (same); cf. 5 U.S.C. § 552b note (2000 & Supp. III 2003) (policy statement enacted as part of the Government in the Sunshine Act specifying that it is "the policy of the United States that the public is entitled to the fullest practicable information

(continued...)

ary, not mandatory,[3] agencies may make "discretionary disclosures" of exempt information, as a matter of their administrative discretion, where they are not otherwise prohibited from doing so.[4]

In October 2001, a statement of governmentwide FOIA policy was issued by Attorney General John Ashcroft.[5] The Ashcroft FOIA Memorandum recognizes the continued agency practice of considering whether to make "discretionary disclosures" of information that is exempt under the Act, while at the same time emphasizing that agencies should do so only

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[2](...continued)
regarding the decisionmaking processes of the Federal Government") (emphasis added).

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

[4] See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1334 n.1 (D.C. Cir. 1987) (explaining that an agency's FOIA disclosure decision can "be grounded either in its view that none of the FOIA exemptions applies, and thus that disclosure is mandatory, or in its belief that release is justified in the exercise of its discretion, even though the data fall within one or more of the statutory exemptions."); see also, e.g., Chenkin v. Dep't of the Army, No. 94-7109, slip op. at 1 (3d Cir. June 7, 1995) (deciding that discretionary disclosure of documents during appellate litigation process renders case moot as to those documents); see also FOIA Update, Vol. VI, No. 3, at 3 ("[A]gencies generally have discretion under the Freedom of Information Act to decide whether to invoke applicable FOIA exemptions."); FOIA Update, Vol. XIII, No. 2, at 5-6 (discussing exercise of agency discretion in processing of requests for information maintained in electronic form); cf. *FOIA Post*, "The Use of Contractors in FOIA Administration" (posted 09/30/04) (advising of general rule that agencies may "contract out" tasks involved in FOIA administration by "allowing contractors to do any work that does not require discretionary decisionmaking").

[5] See Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001) [hereinafter Attorney General Ashcroft's FOIA Memorandum], reprinted in *FOIA Post* (posted 10/15/01) (emphasizing the public interest in protecting fundamental societal values, "[a]mong [which] are safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy").

upon "full and deliberate consideration" of all interests involved.[6] It reminds agencies "to carefully consider the protection of all [applicable] values and interests when making disclosure determinations under the FOIA."[7]

When agencies make discretionary disclosures of exempt information upon such "full and deliberate" consideration of all of the interests involved in accordance with Attorney General Ashcroft's FOIA Memorandum,[8] they should not be held to have "waived" their ability to invoke applicable FOIA exemptions for similar or related information in the future. In other situations, however, various types of agency conduct and circumstances can reasonably be held to result in exemption waiver.

Discretionary Disclosure

As a general rule, an agency's ability to make a discretionary disclosure of exempt information, as recognized in Attorney General Ashcroft's

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[6] Attorney General Ashcroft's FOIA Memorandum, reprinted in *FOIA Post* (posted 10/15/01); see also *FOIA Post*, "New Attorney General FOIA Memorandum Issued" (posted 10/15/01) (adding that much FOIA-exempt information is subject to statutory disclosure prohibitions as well as to prudential nondisclosure considerations).

[7] Attorney General Ashcroft's FOIA Memorandum, reprinted in *FOIA Post* (posted 10/15/01); see also, e.g., White House Memorandum for Heads of Executive Departments and Agencies Concerning Safeguarding Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security (Mar. 19, 2002), reprinted in *FOIA Post* (posted 3/21/02) (focusing on need to protect sensitive homeland security-related information); *FOIA Post*, "FOIA Officers Conference Held on Homeland Security" (posted 7/3/03) (noting that though Attorney General Ashcroft's FOIA Memorandum "was developed well before the events of September 11, 2001, its issuance highlighted the importance of carefully considering the applicability of FOIA exemptions to information viewed as sensitive through a post-9/11 lens"); *FOIA Post*, "New Attorney General FOIA Memorandum Issued" (posted 10/15/01) (highlighting government's "need to protect critical systems, facilities, stockpiles, and other assets from security breaches and harm -- and in some instances from their potential use as weapons of mass destruction in and of themselves"); accord 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.

[8] Attorney General Ashcroft's FOIA Memorandum, reprinted in *FOIA Post* (posted 10/15/01); see also *FOIA Post*, "New Attorney General FOIA Memorandum Issued" (posted 10/15/01) (pointing out significance of "discretionary disclosure" element of Attorney General Ashcroft's FOIA Memorandum).

FOIA Memorandum,[9] will vary according to the nature of the FOIA exemption and the underlying interests involved. First, while the FOIA does not itself prohibit the disclosure of any information,[10] an agency's ability to make a discretionary disclosure of information covered by a FOIA exemption can hinge on whether there exists any legal barrier to disclosure of that information. Some of the FOIA's exemptions -- such as Exemption 2,[11] and Exemption 5,[12] for example -- protect a type of information that is not subject to any such disclosure prohibition. Other FOIA exemptions -- most notably Exemption 3[13] -- directly correspond to, and serve to accommodate, distinct prohibitions on information disclosure that operate independently of the FOIA or are given nondisclosure effect under it. Agencies are constrained from making a discretionary FOIA disclosure of the types of information covered by the following FOIA exemptions:

Exemption 1 of the FOIA protects from disclosure national security information concerning the national defense or foreign policy, provided that it has been properly classified in accordance with both the substantive and procedural requirements of an existing executive order.[14] As a rule, an agency official holding classification authority determines whether information requires classification and then that determination is implemented under the FOIA through the invocation of Exemption 1.[15] Thus, if information is in fact properly classified, and therefore is exempt from disclosure under Exemption 1, it is not appropriate for discretionary FOIA disclosure. (See the discussion of Exemption 1, above.)

Exemption 3 of the FOIA explicitly accommodates the nondisclosure provisions that are contained in a variety of other federal statutes.[16] Some

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[9] Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001) [hereinafter Attorney General Ashcroft's FOIA Memorandum], reprinted in *FOIA Post* (posted 10/15/01); see also Exec. Order No. 13,392, 70 Fed. Reg. 75,373 (Dec. 14, 2005) (addressing procedural aspects of governmentwide FOIA administration).

[10] See 5 U.S.C. § 552(d) (2000 & Supp. IV 2004).

[11] Id. § 552(b)(2).

[12] Id. § 552(b)(5).

[13] Id. § 552(b)(3).

[14] Id. § 552(b)(1) (implementing Executive Order 12,958, as amended, 68 Fed. Reg. 15,315 (Mar. 28, 2003), reprinted in 50 U.S.C. § 435 (2000 & Supp. III 2003) and summarized in *FOIA Post* (posted 4/11/03)).

[15] See generally FOIA Update, Vol. VI, No. 1, at 1-2.

[16] See 5 U.S.C. § 552(b)(3); see also *FOIA Post*, "Agencies Rely on Wide (continued...)

of these statutory nondisclosure provisions, such as those pertaining to grand jury information[17] and census data,[18] categorically prevent disclosure harm and establish absolute prohibitions on agency disclosure; others leave agencies with some discretion as to whether to disclose certain information, but such administrative discretion generally is exercised independently of the FOIA.[19] (See the discussion of Exemption 3, above.) Therefore, agencies ordinarily do not make discretionary disclosure under the FOIA of information that falls within the scope of Exemption 3.[20]

Exemption 4 of the FOIA protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."[21] For the most part, Exemption 4 protects information implicating private commercial interests that would not ordinarily be the subject of discretionary FOIA disclosure. (See the discussions of Exemption 4, above, and "Reverse" FOIA, below.) Even more significantly, a specific criminal statute, the Trade Secrets Act,[22] prohibits the unauthorized disclosure of most (if not all) of the information falling within Exemption 4; its practical effect is to constrain an agency's ability to make a discretionary disclosure of Exemption 4 information,[23] absent an agency regulation (based upon a

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[16](...continued)
Range of Exemption 3 Statutes" (posted 12/16/03).

[17] See Fed. R. Crim. P. 6(e) (enacted as statute in 1977).

[18] See 13 U.S.C. § 8(b), 9(a) (2000).

[19] See, e.g., Aronson v. IRS, 973 F.2d 962, 966 (1st Cir. 1992).

[20] See, e.g., Ass'n of Retired R.R. Workers v. Railroad Retirement Bd., 830 F.2d 331, 335 (D.C. Cir. 1987) (deciding that FOIA jurisdiction does not extend to exercise of agency disclosure discretion within Exemption 3 statute); see also FOIA Update, Vol. XV, No. 4, at 7 (describing firm limitation imposed on disclosure of "tax return information" under 26 U.S.C.A. § 6103 (2002 & West. Supp. 2006)). But see Palmer v. Derwinski, No. 91-197, slip op. at 3-4 (E.D. Ky. June 10, 1992) (exceptional FOIA case in which court ordered Veterans Administration to disclose existence of certain medical records pursuant to discretionary terms of 38 U.S.C. § 7332(b) (2000)); see also, e.g., Craig v. United States, 131 F.3d 99, 101-07 (2d Cir. 1997) (articulating factors according to which courts make discretionary disclosure determinations for grand jury information) (non-FOIA case).

[21] 5 U.S.C. § 552(b)(4) (2000 & Supp. IV 2004).

[22] 18 U.S.C. § 1905 (2000 & Supp. IV 2004).

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

federal statute) that expressly authorizes disclosure.[24] (See the discussion of this point under "Reverse" FOIA, below.)

Exemptions 6 and 7(C) of the FOIA protect personal privacy interests, in non-law enforcement records[25] and law enforcement records,[26] respectively. As with private commercial information covered by Exemption 4, the personal information protected by Exemptions 6 and 7(C) is not the type of information ordinarily considered appropriate for discretionary FOIA disclosure; with these exemptions, a balancing of public interest considerations is built into the determination of whether the information is exempt in the first place.[27] (See the discussions of this point under Exemption 6, above, and Exemption 7(C), above.)

Moreover, the personal information covered by Exemptions 6 and 7(C) in many cases falls within the protective coverage of the Privacy Act of 1974,[28] which mandates that any such information concerning U.S. citizens and permanent-resident aliens that is maintained in a "system of records"[29] not be disclosed unless that disclosure is permitted under one of the specific exceptions to the Privacy Act's general disclosure prohibition.[30] Inasmuch as the FOIA-disclosure exception in the Privacy Act permits only those disclosures that are "required" under the FOIA,[31] the making of discretionary FOIA disclosures of personal information is fundamentally incompatible with the Privacy Act and, in many instances, is prohibited by

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[24] See Chrysler v. Brown, 441 U.S. 281, 295-96 (1979); see, e.g., St. Mary's Hosp., Inc. v. Harris, 604 F.2d 407, 409-10 (5th Cir. 1979).

[25] 5 U.S.C. § 552(b)(6).

[26] Id. § 552(b)(7)(C).

[27] See NARA v. Favish, 541 U.S. 157, 171 (holding that agency must balance privacy interests of persons affected by disclosure against public interest in disclosure), reh'g denied, 541 U.S. 1057 (2004).

[28] 5 U.S.C. § 552a (2000 & Supp. IV 2004).

[29] Id. § 552a(a)(5).

[30] Id. § 552a(b)(1)-(12).

[31] Id. § 552a(b)(2). But see also Bartel v. FAA, 725 F.2d 1403 (D.C. Cir. 1984) (holding that the exception applies "[o]nly when the agency is faced with a FOIA request," which in practice means that the Privacy Act disclosure prohibition "could turn on the wholly fortuitous circumstance of whether a FOIA request for records has been lodged"), reh'g en banc denied, No. 82-2473 (D.C. Cir. Mar. 23, 1984); FOIA Update, Vol. V, No. 3, at 2 (discussing interplay between FOIA and Privacy Act under Bartel).

it.[32]

With the exception of information that is subject to the disclosure prohibitions accommodated by the above FOIA exemptions, agencies may make discretionary disclosures of any information that is exempt under the FOIA. A prime example is the type of administrative information that can fall within the "low 2" aspect of Exemption 2, which is uniquely designed to shield agencies from sheer administrative burden rather than from any substantive disclosure harm. (See the discussion of Exemption 2, above.) In many instances, especially when the information in question is a portion of a document page not otherwise exempt in its entirety, it is more efficient simply to release the information than to withhold it.[33]

Perhaps the most common examples of information that an agency might disclose as a matter of administrative discretion can be found under Exemption 5, which incorporates discovery privileges that almost always protect only the institutional interests of the agency possessing the information. (See the discussion of Exemption 5, above.) Information that otherwise could be withheld under the deliberative process privilege to protect an agency deliberative process might be disclosed with the passage of time, for example.[34] Some litigation-related records that otherwise might routinely be withheld under Exemption 5's attorney work-product privilege can be discretionarily disclosed if the agency determines that it is appropriate to do so, as this privilege broadly covers practically all information prepared in connection with litigation without any temporal limitation whatsoever. (See the discussion of Exemption 5, Attorney Work-Product Privilege, above.) This is theoretically possible even for information covered by the attorney-client privilege of Exemption 5 as well, but all agencies should be careful to heed the fundamental importance of "these

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[32] See DOD v. FLRA, 964 F.2d 26, 30-31 n.6 (D.C. Cir. 1992) (discussing Privacy Act's limitations on discretionary FOIA disclosure); see also FOIA Update, Vol. V, No. 3, at 2; cf. Crumpton v. United States, 843 F. Supp. 751, 756 (D.D.C. 1994) (holding that disclosure under FOIA of personal information that is not subject to Privacy Act creates no liability under Federal Tort Claims Act (FTCA), due to applicability of FTCA's discretionary function exception), aff'd on other grounds sub nom. Crumpton v. Stone, 59 F.3d 1400 (D.C. Cir. 1995).

[33] See FOIA Update, Vol. V, No. 1, at 11-12 ("FOIA Counselor: The Unique Protection of Exemption 2") (advising agencies not to invoke exemption needlessly); accord Exec. Order No. 13,392, Sec. 1(c) (requiring agencies to "process requests under the FOIA in an efficient and appropriate manner").

[34] See FOIA Update, Vol. 1, No. 1, at 4 (identifying "age" of document of document as something logically taken into account in FOIA decisionmaking).

privileges and the sound policies underlying them."[35]

The potential held by other FOIA exemptions for discretionary disclosure necessarily varies from exemption to exemption -- but in all cases agencies should remember that any such action should be taken, as stated in Attorney General Ashcroft's FOIA Memorandum, "only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information."[36]

For purposes of any discretionary disclosure that an agency considers, it also may be remembered that the FOIA requires agencies to focus on individual portions of records in connection with the applicability of all exemptions of the Act and to disclose all individual, "reasonably segregable" record portions that are not covered by an exemption.[37] (See the discussions of this issue under Procedural Requirements, "Reasonably Segregable" Obligation, above, and Litigation Considerations, "Reasonably Segregable" Requirements, below.) The satisfaction of this important statutory requirement sometimes involves an onerous delineation process, one that can lend itself to the making of discretionary disclosures, particularly at the

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[35] Attorney General Ashcroft's FOIA Memorandum, reprinted in *FOIA Post* (posted 10/15/01).

[36] Id.; see also Exec. Order No. 13,392, Sec. 4(a) (procedural directive speaking of Attorney General's authority regarding "release of public information").

[37] 5 U.S.C. § 552(b) (sentence immediately following exemptions); see also, e.g., Trans-Pac. Policing Agreement v. U.S. Customs Serv., 177 F.3d 1022, 1028 (D.C. Cir. 1999) (holding that district courts have affirmative duty to consider issue of segregability sua sponte even if issue has not been specifically raised by plaintiff); Kimberlin v. Dep't of Justice, 139 F.3d 944, 946, 949-51 (D.C. Cir. 1998) (holding that district court erred in approving agency's withholding of entire documents without making specific finding on segregability); PHE, Inc. v. Dep't of Justice, 983 F.2d 248, 252 (D.C. Cir. 1993) (holding that both agency and court must determine whether any nonexempt information can be segregated from exempt information and released); Hronek v. DEA, 16 F. Supp. 2d 1260, 1270 (D. Or. 1998) (making extensive finding on segregability and stating that "[b]lanket explanations . . . do not meet FOIA's requirements and do not permit the court to make the necessary findings"); Steinberg v. U.S. Dep't of Justice, 179 F.R.D. 357, 364 (D.D.C. 1998) (requiring agency to submit documents for in camera review of segregability where "substantial segments of material -- several consecutive paragraphs or pages" -- were withheld "based on assurances that the entirety of each redaction would identify a third-party [sic] with a privacy interest"); Brooks v. IRS, No. CV-F-96-6284, 1997 WL 842415 at *2 (E.D. Cal. Nov. 19, 1997) ("The court may not simply approve the withholding of an entire document without entering a finding on segregability.").

margins of FOIA exemption applicability.[38]

When an agency considers making a discretionary disclosure of exempt information under the FOIA, it may do so without undue concern that in exercising its administrative discretion with respect to particular information it is impairing its ability to invoke applicable FOIA exemptions for any arguably similar information in the future. Indeed, in the leading judicial pronouncement on this point, Mobil Oil Corp. v. EPA,[39] a FOIA requester argued that by making a discretionary disclosure of certain records that could have been withheld under Exemption 5 the agency had waived its right to invoke that exemption for a group of "related" records that the requester sought.[40] In soundly rejecting such a waiver argument, however, the Court of Appeals for the Ninth Circuit surveyed the law of waiver under the FOIA and found "no case . . . in which the release of certain documents waived the exemption as to other documents. On the contrary, [courts] generally have found that the release of certain documents waives FOIA exemptions only for those documents released."[41]

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

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[38] See, e.g., Army Times Publ'g Co. v. U.S. Dep't of the Air Force, 998 F.2d 1067, 1071 (D.C. Cir. 1993) (emphasizing significance of segregation requirement in connection with deliberative process privilege under Exemption 5); Wightman v. ATF, 755 F.2d 979, 983 (1st Cir. 1985) (finding that "detailed process of segregation" was not unreasonable for request involving thirty-six pages).

[39] 879 F.2d 698 (9th Cir. 1989).

[40] Id. at 700.

[41] Id. at 701; see Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) ("[D]isclosure of a similar type of information in a different case does not mean that the agency must make its disclosure in every case."); Stein v. U.S. Dep't of Justice, 662 F.2d 1245, 1259 (7th Cir. 1981) (holding that exercise of discretion should waive no right to withhold records of "similar nature"); Schiller v. NLRB, No. 87-1176, slip op. at 7 (D.D.C. July 10, 1990) ("Discretionary release of a document pertains to that document alone, regardless of whether similar documents exist."), rev'd on other grounds, 964 F.2d 1205 (D.C. Cir. 1992); see also, e.g., U.S. Student Ass'n v. CIA, 620 F. Supp. 565, 571 (D.D.C. 1985) (rejecting waiver through prior disclosure, except as to "duplicate" information); Dow, Lohnes & Albertson v. Presidential Comm'n on Broad. to Cuba, 624 F. Supp. 572, 578 (D.D.C. 1984) (same); cf. Silber v. U.S. Dep't of Justice, No. 91-876, transcript at 18 (D.D.C. Aug. 13, 1992) (bench order) (reasoning that no waiver would be found even if it were to be established that other comparable documents had been disclosed).

> Implying such a waiver could tend to inhibit agencies from making any disclosures other than those explicitly required by law because voluntary release of documents exempt from disclosure requirements would expose other documents [of a related nature] to risk of disclosure. An agency would have an incentive to refuse to release all exempt documents if it wished to retain an exemption for any documents . . . . [R]eadily finding waiver of confidentiality for exempt documents would tend to thwart the [FOIA's] underlying statutory purpose, which is to implement a policy of broad disclosure of government records.[42]

In fact, this rule was presaged by the Court of Appeals for the District of Columbia Circuit many years ago, when it observed:

> Surely this is an important consideration. The FOIA should not be construed so as to put the federal bureaucracy in a defensive or hostile position with respect to the Act's spirit of open government and liberal disclosure of information.[43]

As another court phrased it: "A contrary rule would create an incentive against voluntary disclosure of information."[44]

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[42] 879 F.2d at 701; see also Army Times, 998 F.2d at 1068 (articulating general principle of no waiver of exemption simply because agency released "information similar to that requested" in past); Halkin v. Helms, 598 F.2d 1, 9 (D.C. Cir. 1978) ("The government is not estopped from concluding in one case that disclosure is permissible while in another case it is not.").

[43] Nationwide Bldg. Maintenance, Inc. v. Sampson, 559 F.2d 704, 712 n.34 (D.C. Cir. 1977).

[44] Mehl v. EPA, 797 F. Supp. 43, 47 (D.D.C. 1992); see also Military Audit Project v. Casey, 656 F.2d 724, 754 (D.C. Cir. 1981) (reasoning that an agency should not be penalized for declassifying and releasing documents during litigation; otherwise, there would be "a disincentive for an agency to reappraise its position and, when appropriate, release documents previously withheld"); Greenberg v. U.S. Dep't of Treasury, 10 F. Supp. 2d 3, 23-24 (D.D.C. 1998) ("Penalizing agencies by holding that they waive their exhaustion defense if they make a discretionary document release after the time for an administrative appeal had expired would not advance the underlying purpose of the FOIA -- the broadest possible responsible disclosure of government documents."); Shewchun v. INS, No. 95-1920, slip op. at 8 (D.D.C. Dec. 10, 1995) (to find agency bad faith after agency conducted new search and released more information "would create a disincentive for agencies to conduct reviews of their initial searches"), summary affirmance granted, No. 97-5044, 1997 WL 404711 (D.C. Cir. June 5, 1997); Berg v. U.S. Dep't of Energy, No. 94-0488, slip op. at 8 (D.D.C. Nov. 7, 1994) (stating that release of information after initial search does not prove inadequacy of search and that to hold otherwise would end "laudable agency practice of

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By the same token, moreover, in cases in which discretionary disclosures are made by agencies, courts have found that they do not constitute a basis for awarding attorneys fees under the Act -- especially insofar as they involve no "court-ordered" relief.[45] Agencies may make discretionary

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[44](...continued)
updating and reconsidering the release of information after the completion of the initial FOIA search"); Gilmore v. NSA, No. 92-3646, 1993 U.S. Dist. LEXIS 22027, at *29 (N.D. Cal. May 3, 1993) (following Military Audit and declining to penalize agency), aff'd on other grounds, 76 F.3d 386 (9th Cir. 1995) (unpublished table decision); Stone v. FBI, 727 F. Supp. 662, 666 (D.D.C. 1990) (reasoning that agencies should be free to make "voluntary" disclosures without concern that they "could come back to haunt" them in other cases); cf. Pub. Citizen v. Dep't of State, 11 F.3d 198, 203 (D.C. Cir. 1993) (holding that agency should not be required to disclose "related materials" where "to do so would give the Government a strong disincentive ever to provide its citizenry with briefings of any kind on sensitive topics"). But see Billington v. U.S. Dep't of Justice, 11 F. Supp. 2d 45, 59 (D.D.C. 1998) (citing Bonner v. Dep't of State, 928 F.2d 1148, 1151 (D.C. Cir. 1991), for the proposition that "[w]hile a full release of documents previously withheld does not demonstrate bad faith, doubt may be cast on the agency's original exemption claim when the information in question is found releasable within two years" and that a district court in such a case must accordingly "examine closely the initial exemption claims"), summary judgment granted in pertinent part, 69 F. Supp. 2d 128, 135 (D.D.C. 1999), aff'd in part, vacated in part & remanded on other grounds, 233 F.3d 581 (D.C. Cir. 2000).

[45] Davis v. Dep't of Justice, 460 F.3d 92, 105-06 (D.C. Cir. 2006) (applying Oil, Chem. & Atomic Workers, and rejecting requester's claim for attorneys fees as there had been no finding on merits for requester); Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Dep't of Energy, 288 F.3d 452, 454-55 (D.C. Cir. 2002) (applying Supreme Court precedent, Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 603 (2001), to hold that "for plaintiffs in FOIA actions to become eligible for an award of attorney's fees, they must have 'been awarded some relief by [a] court'"); see, e.g., Lovell v. Alderete, 630 F.2d 428, 432 & n.4 (5th Cir. 1980) (alternative holding) ("[The] Government's compliance with [plaintiff's] request was not caused mainly by the institution of the suit, but rather was also affected by a change in the United States Attorney General's [May 5, 1977] guidelines concerning disclosure of exempted materials."); Lissner v. U.S. Customs Serv., No. 98-7438, slip op. at 7 (C.D. Cal. Aug. 19, 1999) (refusing to award attorney fees because such an award would punish the agency "for its disclosure of information it believed was exempt [and would] . . . lead to the undesirable result that agencies would simply entrench themselves in their original positions, for fear that releasing subsequent documents would subject them to attorney fees liability"), rev'd on other grounds, 241 F.3d 1220 (9th Cir. 2001); cf. Bubar v. FBI, 3 Gov't Disclosure Serv. (P-H) ¶ 83,218, at 89,930-31 (D.D.C. June 13, 1983) (declining (continued...)

dis-closures of exempt information, at any stage of the FOIA administrative or litigative process, without concern for such consequences.[46] In fact, one court had occasion to express this principle in broad terms:

> Were the courts to construe disclosure of a document as an agency's concession of wrongful withholding, . . . agencies would be forced to either never disclose a document once withheld or risk being assessed fees. This result would frustrate the policy of encouraging disclosure that prompted enactment of the FOIA and its amendments. . . . Penalizing an agency for disclosure at any stage of the proceedings is simply not in the spirit of the FOIA.[47]

Agencies should be mindful, though, that these principles apply to true discretionary disclosures made under the FOIA -- which should be made available, if at all, to anyone -- as distinguished from any "selective" disclosure made more narrowly outside the realm of the FOIA.[48] Such non-FOIA disclosures can lead to more difficult waiver questions.

Waiver

Sometimes when a FOIA exemption is being invoked, a further inquiry must be undertaken to determine whether the applicability of the exemption has been waived through some prior disclosure, or perhaps even as the result of an express authorization from the party or parties affected by the disclosure. Resolution of this inquiry requires a careful analysis of the specific nature of, and circumstances surrounding, the prior disclosure

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[45](...continued)
to award attorney fees when disclosure was caused by administrative reprocessing of request "pursuant to newly-adopted procedures").

[46] See Nationwide, 559 F.2d at 712 n.34 ("Certainly where the government can show that information disclosed . . . was nonetheless exempt from the FOIA a plaintiff should not be awarded attorney fees."); cf. Pub. Law Educ. Inst. v. U.S. Dep't of Justice, 744 F.2d 181, 183-84 (D.C. Cir. 1984) (denying attorney fees award when agency disclosed requested records discretionarily in related proceeding).

[47] Am. Commercial Barge Lines v. NLRB, 758 F.2d 1109, 1112 (6th Cir. 1985).

[48] See, e.g., North Dakota ex rel. Olson v. Andrus, 581 F.2d 177, 182 (8th Cir. 1978) (finding waiver when agency made "selective" disclosure to one interested party only); Comm. to Bridge the Gap v. Dep't of Energy, No. 90-3568, transcript at 5 (C.D. Cal. Oct. 11, 1991) (bench order) (finding waiver when agency gave preferential treatment to interested party; such action is "offensive" to FOIA and "fosters precisely the distrust of government the FOIA was intended to obviate"), aff'd on other grounds, 10 F.3d 808 (9th Cir. 1993) (unpublished table decision).

and may even vary according to the particular exemption involved.[49]

There are some well-established rules for determining whether an agency has waived its right to use FOIA exemptions with regard to requested information.[50] As a general rule, the government may not rely on an otherwise valid exemption to justify withholding information that officially has entered the public domain.[51] The Court of Appeals for the District of Columbia Circuit has adopted this rule because ordinarily an "exemption can serve no purpose once information . . . becomes public."[52] To have been "officially" released, however, information generally must have been disclosed under circumstances in which an authoritative government official allowed the information to be made public.[53] Further, courts have

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[49] See FOIA Update, Vol. IV, No. 2, at 6 (advising of fundamental approach to waiver questions by agencies and courts); see also Mobil Oil Corp. v. EPA, 879 F.2d 698, 700 (9th Cir. 1989) ("The inquiry into whether a specific disclosure constitutes a waiver is fact specific."); Carson v. U.S. Dep't of Justice, 631 F.2d 1008, 1016 n.30 (D.C. Cir. 1980) ("[T]he extent to which prior agency disclosure may constitute a waiver of the FOIA exemptions must depend both on the circumstances of prior disclosure and on the particular exemptions claimed.").

[50] See Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990) (explaining criteria for official agency acknowledgment of publicly disclosed information (citing Afshar v. Dep't of State, 702 F.2d 1125, 1133 (D.C. Cir. 1983))); James Madison Project v. NARA, No. 98-2737, slip op. at 7 n.5 (D.D.C. Mar. 5, 2002) (collecting cases that describe elements of waiver), summary affirmance granted in pertinent part & remanded in part, No. 02-5089, 2002 WL 31296220 (D.C. Cir. Oct. 11, 2002).

[51] Students Against Genocide v. Dep't of State, 257 F.3d 828, 836 (D.C. Cir. 2001) (emphasizing that "[f]or the public domain doctrine to apply, the specific information sought must have already been 'disclosed and preserved in a permanent public record'" (citing Cottone v. Reno, 193 F.3d 550, 554-55 (D.C. Cir. 1999))); Callahan v. Executive Office for U.S. Attorneys, No. 98-1826, slip op. at 3 (D.D.C. Apr. 18, 2002) (ordering release of court-filed documents on basis that they already were in public domain).

[52] Cottone, 193 F.3d at 555 (noting also that a court "must be confident that the information sought is truly public and that the requester receives no more than what is publicly available"). But cf. Fitzgibbon, 911 F.2d at 766 (suggesting that the "'fact that [national security] information resides in the public domain does not eliminate the possibility that further disclosures can cause harm to intelligence sources, methods and operations'"); see also Edmonds v. FBI, 272 F. Supp. 2d 35, 48 (D.D.C. 2003) (same).

[53] See, e.g., Wolf v. CIA, 473 F. 3d 370, 379-380 (D.C. Cir. 2007) (holding that former CIA director's testimony before congressional subcommittee, which included reading from dispatch mentioning individual who was

(continued...)

consistently held that it is the FOIA plaintiff who bears the burden of demonstrating that the withheld information has been officially disclosed.[54]

With regard to prior disclosure, courts have consistently held that the prior public disclosure must "match" the exempt information in question; otherwise, the difference between the two might itself be a sufficient basis for reaching the conclusion that no waiver has occurred.[55] For example, if

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[53](...continued)
subject of request, waived CIA's ability to refuse to confirm or deny existence of responsive records pertaining to that individual); Myles-Pirzada v. Dep't of the Army, No. 91-1080, slip op. at 6 (D.D.C. Nov. 23, 1992) (finding that privilege was waived when agency official read report to requester); see also Frugone v. CIA, 169 F.3d 772, 774 (D.C. Cir. 1999) (ruling that disclosure made by employee from agency other than one from which information was sought is not official and thus does not constitute waiver).

[54] See, e.g., Pub. Citizen v. Dep't of State, 276 F.3d 634, 645 (D.C. Cir. 2002) (reaffirming that burden is on requester to establish that specific record in public domain duplicates that being withheld (citing Afshar, 702 F.2d at 1132)); Deglace v. DEA, No. 05-2276, 2007 WL 521896, at *2 (D.D.C. Feb. 15, 2007) (finding no waiver when plaintiff produced circumstantial evidence that records have entered the public domain, but not the records themselves) (appeal pending); Bronx Defenders v. DHS, No. 04 CV 8576, 2005 WL3462725, at *3 (S.D.N.Y. Dec. 19, 2005) (finding that release of excerpts from document does not replicate whole document and create waiver); Shores v. FBI, 185 F. Supp. 2d 77, 86-87 (D.D.C. 2002) (finding no waiver when plaintiff failed to demonstrate that specific information had entered public domain). But see Natural Res. Def. Council v. DOD, 442 F. Supp. 2d 857, 865-66 (C.D. Cal. Mar. 21, 2006) (rejecting government's argument that records were "leaked" to lobbying firm in light of facts that agency failed "to take affirmative steps to inhibit . . . further dissemination" and agency staff discussed content of records with firm's representatives).

[55] See, e.g., Wolf, 473 F. 3d at 379-380 (distinguishing official acknowledgment of the record's existence from official acknowledgment of the record's content and emphasizing that content needed to have been entered into public domain in order to be considered waived); Heeney v. FDA, 7 F. App'x 770, 772 (9th Cir. 2001) (concluding that "[b]ecause . . . FDA's previous disclosures involved unrelated files . . . the information [at issue] was properly withheld"); Nowak v. IRS, No. 98-56656, 2000 WL 60067, at *2 (9th Cir. Jan. 21, 2000) (determining that in order for FOIA plaintiff to establish waiver of FOIA exemption, he must be able to establish that information in his possession originated from same documents as those released in prior disclosure); Davis v. U.S. Dep't of Justice, 968 F.2d 1276, 1280 (D.C. Cir. 1992) (finding no waiver as plaintiff failed to demonstrate that "exact portions" of records sought are in public domain); Fitzgibbon, 911 F.2d at 766 (finding no waiver when withheld information "pertain[s] to a time period later than the date of the publicly documented information"); Afshar, 702
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the information that already is available to the public is less specific than that at issue, the agency still may properly invoke an exemption to protect the more detailed information.[56] Likewise, the fact that an agency has re-

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[55](...continued)
F.2d at 1132 (finding that "withheld information is in some material respect different" from that which requester claimed had been released previously); Hertzberg v. Veneman, 273 F. Supp. 2d 67, 81-82 (D.D.C. 2003) (holding that "selective" disclosure of some withheld material does not waive use of exemptions to protect similar, but undisclosed, information); Enviro Tech Int'l, Inc. v. EPA, No. 02-C-4650, slip op. at 15 (N.D. Ill. Mar. 11, 2003) (holding that agency "summarization" disclosure of withheld information could waive use of exemptions only for limited information contained within summary, not for all related records), aff'd, 371 F.3d 370 (7th Cir. 2004); Starkey v. U.S. Dep't of the Interior, 238 F. Supp. 2d 1188, 1193 (S.D. Cal. 2002) (finding waiver of exemptions for two documents filed with, and publicly available through, local county government); Assassination Archives & Research Ctr. v. CIA, 177 F. Supp. 2d 1, 10 (D.D.C. 2001) (holding that plaintiff had not demonstrated that information at issue matched documents previously disclosed or released by CIA under JFK Act), aff'd, 334 F.3d 55 (D.C. Cir. 2003); Nat'l Sec. Archive Fund, Inc. v. CIA, No. 99-1160, slip op. at 14 (D.D.C. July 31, 2000) (reiterating that CIA's prior release of several declassified biographies of world leaders did not compel it to disclose whether it maintained other information on those world leaders); Pease v. U.S. Dep't of Interior, No. 1:99CV113, slip op. at 7 (D. Vt. Sept. 11, 1999) (disclosing similar records prior to enactment of Exemption 3 statute does not result in waiver of current records covered by that statute); Kay v. FCC, 867 F. Supp. 11, 20-21 (D.D.C. 1994) (inadvertent disclosure of some informants' names does not waive Exemption 7(A) protection for information about other informants); cf. Herrick v. Garvey, 200 F. Supp. 2d 1321, 1329 (D. Wyo. Dec. 12, 2000) (finding no waiver where corporation reversed its earlier decision to disclose materials and disputed items had not been released by FAA previously), aff'd, 298 F.3d 1184 (10th Cir. 2002). But see Comm. to Bridge the Gap v. Dep't of Energy, No. 90-3568, transcript at 2-5 (C.D. Cal. Oct. 11, 1991) (bench order) (distinguishing Mobil Oil and finding deliberative process privilege waived for draft order by prior voluntary disclosure of earlier draft order to interested party; agency ordered to release earlier draft order and all subsequent revisions), aff'd on other grounds, 10 F.3d 808 (9th Cir. 1993) (unpublished table decision).

[56] See Edmonds v. FBI, 272 F. Supp. 2d 35, 49 (D.D.C. 2003) (holding that because the withheld information is far more detailed than that in the public domain, "its release could provide a composite picture, or at least additional information, that would be harmful to national security"); Kelly v. CIA, No. 00-2498, slip op. at 12 (D.D.C. Aug. 8, 2002) (holding that agency had not waived use of exemptions, because prior public disclosure was less specific and detailed than information withheld); Heeney v. FDA, No. 97-5461, slip op. at 19 (C.D. Cal. Mar. 16, 1999) (holding that mere fact that withheld documents may contain information previously released is insuffi-
(continued...)

leased to the public general information concerning a subject does not preclude the agency from invoking an exemption to protect the more specific information concerning that same subject.[57] Indeed, courts have consistently "refused to find that the discretionary disclosure of a document effectuates a waiver of other related documents."[58]

Furthermore, general or limited public discussion of a subject by agency officials usually does not lead to waiver with respect to specific information or records.[59] Courts ordinarily do not penalize agency officials for

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[56](...continued)
cient because context in which documents were previously released may differ from context in which documents are currently being withheld), aff'd, 7 F. App'x 770 (9th Cir. 2001); Baltimore Sun Co. v. U.S. Customs Serv., No. 97-1191 (D. Md. Nov. 21, 1997) (ruling that public disclosure of "a poor quality photograph" did not waive the agency's ability to protect a clear copy where there was greater sensitivity in the latter); see also Cottone, 193 F.3d at 555-56 (finding waiver where plaintiff had identified specific tapes in public domain).

[57] See Assassination Archives & Research Ctr. v. CIA, 334 F.3d 55, 61 (D.C. Cir. 2003) (holding that previous generalized disclosures did not result in waiver, because they "did not precisely track the records sought to be released"); Coastal Delivery Corp. v. U.S. Customs Serv., 272 F. Supp. 2d 958, 966 (C.D. Cal. 2003) (rejecting the requester's waiver argument because the withheld information was "merely the same category of information, not the exact information" as that previously disclosed); Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Representative, 237 F. Supp. 2d 17, 23 (D.D.C. 2002) (holding that public availability of "similar but not identical information" does not lead to waiver for all information on same subject).

[58] Enviro Tech, No. 02-C-4650, slip op. at 15 (N.D. Ill. Mar. 11, 2003), aff'd, 371 F.3d 370 (7th Cir. 2004); see also Wood v. FBI, 312 F. Supp. 2d 328, 344 (D. Conn. 2004) (ruling that agency official could not possibly have waived exemptions applicable to memorandum that he had not even seen), aff'd in pertinent part, 432 F.3d 78 (2d Cir. 2005); see also Riquelme v. CIA, 453 F. Supp. 2d 103, 115 (D.D.C. 2006) (holding that declassification of records pertaining to Chilean and Argentinian involvement in regional intelligence initiative does not result in waiver as to possible Paraguayan involvement in same intelligence initiative).

[59] See, e.g., Students Against Genocide, 257 F.3d at 836 (holding that government did not waive its right to "invoke . . . FOIA exemptions by displaying the withheld photographs to the delegates of . . . foreign governments . . . [because they] were not released to the general public"); Kimberlin v. Dep't of Justice, 139 F.3d 944, 949 (D.C. Cir. 1998) (holding that public acknowledgment of investigation and "vague reference to its conclusion" does not waive use of Exemption 7(C) to protect "details of the investigation"); Goodman v. U.S. Dep't of Labor, No. 01-515, 2001 WL 34039487, at *4
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sharing information concerning government activities with the public in general terms.[60]

Under some circumstances, though, an agency certainly can waive the applicability of a FOIA exemption through the public discussion of information by agency official.[61] In this context, one district court held that

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[59](...continued)
(D. Or. Dec. 21, 2001) (finding no waiver, because agency official was merely describing disputed documents, rather than releasing them); Billington v. Dep't of Justice, 11 F. Supp. 2d 45, 55 (D.D.C. 1999) (finding no waiver where requester failed to show that "exact activities" claimed to be in public domain "have been disclosed in these documents"), aff'd on other grounds, 233 F.3d 581 (D.C. Cir. 2000); Rothschild v. Dep't of Energy, 6 F. Supp. 2d 38, 40-41 (D.D.C. 1998) (finding no waiver where requester failed to specify how public discussion of particular economic theory revealed agency deliberative process with respect to long-term, wide-ranging study); Marriott Employees' Fed. Credit Union v. Nat'l Credit Union Admin., No. 96-478-A, 1996 WL 33497625, at *2 (E.D. Va. Dec. 24, 1996) (finding no waiver because "[a]lthough the existence and general subject of the investigations is known to the public, there is no evidence in the record indicating that specific information concerning these investigations has been shared with unauthorized parties"); Blazar v. OMB, No. 92-2719, slip op. at 11-12 (D.D.C. Apr. 15, 1994) (following Public Citizen and finding no waiver of Exemptions 1 and 3 when published autobiography refers to information sought but provides no more than general outline of it). But see Wash. Post Co. v. U.S. Dep't of the Air Force, 617 F. Supp. 602, 605 (D.D.C. 1985) (disclosure of document's conclusions waived privilege for body of document).

[60] See, e.g., Pub. Citizen v. Dep't of State, 11 F.3d 198, 201 (D.C. Cir. 1993) (finding that an "agency official does not waive FOIA exemption 1 by publicly discussing the general subject matter of documents which are otherwise properly exempt from disclosure"); Dow Jones & Co. v. U.S. Dep't of Justice, 880 F. Supp. 145, 151 (S.D.N.Y. 1995) (holding that agency's "limited, general and cursory discussions" of investigative subject matter during press conference did not waive Exemption 7(A)), vacated on other grounds, 907 F. Supp. 79 (S.D.N.Y. 1995); see also Military Audit Project v. Casey, 656 F.2d 724, 754 (D.C. Cir. 1981) (resisting any rule that would be "a disincentive for an agency to reappraise its position and, when appropriate, release documents previously withheld"); Greenberg, 10 F. Supp. 2d at 23-24 (resisting likewise any rule that "would not advance the underlying purpose of the FOIA -- the broadest possible responsible disclosure of government documents.").

[61] See, e.g., Wolf, 473 F. 3d at 379-380 (finding waiver of "Glomar" response where agency head had discussed subject of request in congressional testimony); Myles-Pirzada, No. 91-1080, slip op. at 6 (D.D.C. Nov. 23, 1992) (finding waiver when agency official read report to requester over
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information that was the subject of an "off-the-record" disclosure to the press by an agency official cannot be protected under Exemption 1.[62] Such waiver can occur even in a telephone conversation,[63] though the District Court for the District of Columbia has limited the waiver to the information actually made public.[64] In one case, for example, it was held that an agency official's oral disclosure of only the conclusion reached in a predecisional document "does not, without more, waive the [deliberative process] privilege."[65] In another, an agency disclosure to a small group of nongovernmental personnel, with no copies permitted, was held not to inhibit agency decisionmaking, so the deliberative process privilege was not waived.[66] Even in the context of civil litigation, a court has held that the discussion of classified information with a plaintiff's uncleared counsel did not amount to a waiver.[67]

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[61](...continued)
telephone); Comm. to Bridge the Gap, No. 90-3568, transcript at 3-5 (C.D. Cal. Sept. 9, 1991) (bench order) (ruling that agency waived deliberative process privilege by voluntarily providing draft order to interested party).

[62] Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 569 (S.D.N.Y. 1989), motion for reargument denied, No. 87-Civ-1115, slip op. at 1-3 (S.D.N.Y. May 23, 1990); see also Grand Cent. P'ship v. Cuomo, 166 F.3d 473, 484 (2d Cir. 1999) (refusing to extend Exemption 5 protection to "[a] letter [which] appear[ed] to report matters that were aired at a public hearing"); Shell Oil Co. v. IRS, 772 F. Supp. 202, 211 (D. Del. 1991) (finding waiver when agency employee read aloud entire draft document at public meeting).

[63] See, e.g., Catchpole v. Dep't of Transp., No. 97-8058, slip op. at 5-7 (11th Cir. Feb. 25, 1998) (remanding to determine if official read memorandum to requester over telephone, thereby waiving privilege).

[64] See Myles-Pirzada, No. 91-1080, slip op. at 6 (D.D.C. Nov. 23, 1992).

[65] Morrison v. U.S. Dep't of Justice, No. 87-3394, 1988 WL 47662, at *1 (D.D.C. Apr. 29, 1988).

[66] Dow, Lohnes & Albertson v. Presidential Comm'n on Broad. to Cuba, 624 F. Supp. 572, 577-78 (D.D.C. 1984); see also Am. Lawyer Media, Inc. v. SEC, No. 01-1967, 2002 U.S. Dist. LEXIS 16940, at *4 (D.D.C. Sept. 6, 2002) (holding that agency did not waive right to withhold portions of training manual by permitting requester to review manual during public training conference); Brinderson Constructors, Inc. v. Army Corps of Eng'rs, No. 85-0905, 1986 WL 293230, at *5 (D.D.C. June 11, 1986) (requester's participation in agency enterprise did not entitle requester to all related documents).

[67] Edmonds v. U.S. Dep't of Justice, 405 F. Supp. 2d 23, 31 (D.D.C. Dec. 19, 2005) (distinguishing partial disclosure to plaintiff's counsel during meeting, on one hand, from making entire compendium of information used
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DISCRETIONARY DISCLOSURE AND WAIVER

Further, it is important to note that "[t]he fact that [a FOIA requester] can guess which names have been deleted from the released documents does not act as a waiver to disclosure."[68] This holds true even when a requester has personal knowledge of the facts, such as by observing or participating in the events detailed in government records.[69] Indeed, even if a requester could piece together information from different sources and potentially develop a complete picture of withheld facts, that does not compel the waiver of applicable exemptions.[70] In sum, a FOIA plaintiff's personal knowledge of information contained within a government record does not alone mean that an agency has made (or should make) any official disclosure to the public.[71]

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[67](...continued)
by FBI publicly available, on another hand).

[68] Valencia-Lucena v. DEA, No. 99-0633, slip op. at 7 (D.D.C. Feb. 8, 2000) (citing Weisberg v. U.S. Dep't of Justice, 745 F.2d 1476, 1491 (D.C. Cir. 1984)); see also LaRouche v. U.S. Dep't of Justice, No. 90-2753, slip op. at 15-16 (D.D.C. July 5, 2001) (holding that mere fact that plaintiff purported that he was able to identify witness names from other sources did not diminish privacy interests held); LaRouche v. U.S. Dep't of Justice, No. 90-2753, slip op. at 11-12 (D.D.C. Nov. 17, 2000) (finding that Exemption 7(D) protection for confidential sources who provided information was not waived just because plaintiff might well identify sources from documents disclosed by different agency).

[69] See, e.g., Rubis v. DEA, No. 01-1132, slip op. at 7 (D.D.C. Sept. 30, 2002) (reaffirming that exemption is not waived by fact that plaintiff might well already know identities of individuals); Tanks v. Huff, No. 95-568, 1996 U.S. Dist. LEXIS 7266, at *10 (D.D.C. May 28, 1996) (holding that requester's knowledge of identities of informants who testified against him does not affect ability of agency to invoke exemption).

[70] See, e.g., Whalen v. U.S. Marine Corps, 407 F. Supp. 2d 54, 60 (D.D.C. 2005) (holding that government did not waive Exemptions 1 and 3 merely because plaintiff might well surmise what redacted information was by using knowledge obtained from nonfiction books written by private authors); see also Gilda Indus., Inc. v. U.S. Customs & Border Prot. Bureau, 457 F. Supp. 2d 6, 12 (D.D.C. 2006) (finding no waiver even though requester could compare two publicly available lists and deduce correlation bearing upon withheld information; information therefore was properly protected under Exemption 4).

[71] See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 770 (1989) (holding that "the identity of the requesting party has no bearing on the merits of his or her FOIA request"); see also FOIA Update, Vol. X, No. 2, at 3-6 ("OIP Guidance: Privacy Protection Under the Supreme Court's Reporters Committee Decision") (advising that "a requester's particular knowledge of the information in question or its underlying
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It also should be noted that courts are generally sympathetic to the necessities of effective agency functioning when confronted with an issue of waiver.[72] For example, courts have recognized that agencies ordinarily

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[71](...continued)
circumstances (perhaps due to his relationship with the interested party, for example) should not be taken into account"); accord NARA v. Favish, 541 U.S. 157 (reiterating that "disclosure does not depend on the identity of the requester," and reminding that information subject to disclosure "belongs to all"), reh'g denied, 541 U.S. 1057 (2004); see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (observing that well-known maxim under FOIA that "release to one is release to all" was firmly reinforced by Supreme Court in its Favish decision).

[72] See, e.g., Isley v. Executive Office for U.S. Attorneys, No. 98-5098, 1999 WL 1021934, at *4 (D.C. Cir. Oct. 21, 1999) (finding that witnesses' testimony at trial does not waive the "government's right to withhold specific information about matters as to which [the witnesses have] testified" at trial); Schiffer v. FBI, 78 F.3d 1405, 1410-11 (9th Cir. 1996) (finding no waiver of FBI's right to invoke Exemption 7(C) for information made public during related civil action); Massey v. FBI, 3 F.3d 620, 624 (2d Cir. 1993) (ruling that individuals did not waive "strong privacy interests in government documents containing information about them even where the information may have been public at one time"); Cooper v. Dep't of the Navy, 558 F.2d 274, 278 (5th Cir. 1977) (finding that prior disclosure of aircraft accident investigation report to aircraft manufacturer did not constitute waiver); Summers v. U.S. Dep't of Justice, No. 98-1837, slip op. at 15-16 (D.D.C. Apr. 13, 2004) (determining that agency did not waive applicability of Exemption 7(C) by disclosure of third-party names from separate documents); Hornbostel v. U.S. Dep't of the Interior, 305 F. Supp. 2d 21, 28-29 (D.D.C. 2003) (holding that defendant's failure to respond to request within statutory time limit certainly does not waive exemptions and "has little substantive effect"); Dayton Newspapers, Inc. v. VA, 257 F. Supp. 2d 988, 1010 (S.D. Ohio Jan. 23, 2003) (noting that modern information technology has altered understanding of personal privacy, and observing generally that requesters "cannot claim that private records are no longer private simply because they are accessible through other means"); Nat'l Sec. Archive, No. 99-1160, slip op. at 13 (D.D.C. July 31, 2001) (concluding that disclosure of CIA-produced biographies by other agencies did not "preempt the CIA's ability to withhold [them]"); Doolittle v. U.S. Dep't of Justice, 142 F. Supp. 2d 281, 286 (N.D.N.Y. 2001) (declaring that "the [g]overnment's promise of confidentiality to an informant is intended to apply notwithstanding the type of limited disclosure present here [a sentencing hearing]," and finding that "such disclosure should not constitute a waiver of the [g]overnment's promise to keep the informant's identity confidential"); McGilvra v. Nat'l Transp. Safety Bd., 840 F. Supp. 100, 102 (D. Colo. 1993) (citing Cooper and finding that release of cockpit voice recorder tapes to parties to accident investigation is not "public" disclosure under FOIA); Medera Cmty. Hosp. v. United States, No. 86-542, slip op. at 6-9 (E.D. Cal. June 28, 1988) (finding no waiver
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should be granted special latitude in matters of national security[73] and criminal law enforcement,[74] because of the inherent sensitivity of such activities and information. And in the national security context, this latitude can lead to an especially pragmatic view of what amounts to a waiver by the government,[75] with one appellate court even deciding that the passage of time should properly be considered when determining whether public disclosure of national security information has resulted in waiver.[76]

In the law enforcement context, it has been firmly held that the mere fact that a confidential source testifies at a trial does not waive Exemption 7(D) protection for any source-provided information not actually revealed in public.[77]

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[72](...continued)
where memoranda interpreting agency's regulations were sent to state auditor involved in enforcement proceeding); Erb v. U.S. Dep't of Justice, 572 F. Supp. 954, 956 (W.D. Mich. 1983) (upholding nondisclosure under Exemption 7(A) despite "limited disclosure" of FBI criminal investigative report to defense attorney and state prosecutor).

[73] See Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003) (emphasizing need for deference to agencies in all national security-related matters); Students Against Genocide, 257 F.3d at 835 (reiterating that sharing of classified information with foreign government does not result in waiver); Van Atta v. Def. Intelligence Agency, No. 87-1508, 1988 WL 73856, at *2 (D.D.C. July 6, 1988) (same).

[74] See Neely v. FBI, 208 F.3d 461, 466 (4th Cir. 2000) (holding that "public availability [does not] effect a waiver of the government's right" to invoke Exemption 7(D)); Irons v. FBI, 880 F.2d 1446, 1456-57 (1st Cir. 1989) (en banc) (finding good public policy reasons why public testimony by confidential source should not waive FBI's right to withhold information pursuant to Exemption 7(D)); Garcia v. U.S. Dep't of Justice, 181 F. Supp. 2d 356, 377 (S.D.N.Y. 2002) (finding that inadvertent disclosure of names of confidential sources does not waive government's right to invoke Exemption 7(D)).

[75] See Edmonds, 405 F. Supp. 2d at 29 (finding that even agency's disclosure to plaintiff's counsel at meeting did not amount to affirmative step toward declassification action with regard to information withheld under Exemption 1); Nat'l Sec. Archive v. CIA, No. 99-1160, slip op. at 12-13 (D.D.C. July 31, 2000) (ruling that Exemption 1 can be waived only through official action of CIA, not by disclosure by other agencies or presence of related information in public domain).

[76] Bassiouni v. CIA, 392 F.3d 244, 247 (7th Cir. 2004) (rejecting plaintiff's argument that agency acknowledgment of existence of records fourteen years earlier waived FOIA protection), cert. denied, 545 U.S. 1129 (2005).

[77] See Isley, 1999 WL 1021934, at *4 (finding that the fact that a witness (continued...)

As a sound general rule, agencies making an official disclosure of information outside the executive branch should be able to do so without risking waiver of that information under circumstances in which the agency can demonstrate a legitimate purpose for the disclosure, and is able to establish that the disclosure was made with a restriction on further dissemination.[78] Generally speaking, if an agency is able to establish these two fundamental anti-waiver elements, its later claim of exemption will

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[77](...continued)
testifies "only bars the government from withholding the [witnesses'] testimony itself"); Housley v. DEA, No. 92-16946, 1994 WL 168278, at *2 (9th Cir. May 4, 1994) (fact that some information may have been disclosed at criminal trial does not result in waiver as to other information); see also Jones v. FBI, 41 F.3d 238, 249 (6th Cir. 1994) (Exemption 7(D) "focuses on the source's intent, not the world's knowledge . . . . [H]old[ing] otherwise would discourage sources from cooperating with the FBI because of fear of revelation via FOIA."); Davoudlarian v. Dep't of Justice, No. 93-1787, 1994 WL 423845, at *3 (4th Cir. Aug. 15, 1994) (per curiam) (requester must demonstrate that specific witness statements were disclosed at civil trial in order to show waiver); Parker v. Dep't of Justice, 934 F.2d 375, 379 (D.C. Cir. 1991) (finding that "government agency is not required to disclose the identity of a confidential source or information conveyed to the agency in confidence in a criminal investigation notwithstanding the possibility that the informant may have testified at a public trial"); Larouche v. U.S. Dep't of Justice, No. 90-2753, slip op. at 6 (D.D.C. Aug. 8, 2002) (noting that "[a]lthough the government may not withhold information that is in the public domain, it need not make a wholesale disclosure about an individual just because he is a publicly acknowledged FBI source"); Daniel v. U.S. Dep't of Justice, No. 99-2423, slip op. at 3-4 (D.D.C. Mar. 30, 2001) (finding Exemption 7(D)'s protection not waived regarding previously undisclosed information furnished by witnesses who testified at trial under grant of immunity); Coleman v. FBI, 13 F. Supp. 2d 75, 80 (D.D.C. 1998) (finding that "an individual who testifies at trial does not waive this privacy interest beyond the scope of the trial[;] . . . [to] hold otherwise would discourage essential witness testimony"); cf. Reiter v. DEA, No. 96-0378, 1997 WL 470108, at *6 (D.D.C. Aug. 13, 1997) ("An agency may . . . continue to invoke Exemption 7(D) in the event that the requester learns of the source's identity and the information supplied by him through the source's open court testimony."), aff'd, No. 97-5246, 1998 WL 202247 (D.C. Cir. Apr. 27, 1998).

[78] See FOIA Update, Vol. IV, No. 2, at 6 ("The Effect of Prior Disclosure: Waiver of Exemptions"); see, e.g., Judicial Watch v. USPS, 297 F. Supp. 2d 252, 268 (D.D.C. 2004) (observing that a "disclosure to a third party that promotes the client's trial strategy and is consistent with maintaining secrecy against trial opponents does not waive the privilege"); McSheffrey v. Executive Office for U.S. Attorneys, No. 02-5239, 2003 WL 179840, at *1 (D.C. Cir. Jan. 24, 2003) (affirming that individuals who provided personal information to prison officials during visit with inmate did not waive personal privacy protection).

likely prevail.[79]

By contrast, however, courts do look harshly upon such prior disclosures, particularly seemingly "selective disclosures," that result in unfairness.[80] Indeed, in one case addressing the potential unfairness of selective disclosures, a commercial life insurance company sought access to records maintained by the United States Navy reflecting the name, rank, and duty locations of servicemen stationed at Quantico Marine Corps Base.[81] The district court, while not technically applying the doctrine of waiver, rejected the agency's privacy arguments on the grounds that virtually the same information -- officers' reassignment stations -- had been routinely published in the Navy Times and that the Dep't of Defense had previously disclosed the names and addresses of 1.4 million service members to a politi-

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[79] See Heggestad v. U.S. Dep't of Justice, 182 F. Supp. 2d 1, 12-13 (D.D.C. 2000) (finding no waiver of deliberative process or attorney work-product privileges where information was disclosed to congressman); see, e.g., Rashid v. HHS, No. 98-0898, slip op. at 7 (D.D.C. Mar. 2, 2000) (disclosure of memorandum to expert witnesses in anticipation of their testimony at trial); McGilvra, 840 F. Supp. at 102 (release of cockpit voice recorder tapes to parties in accident investigation); Badhwar v. U.S. Dep't of the Air Force, 629 F. Supp. 478, 481 (D.D.C. 1986) (disclosure to outside person held necessary to assemble report in first place), aff'd in part & remanded in part on other grounds, 829 F.2d 182 (D.C. Cir. 1987); see also FOIA Update, Vol. V, No. 1, at 4 (discussing congressional access to government records under the FOIA); cf. FOIA Update, Vol. IV, No. 2, at 6 (cautioning that "where such a disclosure is made not in furtherance of a legitimate governmental purpose, especially where it is not authorized under agency regulations, courts have been particularly unsympathetic to agencies").

[80] See, e.g., Natural Res. Def. Council v. DOD, 442 F. Supp. 2d 857, 865-66 (C.D. Cal. Mar. 21, 2006) (rejecting agency's leak argument where evidence of selective disclosure and preferential treatment was substantial); North Dakota ex rel. Olson v. Andrus, 581 F.2d 177, 182 (8th Cir. 1978) (finding "selective disclosure" of record to one party in litigation to be "offensive" to FOIA and sufficient to prevent agency's subsequent invocation of Exemption 5 against other party to litigation); Nw. Envtl. Def. Ctr. v. U.S. Forest Serv., No. 91-125, slip op. at 12 (D. Or. Aug. 23, 1991) (magistrate's recommendation) (determining that agency waived deliberative process privilege as to portion of agency report that was discussed with "interested" third party), adopted (D. Or. Feb. 12, 1992); Comm. to Bridge the Gap, No. 90-3568, transcript at 3-5 (C.D. Cal. Sept. 9, 1991) (bench order) (finding waiver of deliberative process privilege for draft order by prior voluntary disclosure of earlier draft order to interested party; selective disclosure is "offensive" to FOIA).

[81] Hopkins v. Dep't of the Navy, No. 84-1868, 1985 WL 17673, at *1 (D.D.C. Feb. 5, 1985).

cal campaign committee.[82]

While "selective" disclosure does not always result in waiver, courts do often consider the overall fairness of the prior disclosure in question. For example, the Court of Appeals for the Fifth Circuit has held that while "selective disclosure" is of concern "with respect to those exemptions that protect the government's interest in non-disclosure of information . . . [that] concern [is] not implicated when a government agency relies on exemption 6 . . . to prevent disclosure of personal information."[83] Courts also expect an agency to adhere to its own policies and regulations concerning the disclosure of information contained within its records systems. Accordingly, an agency's failure to heed its own regulations regarding circulation of internal agency documents has been found sufficient to warrant a finding of waiver.[84] Similarly, an agency's regulation requiring disclosure of the information,[85] an agency's carelessness in permitting access to certain information,[86] and an agency's mistaken disclosure of the contents of a document[87] all have resulted in waiver.[88]

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[82] Id. at *3; see also In re Subpoena Duces Tecum, 738 F.2d 1367, 1371-74 (D.C. Cir. 1984) (voluntary disclosure by private party of information to one agency waived attorney work-product and attorney-client privileges when same information was sought by second agency) (non-FOIA case).

[83] Sherman v. U.S. Dep't of the Army, 244 F.3d 357, 363-64 (5th Cir. 2001) ("only the individual whose informational privacy interests are protected by exemption 6 can effect a waiver of those privacy interests"); accord 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) (emphasizing importance of protecting personal privacy).

[84] Shermco Indus. v. Sec'y of the Air Force, 613 F.2d 1314, 1320 (5th Cir. 1980).

[85] See Johnson v. HHS, No. 88-243-5, slip op. at 10-11 (E.D.N.C. Feb. 7, 1989), aff'd, 905 F.2d 1530 (4th Cir. 1990) (unpublished table decision).

[86] See, e.g., Cooper v. Dep't of the Navy, 594 F.2d 484, 488 (5th Cir. 1978) (finding it "intolerable that such confidential documents should be furnished to one side of a lawsuit and not to the other," but noting that even "an unauthorized filching of the document would not in the normal course operate as a waiver of the [agency's] right to withhold it"); Haddam v. INS, No. 99-3371, slip op. at 5 (D.D.C. Feb. 15, 2001) (holding that INS's mistaken disclosure of document protected by attorney-client privilege to plaintiff's attorney waived that privilege for that document).

[87] See, e.g., Dresser Indus. Valve Operations, Inc. v. EEOC, 2 Gov't Disclosure Serv. (P-H) ¶ 82,197, at 82,575 (W.D. La. Jan. 19, 1982).

[88] See also Gannett River States Publ'g Corp. v. Bureau of the Nat'l

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On the other hand, and as a matter of practicality, courts have followed a general rule that waiver is not necessarily found when an agency makes an entirely mistaken disclosure of information.[89] Similarly, they also

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[88](...continued)
Guard, No. J91-0455-L, 1992 WL 175235, at *6 (S.D. Miss. Mar. 2, 1992) (finding privacy interests in withholding identities of soldiers disciplined for causing accident to be de minimis because agency previously released much identifying information); Powell v. United States, 584 F. Supp. 1508, 1520-21 (N.D. Cal. 1984) (suggesting that attorney work-product privilege may be waived when agency made earlier release of such information which "reflect[ed] positively" on agency, and later may have withheld work-product information on same matter which did not reflect so "positively" on agency).

[89] See Ford v. West, No. 97-1342, 1998 WL 317561, at *3 (10th Cir. June 12, 1998) (rejecting claim that defendant's inadvertent release of names constituted waiver: "[D]efendant's inadequate redactions do not operate to waive the personal privacy interests of the individuals discussed in the investigative file."); Garcia, 181 F. Supp.2d at 377 (ruling that inconsistent redactions of names of confidential sources does not waive government's ability to invoke Exemption 7(D)); Am. Lawyer Media, 2002 U.S. Dist. LEXIS 16940, at *4 (holding that agency did not waive right to withhold portions of training manual by permitting plaintiff's employee to review manual during public training conference, because plaintiff had not shown that manual is in public domain); Fort Hall Landowners Alliance, Inc. v. Bureau of Indian Affairs, No. 99-00052, slip op. at 13-14 (D. Idaho Mar. 17, 2000) (noting that "an agency's inadvertent or mistaken disclosure does not necessarily constitute a waiver," and declining to find waiver when agency recognized its error and took corrective action); LaRouche v. U.S. Dep't of Justice, No. 90-2753, slip op. at 24 (D.D.C. July 5, 2001) (holding that inadvertent disclosure of information to another FOIA requester does not warrant disclosure of properly exempt information); Ponder v. Reno, No. 98-3097, slip op. at 6 (D.D.C. Jan. 22, 2001) (reaffirming principle that inadvertent disclosure does not constitute a waiver of Exemption 7(C)); Sinito v. U.S. Dep't of Justice, No. 87-0814, slip op. at 29-30 (D.D.C. July 12, 2000) (finding that documents inadvertently disclosed and briefly released to public did not "erase every vestige" of the privacy interests at stake), summary affirmance granted, 22 F. App'x 1 (D.C. Cir. 2001); Billington, 11 F. Supp. 2d at 66 (finding no waiver of Exemption 7(D) protection in case involving more than 40,000 documents where agency mistakenly released one withheld document to previous requester, and observing: "One document in such an enormous document request is merely a needle in a haystack. That one FBI agent may have redacted a document differently than another, or that the same FBI agent did not redact a document in precisely the same manner in different years, did not constitute bad faith."); Pub. Citizen Health Research Group v. FDA, 953 F. Supp. 400, 404-06 (D.D.C. 1996) (finding no waiver where material accidently released and information not disseminated by requester); Nation Magazine v. Dep't of State, 805 F. Supp. 68, 73 (D.D.C.
(continued...)

have held that an agency does not waive its use of FOIA exemptions when an agency official mistakenly promises to make a disclosure.[90]

When an agency has been compelled to share information with Congress without making an official disclosure of information to the public, courts have consistently ruled that this exchange of information does not result in waiver, especially for information relating to national security.[91]

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[89](...continued)
1992) (dicta) ("[N]o rule of administrative law requires an agency to extend erroneous treatment of one party to other parties, 'thereby turning an isolated error into a uniform misapplication of the law.'" (quoting Sacred Heart Med. Ctr. v. Sullivan, 958 F.2d 537, 548 n.24 (3d Cir. 1992))); Astley v. Lawson, No. 89-2806, 1991 WL 7162, at *8 (D.D.C. Jan. 11, 1991) (holding that inadvertent placement of documents into public record did not waive exemption when it was remedied immediately upon agency's awareness of mistake); cf. Kay, 867 F. Supp. at 23-24 (inadvertent disclosure of documents caused entirely by clerical error has no effect on remaining material at issue); Fleet Nat'l Bank v. Tonneson & Co., 150 F.R.D. 10, 16 (D. Mass. 1993) (holding that inadvertent production of one volume of three-volume report did not constitute waiver of attorney work-product privilege as to that volume, nor as to remaining two volumes of report) (non-FOIA case); Myers v. Williams, 819 F. Supp. 919, 921 (D. Or. 1993) (granting preliminary injunction prohibiting FOIA requester from disclosing original and all copies of erroneously disclosed document containing trade secrets) (non-FOIA case).

[90] See Hertzberg, 273 F. Supp. 2d at 82 (concluding that agency official's assurances that information would be released did not waive Exemption 5); Anderson v. U.S. Dep't of the Treasury, No. 98-1112, 1999 WL 282784, at *4 (W.D. Tenn. Mar. 24, 1999) (finding that the mere promise of an IRS agent to disclose a document to a FOIA requester did not constitute waiver, because "[n]othing in [the] FOIA . . . make[s] such a statement binding and irrevocable").

[91] See Rockwell v. U.S. Dep't of Justice, 235 F.3d 598, 604-05 (D.C. Cir. 2001) (finding no waiver when agency secured promise of confidentiality from congressional subcommittee); Pub. Citizen, 11 F.3d at 201 (finding no waiver when agency official publicly discussed only general subject matter of documents in congressional testimony); Fitzgibbon, 911 F.2d at 765 (holding that prior disclosure in a congressional report does not waive "information pertaining to a time period later than the date of the publicly documented information"); Edmonds v. FBI, 272 F. Supp. 2d at 49 (affirming that disclosure of classified material to congressional committee "does not deprive the [agency] of the right to classify the information under Exemption 1" (citing Fitzgibbon, 911 F.2d at 766)); see also Afshar, 702 F.2d at 1131-32 (finding no waiver when withheld information is in some respect materially different); cf. Heeney, No. 97-5461, slip op. at 19 (C.D. Cal. Mar. 16, 1999) (finding no waiver where documents at issue contained informa-
(continued...)

DISCRETIONARY DISCLOSURE AND WAIVER

Furthermore, disclosure in a congressional report does not waive Exemption 1 applicability if the agency itself has never publicly acknowledged the information.[92] Most significantly, in deference to the common agency practice of disclosing specifically requested information to a congressional committee,[93] or to the General Accounting Office (an arm of Congress),[94] such disclosures generally do not result in waiver.

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[91](...continued)
tion that previously was released in different context).

[92] See Earth Pledge Found. v. CIA, 988 F. Supp. 623, 627 (S.D.N.Y. 1996), aff'd, 128 F.3d 788 (2d Cir. 1997); see also Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) (holding that information in Senate report "cannot be equated with disclosure by the agency itself"); Military Audit Project, 656 F.2d at 744 (finding that publication of Senate report does not constitute official release of agency information); Students Against Genocide, 50 F. Supp. 2d at 25 (affirming principle that only agency that is original source of information in question can waive applicability of FOIA exemption).

[93] See, e.g., Rockwell, 235 F.3d at 604 (finding no waiver for documents provided to congressional oversight subcommittee, in accordance with FOIA's specific congressional-disclosure provision, found at 5 U.S.C. § 552(d)); Fla. House of Representatives v. U.S. Dep't of Commerce, 961 F.2d 941, 946 (11th Cir. 1992) (holding no waiver of exemption due to court-ordered disclosure, involuntary disclosure to Congress, or disclosure of related information); Aspin v. DOD, 491 F.2d 24, 26 (D.C. Cir. 1973) (accepting that military criminal investigation records related to "My Lai Massacre," during Vietnam War, were exempt from disclosure, despite release to Armed Services Committees of both Houses of Congress); Edmonds, 272 F. Supp. 2d at 49 (affirming that disclosure of classified material to congressional committee "does not deprive the [agency] of the right to classify the information under Exemption 1" (citing Fitzgibbon 911 F.2d at 766)); Wash. Post Co. v. DOD, No. 84-2949, 1987 U.S. Dist. LEXIS 16108, at *25 n.9 (D.D.C. Feb. 25, 1987) ("unprincipled disclosure" by Members of Congress who had signed statements of confidentiality "cannot be the basis to compel disclosure" by the agency); see also Eagle-Picher Indus. v. United States, 11 Ct. Cl. 452, 460-61 (1987) (holding that work-product privilege is not waived in nonspecific congressional testimony "if potentially thousands of documents need be reviewed to determine if the gist or a significant part of documents were revealed") (non-FOIA case); FOIA Update, Vol. V, No. 1, at 3-4 ("OIP Guidance: Congressional Access Under FOIA") (analyzing Murphy v. Dep't of the Army, 613 F.2d 1151 (D.C. Cir. 1979), and advising that "[e]ven where a FOIA request is made by a Member clearly acting in a completely official capacity, such a request does not properly trigger the special access rule of subsection ([d]) unless it is made by a committee or subcommittee chairman, or otherwise under the authority of a committee or subcommittee").

[94] See, e.g., Shermco, 613 F.2d at 1320-21.

In addition, when an agency has been compelled to disclose a document under limited and controlled conditions, such as under a protective order in an administrative proceeding, its authority to withhold the document thereafter is not diminished.[95] This applies as well to disclosures made in the criminal discovery context.[96]

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[95] See, e.g., Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 79 n.13 (2d Cir. 1979) (permitting OSHA to withhold records that it previously shared with consultant for decisionmaking purposes); see also Allnet Commc'n Servs. v. FCC, 800 F. Supp. 984, 989 (D.D.C. 1992) (finding no waiver where information was disclosed under "strict confidentiality"), aff'd, No. 92-5351 (D.C. Cir. May 27, 1994); Abrams v. Office of the Comptroller of the Currency, No. 3:05-CV-2433, 2006 WL 1450525 at *5 (N.D. Tex. May 25, 2006) (concluding that agency did not waive Exemption 8 protection when it released information to limited number of people for limited purpose of demonstrating authority to issue subpoenas); see also Silverberg v. HHS, No. 89-2743, 1991 WL 633740, at *3 (D.D.C. June 14, 1991) (ruling that fact that individual who is subject of drug test by particular laboratory has right of access to its performance and testing information does not render such information publicly available), appeal dismissed per stipulation, No. 91-5255 (D.C. Cir. Sept. 2, 1993).

[96] See, e.g., Hronek, 7 F. App'x 591, 592 (9th Cir. 2001) (rejecting contention that DEA waived claimed exemptions where documents at issue "relate[d] to documents released to [plaintiff during] the course of his criminal conviction."); Cottone, 193 F.3d at 556 (limiting finding of waiver to specific wiretapped recordings played in open court and refusing to extend finding of waiver to wiretapped recordings provided to plaintiff's counsel as Brady material); Ferguson v. FBI, 957 F.2d 1059, 1068 (2d Cir. 1992) (holding that fact that local police department released records pursuant to New York Freedom of Information Law and one of its officers testified at length in court did not to waive police department's status as confidential source under Exemption 7(D)); Parker, 934 F.2d at 379 (affirming nondisclosure under Exemption 7(D) even though confidential informant may have testified at requester's trial); 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. July 22, 1998) (ruling that limited disclosure of draft report to defendants pursuant to criminal discovery rules does not waive Exemption 5 protection); Willis v. FBI, No. 96-1455, slip op. at 2-6 (D.D.C. Feb. 14, 1998) ("The mere fact that at one time the Plaintiff's counsel may have had a right of access to portions of the transcript for a limited purpose hardly suffices to show that all of the requested transcripts now are a part of the public domain."), aff'd in part & remanded in part on other grounds, 194 F.3d 175 (D.C. Cir. 1999) (unpublished table decision); Fisher v. U.S. Dep't of Justice, 772 F. Supp. 7, 12 (D.D.C. 1991) (even if some of withheld information has appeared in print, nondisclosure is proper because disclosure from official source would confirm unofficial information and thereby cause harm to third parties); Beck v. U.S. Dep't of Justice, No. 88-3433, slip op. at 2 (D.D.C. July 24, 1991) ("Exemption 7(C) is not necessarily waived where an individual has testified at trial."), summa-

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DISCRETIONARY DISCLOSURE AND WAIVER

Of course, circulation of a document within an agency does not waive an exemption.[97] Nor does disclosure among federal agencies,[98] or to advisory committees (even those including members of the public).[99] Similarly, properly controlled disclosure to state or local law enforcement officials,[100]

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[96](...continued)
ry affirmance granted in pertinent part & denied in part, No. 91-5292 (D.C. Cir. Nov. 19, 1992); Erb, 572 F. Supp. at 956 (nondisclosure to third party upheld under Exemption 7(A) even though document provided to defendant through criminal discovery); cf. Johnston v. U.S. Dep't of Justice, No. 97-2173, 1998 WL 518529, at *1-2 (8th Cir. Aug. 10, 1998) ("'[T]he fact that an agent decided or was required to testify . . . does not give plaintiff a right under FOIA to documents revealing the fact and nature of [agent's] employment.'" (quoting Jones, 41 F.3d at 246-47)). But see Kronberg v. U.S. Dep't of Justice, 875 F. Supp. 861, 867 (D.D.C. 1995) (waiver of exemption found when agency had previously released same documents during requester's criminal trial).

[97] See, e.g., Direct Response Consulting Serv. v. IRS, No. 94-1156, 1995 WL 623282, at *5 (D.D.C. Aug. 21, 1995) (attorney-client privilege not waived when documents sent to other divisions within agency); Chemcentral/ Grand Rapids Corp. v. EPA, No. 91-C-4380, 1992 WL 281322, at *7 (N.D. Ill. Oct. 6, 1992) (no waiver of attorney-client privilege when documents in question were circulated to only those employees who needed to review legal advice contained in them); Lasker-Goldman Corp. v. GSA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,125, at 81,322 (D.D.C. Feb. 27, 1981) (no waiver when document was circulated to management officials within agency).

[98] See, e.g., Chilivis v. SEC, 673 F.2d 1205, 1211-12 (11th Cir. 1982) (agency does not automatically waive exemption by releasing documents to other agencies); Silber v. U.S. Dep't of Justice, No. 91-876, transcript at 10-18 (D.D.C. Aug. 13, 1992) (bench order) (distribution of manual to other agencies does not constitute waiver). But cf. Lacefield v. United States, No. 92-N-1680, 1993 WL 268392, at *6 (D. Colo. Mar. 10, 1993) (attorney-client privilege waived with respect to letter from City of Denver attorney to Colorado Department of Safety because letter was circulated to IRS).

[99] See, e.g., Aviation Consumer Action Project v. Washburn, 535 F.2d 101, 107-08 (D.C. Cir. 1976).

[100] See, e.g., Gen. Elec. Co. v. EPA, 18 F. Supp. 2d 138, 143 (D. Mass. 1998) (finding that because EPA is obligated to consult with state agencies in formulating federal policy, disclosures made pursuant to that obligation do not constitute waiver of applicability of FOIA exemption); Kansi v. U.S. Dep't of Justice, 11 F. Supp. 2d 42, 44-45 (D.D.C. 1998) (stating that even if plaintiff had adduced evidence that information was actually disclosed to local prosecutor, such disclosure would not have waived Exemption 7(A) protection); Erb, 572 F. Supp. at 956 (holding that disclosure of FBI report to local prosecutor did not cause waiver of Exemption 7(A)).

or to state attorneys general,[101] does not waive FOIA exemption protection.[102]

The one circumstance in which an agency's failure to treat information in a responsible, appropriate fashion should not result in waiver is when the failure is not fairly attributable to the agency -- i.e., when an agency employee has made an unauthorized disclosure, a "leak" of information.[103] Recognizing that a finding of waiver in such circumstances would only lead to "exacerbation of the harm created by the leaks,"[104] the courts have invariably refused to penalize agencies by ruling that a waiver has occurred due to such conduct.[105]

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[101] See Interco, Inc. v. FTC, 490 F. Supp. 39, 44 (D.D.C. 1979).

[102] See FOIA Update, Vol. IV, No. 2, at 6.

[103] See, e.g., Favish, 541 U.S. at 158 (accepting that unofficial leak and subsequent publication of death-scene photograph of body of presidential aide did not prevent agency from invoking Exemption 7(C) to protect privacy of surviving family members); see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (observing that waiver issue regarding "leaked" photograph was quickly "dispatched" by Court "in no uncertain terms"); see also Hanson v. U.S. Agency for Int'l Dev., 372 F.3d 286, 294 (4th Cir. 2004) (finding no waiver when attorney consulting for federal agency unilaterally released documents that he authored during course of attorney-client relationship between him and agency).

[104] Murphy, 490 F. Supp. at 1142.

[105] See, e.g., Simmons v. U.S. Dep't of Justice, 796 F.2d 709, 712 (4th Cir. 1986) (unauthorized disclosure does not constitute waiver); Medina-Hincapie v. Dep't of State, 700 F.2d 737, 742 n.20 (D.C. Cir. 1983) (official's ultra vires release does not constitute waiver); Edmonds, 272 F. Supp. 2d at 49 (holding that because information in public domain was leaked, agency may continue to withhold identical information because "'release would amount to official confirmation or acknowledgment of [its] accuracy'" (quoting Wash. Post v. DOD, 766 F. Supp. 1, 9 (D.D.C. 1991))); Trans-Pac. Policing Agreement v. U.S. Customs Serv., No. 97-2188, 1998 WL 34016806, at *4 (D.D.C. May 14, 1998) (finding no waiver from "isolated and unauthorized" disclosures that were not "in accordance with [agency] regulations or directions"), rev'd & remanded on other grounds, 177 F.3d 1022 (D.C. Cir. 1999); Harper v. Dep't of Justice, No. 92-462, slip op. at 19 (D. Or. Aug. 9, 1993) ("alleged, unauthorized, unofficial, partial disclosure" in private publication does not waive Exemption 1), aff'd in part, rev'd in part & remanded on other grounds sub nom. Harper v. DOD, 60 F.3d 833 (9th Cir. 1995) (unpublished table decision); LaRouche v. U.S. Dep't of Justice, No. 90-2753, 1993 WL 388601, at *7 (D.D.C. June 25, 1993) (fact that some aspects of grand jury proceeding were leaked to press has "no bearing" on FOIA litigation); RTC v. Dean, 813 F. Supp. 1426, 1429-30 (D. Ariz. 1993) (no waiver

(continued...)

On the other hand, "official" disclosures -- i.e., direct acknowledgments by authoritative government officials -- may well waive an otherwise applicable FOIA exemption.[106]

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[105](...continued)
of attorney-client privilege when agency took precautions to secure confidentiality of document, but inexplicable leak nonetheless occurred) (non-FOIA case); Laborers' Int'l Union v. U.S. Dep't of Justice, 578 F. Supp. 52, 58 n.3 (D.D.C. 1983) (finding that unauthorized disclosure of document "resembling" one at issue does not waive invocation of exemptions), aff'd, 772 F.2d 919, 921 n.1 (D.C. Cir. 1984) (noting that disclosure would "enable the [plaintiff] to verify whether the report in its possession is an authentic copy"); Safeway Stores, Inc. v. FTC, 428 F. Supp. 346, 347-48 (D.D.C. 1977) (finding no waiver where congressional committee leaked report to press); cf. Hunt v. CIA, 981 F.2d 1116, 1120 (9th Cir. 1992) (agency not required to confirm or deny accuracy of information released by other government agencies regarding its interest in certain individuals); Rush v. Dep't of State, 748 F. Supp. 1548, 1556 (S.D. Fla. 1990) (finding that author of agency documents, who had since left government service, did not have authority to waive Exemption 5 protection). But cf. In re Engram, No. 91-1722, 1992 WL 120211, at *5 (4th Cir. June 2, 1992) (per curiam) (permitting discovery as to circumstances of suspected leak).

[106] See Wolf, 473 F. 3d at 379-380 (holding that agency waived ability to refuse to confirm or deny existence of responsive records pertaining to individual because agency head had discussed that individual during congressional testimony); Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat'l R.R. Passenger Corp., No. 6:02-CV-126, slip op. at 21 (M.D. Fla. Aug. 18, 2003) (ruling that agency waived deliberative process privilege when it shared results of draft audit report with subject of audit), rev'd on other grounds, 376 F.3d 1270 (11th Cir. 2004), cert. denied, 543 U.S. 1121 (2005); Starkey, 238 F. Supp. 2d at 1193 (finding that public availability of documents filed with local government waived exemptions); Melendez-Colon v. U.S. Dep't of the Navy, 56 F. Supp. 2d 142, 145 (D.P.R. 1999) (finding in civil discovery dispute that because Navy previously disclosed document in question pursuant to FOIA, that prior disclosure waived Navy's privilege claim); Kimberlin v. Dep't of Justice, 921 F. Supp. 833, 835-36 (D.D.C. 1996) (holding exemption waived when material was released pursuant to "valid, albeit misunderstood, authorization"), aff'd in pertinent part & remanded in other part, 139 F.3d 944 (D.C. Cir. 1998); Quinn v. HHS, 838 F. Supp. 70, 75 (W.D.N.Y. 1993) (attorney work-product privilege waived where "substantially identical" information was previously released to requester); Schlesinger v. CIA, 591 F. Supp. 60, 66 (D.D.C. 1984); see also Krikorian v. Dep't of State, 984 F.2d 461, 467-68 (D.C. Cir. 1993) (court on remand must determine whether redacted portions of document has been "officially acknowledged"); cf. Abbotts v. NRC, 766 F.2d 604, 607 (D.C. Cir. 1985) (holding agency's official "level of threat nuclear facility should guard against" is not waived by prior public estimates of appropriate level by congressional and other agency reports); Isley, 1999 WL 1021934, at *4 (finding no waiver
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Similarly, an individual's express disclosure authorization with respect to his own interests implicated in requested records can also result in a waiver.[107] By the same token, it has been held that "only the individual whose informational privacy interests are protected . . . can effect a waiver of th[e] privacy interest[] when they are threatened by a[] FOIA request . . . because the privacy interest at stake belongs to the individual, [and] not the agency holding the information."[108] Accordingly, even if an agency has

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[106](...continued)
where plaintiff failed to demonstrate that documents at issue were a part of permanent public record); Afshar, 702 F.2d at 1133 (books by former agency officials do not constitute "an official and documented disclosure"); Armstrong v. Executive Office of the President, No. 89-142, slip op. at 16-17 (D.D.C. Aug. 29, 1995) (holding that book by former agency official containing information "substantially different" from documents sought is not official disclosure); Holland v. CIA, No. 92-1233, 1992 WL 233820, at *7 (D.D.C. Aug. 31, 1992) (applying Afshar and finding that requester has not demonstrated that specific information in public domain has been "officially acknowledged").

[107] See, e.g., Providence Journal Co. v. U.S. Dep't of the Army, 981 F.2d 552, 567 (1st Cir. 1992) (source statements not entitled to Exemption 7(D) protection when individuals expressly waived confidentiality); Blanton v. U.S. Dep't of Justice, 63 F. Supp. 2d 35, 47 (D.D.C. 1999) (finding that FBI confidential sources waive their privacy interests where they extensively publicize their status as confidential sources); Key Bank of Me., Inc. v. SBA, No. 91-362, 1992 U.S. Dist. LEXIS 22180, at *25-26 (D. Me. Dec. 31, 1992) (given that subject of documents has specifically waived any privacy interest she might have in requested information, agency has not demonstrated that release of information would harm any privacy interest) (Exemption 6); cf. Wiley v. VA, 176 F. Supp. 2d 747, 753 (E.D. Mich. 2001) (observing that "[p]laintiff might well have forfeited his Privacy Act protection through his own selective disclosure and reference to his VA records"). But cf. McSheffrey, 2003 WL 179840, at *1 (determining that prison visitors do not waive privacy interest in information provided to prison officials for security purposes); Campaign for Family Farms v. Glickman, 200 F.3d 1180, 1188 (8th Cir. 1999) (finding that although parties who signed petition in question did so with knowledge that subsequent signatories would be able to view their names, they did not waive their privacy interests under FOIA) ("reverse" FOIA suit); Kimberlin, 139 F.2d at 949 (holding that fact that employee publicly acknowledged that he had been investigated and disciplined by Office of Professional Responsibility did not "waive all his interest in keeping the contents of the OPR file confidential"); Church of Scientology Int'l v. IRS, 995 F.2d 916, 921 (9th Cir. 1993) (IRS agents' purported waivers of privacy interests held insufficient to compel disclosure).

[108] Sherman, 244 F.3d at 363-64; see also Wiley, 176 F. Supp. 2d at 753 (finding that "[t]he case law on this subject, though extremely limited, indicates that an individual can waive the privacy interest that the [Privacy
(continued...)

previously disclosed such information, that disclosure may not waive the individual's privacy interest in that information.[109]

As mentioned above, the government is not required to demonstrate in a FOIA case that it has positively determined that not a single disclosure of any withheld information has occurred.[110] Indeed, the burden is on the plaintiff to show that the information sought is public.[111] As the D.C.

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[108](...continued)
Act] is meant to safeguard by . . . disclosing otherwise confidential information"); Wayne's Mech. & Maint. Contractor, Inc. v. U.S. Dep't of Labor, No. 1:00-CV-45, slip op. at 18 (N.D. Ga. May 7, 2001) (reiterating that "[o]nly the witness, not the Department of Labor or OSHA, has the power to waive Exemption 7(D)'s protection of confidentiality"); Judicial Watch v. Reno, No. 00-0723, 2001 WL 1902811, at *7 (D.D.C. Mar. 30, 2001) (holding that the privacy interest belongs to individual whose interest is at stake and agency cannot surrender that interest). But see Iowa Citizens for Cmty. Improvement v. USDA, 256 F. Supp. 2d 946, 955 (S.D. Iowa Aug. 13, 2002) (noting that "common sense dictates that prior disclosure -- either by the government, the news media or private individuals -- does lessen an individual's expectation of privacy").

[109] Sherman, 244 F.3d at 364; see, e.g., Wayne's Mech. & Maint. Contractor, No. 1:00-CV-45, slip op. at 18 (N.D. Ga. May 7, 2001) (noting that "[o]nly the witness, not the Dep't of Labor or OSHA, has the power to waive Exemption 7(D)'s protection of confidentiality"); Judicial Watch, No. 00-0723, 2001 WL 1902811, at *7 (D.D.C. Mar. 30, 2001) (noting that "the privacy interest belongs to [subject], and defendants cannot surrender it"); cf. Kimberlin, 139 F.2d at 949 (holding that an employee's acknowledgment that he had been investigated by the Office of Professional Responsibility (OPR) did not "waive all his interest in keeping the contents of the OPR file confidential"); LaRouche, No. 90-2753, slip op. at 14 (D.D.C. Aug. 8, 2002) (observing that the FBI "need not make a wholesale disclosure about an individual just because he is a publicly acknowledged FBI source") (Exemption 7(C)).

[110] See Williams v. U.S. Dep't of Justice, 556 F. Supp. 63, 66 (D.D.C. 1982) (court refused, in a FOIA action brought by a former senator convicted in the Abscam investigation, to impose upon the agency a duty to search for the possibility that privacy interests "may have been partially breached in the course of many-faceted proceedings occurring in different courts over a period of prior years," for to do so "would defeat the exemption in its entirety or at least lead to extended delay and uncertainty"); cf. McGehee v. Casey, 718 F.2d 1137, 1141 n.9 (D.C. Cir. 1983) (in a non-FOIA case involving CIA's prepublication review, observing that an agency "cannot reasonably bear the burden of conducting an exhaustive search to prove that a given piece of information is not published anywhere" else).

[111] See, e.g., Lopez, 2004 WL 626726, at *1 at (ruling that plaintiff failed
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[111](...continued)
to demonstrate that specific information is in public domain); James Madison Project, 2002 WL 31296220, at *1 (holding that a FOIA plaintiff "bears the burden of showing that the specific information at issue has been officially disclosed"); Pub. Citizen, 276 F.3d at 645 (finding that plaintiff has burden of demonstrating that specific information is in public domain); Cottone, 193 F.3d at 555 (holding that requester has burden of demonstrating "precisely which tapes . . . were played" in open court and that because trial transcript clearly indicated precise date and time of particular conversations in question, plaintiff had discharged his burden of production by pointing to those specific tapes); Isley, 1999 WL 1021934, at *4 (holding that party may gain access to information on waiver basis only if it can point to specific information identical to information which is currently being withheld); Nowak, 2000 WL 60067, at *2 (holding that "[i]n order to establish a waiver, the [plaintiff must be able to demonstrate that the previous disclosure was] authorized and voluntary"); Davoudlarian, 1994 WL 423845, at *3 (requester has burden of demonstrating that specific information was disclosed at trial); Pub. Citizen, 11 F.3d at 201 (applying Afshar and holding "plaintiffs cannot simply show that similar information has been released, but must establish that a specific fact already has been placed in the public domain"); Wood, 312 F. Supp. 2d at 344 (ruling that plaintiff has not demonstrated waiver of attorney work-product privilege); Edmonds, 272 F. Supp. 2d at 48-49 (noting that plaintiff has failed to show that this specific information has been released to public); Assassination Archives, 334 F.3d at 60 (holding that plaintiff must show that previous disclosure duplicates specificity of withheld material); Enviro Tech, No. 02-C-4650, slip op. at 15 (N.D. Ill. Mar. 11, 2003) (holding that plaintiff has not demonstrated that information at issue is exactly same as what is in public domain); Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Representative, 237 F. Supp. 2d 17, 20 (D.D.C. 2002) (holding that plaintiff failed to show that information was in public domain merely by pointing to other publicly available documents that deal with same general subject); Shores, 185 F. Supp. 2d at 86 (citing Cottone, 193 F.3d at 554, and finding that party seeking disclosure bears initial burden of production to identify specific information in public domain that is duplicative of information being withheld); Scott v. CIA, 916 F. Supp. 42, 50-51 (D.D.C. 1996) (requiring requester to compile list of any public source material believed to mirror withheld information); Freeman v. U.S. Dep't of Justice, No. 02-0557, 1993 WL 260694, at *3-4 (D.D.C. June 28, 1993) (finding that requester failed to demonstrate that agencies have shown "complete disregard for confidentiality" and had not shown that information available to public duplicated that being withheld); Pfeiffer v. CIA, 721 F. Supp. 337, 342 (D.D.C. 1989) (declaring that a plaintiff must do more than simply identify "information that happens to find its way into a published account" to meet this burden). But see also Dean, 813 F. Supp. at 1429 ("[A] party seeking to invoke the attorney-client privilege has the burden of affirmatively demonstrating non-waiver.") (non-FOIA case); Wash. Post, 766 F. Supp. at 12-13 (suggesting that agency has

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Circuit has pointedly observed: "It is far more efficient, and obviously fairer, to place the burden of production on the party who claims that the information is publicly available."[112] In another case, the D.C. Circuit reasoned that the burden of production should fall upon the requester "because the task of proving the negative -- that the information has not been revealed -- might require the government to undertake an exhaustive, potentially limitless search"[113] If a plaintiff meets the burden of production, it is then "up to the government, if it so chooses, to rebut the plaintiff's proof [and demonstrate] that the specific . . . [records] identified" are not publicly available."[114] When a record may be publicly available in theory, but is so hard to obtain that no objective disclosure or waiver arguably has occurred, the burden is on the requester to prove that the records are in fact obtainable.[115]

(The related issue of whether an agency waives its ability to invoke an exemption in litigation by not raising it at an early stage of the proceedings is discussed under Litigation Considerations, Waiver of Exemptions in Litigation, below.)

LITIGATION CONSIDERATIONS

It has been said that "[t]he FOIA is intended to work without court intervention."[1] While this may be true most of the time, it nevertheless is the case that when a FOIA lawsuit is filed, litigants frequently find that

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[111](...continued)
ultimate burden of proof when comparing publicly is identical and, if not, determining whether release of slightly different information would harm national security).

[112] Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 342 (D.C. Cir. 1989) (reverse FOIA suit).

[113] Davis, 968 F.2d at 1279-82.

[114] Cottone, 193 F.3d at 556.

[115] See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 764 (1989) (applying test of availability to contents of "rap sheets" scattered among different courthouses and police stations, and viewing requested "rap sheet" as unavailable to general public in spite of requester's claims to contrary); see also Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys., 463 F.3d 239, 251 (2d Cir. 2006) (applying availability test and distinguishing from record involved in Reporters Committee any record that could be obtained via single visit to single federal agency Web site).

[1] Landmark Legal Found. v. EPA, 272 F. Supp. 2d 70, 85 (D.D.C. 2003).