clear from the Exemption 9 decisions thus far is that courts have applied it to all types of wells and to various information about these wells.[15] It also is reasonable to assume that both agencies and courts may apply Exemption 9 to protect well data in other compelling circumstances, such as when Exemption 9 protection is necessary to guard against an attack upon pooled natural resources intended to cause harm to the public.[16]

EXCLUSIONS

In amending the Freedom of Information Act in 1986, Congress created a novel mechanism for protecting certain especially sensitive law enforcement matters, under subsection (c) of the Act.[1] These three special protection provisions, referred to as record "exclusions," expressly authorize federal law enforcement agencies, for especially sensitive records under certain specified circumstances, to "treat the records as not subject to the requirements of [the FOIA]."[2] Today, more than twenty years after the creation of these special record exclusions, it must be remembered that the procedures that are required to properly employ them still are by no means straightforward and must be implemented with the utmost care.[3] Any agency considering employing an exclusion or having a question as to their

---

[14](...continued)
table levels and well-yield data); Black Hills Alliance, 603 F. Supp. at 122 (uranium exploration test drilling data).

[15] Id.

[16] See Living Rivers, Inc. v. U.S. Bureau of Reclamation, 272 F. Supp. 2d 1313, 1321-22 (D. Utah 2003) (finding that disclosure of "inundation maps" could reasonably be expected to place at risk lives of individuals in downstream areas, which would be flooded by breach of dams, through increasing risk of terrorist attack on dams) (Exemption 7(F)); cf. 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) (emphasizing "obligation to safeguard" homeland security-related records).

[1] See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 18-30 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum]; cf. NARA v. Favish, 541 U.S. 157, 169 (evincing the Supreme Court's reliance on "the Attorney General's consistent interpretation of" the FOIA in successive such Attorney General memoranda), reh'g denied, 541 U.S. 1057 (2004).

[2] 5 U.S.C. § 552(c)(1), (c)(2), (c)(3) (2000 & Supp. IV 2004); see Tanks v. Huff, No. 95-568, 1996 WL 293531, at *5 (D.D.C. May 28, 1996), appeal dismissed, No. 96-5180 (D.C. Cir. Aug. 13, 1996).

[3] See Attorney General's 1986 Amendments Memorandum at 27 n.48.

implementation should first consult with the Office of Information and Privacy, at (202) 514-3642.[4]

At the outset, it is important to recognize the somewhat subtle, but very significant, distinction between the result of employing a record exclusion and the concept that is colloquially known as "Glomarization."[5] That latter term refers to the situation in which an agency expressly refuses to confirm or deny the existence of records responsive to a request.[6] (A more detailed discussion of "Glomarization" can be found under Exemption 1, In Camera Submissions, above, and also under Exemption 7(C), above.) The application of one of the three record exclusions, on the other hand, results in a response to the FOIA requester stating that no records responsive to his FOIA request exist.[7] While "Glomarization" remains adequate to provide necessary protection in certain situations, these special record exclusions are invaluable in addressing the exceptionally sensitive situations in which even "Glomarization" is inadequate to the task.

The (c)(1) Exclusion

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

> Whenever a request is made which involves access to records described in subsection (b)(7)(A) and (A) the investigation or proceeding involves a possible violation of criminal law; and (B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during

---

[4] See id.; accord 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) (advising agencies to consult with Office of Information and Privacy on all "significant FOIA issues").

[5] See id. at 26 & n.47; see also Benavides v. DEA, 968 F.2d 1243, 1246-48 (D.C. Cir.) (initially confusing exclusion mechanism with "Glomarization"), modified, 976 F.2d 751, 753 (D.C. Cir. 1992); Valencia-Lucena v. DEA, No. 99-0633, slip op. at 8 (D.D.C. Feb. 8, 2000) (recognizing that Benavides "was subsequently clarified"), summary affirmance granted sub nom. Lucena v. DEA, No. 00-5117, 2000 WL 1582743 (D.C. Cir. Sept. 7, 2000).

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

[7] See Attorney General's 1986 Amendments Memorandum at 18 (cited in Tanks, 1996 WL 293531, at *5); see also Steinberg v. U.S. Dep't of Justice, No. 93-2409, 1997 WL 349997, at *1 (D.D.C. June 18, 1997) ("[T]he government need not even acknowledge the existence of excluded information.").

only such time as that circumstance continues, treat the records as not subject to the requirements of this section.[8]

In most cases, the protection of Exemption 7(A) is sufficient to guard against any impairment of law enforcement investigations or proceedings through the FOIA. To avail itself of Exemption 7(A), however, an agency must routinely specify that it is doing so -- first administratively and then, if sued, in court -- even when it is invoking the exemption to withhold all responsive records in their entireties. Thus, in specific situations in which the very fact of an investigation's existence is yet unknown to the investigation's subject, invoking Exemption 7(A) in response to a FOIA request for pertinent records permits an investigation's subject to be "tipped off" to its existence. By the same token, any person (or entity) engaged in criminal activities could use a carefully worded FOIA request to try to determine whether he, she, or it is under federal investigation. An agency response that does not invoke Exemption 7(A) to withhold law enforcement files tells such a requester that his activities have thus far escaped detection.

The (c)(1) exclusion authorizes federal law enforcement agencies, under specified circumstances, to shield the very existence of records of ongoing investigations or proceedings by excluding them entirely from the FOIA's reach.[9] To qualify for such exclusion from the FOIA, the records in question must be those which would otherwise be withheld in their entireties under Exemption 7(A). Further, they must relate to an "investigation or proceeding [that] involves a possible violation of criminal law."[10] Hence, any records pertaining to a purely civil law enforcement matter cannot be excluded from the FOIA under this provision, although they may qualify for ordinary Exemption 7(A) withholding. However, the statutory requirement that there be only a "possible violation of criminal law," by its very terms, admits a wide range of investigatory files maintained by more than just criminal law enforcement agencies.[11]

Next, the statute imposes two closely related requirements which go to the very heart of the particular harm addressed through this record exclusion. An agency determining whether it can employ (c)(1) protection must consider whether it has "reason to believe" that the investigation's

---

[8] 5 U.S.C. § 552(c)(1) (2000 & Supp. IV 2004).

[9] See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 18-22 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum].

[10] 5 U.S.C. § 552(c)(1)(A).

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

subject is not aware of its pendency and that, most fundamentally, the agency's disclosure of the very existence of the records in question "could reasonably be expected to interfere with enforcement proceedings."[12]

Obviously, where all investigatory subjects are already aware of an investigation's pendency, the "tip off" harm sought to be prevented through this record exclusion is not of concern. Accordingly, the language of this exclusion expressly obliges agencies contemplating its use to consider the level of awareness already possessed by the investigative subjects involved. It is appropriate that agencies do so, as the statutory language provides, according to a good-faith, "reason to believe" standard -- which very much comports with the "could reasonably be expected to" standard utilized both elsewhere in this exclusion and in the amended language of Exemption 7(A).[13]

This "reason to believe" standard for considering a subject's present awareness should afford agencies all necessary latitude in making such determinations. As the exclusion is phrased, this requirement is satisfied so long as an agency determines that it affirmatively has a "reason to believe" that such awareness does not in fact exist. While it is always possible that an agency might possess somewhat conflicting or even contradictory indications on such a point, unless an agency can resolve that a subject is aware of an investigation, it should not risk impairing that investigation through a telling FOIA disclosure.[14] Moreover, agencies are not obligated to accept any bald assertions by investigative subjects that they "know" of ongoing investigations against them; such assertions might well constitute no more than sheer speculation. Because such a ploy, if accepted, could defeat the exclusion's clear statutory purpose, agencies should rely upon their own objective indicia of subject awareness and consequent harm.[15]

In the great majority of cases, invoking Exemption 7(A) will protect the interests of law enforcement agencies in responding to FOIA requests for active law enforcement files. The (c)(1) exclusion should be employed only in the exceptional case in which an agency reaches the judgment that, given its belief of the subject's unawareness of the investigation, the mere invocation of Exemption 7(A) could reasonably be expected to cause harm -- a judgment that should be reached distinctly and thoughtfully.[16]

Finally, the clear language of this exclusion specifically restricts its

---

[12] 5 U.S.C. § 552(c)(1)(B).

[13] See Attorney General's 1986 Amendments Memorandum at 21.

[14] See id.

[15] See id. at n.38.

[16] See id. at 21.

applicability to "during only such time" as the above required circumstances continue to exist. This limitation comports with the extraordinary nature of the protection afforded by the exclusion, as well as with the basic temporal nature of Exemption 7(A) underlying it. It means, of course, that an agency that has employed the exclusion in a particular case is obligated to cease doing so once the circumstances warranting it cease to exist.

Once a law enforcement matter reaches a stage at which all subjects are aware of its pendency, or at which the agency otherwise determines that the public disclosure of that pendency no longer could lead to harm, the exclusion should be regarded as no longer applicable. If the FOIA request that triggered the agency's use of the exclusion remains pending administratively at such time, the excluded records should be identified as responsive to that request and then processed in an ordinary fashion.[17] In the exceptional event that this occurs during the pendency of litigation, the court should exercise its discretion to permit the agency to employ all applicable exemptions for the protection of sensitive portions of the underlying records.[18] (See also the discussions of this basic point under Exemption 7(A), above, and Litigation Considerations, Waiver of Exemptions in Litigation, below.) However, an agency is under no legal obligation to spontaneously reopen a closed FOIA request, or a litigation case, even though records were excluded during its entire pendency: By operation of law, the records simply were not subject to the FOIA during the pendency of the request.[19]

Where all of these requirements are met, and an agency reaches the judgment that it is necessary and appropriate that the (c)(1) exclusion be

---

[17] See id. at 22.

[18] See August v. FBI, 328 F.3d 697, 699 (D.C. Cir. 2003) (explaining that "[g]iven the drafters' recognition that the harms of disclosure may in some cases outweigh its benefits, we have avoided adopting a 'rigid press it at the threshold, or lose it for all times' approach to . . . agenc[ies'] FOIA exemption claims'" (quoting Senate of P.R. v. U.S. Dep't of Justice, 823 F.2d 574, 581 (D.C. Cir. 1987))); LeCedra v. Executive Office for U.S. Attorneys, 317 F.3d 345, 348 (D.C. Cir. 2003) (holding that agency acting in good faith should be permitted to raise underlying exemptions); Senate of P.R., 823 F.2d at 589 (finding that "district court did not abuse its discretion in permitting the [agency] to press additional FOIA exemptions after its original, all-encompassing (7)(A) exemption claim became moot"). But see *FOIA Post*, "Supreme Court Is Asked to Review Law Enforcement Case" (posted 5/30/01) (discussing Maydak v. U.S. Dep't of Justice, 218 F.3d 760, 765-68 (D.C. Cir. 2000), in which the Court of Appeals for the District of Columbia Circuit held that an agency had waived other FOIA exemptions by failing to raise them prior to the expiration of Exemption 7(A) applicability); see also *FOIA Post*, "Supreme Court Declines to Review Waiver Case" (posted 8/7/01) (cautioning agencies further in light of Maydak case).

[19] See Attorney General's 1986 Amendments Memorandum at 22 n.39.

employed in connection with a request, the records in question will be treated, as far as the FOIA requester is concerned, as if they did not exist.[20] Where it is the case that the excluded records are just part of the totality of records responsive to a FOIA request, the request will be handled as a seemingly routine one, with the other responsive records processed as if they were the only responsive records in existence. Where the only records responsive to a request fall within the exclusion, the requester will lawfully be told that no records responsive to his FOIA request exist.[21]

In order to maintain the integrity of an exclusion, each agency that employs it must ensure that its FOIA responses are consistent throughout. Therefore, all agencies that could possibly employ at least one of the three record exclusions should ensure that their FOIA communications are consistently phrased so that a requester cannot ever discern the existence of any excluded records, or of any matter underlying them, through the agency's response to his FOIA request.

The (c)(2) Exclusion

The second exclusion applies to a narrower situation, involving the threatened identification of confidential informants in criminal proceedings.[22] The "(c)(2) exclusion" provides as follows:

> Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of [the FOIA] unless the informant's status as an informant has been officially confirmed.[23]

This exclusion contemplates the situation in which a sophisticated requester could try to identify an informant by forcing a law enforcement agency into a position in which it otherwise would have no lawful choice but to tellingly invoke Exemption 7(D) in response to a request which en-

---

[20] See id. at 22.

[21] See id.

[22] See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 22-24 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum]; see also Tanks v. Huff, No. 95-568, 1996 WL 293531, at *5 (D.D.C. May 28, 1996), appeal dismissed, No. 96-5180 (D.C. Cir. Aug. 13, 1996).

[23] 5 U.S.C. § 552(c)(2) (2000 & Supp. IV 2004).

compasses informant records maintained on a named person.[24] In the ordinary situation, Exemption 7(D), as amended, should adequately allow a law enforcement agency to withhold all items of information necessary to prevent the identification of any of its confidential sources.[25]

But as with Exemption 7(A), invoking Exemption 7(D) in response to a FOIA request tells the requester that somewhere within the records encompassed by his particular request there is reference to at least one confidential source. Again, under ordinary circumstances the disclosure of this fact poses no direct threat. But under certain extraordinary circumstances, this disclosure could result in devastating harms to the source and to the system of confidentiality existing between sources and criminal law enforcement agencies.

The scenario in which the exclusion is most likely to be employed is one in which the ringleaders of a criminal enterprise suspect that they have been infiltrated by a source and therefore force all participants in the criminal venture either to directly request that any law enforcement files on them be disclosed to the organization or to execute privacy waivers authorizing disclosure of their files in response to a request from the organization. Absent the (c)(2) exclusion, a law enforcement agency could effectively be forced to disclose information to the subject organization (i.e., through the very invocation of Exemption 7(D)) indicating that the named individual is a confidential source.[26]

The (c)(2) exclusion is principally intended to address this unusual, but dangerous situation by permitting an agency to escape the necessity of giving a response that would be tantamount to identifying a named party as a law enforcement source.[27] Any criminal law enforcement agency is authorized to treat such requested records, within the extraordinary context of such a FOIA request, as beyond the FOIA's reach. As with the (c)(1)

---

[24] See Attorney General's 1986 Amendments Memorandum at 23.

[25] See, e.g., Keys v. U.S. Dep't of Justice, 830 F.2d 337, 345-46 (D.C. Cir. 1987); see also U.S. Dep't of Justice v. Landano, 508 U.S. 165, 179-81 (1993) (Although "the Government is not entitled to a presumption that a source is confidential within the meaning of Exemption 7(D) whenever the source provides information to the FBI in the course of a criminal investigation," it should "often" be able to identify circumstances supporting an inference of confidentiality.); FOIA Update, Vol. XIV, No. 3, at 10.

[26] See Attorney General's 1986 Amendments Memorandum at 23; Tanks, No. 95-568, 1996 WL 293531, at *5-6.

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

exclusion, the agency would have "no obligation to acknowledge the existence of such records in response to such request."[28]

By its terms, the exclusion simply becomes inapplicable if and when the individual's status as a source has been officially confirmed.[29] But by merely confirming a source's status as such, a law enforcement agency does not thereby obligate itself to confirm the existence of any specific records regarding that source.[30] Thus, the (c)(2) exclusion cannot be read to automatically require disclosure of source-related information once a source has been officially acknowledged,[31] so long as such information may properly be protected under a FOIA exemption.[32]

---

[28] S. Rep. No. 98-221, at 25 (1983).

[29] See 5 U.S.C. § 552(c)(2); Gonzalez v. FBI, No. 99-5789, slip op. at 18 (E.D. Cal. Aug. 11, 2000) (recognizing that subsection (c)(2) "requires an agency to treat the records as subject to the requirements of [the FOIA] if the informant's status as an informant has been officially confirmed"), aff'd, 14 F. App'x 916 (9th Cir. 2001); Valencia-Lucena v. DEA, No. 99-0633, slip op. at 8 (D.D.C. Feb. 8, 2000) (concluding that "[subs]ection (c)(2) is irrelevant to the resolution of this action" because the subject's status as an informant was "officially confirmed at [the requester's] criminal trial"); Tanks, 1996 WL 293531, at *5 (holding that "given the fact that the status of [the subjects] as government informants in Plaintiff's case is confirmed, the (c)(2) exclusion simply has no bearing on the instant case").

[30] See Gonzalez, No. 99-5789, slip op. at 18 (E.D. Cal. Aug. 11, 2000) (finding that "nowhere within [subsection (c)(2)] does it state that the privacy exemptions found at subsections (b)(6) and (b)(7) are invalidated because a person is a confirmed informant"); Valencia-Lucena, No. 99-0633, slip op. at 8 (D.D.C. Feb. 8, 2000) (rejecting plaintiff's argument that "when FOIA [subs]ection (c)(2) does not apply, the agency must confirm the existence of responsive records"); Tanks, 1996 WL 293531, at *5-6 (same).

[31] See Benavides v. DEA, 968 F.2d 1243, 1248 (D.C. Cir.) ("There is no evidence that Congress intended subsection (c)(2) to repeal or supersede the other enumerated FOIA exemptions or to require disclosure whenever the informant's status has been officially confirmed."), modified on other grounds, 976 F.2d 751, 753 (D.C. Cir. 1992); cf. Valencia-Lucena, No. 99-0633, slip op. at 8-9 (D.D.C. Feb. 8, 2000) (holding that once subsection (c)(2) was rendered inapplicable by official confirmation of source's status as such, FBI appropriately relied on Exemptions 6 and 7(C) as basis for new refusal to confirm or deny existence of any responsive records).

[32] See Benavides, 968 F.2d at 1248 ("The legislative history suggests, in fact, that Congress intended to permit the DEA to withhold documents under 7(C) and 7(D), even if the agency must, under subsection (c)(2), acknowledge their existence."); Tanks, 1996 WL 293531, at *6 ("Accepting the status of [two named individuals] as government informants, the FBI ex-

(continued...)

A criminal law enforcement agency forced to employ this exclusion should do so in the same fashion as it would employ the (c)(1) exclusion discussed above.[33] It is imperative that all information that ordinarily would be disclosed to a first-party requester, other than information which would reflect that an individual is a confidential source, be disclosed. If, for example, the Federal Bureau of Investigation were to respond to a request for records pertaining to an individual having a known record of federal prosecutions by replying that "there exist no records responsive to your FOIA request," the interested criminal organization would surely recognize that its request had been afforded extraordinary treatment and would draw its conclusions accordingly. Therefore, the (c)(2) exclusion must be employed in a manner entirely consistent with its clear source-protection objective.

The (c)(3) Exclusion

The third of these special record exclusions pertains only to certain law enforcement records that are maintained by the FBI.[34] The "(c)(3) exclusion" provides as follows:

> Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in [Exemption 1], the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of [the FOIA].[35]

This exclusion recognizes the exceptional sensitivity of the FBI's activities in the areas of foreign intelligence, counterintelligence, and the battle against international terrorism, as well as the fact that the classified files of these activities can be particularly vulnerable to targeted FOIA requests. Sometimes, within the context of a particular FOIA request, the very fact that the FBI does or does not hold any records on a specified person or subject can itself be a sensitive fact, properly classified in accordance with the applicable executive order on the protection of national se-

---

[32](...continued)
plained why disclosure of any information in its files unrelated to the Plaintiff and his prosecution would constitute an unwarranted invasion of personal privacy pursuant to Exemption 7(C), 5 U.S.C. § 552(b)(7)(C).").

[33] See Attorney General's 1986 Amendments Memorandum at 24.

[34] See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 24-27 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum].

[35] 5 U.S.C. § 552(c)(3) (2000 & Supp. IV 2004).

curity information[36] and protectible under FOIA Exemption 1.[37] Once again, however, the mere invocation of Exemption 1 to withhold such information can provide information to the requester which would have an extremely adverse effect on the government's interests. In some possible contexts, the furnishing of an actual "no records" response, even in response to a seemingly innocuous "first-party" request, could compromise sensitive activities.[38]

Congress took cognizance of this through the (c)(3) exclusion, in which it authorizes the FBI to protect itself against such harm in connection with any of its records pertaining to these three, especially sensitive, areas. To do so, the FBI must of course reach the judgment, in the context of a particular request, that the very existence or nonexistence of responsive records is itself a classified fact and that it need employ this record exclusion to prevent its disclosure.[39] By the terms of this provision, the excluded records may be treated as such so long as their existence, within the context of the request, "remains classified information."[40]

Additionally, it should be noted that while the statute refers to records maintained by the FBI, exceptional circumstances could possibly arise in which it would be appropriate for another component of the Department of Justice or another federal agency to invoke this exclusion on a derivative basis as well.[41] Such a situation could occur where information in records of another component or agency is derived from FBI records which fully qualify for (c)(3) exclusion protection. In such extraordinary circumstances,

---

[36] See Exec. Order No. 12,958, as amended, § 3.6(a), 68 Fed. Reg. 15,315 (Mar. 28, 2003), reprinted in 50 U.S.C. § 435 note (2000 & Supp. III 2003) and summarized in *FOIA Post* (posted 4/11/03).

[37] See 5 U.S.C. § 552(b)(1); see also Attorney General's 1986 Amendments Memorandum at 25.

[38] See id. (suggesting that especially with the passage of time, such sensitive records or information might be "maintained elsewhere" (e.g., by the ODNI's National Counterterrorism Center) in which case this exclusion should nonetheless apply, in order to "avoid an anomalous result").

[39] See id.; see also id. at n.44 (addressing overlap with subsection (c)(1)).

[40] 5 U.S.C. § 552(c)(3); see FOIA Update, Vol. XVI, No. 2, at 1-2, 11 (noting that executive order places emphasis on limited classification and automatic declassification); see also *FOIA Post*, "Executive Order on National Security Classification Amended" (posted 4/11/03) (noting substantive changes to Executive Order 12,958).

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

the agency processing the derivative information should consult with the FBI regarding the possible joint invocation of the exclusion in order to avoid a potentially damaging inconsistent response.[42]

Procedural Considerations

Several procedural considerations regarding the implementation and operation of these special record exclusions should be noted. First, it should be self-evident that the decision to employ an exclusion in response to a particular request must not be reflected on anything made available to the requester. This, of course, requires careful attention to the handling of a request at its earliest stages in order to ensure that an agency does not mistakenly speak of the existence (or even of the possible existence) of responsive records in its early administrative correspondence with the requester. And when an agency reaches the judgment that it is necessary to employ an exclusion, it should do so as a specific official determination that is reviewed carefully by appropriate supervisory agency officials.[43] The particular records covered by an exclusion action should be concretely and carefully identified and segregated from any responsive records that are to be processed according to ordinary procedures.[44]

It must be remembered that providing a "no records" response as part of an exclusion strategy does not insulate the agency from either administrative or judicial review of the agency's action. The recipient of a "no records" response might challenge it because he believes that the agency has failed to conduct a sufficiently detailed search to uncover the requested records.[45] Alternately, any requester, mindful of the exclusion mechanism and seeking information of a nature which could possibly trigger an exclusion action, could seek judicial review in an effort to pursue his suspicions and to have a court determine whether an exclusion, if in fact used, was employed appropriately.

Moreover, because the very objective of the exclusions is to preclude the requester from learning that there exist such responsive records, all administrative appeals and court cases involving a "no records" response

---

[42] See id.; cf. *FOIA Post*, "FOIA Amended by Intelligence Authorization Act" (posted 12/23/02) (discussing the enactment of a provision in the Intelligence Authorization Act of 2003, 5 U.S.C. § 552(a)(3)(E) (2000 & Supp. IV 2004), that precludes the making of certain "foreign" FOIA requests to any "element[] of the intelligence community").

[43] See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 27 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum].

[44] See id.

[45] See id. at 29; see also Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 67 (D.C. Cir. 1990).

must receive extremely careful attention. If one procedure is employed in adjudicating appeals or litigating cases in which there actually are no responsive records, and any different course is followed where an exclusion is in fact being used, sophisticated requesters could quickly learn to distinguish between the two and defeat the exclusion's very purpose.[46]

Consequently, agencies should prepare in advance a uniform procedure to handle administrative appeals and court challenges that seek review of the possibility that an exclusion was employed in a given case. In responding to administrative appeals from "no record" responses,[47] agencies should accept any clear request for administrative appellate review of the possible use of an exclusion and specifically address it in evaluating and responding to the appeal.[48]

In the exceptional case in which an exclusion was in fact invoked, the appellate review authority should examine the correctness of that action and come to a judgment as to the exclusion's continued applicability as of that time.[49] In the event that an exclusion is found to have been improperly employed or to be no longer applicable, the appeal should be remanded for prompt conventional processing of all formerly excluded records, with the requester advised accordingly.[50] When it is determined either that an exclusion was properly employed or that, as in the overwhelming bulk of cases, no exclusion was used, the result of the administrative appeal should be, by all appearances, the same: The requester should be specifically advised that this aspect of his appeal was reviewed and found to be without merit.[51]

Such administrative appeal responses, of course, necessarily must be stated in such a way that does not indicate whether an exclusion was in fact invoked.[52] Moreover, in order to preserve the exclusion mechanism's effectiveness, requesters who inquire in any way whether an exclusion has been used should routinely be advised that it is the agency's standard poli-

---

[46] See Attorney General's 1986 Amendments Memorandum at 29.

[47] See FOIA Update, Vol. XII, No. 2, at 5 ("OIP Guidance: Procedural Rules Under the D.C. Circuit's Oglesby Decision") (requiring agency to advise any requester who receives "no record" response of its procedures for filing administrative appeal) (superseding FOIA Update, Vol. V, No. 3, at 2).

[48] See Attorney General's 1986 Amendments Memorandum at 29 (superseded in part by FOIA Update, Vol. XII, No. 2, at 5).

[49] See id. at 28.

[50] See id.

[51] See id. at 28-29.

[52] See id. at 29.

cy to refuse to confirm or deny that an exclusion was employed in any particular case.[53]

Exclusion issues in court actions must be handled with similarly careful and thoughtful preparation.[54] First, it need be recognized that any judicial review of a suspected exclusion determination must of course be conducted ex parte, based upon an in camera court filing submitted directly to the judge.[55] Second, it is essential to the integrity of the exclusion mechanism that requesters not be able to determine whether an exclusion was employed at all in a given case based upon how any case is handled in court. Thus, it is critical that the in camera defenses of exclusion issues raised in FOIA cases occur not merely in those cases in which an exclusion actually was employed and is in fact being defended.[56]

Accordingly, it is the government's standard litigation policy in the defense of FOIA lawsuits that, whenever a FOIA plaintiff raises a distinct claim regarding the suspected use of an exclusion, the government will routinely submit an in camera declaration addressing that claim, one way or the other.[57] When an exclusion was in fact employed, the correctness of that action will be justified to the court. When an exclusion was not in fact employed, the in camera declaration will state simply that it is being submitted to the court so as to mask whether or not an exclusion is being em-

---

[53] See id. at 29 & n.52; Steinberg v. U.S. Dep't of Justice, No. 93-2409, 1997 WL 349997, at *1 (D.D.C. June 18, 1997) (refusing to "confirm[] or deny[] the existence of any exclusion . . . and conclud[ing] that if an exclusion was invoked, it was and remains amply justified"); cf. NARA v. Favish, 541 U.S. 157, 170 (reminding of the "general rule" that withholding information under the FOIA "cannot be predicated on the identity of the requester"), reh'g denied, 541 U.S. 1057 (2004).

[54] 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) (reminding agencies to "carefully consider" the handling of all FOIA requests, including matters in litigation).

[55] See Attorney General's 1986 Amendments Memorandum at 29; see also Steinberg, 1997 WL 349997, at *1 (approving use of agency in camera declaration where plaintiff "alleged that certain requested information may have been excluded pursuant to [sub]section 552(c)").

[56] See Attorney General's 1986 Amendments Memorandum at 29.

[57] See id. at 30; see also, e.g., Steinberg, 1997 WL 349997, at *1 ("[T]he government is permitted to file an in camera declaration, which explains either that no exclusion was invoked or that the exclusion was invoked appropriately."); Steinberg v. U.S. Dep't of Justice, No. 91-2740, 1993 WL 524528, at *2 (D.D.C. Dec. 2, 1993) (agency "volunteered an in camera submission related to the allegation of covert reliance on § 552(c)").

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-

---

[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...)