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).

"Freedom of Information Act cases are peculiarly difficult."[2] To help simplify these peculiar difficulties and to provide a general overview of FOIA litigation considerations, this discussion will follow a rough chronology of a typical FOIA lawsuit -- from the threshold question of whether jurisdictional prerequisites have been met, to the assessment of costs on appeal.

In considering litigation under the FOIA, it is important to bear in mind that in accordance with the Attorney General's FOIA Memorandum of October 12, 2001, it is the Department of Justice's policy to defend an agency's decisions made under the FOIA "unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records."[3] It should be remembered that this is not unlike the comparable litigation-defense standards employed in earlier years of the FOIA's administration.[4]

Jurisdiction, Venue, and Other Preliminary Matters

The United States district courts are vested with exclusive jurisdiction over FOIA cases by section (a)(4)(B) of the Act, which provides in pertinent part:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.[5]

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[2] Miscavige v. IRS, 2 F.3d 366, 367 (11th Cir. 1993); see also Summers v. Dep't of Justice, 140 F.3d 1077, 1080 (D.C. Cir. 1998) (noting "peculiar nature of the FOIA"); Nat'l Res. Def. Council v. DOD, 388 F. Supp. 2d 1086, 1095 (C.D. Cal. 2005) ("The peculiar nature of a FOIA dispute poses unique problems."); cf. Exec. Order No. 13,392, Sec. 1(d), 70 Fed. Reg. 75,373 (Dec. 14, 2005) (seeking to strengthen individual agency compliance with FOIA in order to "help avoid disputes and related litigation").

[3] 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).

[4] See *FOIA Post*, "New Attorney General FOIA Memorandum Issued" (posted 10/15/01) (discussing new Attorney General FOIA Memorandum in context of previous such memoranda); cf. FOIA Update, Vol. XIV, No. 3, at 1 ("President and Attorney General Issue New FOIA Policy Memoranda").

[5] 5 U.S.C. § 552(a)(4)(B) (2000 & Supp. IV 2004); see also Clark v. United States, 116 F. App'x 278, 279 (Fed. Cir. 2004) (explaining that FOIA suits

(continued...)

LITIGATION CONSIDERATIONS

This provision has been held to govern judicial review under all three of the FOIA's access provisions.[6] Because of its specific reference to the "complainant," however, the Court of Appeals for the District of Columbia Circuit has held that this language limits relief under the FOIA to disclosure of records to a particular requester.[7] Consequently, it does not appear to authorize a court to order the publication of information, even informa-

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[5](...continued)
are not within subject matter jurisdiction of Court of Federal Claims); Arriaga v. West, No. 00-1171, 2000 WL 870867, at *2 (Vet. App. June 21, 2000) (commenting that Court of Appeals for Veterans Claims has no jurisdiction over FOIA claims); Bernard v. United States, 59 Fed. Cl. 497, 503 (2004) (declaring that Court of Federal Claims has no jurisdiction over FOIA matters), aff'd, 98 F. App'x 860 (Fed. Cir. 2004), reh'g denied, No. 04-5039 (Fed. Cir. May 5, 2004); In re Lucabaugh, 262 B.R. 900, 905 (E.D. Pa. 2000) (finding FOIA claims insufficient to confer jurisdiction on bankruptcy court). But cf. U.S. Ass'n of Imps. of Textiles & Apparel v. United States, 366 F. Supp. 2d 1280, 1283 n.2 (Ct. Int'l Trade 2005) (concluding that Court of International Trade has jurisdiction under 28 U.S.C. § 1581(i) to consider claims implicating FOIA's affirmative publication provisions, 5 U.S.C. § 552(a)(1)-(2)).

[6] See Kennecott Utah Copper Corp. v. U.S. Dep't of the Interior, 88 F.3d 1191, 1202 (D.C. Cir. 1996) ("The 'judicial review provisions apply to requests for information under subsections (a)(1) and (a)(2) of section 552 as well as under subsection (a)(3).'" (quoting Am. Mail Line v. Gulick, 411 F.2d 696, 701 (D.C. Cir. 1969))).

[7] See Kennecott, 88 F.3d at 1203 (holding that remedial provision of FOIA limits relief to ordering disclosure of documents); Dietz v. O'Neill, No. 00-3440, 2001 U.S. Dist. LEXIS 3222, at *2 (D. Md. Feb. 15, 2001) (holding that remedial provision of FOIA limits relief to ordering disclosure of documents), aff'd per curiam, 15 F. App'x 42 (4th Cir. 2001); Green v. NARA, 992 F. Supp. 811, 817 (E.D. Va. 1998) (concluding that unless agency records have been improperly withheld, "'a district court lacks jurisdiction to devise remedies to force an agency to comply with FOIA's disclosure requirements'" (quoting U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 142 (1989))). But cf. Pub. Citizen v. Dep't of State, 276 F.3d 634, 645 (D.C. Cir. 2002) (declaring that agency's "cut-off" policy for conducting FOIA record searches is unreasonable "both generally and as applied to [plaintiff's] request"); Pa. Dep't of Pub. Welfare v. United States, No. 99-175, 1999 WL 1051963, at *2 (W.D. Pa. Oct. 12, 1999) (suggesting that "[Administrative Procedure Act] review is available to enforce provisions of the FOIA for which the FOIA provides no express remedy"); Pub. Citizen v. Lew, No. 97-2891, slip op. at 4 (D.D.C. July 14, 1998) (refusing to dismiss claim alleging noncompliance with FOIA requirement to publish descriptions of "major information systems" compiled under Paperwork Reduction Act, 44 U.S.C.A. §§ 3501-3520 (1991 & West Supp. 2006), because even in the absence of an express judicial review provision in the FOIA, the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2000), provides a "strong presumption that Congress intend[ed] judicial review of administrative action").

tion required to be published under subsection (a)(1) of the FOIA.[8] Nor does it appear to empower a court to order an agency to make records available for public inspection and copying in an agency reading room under subsection (a)(2).[9] Similarly, the FOIA does not provide a jurisdictional vehicle for a court to consider Bivens-type constitutional tort claims against FOIA officers.[10] Instead, its statutory language, as the Supreme Court ruled in Kissinger v. Reporters Committee for Freedom of the Press, makes federal jurisdiction dependent upon a showing that an agency has

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[8] See Kennecott, 88 F.3d at 1203 ("We think it significant, however, that § 552(a)(4)(B) is aimed at relieving the injury suffered by the individual complainant, not by the general public. It allows district courts to order 'the production of any agency records improperly withheld from the complainant,' not agency records withheld from the public." (quoting 5 U.S.C. § 552(a)(4)(B) (emphasis added by court))); cf. Perales v. DEA, 21 F. App'x 473, 474-75 (7th Cir. 2001) (dismissing an action brought to obtain an "implementing regulation," because such a request "described only material that would be available in the public domain," not material "properly covered" by the FOIA). But see Pa. Dep't of Pub. Welfare v. United States, No. 99-175, 2001 U.S. Dist. LEXIS 3492, at *28 (W.D. Pa. Feb. 7, 2001) (deciding that the Administrative Procedure Act confers jurisdiction on a court to order publication of an index under subsection (a)(2) of the FOIA even though the FOIA itself does not), appeal dismissed voluntarily, No. 01-1868 (3d Cir. Apr. 24, 2002); cf. Ass'n of Imps., 366 F. Supp. 2d at 1283 n.2 (opining that 28 U.S.C. § 1581(i) confers Court of International Trade with jurisdiction to hear claims seeking publication under subsection (a)(1) of FOIA).

[9] See Kennecott, 88 F.3d at 1203 ("Section 552(a)(4)(B) authorizes district courts to order "production" of agency documents, not 'publication.'"); see also Tax Analysts v. IRS, 117 F.3d 607, 610 (D.C. Cir. 1997) (treating as "conceded for the purposes of this case only" that sole remedy under section 552(a)(4)(B) is order directing agency to produce records to complaining party). But see Tax Analysts v. IRS, No. 94-923, 1998 WL 419755, at *4-6 (D.D.C. May 1, 1998) (ordering disclosure of exceptionally large volume of records upon remand and also ordering uniquely fashioned remedy that, in accordance with 5 U.S.C. § 552(a)(2)(D), such FOIA-processed records be placed in reading room on weekly basis as they are processed), appeal dismissed voluntarily, No. 98-5252 (D.C. Cir. Aug. 11, 1998); cf. Ass'n of Imps., 366 F. Supp. 2d at 1283 n.2 (opining that 28 U.S.C. § 1581(i) confers Court of International Trade with jurisdiction to hear claims implicating subsection (a)(2) of FOIA).

[10] Johnson v. Executive Office for U.S. Attorneys, 310 F.3d 771, 777 (D.C. Cir. 2002) (explaining that the "FOIA precludes the creation of a Bivens remedy"); Thomas v. FAA, No. 05-2391, 2007 WL 219988, at *3 (D.D.C. Jan. 25, 2007) (noting that a plaintiff "cannot obtain a Bivens remedy for an alleged violation of FOIA"). But cf. O'Shea v. NLRB, No. 2:05-2808, 2006 WL 1977152, at *5 (D.S.C. July 11, 2006) (recognizing that agency employees who arbitrarily and capriciously withhold information may be subject to disciplinary action).

(1) "improperly"; (2) "withheld"; (3) "agency records." Judicial authority to devise remedies and enjoin agencies can only be invoked, under the jurisdictional grant conferred by § 552, if the agency has contravened all three components of this obligation.[11]

As a consequence, a plaintiff who does not allege any improper withholding of agency records fails to state a claim over which a court has subject matter jurisdiction within the meaning of Rule 12(b)(1) of the Federal Rules of Civil Procedure[12] or, alternatively, fails to state a claim upon which relief could be granted under Rule 12(b)(6).[13] Regardless of the exact legal

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[11] 445 U.S. 136, 150 (1980).

[12] See, e.g., Segal v. Whitmyre, No. 04-80795, 2005 WL 1406171, at *3 (S.D. Fla. Apr. 6, 2005) (finding lack of jurisdiction over FOIA claim because plaintiff failed to allege improper withholding of agency records); Ellis v. IRS, No. 02-1976, 2003 U.S. Dist. LEXIS 24829, at *11 (D. Colo. Dec. 29, 2003) (dismissing claim for lack of subject matter jurisdiction because all documents were released prior to lawsuit); Armstead v. Gray, No. 3-03-1350, 2003 WL 21730737, at *1-2 (N.D. Tex. July 23, 2003) (finding no basis for jurisdiction under FOIA when plaintiff alleged only that agency employees "improperly accessed" plaintiff's records); Tota v. United States, No. 99-0445E, 2000 WL 1160477, at *2 (W.D.N.Y. July 31, 2000) (dismissing claim for lack of subject matter jurisdiction because the "[p]laintiff has not provided any evidence that the FBI improperly withheld any agency records"); Shafmaster Fishing Co. v. United States, 814 F. Supp. 182, 184 (D.N.H. 1993) ("The court thus lacks subject matter jurisdiction if the information was properly withheld under FOIA exemptions."); see also Goldgar v. Office of Admin., 26 F.3d 32, 34 (5th Cir. 1994) (per curiam) (pointing out that where agency had no records responsive to plaintiff's request, court had no jurisdiction under FOIA); Rae v. Hawk, No. 98-1099, slip op. at 3 (D.D.C. Mar. 7, 2001) (finding no subject matter jurisdiction over claims against agencies that received no FOIA request from plaintiff); Unigard Ins. Co. v. Dep't of the Treasury, 997 F. Supp. 1339, 1341 (S.D. Cal. 1997) ("The court presumes a lack of jurisdiction until the party asserting [it] proves otherwise."); cf. Kennecott, 88 F.3d at 1202 (dismissing, for lack of jurisdiction, claim seeking court-ordered publication of information, when court concluded that no such remedy exists under FOIA).

[13] Williams v. Reno, No. 95-5155, 1996 WL 460093, at *2 (D.C. Cir. Aug. 7, 1996) (disagreeing that the district court lacked jurisdiction over a FOIA claim, because the plaintiff alleged improper withholding and, in any event, "the district court has subject matter jurisdiction over FOIA claims" (citing Sweetland v. Walters, 60 F.3d 852, 855 (D.C. Cir. 1996))); Torres v. CIA, 39 F. Supp. 2d 960, 962 n.3 (N.D. Ill. 1999) (suggesting that an agency's "summary judgment motion" predicated on a lack of subject matter jurisdiction was "an imprecise use of the notion of 'jurisdiction' [and that if the] CIA's position were sound, no court could ever decide a FOIA case in favor of a governmental defendant on the merits, for it would lose jurisdic-

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basis used, however, if an agency has not improperly withheld records, a FOIA suit should be dismissed.[14]

For the jurisdictional requirements for a FOIA case to be met, "an agency first must either have created or obtained a record as a prerequisite to its becoming an 'agency record' within the meaning of the FOIA."[15] Of course, if an agency does not have, nor ever had, possession and control of the requested record, then there can be no improper withholding.[16] Rec-

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[13](...continued)
tion as soon as it found that no documents responsive to a plaintiff's FOIA request had been improperly withheld"); Mace v. EEOC, 37 F. Supp. 2d 1144, 1146 (E.D. Mo. 1999) (deciding that dismissal for lack of jurisdiction was "inappropriate," but that dismissal for failure to state a claim was applicable because court lacked further jurisdiction to grant relief), aff'd, 197 F.3d 329 (8th Cir. 1999); Prado v. Ilchert, No. 95-1497, 1997 WL 383239, at *3 (N.D. Cal. June 10, 1997) (dismissing for failure to state claim upon which relief can be granted under FOIA when agency to which request was made lacked responsive records); see also Hart v. FBI, No. 95-2110, 1996 WL 403016, at *3 n.11 (7th Cir. July 16, 1996) (although plaintiff's "los[s] on the merits does not retroactively revoke a district court's jurisdiction," district court's grant of summary judgment to government deprived it of further jurisdiction to act).

[14] See, e.g., Kissinger, 445 U.S. at 139 ("When an agency has demonstrated that it has not "withheld" requested records in violation of the standards established by Congress, the federal courts have no authority to order the production of such records under the FOIA."); Bloom v. Soc. Sec. Admin., 72 F. App'x 733, 735 (10th Cir. July 3, 2003) (finding that once documents were released, "there existed no 'case or controversy' sufficient to confer subject matter jurisdiction on the federal court").

[15] Forsham v. Harris, 445 U.S. 169, 182 (1980), overruled in part by Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (making certain research data generated by private federal grantees subject to FOIA requests); Judicial Watch, Inc. v. U.S. Dep't of Energy, 412 F.3d 125, 132 (D.C. Cir. 2005) (holding that records created or obtained by agency employees while detailed to the National Energy Policy Development Group, a unit of the Executive Office of the President, "are not 'agency records' within the meaning of the FOIA"); see also Apel v. CIA, No. 3:06-CV-136, 2006 WL 1446874, at *1-2 (N.D. Fla. May 23, 2006) (holding that messages sent "through" CIA's Web site are not agency records for purposes of FOIA, because they were not created by CIA).

[16] See U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 145 (1989); Kissinger, 445 U.S. at 155 n.9 ("[T]here is no FOIA obligation to retain records prior to [receipt of a FOIA] request."); Lechliter v. Rumsfeld, No. 05-4381, 2006 WL 1506717, at *2 (3d Cir. June 1, 2006) (finding no improper with-
(continued...)

ords that are created by or come into the possession of an agency after a

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[16](...continued)
holding where agency destroyed documents for reason that "'is not itself suspect'" (citing SafeCard Servs. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991))); Wilbur v. CIA, 355 F.3d 675, 678 (D.C. Cir. 2004) (per curiam) ("[T]he fact that responsive documents once existed does not mean that they remain in the [agency's] custody today or that the [agency] had a duty under FOIA to retain the records."); Jones v. FBI, 41 F.3d 238, 249 (6th Cir. 1994) (finding no remedy for records destroyed prior to FOIA request); Sliney v. Fed. Bureau of Prisons, No. 04-1812, 2005 WL 839540, at *5 (D.D.C. Apr. 11, 2005) ("The fact that the agency once possessed documents that have been destroyed does not preclude the entry of summary judgment for the agency."); Piper v. U.S. Dep't of Justice, 294 F. Supp. 2d 16, 22 (D.D.C. 2003) ("FOIA does not impose a document retention requirement on government agencies."), reconsideration denied, 312 F. Supp. 2d 17 (D.D.C. 2004); Graves v. EEOC, Nos. 02-6842, 02-6306, slip op. at 10-11 (C.D. Cal. Apr. 4, 2003) (providing no relief to plaintiff where agency properly destroyed records prior to receiving his FOIA request); Blanton v. U.S. Dep't of Justice, 182 F. Supp. 2d 81, 85 (D.D.C. 2002) (rejecting plaintiff's contention that agency should have contacted former employees about location of responsive records, and awarding agency summary judgment), aff'd, 64 F. App'x 787 (D.C. Cir. 2003) (per curiam), reh'g en banc denied, Nos. 02-5115, 02-5296 (D.C. Cir. July 22, 2003); Folstad v. Bd. of Governors of the Fed. Reserve Sys., No. 1:99-124, 1999 U.S. Dist. LEXIS 17852, at *5 (W.D. Mich. Nov. 16, 1999) (declaring that the FOIA "does not independently impose a retention obligation on the agency and that "[e]ven if the agency failed to keep documents that it should have kept, that failure would create neither responsibility under FOIA to reconstruct those documents nor liability for the lapse"), aff'd, 234 F.3d 1268 (6th Cir. 2000) (unpublished table decision); Bartlett v. U.S. Dep't of Justice, 867 F. Supp. 314, 316 (E.D. Pa. 1994) (dismissing case for lack of jurisdiction after finding that "[plaintiff's] request seeks presently nonexistent material"); cf. Morris v. Comm'r, No. F-97-5031, 1997 WL 842413, at *4 (E.D. Cal. Nov. 25, 1997) (finding that a request for determination of tax status "was not a request for a document in existence" and thus was not "a valid FOIA request"). But see also Cal-Almond, Inc. v. USDA, No. 89-574, slip op. at 2-3 (E.D. Cal. Mar. 12, 1993) (ruling that when agency returned requested records to submitter four days after denying requester's administrative appeal, in violation of its own records-retention requirements, and court determined that such records were required to be disclosed, agency must seek return of records from submitter for disclosure to requester), appeal dismissed per stipulation, No. 93-16727 (9th Cir. Oct. 26, 1994); OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," 64 Fed. Reg. 54,926 (Oct. 8, 1999) (requiring agencies to respond to FOIA requests for certain grantee research data by first obtaining that data from grantee, in implementation of Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999).

FOIA request is received but before the search for responsive records is conducted, however, may be considered "agency records" for purposes of such FOIA request depending upon the agency's "scope-of-search cut-off" policy.[17] An agency's failure to consider these records when responding to the FOIA request may be considered an improper withholding.[18] (For further discussions of "cut-off" dates and determining the scope of a FOIA request, see Procedural Requirements, Proper FOIA Requests, above.)

Further, the term "record" includes "any information that would be an agency record subject to the [FOIA] when maintained by an agency in any format, including an electronic format."[19] This definition thus broadly encompasses within the concept of "agency record" information maintained by agencies in electronic form.[20] Of course, the FOIA provides no jurisdiction over records other than those held by a federal agency.[21] (For further

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[17] See *FOIA Post*, "Use of 'Cut-Off' Dates for FOIA Searches" (posted 5/6/04) (explaining importance of agency "cut-off" dates, and advising that "date-of-search cut-off" should be used absent compelling circumstances); see also 28 C.F.R. § 16.4(a) (2006) (Department of Justice FOIA regulation specifying that its standard "cut-off" practice "include[s] only records in its possession as of the date [that it] begins its search for them") (emphasis added).

[18] See Pub. Citizen, 276 F.3d at 643-44 (refusing to approve agency's "date-of-request cut-off" policy, and pointing out that it effectively results in withholding of potentially large number of relevant agency records); McGehee v. CIA, 697 F.2d 1095, 1110 (D.C. Cir. 1983) (cautioning agencies against adopting policies the net effect of which "is significantly to impair the requester's ability to obtain the records or significantly to increase the amount of time he must wait to obtain them"), vacated on other grounds on panel reh'g & reh'g en banc denied, 711 F.2d 1076 (D.C. Cir. 1983).

[19] 5 U.S.C. § 552(f)(2).

[20] See FOIA Update, Vol. XVII, No. 4, at 2 (discussing applicability of FOIA to electronic records).

[21] See, e.g., Megibow v. Clerk of U.S. Tax Court, 432 F.3d 387, 388 (2d Cir. 2005) (ruling that United States Tax Court is not subject to FOIA); Blankenship v. Claus, 149 F. App'x 897, 898 (11th Cir. 2005) (affirming dismissal of FOIA claim brought against state authority); Wright v. Curry, 122 F. App'x 724, 725 (5th Cir. 2004) (emphasizing that FOIA "applies to federal agencies, not state agencies"); United States v. Alcorn, 6 F. App'x 315, 316-17 (6th Cir. 2001) (affirming the dismissal of a FOIA claim against a district court "because the federal courts are specifically excluded from FOIA's definition of 'agency'"); McDonnell v. Clinton, No. 97-5179, 1997 WL 812536, at *1 (D.C. Cir. Dec. 29, 1997) (dismissing FOIA claim brought solely against the President); Ortez v. Wash. County, 88 F.3d 804, 811 (9th Cir. 1996) (dismissing FOIA claims against county and county officials); Simon v. Miami

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discussions of the terms "agency" and "agency records," see Procedural Requirements, Entities Subject to the FOIA, above, and Procedural Requirements, "Agency Records," above.)

Whether an agency has "improperly" withheld records usually turns on whether one or more exemptions applies to the documents at issue.[22] If

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[21](...continued)
County Incarceration Facility, No. 3:05-CV-191, 2006 WL 1663689, at *1 (S.D. Ohio May 5, 2006) (magistrate's recommendation) (explaining that because telecommunications company is not federal agency, it is not subject to FOIA), adopted, 2006 WL 1663689 (S.D. Ohio May 12, 2006); Cruz v. Superior Court Judges, No. 3:04-CV-1103, 2006 WL 547930, at *1 (D. Conn. Mar. 1, 2006) (holding that municipal police department is not subject to FOIA, which "applies [only] to federal agencies"); Davis v. Johnson, No. 05-2060, 2005 U.S. Dist. LEXIS 12475, at *1 (N.D. Cal. June 20, 2005) (disallowing FOIA claim against deputy public defender who represented plaintiff in state criminal trial); Benjamin v. Fuller, No. 3:05-cv-941, 2005 WL 1136864, at *1 (M.D. Pa. May 13, 2005) (dismissing a FOIA suit against a district court because the FOIA's definition of "'agency' does not include the courts of the United States"); Carter v. U.S. 6th Circuit Court of Appeal, No. 3:05-cv-134, 2005 WL 1138828, at *1 (E.D. Tenn. May 12, 2005) (dismissing claim against appellate court and explaining that FOIA applies only to executive branch agencies); Yoonessi v. N.Y. State Bd. for Prof'l Med. Conduct, No. 03-cv-871, 2005 WL 645223, at *26 (W.D.N.Y. Mar. 21, 2005) ("[T]he plain language of the FOIA precludes its application to state and local agencies or to individuals."); Slovinec v. Ill. Dep't of Human Servs., No. 02-4124, 2005 WL 442555, at *7 (N.D. Ill. Feb. 22, 2005) (explaining that the "FOIA has no application to the States"); Troyer v. McCallum, No. 03-0143, 2002 WL 32365922, at *1 (W.D. Wis. Mar. 14, 2002) (holding that FOIA "creates no obligations for state agencies"); Allnut v. U.S. Dep't of Justice, 99 F. Supp. 2d 673, 678 (D. Md. 2000) (ruling that trustees of bankruptcy estates are "private" and thus are not subject to FOIA), aff'd sub. nom. Allnutt v. Handler, 8 F. App'x 225 (4th Cir. 2001); Anderson v. Fed. Pub. Defender, No. 95-1485, slip op. at 1 (D.D.C. Mar. 28, 1996) (The "Federal Public Defender is not an agency subject to the requirements of the Freedom of Information Act."); cf. Moye, O'Brien, O'Rourke, Hogan & Pickert v. National R.R. Passenger Corp., No. 6:02-CV-126, 2003 WL 21146674, at *6 (M.D. Fla. May 13, 2003) ("Although Amtrak is not a federal agency, it must comply with FOIA pursuant to statute."), rev'd & remanded on other grounds, 116 F. App'x 251 (11th Cir. 2004), cert. denied, 543 U.S. 1121 (2005). See generally Price v. County of San Diego, 165 F.R.D. 614, 620 (S.D. Cal. 1996) (emphasizing that the FOIA applies only "to authorities of the Government of the United States").

[22] See Tax Analysts, 492 U.S. at 151 (generalizing that "agency records which do not fall within one of the exemptions are improperly withheld"); Abraham & Rose, P.L.C. v. United States, 138 F.2d 1075, 1078 (6th Cir. 1998) (indicating that agency denying FOIA request bears burden of estab-
(continued...)

the agency can establish that no responsive records exist, then there is of course no "improper" withholding, and judgment for the agency should be granted.[23] The same is true if all responsive records have been released in full to the requester,[24] though a court still may grant equitable relief if it

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[22](...continued)
lishing that requested information falls within exemption and remanding case for consideration of appropriate exemptions).

[23] See, e.g., Perales v. DEA, 21 F. App'x 473, 474 (7th Cir. Oct. 17, 2001) (affirming dismissal because information requested does not exist); Coal. on Political Assassinations v. DOD, 12 F. App'x 13, 14 (D.C. Cir. 2001) (finding search to be adequate even though no records were located; "[t]hat responsive documents may have once existed does not establish that they remain in the DOD's custody today"); Sorrells v. United States, No. 97-5586, 1998 WL 58080, at *1 (6th Cir. Feb. 6, 1998) (finding no improper withholding when agency does not have document with "full, legible signature"); Jones v. FBI, 41 F.3d 238, 249 (6th Cir. 1994) (finding no remedy for records destroyed prior to FOIA request); Cal-Almond, Inc. v. USDA, 960 F.2d 105, 108-09 (9th Cir. 1992) (adjudging that absent improper conduct by government, FOIA does not require recreation of destroyed records); see also FOIA Update, Vol. XII, No. 2, at 5 (advising agencies to afford administrative appeal rights to FOIA requesters in "no record" situations (citing Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 67 (D.C. Cir. 1990))); cf. Urban v. United States, 72 F.3d 94, 95 (8th Cir. 1995) (holding that district court erred by dismissing Complaint prior to service on ground that no records existed; case remanded for submission of evidence as to existence of responsive records). But cf. Satterlee v. IRS, No. 05-3181, 2006 WL 561485, at *1-2 (W.D. Mo. Mar. 6, 2006) (refusing to grant motion to dismiss, and concluding that court has jurisdiction -- despite agency's failure to locate responsive records -- but inviting government to "reframe" its motion as seeking summary judgment).

[24] See, e.g., Gabel v. Comm'r, No. 94-16245, 1995 WL 267203, at *2 (9th Cir. May 5, 1995) (finding no improper withholding because "it was uncontested" that agency provided complete response to request); Burr v. Huff, No. 04-C-53, 2004 WL 253345, at *2 (W.D. Wis. Feb. 6, 2004) ("If no documents exist, nothing can be withheld, and jurisdiction cannot be established."), aff'd, No. 04-1466, 2004 U.S. App. LEXIS 22476, at *2-3 (7th Cir. Oct. 14, 2004), cert. denied, 544 U.S. 1004 (2005); Ferranti v. Gilfillan, No. 04-cv-339, 2005 WL 1366446, at *2 (D. Conn. May 31, 2005) (dismissing suit for lack of jurisdiction after agency fully released all requested records); Reg'l Mgmt. Corp. v. Legal Servs. Corp., 10 F. Supp. 2d 565, 573-74 (D.S.C. 1998) (concluding that "no case or controversy exists" because agency produced all requested documents); D'Angelica v. IRS, No. S-94-1998, 1996 U.S. Dist. LEXIS 6681, at *3 (E.D. Cal. Apr. 25, 1996) (granting agency summary judgment when all requested records either did not exist or were fully disclosed); cf. Martinez v. Fed. Bureau of Prisons, 444 F.3d 620, 624 (D.C. Cir. 2006) (holding that agency fulfilled its FOIA obligations by affording
(continued...)

finds in an exceptional case that the agency maintains an unlawful FOIA "policy or practice" threatening to impair the requester's ability to obtain records in the future, upon application of a strict "capable of repetition but evading review" standard.[25] This narrow situation, however, is far different from the issuance of declaration, following disclosure of all requested records, that an agency's initial withholding violated the FOIA.[26] The D.C. Circuit has held that such a declaratory judgment would constitute an advisory opinion that courts lack the jurisdiction to issue.[27]

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[24](...continued)
prisoner-plaintiff "meaningful opportunity to review" his presentence reports and to take notes on them); Howell v. U.S. Dep't of Justice, No. 04-0479, 2006 WL 890674, at *2 (D.D.C. Apr. 4, 2006) (finding no improper withholding where, pursuant to Federal Bureau of Prisons policy, inmate was afforded opportunity to review his presentence investigation report (citing Martinez)).

[25] See Payne Enters. v. United States, 837 F.2d 486, 490-92 (D.C. Cir. 1988) (finding repeated, unacceptably long agency delays in providing nonexempt information sufficient to create jurisdiction where such delays are likely to recur absent immediate judicial intervention); Pub. Citizen v. Office of the U.S. Trade Representative, 804 F. Supp. 385, 387 (D.D.C. 1992) (deciding that a court has jurisdiction to consider an "agency's policy to withhold temporarily, on a regular basis, certain types of documents"); cf. Gavin v. SEC, No. 04-4552, 2005 WL 2739293, at *6 (D. Minn. Oct. 24, 2005) (rejecting request to enjoin SEC from using "Glomar" response, because "future harm is merely speculative in nature, and injunctive relief is [therefore] inappropriate"); Ctr. for Individual Rights v. U.S. Dep't of Justice, No. 03-1706, slip op at 11-12 (D.D.C. Sept. 21, 2004) (finding a lack of jurisdiction to grant equitable relief -- after the agency made full disclosure during the course of litigation -- because the plaintiff failed to establish an unlawful FOIA policy or otherwise "articulate what documents it might seek in the future or in what way future requests would mirror the circumstances of its original request").

[26] Payne Enters., 837 F.2d at 491 (distinguishing between the issuance of "[a] declaration that an agency's initial refusal to disclose requested information was unlawful, after the agency made that information available, [which] would constitute an advisory opinion in contravention of Article III of the Constitution," and a grant of equitable relief, following full disclosure, where an agency maintains an otherwise-unreviewable "policy or practice that will impair . . . lawful access to information in the future").

[27] Id.; see also Pagosans for Pub. Lands v. U.S. Forest Serv., No. 06-cv-00556, 2007 WL 162745, at *3 (D. Colo. Jan. 18, 2007) ("There is no jurisdiction under FOIA for a declaratory judgment."). But see Or. Natural Desert Ass'n v. Gutierrez, 409 F. Supp. 2d 1237, 1248 (D. Or. 2006) (issuing, after the agency's disclosure of all requested records, a declaratory judgment that its failure "to make a timely determination resulted in an improper
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Once a court determines that information has been properly withheld pursuant to a FOIA exemption, the court has no inherent, equitable power to order disclosure absent some other statute mandating disclosure.[28] The converse of this rule, however -- that a court has inherent, equitable power to refuse to order disclosure of nonexempt information -- has not been established with the same degree of certainty.[29]

Similarly, an agency has not improperly withheld records when it is prohibited from disclosing them by a pre-existing court order.[30] While the

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[27](...continued)
withholding under the Act"); Beacon Journal Publ'g Co. v. Gonzalez, No. 05-CV-1396, 2005 U.S. Dist. LEXIS 28109, at *3-4 (N.D. Ohio Nov. 16, 2005) (pronouncing, following an agency's disclosure of the requested photographs, that its initial withholding was "contrary to the FOIA").

[28] See Spurlock v. FBI, 69 F.3d 1010, 1016-18 (9th Cir. 1995) (concluding that when court finds records exempt under FOIA, it has no "inherent" authority to order disclosure of agency information just because it might conflict with depositions or other public statements of informant).

[29] See Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1082, 1087 (9th Cir. 1997) ("We conclude that a district court lacks inherent power, equitable or otherwise, to exempt materials that FOIA itself does not exempt."); Weber Aircraft Corp. v. United States, 688 F.2d 638, 645 (9th Cir. 1982) ("The careful balancing of interests which Congress attempted to achieve in the FOIA would be upset if courts could exercise their general equity powers to authorize nondisclosure of material not covered by a specific exemption."), rev'd on other grounds, 465 U.S. 792 (1984); see also Abraham & Rose, 138 F.3d at 1077 ("Basing a denial of a FOIA request on a factor unrelated to any of the[] nine exemptions clearly contravenes [the FOIA]."); cf. Halperin v. U.S. Dep't of State, 565 F.2d 699, 706 (D.C. Cir. 1977) ("The power of a court to refuse to order the release of information that does not qualify for one of the nine statutory exemptions exists, if at all, only in "exceptional circumstances." (citing Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971))). But see Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 20 (1973) (suggesting, in dicta, that the FOIA does not "limit the inherent powers of an equity court"); Campos v. INS, 32 F. Supp. 2d 1337, 1345-46 (S.D. Fla. 1998) (same).

[30] See, e.g., GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375, 387 (1980) ("To construe the lawful obedience of an injunction issued by a federal district court with jurisdiction to enter such a decree as 'improperly' withholding documents under the Freedom of Information Act would do violence to the common understanding of the term 'improperly' and would extend the Act well beyond the intent of Congress."); Freeman v. U.S. Dep't of Justice, 723 F. Supp. 1115, 1120 (D. Md. 1988) (refusing to order the release of records covered by pre-existing nondisclosure order of sister district court); see also FOIA Update, Vol. IV, No. 3, at 5 (counseling that re-
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validity of such a pre-existing court order does not depend upon whether it is based upon FOIA exemptions,[31] it is the agency's burden to demonstrate that the order was intended to operate as an injunction against the agency, rather than as a mere court seal.[32]

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[30](...continued)
quests for records subject to court order forbidding disclosure ordinarily should be denied). But see also FOIA Update, Vol. XIII, No. 3, at 5 (advising that "protective orders" issued by agency administrative law judges do not qualify as court orders); cf. Riley v. FBI, No. 00-2378, 2002 U.S. Dist. LEXIS 2632, at *7 (D.D.C. Feb. 12, 2002) (finding that "pen register" materials were sealed and therefore were properly withheld on basis of Exemption 3).

[31] See Wagar v. U.S. Dep't of Justice, 846 F.2d 1040, 1047 (6th Cir. 1988) (holding that validity of nondisclosure orders does not depend on their being based on FOIA exemptions).

[32] See, e.g., Morgan v. U.S. Dep't of Justice, 923 F.2d 195, 197 (D.C. Cir. 1991) ("[T]he proper test for determining whether an agency improperly withholds records under seal is whether the seal, like an injunction, prohibits the agency from disclosing the records."); Odle v. Dep't of Justice, No. 05-2771, 2006 WL 1344813, at *14 (N.D. Cal. May 17, 2006) (concluding that agency may not withhold information pursuant to sealing order unless that court order prohibits disclosure in response to FOIA requests); Gerstein v. U.S. Dep't of Justice, No. 03-04893, slip op. at 10-11 (N.D. Cal. Sept. 30, 2005) (determining that sealing orders pertaining to search and seizure warrants prohibited FOIA disclosure, because they were intended to prevent investigative targets "from learning about the warrant[s]"); Armstrong v. Executive Office of the President, 830 F. Supp. 19, 23 (D.D.C. 1993) ("[I]t is also clear that the Protective Order was not intended to act as a limitation on the Government's ability to determine the final disposition of these classified materials."); Senate of P.R. v. U.S. Dep't of Justice, No. 84-1829, 1993 U.S. Dist. LEXIS, at *18-19 (D.D.C. Aug. 24, 1993) (finding that agency declaration failed to satisfy Morgan test, and requiring more detailed explanation of intended effect of sealing order); McDonnell Douglas Corp. v. NASA, No. 91-3134, slip op. at 1-2 (D.D.C. July 12, 1993) ("While this court's sealing Order temporarily precluded release, that order was not intended to operate as the functional equivalent of an injunction prohibiting release. It was only approved by the court for the purposes of expediting this litigation and protecting information . . . until this lawsuit was resolved."); see also Lykins v. U.S. Dep't of Justice, 725 F.2d 1455, 1460-61 & n.7 (D.C. Cir. 1984) (determining that a federal district court policy -- one "now enshrined in an order [that was] not issued as part of a concrete case or controversy before [that] court" -- does not constitute the type of "court order" contemplated in GTE Sylvania); cf. Pansy v. Borough of Stroudsburg, 23 F.3d 772, 791 (3d Cir. 1994) ("[W]here it is likely that information is accessible under a relevant freedom of information law, a strong presumption exists against granting or maintaining an order of confidentiality whose scope would pre-
(continued...)

Further, because the Supreme Court has clearly instructed that, as a general rule, "the identity of the requesting party" does not have any bearing on the proper disclosure of information under the FOIA,[33] it is well settled that it is not appropriate for a court to order disclosure of information to a FOIA requester with a special restriction, either explicit or implicit, that the requester not further disseminate the information received.[34] As the Supreme Court recently put it: "There is no mechanism under FOIA for a protective order allowing only the requester to see whether the information bears out his theory, or for proscribing its general dissemination."[35]

The venue provision of the FOIA, quoted above, provides requesters with a broad choice of forums in which to bring suit.[36] When a requester sues in a jurisdiction other than the District of Columbia, however, he is obliged to allege the nexus giving rise to proper venue in that jurisdiction.[37]

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[32](...continued)
vent disclosure of that information pursuant to the relevant freedom of information law.").

[33] U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771-72 (1989); see also FOIA Update, Vol. X, No. 2, at 3-4 (discussing Reporters Committee decision).

[34] See, e.g., Chin v. U.S. Dep't of the Air Force, No. 99-3127, 2000 WL 960515, at *2 (5th Cir. June 15, 2000) (refusing to allow disclosure of exempt information under protective order); Schiffer v. FBI, 78 F.3d 1405, 1411 (9th Cir. 1996) (overruling district court's order limiting access to persons other than plaintiff "is not authorized by FOIA"); Spurlock, 69 F.3d at 1016 (finding that district court erred when, after determining that requested material was exempt, it nevertheless ordered disclosure of any "falsified statements" made to FBI about requester); cf. Maricopa, 108 F.3d at 1088-89 (rejecting, as irrelevant, plaintiff's offer to agree not to further disclose requested information: "FOIA does not permit selective disclosure of information only to certain parties . . . . [O]nce the information is disclosed to [this requester], it must also be made available to all members of the public who request it.").

[35] NARA v. Favish, 541 U.S. 157, 174, 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 the Court firmly reinforced the general FOIA rule that "release to one is release to all").

[36] See 5 U.S.C. § 552(a)(4)(B) (providing for venue in any of four locations).

[37] See Gaylor v. U.S. Dep't of Justice, No. 05-CV-414, 2006 WL 1644681, at *1 (D.N.H. June 14, 2006) (finding venue lacking in New Hampshire, where plaintiff, who claimed to be resident of Texas, was incarcerated and was general partner in company that was no longer in good standing in New Hampshire); Cosio v. INS, No. 97-5380, slip op. at 3 (C.D. Cal. Dec. 29, 1997)
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LITIGATION CONSIDERATIONS

Largely due to the statutory designation of the District of Columbia as an appropriate forum for any FOIA action,[38] the District Court for the District of Columbia and Court of Appeals for the District of Columbia Circuit have, over the years, decided a great many of the leading cases under the FOIA.[39]

The District Court for the District of Columbia has been held to be the sole appropriate forum for cases in which the requester resides and works outside the United States and the records requested are located in the District of Columbia.[40] As a related matter, aliens are treated the same as U.S. citizens for FOIA venue purposes.[41] And on another technical venue matter, even though the District Court for the District of Columbia is the "uni-

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[37](...continued)
(finding venue improper for plaintiffs who do not reside or have their principal places of business in judicial district and who do not allege that their records were maintained there); Schwarz v. IRS, 998 F. Supp. 201, 203 (N.D.N.Y. 1998) (finding venue improper where agency maintains regional office unless substantial part of activity complained of also occurred there), appeal dismissed for lack of merit, No. 98-6065 (2d Cir. July 30, 1998); Handlery Hotels, Inc. v. U.S. Consumer Prod. Safety Comm'n, No. 97-1100, slip op. at 3 (S.D. Cal. Dec. 5, 1997) (finding venue improper where based on location of plaintiff's counsel); Keen v. FBI, No. 97-2657, 1997 U.S. Dist. LEXIS 16220, at *2 (N.D. Cal. Oct. 17, 1997) (finding venue improper where pro se plaintiff housed temporarily); see also Morrell v. U.S. Dep't of Justice, No. 96-4356, 1996 WL 732499, at *1 (N.D. Cal. Dec. 16, 1996) (transferring pro se action improperly filed in Northern District of California to Eastern District of California, where plaintiff resided); cf. McHale v. FBI, No. 99-1628, slip op. at 8-9 (D.D.C. Nov. 7, 2000) (dismissing case under "first-filed" rule in favor of similar litigation pending in another jurisdiction).

[38] See, e.g., FOIA Update, Vol. XI, No. 2, at 2 (citing "universal venue" provision of FOIA, 5 U.S.C. § 552(a)(4)(B)).

[39] See, e.g., Gaylor, 2006 WL 1644681, at *1 (transferring suit to District Court for District of Columbia, because of its "special expertise in FOIA matters"); Matlack, Inc. v. EPA, 868 F. Supp. 627, 630 (D. Del. 1994) ("The United States Court of Appeals for the District of Columbia Circuit has long been on the leading edge of interpreting the parameters of what a federal agency must disclose and may withhold consistent with the terms of FOIA."); see also FOIA Update, Vol. VI, No. 3, at 1-2 (describing FOIA litigation process within D.C. Circuit).

[40] See Akutowicz v. United States, 859 F.2d 1122, 1126 (2d Cir. 1988).

[41] See, e.g., Arevalo-Franco v. INS, 889 F.2d 589, 590-91 (5th Cir. 1989) (ruling that resident alien may bring FOIA suit in district where he in fact resides).

versal" venue for FOIA lawsuits,[42] it is not settled whether the Tennessee Valley Authority is amenable to FOIA suit either in Washington, D.C. or else only in the Northern District of Alabama (the venue set by statute for that wholly owned government corporation).[43]

The judicial doctrine of forum non conveniens, as codified in 28 U.S.C. § 1404(a),[44] can permit the transfer of a FOIA case to a different judicial district.[45] The courts have invoked this doctrine to transfer FOIA cases under a variety of circumstances.[46] Similarly, when the requested records are the

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[42] See, e.g., FOIA Update, Vol. VI, No. 3, at 2 (noting that under the FOIA's "universal venue provision," 5 U.S.C. § 552(a)(4)(B), any FOIA lawsuit can be filed in the District Court for the District of Columbia).

[43] Compare Jones v. NRC, 654 F. Supp. 130, 132 (D.D.C. 1987) (declaring that "Congress has made clear [in 16 U.S.C. § 831g(a) (2000 & Supp. IV 2004)] that the venue statute that permits [service of] process against federal agencies [i.e., 28 U.S.C. § 1391(e) (2000 & Supp. III 2003)] does not apply to TVA"), with Murphy v. TVA, 559 F. Supp. 58, 59 (D.D.C. 1983) (finding a "strong presumption that Congress intended FOIA actions against the TVA to be maintainable in the District of Columbia").

[44] (2000).

[45] See generally Ross v. Reno, No. 95-CV-1088, 1996 WL 612457, at *3-4 (E.D.N.Y. Aug. 13, 1996) (discussing factors in favor of and in opposition to transfer of case to neighboring jurisdiction).

[46] See, e.g., Carpenter v. U.S. Dep't of Justice, No. 3:05-CV-172, 2005 WL 1290678, at *2 (D. Conn. Apr. 28, 2005) (transferring FOIA suit to district in which plaintiff's criminal case was pending, because request sought records from that proceeding); Cecola v. FBI, No. 94 C 4866, 1995 WL 645620, at *3 (N.D. Ill. Nov. 1, 1995) (transferring remainder of case to district where remaining records and government's declarant are located, where plaintiff operates business, and where activities described in requested records presumably took place); Southmountain Coal Co. v. Mine Safety & Health Admin., No. 94-0110, slip op. at 2-3 (D.D.C. Mar. 10, 1994) (justifying transfer of suit to district where corporate requester resides and has principal place of business and where criminal case on which request is based is pending, on grounds that "a single court [handling] both FOIA and criminal discovery would obviate the possibility of contradictory rulings, and would prevent the use of FOIA as a mere substitute for criminal discovery"); Bauer v. United States, No. 91-374A, slip op. at 3 (W.D.N.Y. Feb. 3, 1992) (finding venue improper where pro se suit filed; action transferred to jurisdiction where records located); Housley v. U.S. Dep't of Justice, No. 89-436, slip op. at 3-4 (D.D.C. Nov. 13, 1989) (transferring case to district where criminal proceeding against plaintiff was held and where evidence obtained by government's electronic surveillance allegedly was improperly withheld); cf. Envtl. Crimes Project v. EPA, 928 F. Supp. 1, 1-2 (D.D.C. 1995) (finding

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subject of pending FOIA litigation in another judicial district, the related doctrine of "federal comity" can permit a court to defer to the jurisdiction of the other court, in order to avoid unnecessarily burdening the federal judiciary and delivering conflicting FOIA judgments.[47]

In a decision involving a somewhat related issue, the Court of Appeals for the Eighth Circuit upheld the removal of a state FOIA case to a federal court because the records at issue actually belonged to the United States Attorney's Office, which had intervened to protect its interests.[48]

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[46](...continued)
that "[t]he interest of justice clearly favors transfer of this case," but absent "precise" information as to location of records sought, declining to order transfer in view of "substantial weight due to plaintiff's choice of forum"). But see In re Scott, 709 F.2d 717, 721-22 (D.C. Cir. 1983) (issuing writ of mandamus and remanding case when district court sua sponte transferred case, without determination of whether venue was proper in other forum, merely in effort to reduce burden of "very large number of in forma pauperis cases"); Haswell v. Nat'l R.R. Passenger Corp., No. 05-723, 2006 WL 839067, at *3-4 (D. Ariz. Mar. 28, 2006) (denying government's request to transfer venue to District of Columbia, because plaintiff was resident of Arizona, even though agency and all responsive records were located in Washington, D.C.; reasoning that "case [likely] will be decided on summary judgment" based upon affidavits).

[47] See, e.g., City of Chicago v. U.S. Dep't of the Treasury, No. 01 C 3835, 2001 WL 1173331, at *3 (N.D. Ill. Oct. 4, 2001) (finding "comity" inapposite when a related case seeking much of the same information at issue is before a court of appeals); see also McHale v. FBI, No. 99-1628, slip op. at 8-9 (D.D.C. Nov. 7, 2000) (applying "first-filed" rule to dismiss case when similar litigation was already pending in another jurisdiction); Hunsberger v. U.S. Dep't of Justice, No. 93-1945, slip op. at 1 (D.D.C. Mar. 16, 1994) (concluding that lack of responsiveness of court in which similar action was previously filed is "inadequate" ground to maintain independent action in second court); Beck v. U.S. Dep't of Justice, No. 88-3433, 1991 U.S. Dist. LEXIS 1179, at *15-16 (D.D.C. Jan. 31, 1991), summary affirmance granted in pertinent part & denied in part, No. 91-5292 (D.C. Cir. Nov. 19, 1992), aff'd on remaining issues, 997 F.2d 1489 (D.C. Cir. 1993); see also Envtl. Crimes Project, 928 F. Supp. at 2 (denying government's transfer motion, but ordering stay of proceedings pending resolution of numerous discovery disputes in related cases in other jurisdiction); FOIA Update, Vol. VI, No. 3, at 6 ("[G]iving a [FOIA] litigant more than one opportunity in court is a 'luxury that cannot be afforded.'" (quoting Charles Alan Wright, Law of Federal Courts 678 (4th ed. 1983))).

[48] See United States v. Todd, 245 F.3d 691, 693 (8th Cir. 2001) (finding a "colorable defense" based on the FOIA, which justified removal); see also, e.g., Brady-Lunny v. Massey, 185 F. Supp. 2d 928, 930, 932 (C.D. Ill. 2002) (indicating that United States removed state FOIA case pursuant to "feder-
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The Eighth Circuit explained that not only does the federal removal statute, 28 U.S.C. § 1442(a)(1),[49] establish an independent basis for federal court jurisdiction, but the FOIA itself raises a "colorable defense" to the state action.[50] (For a further discussion of such removal actions under the federal pre-emption doctrine, see Discretionary Disclosure and Waiver, above.)

On occasion, FOIA plaintiffs have attempted to expedite judicial consideration of their suits by seeking a preliminary injunction to "enjoin" the agency from continuing to withhold the requested records.[51] When such extraordinary relief is sought, the court does not adjudicate the parties' substantive claims, but rather weighs: (1) whether the plaintiff is likely to prevail upon the merits; (2) whether the plaintiff will be irreparably harmed absent relief; (3) whether the defendant will be substantially harmed by the issuance of injunctive relief; and (4) whether the public interest will be

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[48](...continued)
al question doctrine," and ultimately finding that information at issue was exempt under FOIA and therefore should not be disclosed).

[49] (2000).

[50] 245 F.3d at 693.

[51] See U.S. Dep't of Commerce v. Assembly of Cal., 501 U.S. 1272 (1991) (staying preliminary injunction); Aronson v. HUD, 869 F.2d 646, 648 (1st Cir. 1989) (denying preliminary injunction); Carlson v. USPS, No. 02-5471, 2005 WL 756573, at *8 (N.D. Cal. Mar. 31, 2005) (denying request for injunction sought to compel "timely" response to FOIA request); Robbins v. U.S. Bureau of Land Mgmt., 219 F.R.D. 685, 687 (D. Wyo. 2004) (denying as premature a motion to compel production of documents that were the subject of multiple FOIA requests); Beta Steel Corp. v. NLRB, No. 2:97 CV 358, 1997 WL 836525, at *2 (N.D. Ind. Oct. 22, 1997) (denying preliminary injunction); see also Cullinane v. Arnold, No. 97-779, 1998 U.S. Dist. LEXIS 5575, at *4 (C.D. Cal. Mar. 24, 1998) (denying writ of mandamus because FOIA provides adequate remedy); see also Al-Fayed v. CIA, No. 00-2092, slip op. at 18 (D.D.C. Dec. 11, 2000) (reminding plaintiffs, who twice before had petitioned for a temporary restraining order, that a preliminary injunction amounts to "extraordinary" relief, which must be granted "sparingly"), aff'd on other grounds, 254 F.3d 300 (D.C. Cir. 2001); cf. Dorsett v. U.S. Dep't of Justice, 307 F. Supp. 2d 28, 42 (D.D.C., 2004) (describing plaintiff's motion for injunction to prevent agency from "not taking any action honoring or denying" FOIA request, but dismissing it because court has no jurisdiction to make "advisory findings" regarding agency conduct towards FOIA requesters); Wiedenhoeft v. United States, 189 F. Supp. 2d 295, 296-97 (D. Md. 2002) (refusing to issue temporary restraining order to force "immediate compliance" with plaintiff's FOIA requests by moving them "to the head of the queue forthwith").

benefitted by such relief.[52]

In a FOIA case, the granting of such an injunction would necessarily force the government to disclose the very information that is the subject of the litigation, without affording it any opportunity to fully and fairly litigate its position on the merits; such an injunction would moot the government's claims before they could ever be adjudicated and would effectively destroy any possibility of appellate review.[53] Consequently, the government would presumptively sustain irreparable harm in any instance in which a preliminary injunction were issued in a FOIA case.[54]

Moreover, because a court can exercise FOIA jurisdiction only after it has first found an improper withholding, a substantial question exists as to whether the FOIA even empowers a court to issue a preliminary injunction

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[52] See Elec. Privacy Info. Ctr. v. Dep't of Justice, 416 F. Supp. 2d 30, 36 (D.D.C. 2006); Long v. DHS, 436 F. Supp. 2d 38, 43 (D.D.C. 2006); Al-Fayed v. CIA, No. 00-2092, 2000 WL 34342564, at *2 (D.D.C. Sept. 20, 2000); Aguilera v. FBI, 941 F. Supp. 144, 147 (D.D.C. 1996); Ray v. Reno, No. 94-1384, slip op. at 3 (D.D.C. Oct. 24, 1995), appeal dismissed for lack of prosecution, No. 96-5005 (D.C. Cir. Dec. 26, 1996); Hunt v. U.S. Marine Corps, No. 94-2317, slip op. at 2 (D.D.C. Oct. 28, 1994); Nation Magazine v. U.S. Dep't of State, 805 F. Supp. 68, 72 (D.D.C. 1992); see also Mayo v. U.S. Gov't Printing Office, 839 F. Supp. 697, 700 (N.D. Cal. 1992) (finding fact that FOIA expressly authorizes injunctive relief does not divest district court of obligation to "exercise its sound discretion," relying on traditional legal standards, in granting such relief (citing Weinberger v. Romero Barcelo, 456 U.S. 305, 312 (1982))), aff'd, 9 F.3d 1450 (9th Cir. 1993).

[53] See Aronson, 869 F.2d at 648 ("To issue the preliminary injunction discloses the names, permanently injuring the interest HUD seeks to protect[.]"); see also Long, 436 F. Supp. 2d at 44 (refusing to issue a preliminary injunction to compel the production of records, because "[t]he government has not yet had a chance to review its files, prepare and file a dispositive motion, and provide the Court the information necessary to make a decision on any material that might be subject to an exemption"); Hunt, No. 94-2317, slip op. at 5 (D.D.C. Oct. 28, 1994) (denying temporary restraining order, in part on basis of strong "public interest in an 'orderly, fair and efficient administration of the FOIA'" (quoting Nation Magazine, 805 F. Supp. at 74)); cf. Maine v. U.S. Dep't of the Interior, No. 00-122, 2001 WL 98373, at *3 (D. Me. Feb. 5, 2001) (granting stay because "the loss of the right to appeal alone convinces this Court that this factor weighs strongly in favor of Defendants"), aff'd & vacated in part on the merits, 285 F.3d 126 (1st Cir.), amended & superseded, 298 F.3d 60 (1st Cir. 2002).

[54] See generally FOIA Update, Vol. XII, No. 3, at 1-2 (discussing comparable situation of "unstayed" disclosure orders).

to begin with.[55] These considerations lead to the conclusion that the extraordinary mechanism of preliminary injunctive relief should not be available in FOIA cases, although expedited processing may be appropriate.[56] Indeed, the FOIA itself contemplates expedited processing of requests in cases of "compelling need" and in other cases that are determined by agency regulation to warrant such processing.[57]

However, even the timing of an agency's response to an expedited processing request itself has been subject to a preliminary injunction.[58] Such was the case in a ruling by the District Court for the District of Columbia in Electronic Privacy Information Center (EPIC) v. Department of Justice, which involved a request for records concerning the government's terrorist surveillance program.[59] In EPIC, the court ruled that courts have the jurisdictional authority to impose "concrete deadlines" on any agency that "delay[s]" the processing of an expedited FOIA request beyond what arguably is "as soon as practicable,"[60] i.e., the statutory standard applicable to

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[55] See Kissinger, 455 U.S. at 150 (absent improper withholding, FOIA confers no "[j]udicial authority to devise remedies and enjoin agencies"); NLRB v. Sears, 421 U.S. 132, 147-48 (1975) (once it is determined that withheld information falls within one of FOIA's exemptions, FOIA "'does not apply' to such documents" (quoting Act)). But see Wash. Post v. DHS, 459 F. Supp. 2d 61, 76 (D.D.C. 2006) (granting plaintiff's motion for preliminary injunction on basis of "expedited action" rationale), stay granted, No. 06-5337 (D.C. Cir. Nov. 1, 2006).

[56] See Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (ordering Department of Justice to expedite processing and to produce requested documents within ten months); Perdue Farms, Inc. v. NLRB, 927 F. Supp. 897, 906 (E.D.N.C. 1996) (granting injunction mandating processing of month-old FOIA request pertaining to challenged union election "immediately and with all deliberate speed").

[57] 5 U.S.C. § 552(a)(6)(E)(i)(I)-(II); see, e.g., 22 C.F.R. § 171.12(c)(4) (2006) (Department of State regulation under which expedited processing may be granted if "[s]ubstantial humanitarian concerns would be harmed by the [agency's] failure to process [the requested records] immediately"); cf. Aguilera, 941 F. Supp. at 152-53 (granting the plaintiff's motion for a preliminary injunction to compel expedited processing on the basis that the plaintiff "made a strong showing of exceptional and urgent need in this case to fall within the exception . . . [and] to warrant an expedition of his FOIA request").

[58] See Elec. Privacy Info. Ctr., 416 F. Supp. 2d at 42 (granting preliminary injunction to accelerate agency's processing of expedited request).

[59] See id. at 33.

[60] Id. at 38.

expedition.[61] It then issued an injunction to accelerate the processing of EPIC's FOIA request (which the Department of Justice already had agreed to handle on an expedited basis) by requiring production of records within twenty days of its order.[62]

In reaching this decision, the court focused on the "twenty-day deadline applicable to standard FOIA requests" and opined that if an agency fails to meet this deadline, it "presumptively also fails to" meet the expedition standard.[63] Because the Department of Justice had surpassed the "standard" twenty-day deadline -- and had as yet presented no "credible evidence" justifying its "delay" -- the court found that EPIC's "right to expedition" would be lost if a preliminary injunction were not issued.[64] Despite this ruling, it is worth reiterating that the FOIA provides no specific time frame within which an expedited request must be processed, but rather, as mentioned above, requires only that the processing be accomplished "as soon as practicable."[65] (See the further discussions of expedited processing under Procedural Requirements, Time Limits, above, and Litigation Considerations, "Open America" Stays of Proceedings, below.)

In any event, a FOIA plaintiff -- even one who is proceeding pro se

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[61] See 5 U.S.C. § 552(a)(6)(E)(iii).

[62] See Elec. Privacy Info. Ctr., 416 F. Supp. 2d at 40; see also Gerstein v. CIA, No. 06-4643, 2006 WL 3462659, at *4-5 (N.D. Cal. Nov. 29, 2006) (granting plaintiff's motion for preliminary injunction and ordering agencies to process plaintiff's FOIA requests within thirty days); Wash. Post, 459 F. Supp. 2d at 68 n.4, 76 (granting the plaintiff's motion for a preliminary injunction "to complete the processing of the plaintiff's . . . FOIA requests and produce or identify all responsive records within 10 days," and to provide a Vaughn Index, despite the agency's prior expedited review of plaintiff's FOIA request). But cf. Long, 436 F. Supp. 2d at 44 (denying, given the "broad scope of plaintiff's requests," a motion for a preliminary injunction to compel processing within twenty days, and explaining that "[t]he government has not yet had a chance to review its files, prepare and file a dispositive motion, and provide the Court the information necessary to make a decision on any material that might be subject to an exemption").

[63] Elec. Privacy Info. Ctr., 416 F. Supp. 2d at 39.

[64] Id. at 40-41.

[65] 5 U.S.C. § 552(a)(6)(E)(iii); see also S. Rep. 104-272, 1996 WL 262861, at *17 (May 15, 1996) ("The goal [of expedited processing] is not to get the request processed within a specific time period, but to give the request priority in processing more quickly than would otherwise occur." (emphasis added)); ACLU v. DOD, 339 F. Supp. 2d 501, 503 (S.D.N.Y. 2004) ("While it would appear that expedited processing would necessarily require compliance in fewer than 20 days, Congress provided that the executive was to 'process as soon as practicable' any expedited request.").

-- must file suit before expiration of the applicable statute of limitations, just like any other plaintiff.[66] In Spannaus v. Department of Justice, the D.C. Circuit applied the general federal statute of limitations, which is found at 28 U.S.C. § 2401(a),[67] to FOIA actions.[68] Section 2401(a) states, in pertinent part, that "every action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." In Spannaus it was held that the FOIA cause of action accrued -- and, therefore, that the statute of limitations began to run -- once the plaintiff had "constructively" exhausted his administrative remedies (see the discussion of Exhaustion of Administrative Remedies, below) and not when all administrative appeals had been finally adjudicated.[69] In accordance with the Spannaus decision, the National Archives and Records Administration issued General Records Schedule 14,[70] which sets the

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[66] See, e.g., Wilbur v. CIA, 273 F. Supp. 2d 119, 123 (D.D.C. 2003) ("Although [plaintiff] is now without a lawyer, he is still required to follow the basic rules of court procedure."), aff'd on other grounds, 355 F.3d 675 (D.C. Cir. 2004) (per curiam), reh'g denied, No. 03-5142 (D.C. Cir. Apr. 7, 2004).

[67] (2000).

[68] 824 F.2d 52, 55-56 (D.C. Cir. 1987); see also, e.g., Harris v. Freedom of Info. Unit, DEA, No. 3:06-0176, 2006 WL 3342598, at *6 (N.D. Tex. Nov. 17, 2006) (holding that plaintiff's suit is barred by six-year statute of limitations and further concluding that plaintiff is not entitled to equitable tolling); Aftergood v. CIA, 225 F. Supp. 2d 27, 29 (D.D.C. 2002) (noting that section 2401(a) is a "jurisdictional condition attached to the government's waiver of sovereign immunity," and dismissing Complaint filed five months too late because the statute of limitations "must be strictly construed"); Lighter v. IRS, No. 00-00289, 2001 U.S. Dist. LEXIS 3483, at *4 (D. Haw. Feb. 27, 2001) (dismissing Complaint filed eight years after plaintiff exhausted his administrative remedies, two years too late); McClain v. U.S. Dep't of Justice, No. 97-C-0385, 1999 WL 759505, at *4 (N.D. Ill. Sept. 1, 1999) (dismissing Complaint after calculating that cause of action was filed three years after statute of limitations expired), aff'd, 17 F. App'x 471 (7th Cir. 2001); Madden v. Runyon, 899 F. Supp. 217, 226 (E.D. Pa. 1995) (finding that even assuming plaintiff exhausted his administrative remedies, statute of limitations would have expired four years prior to commencement of suit); see also Peck v. CIA, 787 F. Supp. 63, 66 (S.D.N.Y. 1992) (refusing to waive the statute of limitations because to do so would be "a waiver of sovereign immunity," which "cannot be relaxed based on equitable considerations," but noting that "there is nothing in the statute that prevents plaintiff from refiling an identical request . . . and thereby restarting the process").

[69] 824 F.2d at 57-59; see Peck, 787 F. Supp. at 65-66 (once constructive exhaustion period has run, statute of limitations is not tolled while request for information is pending before agency).

[70] Nat'l Archives & Records Admin., General Records Schedule, Schedule

(continued...)

record-retention period at six years for all correspondence and supporting documentation relating to denied FOIA requests.[71]

Lastly, where a pro se FOIA plaintiff seeks appointment of counsel, a district court has wide discretion to decide whether to grant that request under 28 U.S.C. § 1915(e)(1).[72] A court should consider several factors in making this decision: (1) the nature and complexity of the action; (2) the potential merit of the claims; (3) the inability of a pro se party to obtain counsel by other means; and (4) the degree to which the interests of justice will be served by appointment of counsel.[73] If a court denies counsel, it should provide reasons for its decision.[74] (For a discussion of the availability of attorney fees in the event that counsel is appointed, see Attorney Fees, below.) Finally, it should be noted that the FOIA does not provide a plaintiff, pro se or otherwise, with a right to a jury trial.[75]

Pleadings

An agency has thirty days from the date of service of process to an-

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[70](...continued)
14 (1998).

[71] Id.; see also Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 28 n.51 (Dec. 1987) (advising that agencies should be sure to maintain any "excluded" records for purposes of possible further review (citing FOIA Update, Vol. V, No. 4, at 4 (advising same regarding "personal" records))); FOIA Update, Vol. XVIII, No. 1, at 5-6 (advising that particular provision of Electronic FOIA amendments, 5 U.S.C. § 552(a)(3)(B), does not require agencies to alter their records-disposition or records-maintenance practices).

[72] (2000); see, e.g., Schwarz v. U.S. Dep't of the Treasury, No. 00-5453, 2001 WL 674636, at *1 (D.C. Cir. May 10, 2001) (declaring that "appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits").

[73] See, e.g., Willis v. FBI, 274 F.3d 531, 532-33 (D.C. Cir. 2001) (citing local court rules as most appropriate basis upon which to decide a question of appointment of counsel in a FOIA case); Jackson v. County of McLean, 953 F.2d 1070, 1072 (7th Cir. 1992) (providing "nonexclusive" list of factors to be considered on questions of appointment of counsel) (non-FOIA case); Long v. Shillinger, 927 F.2d 525, 527 (10th Cir. 1991) (same) (non-FOIA case).

[74] See Willis v. FBI, No. 98-5071, 1999 WL 236891, at *1 (D.C. Cir. Mar. 19, 1999) (requiring remand when no reasons were provided for refusal to appoint counsel).

[75] See, e.g., Buckles v. Indian Health Serv./Belcourt Serv. Unit, 268 F. Supp. 2d 1101, 1102 (D.N.D. 2003).

swer a FOIA Complaint,[76] not the usual sixty days that are otherwise permitted by Federal Rule of Civil Procedure 12(a). While courts are not required to automatically accord expedited treatment to FOIA lawsuits, they may do so "if good cause therefor is shown."[77]

FOIA lawsuits are adjudicated according to standards and procedures that are atypical within the field of administrative law. First, the usual "substantial evidence" standard of review of agency action is replaced in the FOIA by a de novo review standard.[78] Second, the burden of proof is on the defendant agency, which must justify its decision to withhold any information.[79] When Exemption 1 is invoked, however, most courts have applied a highly deferential standard of review for classified documents in order to avoid compromising national security.[80] (See the

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[76] See 5 U.S.C. § 552(a)(4)(C) (2000 & Supp. IV 2004).

[77] Federal Courts Improvement Act, 28 U.S.C. § 1657 (2000) (repealing 5 U.S.C. § 552(a)(4)(D) (1982), which provided that FOIA proceedings generally "take precedence over all cases on the docket and shall be . . . expedited in every way"); see also Freedom Commc'ns, Inc. v. FDIC, 157 F.R.D. 485, 487 (C.D. Cal. 1994) ("The Court offers its assurance to all concerned that it will continue to handle all matters in this action in an expeditious manner. However, we do not see the value in issuing an order that does no more than reiterate policies already announced by statute and the Court itself."); FOIA Update, Vol. VI, No. 2, at 6 (explaining statutory revision regarding expedition of FOIA actions).

[78] See 5 U.S.C. § 552(a)(4)(B); see also Halpern v. FBI, 181 F.3d 279, 288 (2d Cir. 1999) (observing that de novo standard of review comports with congressional intent); Summers v. Dep't of Justice, 140 F.3d 1077, 1080 (D.C. Cir. 1998) (explaining that review is "de novo").

[79] See 5 U.S.C. § 552(a)(4)(B); Solar Sources, Inc. v. United States, 142 F.3d 1033, 1037 (7th Cir. 1998) ("The government bears the burden of justifying its decision to withhold the requested information pursuant to a FOIA exemption."); Church of Scientology Int'l v. U.S. Dep't of Justice, 30 F.3d 224, 228 (1st Cir. 1994) (same); cf. Trenerry v. U.S. Dep't of the Treasury, No. 92-5053, 1993 WL 26813, at *5 (10th Cir. Feb. 5, 1993) (recognizing that although district court used phrase "arbitrary and capricious" in discussing scope of review, its decision should be upheld if "reviewing the entire order clearly reveals that the court performed a de novo review and correctly placed the burden on IRS").

[80] See, e.g., Students Against Genocide v. Dep't of State, 257 F.3d 828, 833 (D.C. Cir. 2001) (reiterating that agency affidavits in Exemption 1 cases are entitled to "substantial weight" (citing Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978))); Snyder v. CIA, 230 F. Supp. 2d 17, 22 (D.D.C. 2002) (describing "substantial weight" to be given to agency declarations and affidavits concerning classification, provided declarations "'contain reasonable

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discussion under Exemption 1, Standard of Review, above.) Fee waiver issues also are reviewed under the de novo standard of review, but the scope of review is specifically limited by statute to the record before the agency.[81] (For a further discussion of fee waiver review standards, see Fees and Fee Waivers, above.)

Additionally, agency decisions to refuse to expedite the processing of FOIA requests in instances where requesters claim the statutorily based "compelling need"[82] are reviewed under the de novo standard of review,[83] but any such decisions that are based on individual agency regulations providing other grounds for expedition will be "entitled to judicial deference."[84] A major exception to the de novo standard of review is "reverse" FOIA lawsuits, in which courts apply the more deferential "arbitrary and capricious" standard under the Administrative Procedure Act.[85] (See the discussion of this point under "Reverse" FOIA, Standard of Review, below.)

Only federal agencies are proper party defendants in FOIA litigation.[86] Consequently, neither the agency head nor other agency officials

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[80](...continued)
specificity [of] detail'" (quoting Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980))); Halpern v. FBI, No. 94-365, 2002 WL 31012157, at *7 (W.D.N.Y. Aug. 31, 2001) (magistrate's recommendation) ("'[S]ubstantial deference' must be given to Vaughn affidavits in the context of national security." (quoting Diamond v. FBI, 707 F.2d 75, 79 (2d Cir. 1983))), adopted (W.D.N.Y. Oct. 16, 2001); see also Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003) (observing that "the judiciary is in an extremely poor position to second-guess the executive's judgment in this area") (Exemption 7 case).

[81] 5 U.S.C. § 552(a)(4)(A)(vii); see, e.g., Judicial Watch, Inc. v. U.S. Dep't of Justice, 122 F. Supp. 2d 13, 16 (D.D.C. 2000).

[82] 5 U.S.C. § 552(a)(6)(E)(i)(I).

[83] See Al-Fayed v. CIA, 254 F.3d 300, 306-08 (D.C. Cir. 2001) (holding, in a case of first impression, that "a district court must review de novo an agency's denial of a request for expedition under FOIA"); ACLU v. U.S. Dep't of Justice, 321 F. Supp. 2d 24, 29 (D.D.C. 2004) (same).

[84] Al-Fayed, 254 F.3d at 307 n.7.

[85] 5 U.S.C. §§ 701-706 (2000).

[86] See 5 U.S.C. § 552(a)(4)(B) (granting district courts "jurisdiction to enjoin the agency from withholding agency records improperly withheld from complainant"); 5 U.S.C. § 552(f)(1) (defining the term "agency"); see also Megibow v. Clerk of U.S. Tax Court, 432 F.3d 387, 387 (2d Cir. 2005) (concluding, on issue of first impression, that United States Tax Court is not subject to FOIA); United States v. Casas, 376 F.3d 20, 22 (1st Cir. 2004)
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are proper parties to a FOIA suit,[87] nor is "the United States" as such.[88] (For

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[86](...continued)
(stating that judicial branch is not subject to FOIA); United States v. Choate, 102 F. App'x 634, 635 (10th Cir. 2004) (same); Dunnington v. DOD, No. 06-0925, 2007 WL 60902, at *1 (D.D.C. Jan. 8, 2007) ("Neither branch of Congress is an executive agency subject to FOIA."); Pena v. U.S. Dep't of Prob., No. 06 CV 2481, 2006 WL 2806383, at *1 (E.D.N.Y. Sept. 28, 2006) (dismissing for lack of subject matter jurisdiction because "[t]he Probation Department, an administrative unit of the judiciary, is not subject to the disclosure obligations of FOIA"); Boyd v. Criminal Div., U.S. Dep't of Justice, No. 04-1100, 2005 WL 555412, at *4 (D.D.C. Mar. 9, 2005) (same), aff'd, 475 F.3d 381 (D.C. Cir. 2007); Ali v. Przbyl, No. 04-CV-0459E, 2004 WL 1682774, at *2 (W.D.N.Y. July 26, 2004) ("FOIA does not apply to state or local agencies or state or local individuals."); Woodruff v. Office of the Pub. Defender, No. 03-791, slip op. at 3-4 (N.D. Cal. June 3, 2004) (dismissing defendants Office of Federal Public Defender and Clerk of U.S. District Court because federal courts and organizations under control of courts are not subject to FOIA); Mount of Olives Paralegals v. Bush, No. 04 C 620, 2004 WL 1102315, at *2 (N.D. Ill. May 6, 2004) (noting that state agencies are not subject to federal FOIA).

[87] See, e.g., Thompson v. Walbran, 990 F.2d 403, 405 (8th Cir. 1993) (per curiam) (dismissing suit brought against prosecutor, because plaintiff "sued the wrong party"); Petrus v. Bowen, 833 F.2d 581, 582 (5th Cir. 1987) ("Neither the Freedom of Information Act nor the Privacy Act creates a cause of action for a suit against an individual employee of a federal agency."); Harrison v. Lappin, No. 04-0061, 2005 WL 752186, at *3 (D.D.C. Mar. 31, 2005) (same); Buckles v. Indian Health Serv./Belcourt Serv. Unit, 268 F. Supp. 2d 1101, 1102 (D.N.D. 2003) (same); Eison v. Kallstrom, 75 F. Supp. 2d 113, 115-16 (S.D.N.Y. 1999) (recognizing that FOIA creates no cause of action against individual defendants, but allowing pro se plaintiff to amend Complaint to substitute agency as defendant); Barvick v. Cisneros, 941 F. Supp. 1015, 1017 n.2 (D. Kan. 1996) (ruling that the only proper party defendant in a FOIA action is the agency, not an individual federal official); see also Payne v. Minihan, No. 97-0266SC, slip op. at 14-15 (D.N.M. Apr. 30, 1998) (agreeing with majority view that agency personnel are not proper parties to FOIA suit, but nevertheless declining to dismiss action, because agency did "not challenge" suit on basis of improper party and was "on notice" of suit), aff'd sub nom. Payne v. NSA, 232 F.3d 902 (10th Cir. 2000) (unpublished table decision); cf. Thomas v. FAA, No. 05-2391, 2007 WL 219988, at *3 (D.D.C. Jan. 25, 2007) (noting that proper defendant in FOIA case is federal agency and, "[t]herefore, Plaintiff cannot obtain a Bivens remedy for an alleged violation of FOIA by the [individual] defendants").

[88] See Sanders v. United States, No. 96-5372, 1997 WL 529073, at *1 (D.C. Cir. July 3, 1997) (dismissing Complaint because "United States" is not agency subject to FOIA); United States v. Trenk, No. 06-1004, 2006 WL 3359725, at *8 (D.N.J. Nov. 20, 2006) ("The United States is not a proper
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a further discussion of which entities are subject to the FOIA, see Procedural Requirements, Entities Subject to the FOIA, above). This rule derives from the plain language of the Act, which vests the district courts with jurisdiction to enjoin "the agency" from withholding records.[89] Similarly, there is a sound general rule that only the person who has actually submitted a FOIA request at the administrative level can be the proper party plaintiff in any subsequent court action based on that request.[90]

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[88](...continued)
party in a FOIA action."); Huertas v. United States, No. 04-3361, 2005 WL 1719143, at *7 (D.N.J. July 21, 2005) (granting defendants' motion for summary judgment because United States and individual defendants were only defendants named); Lawrence v. United States, No. 8:03-CV-660, 2004 U.S. Dist. LEXIS 15445, at *6-7 (M.D. Fla. July 8, 2004) (ruling that "all parts of [plaintiff's FOIA case] as brought against the United States of America are hereby dismissed for lack of jurisdiction").

[89] 5 U.S.C. § 552(a)(4)(B) (emphasis added); see, e..g,, Pri-Har v. Dep't of Justice, No. 04-1448, 2005 WL 3273550, at *1 n.1 (D.D.C. Sept. 27, 2005) (noting that "[a]lthough the plaintiff lists both the Executive Office for the United States Attorneys and the Department of Justice as defendants in this action, the only proper defendant is the Department of Justice"); Brooks v. Bureau of Prisons, No. 04-0055, 2005 WL 623229, at *2 (D.D.C. Mar. 17, 2005) ("The proper defendant in a FOIA or Privacy Act case is the agency, in this case, the Department of Justice of which BOP is a component."); Judicial Watch, Inc. v. FBI, 190 F. Supp. 2d 29, 30 n.1 (D.D.C. 2002) (stating that the proper defendant is the Department of Justice "rather than the FBI, which is a component of DOJ and therefore not an 'agency' within the statutory definition"); Peralta v. U.S. Attorney's Office, No. 94-760, slip op. at 1-3 (D.D.C. May 17, 1999) (permitting Department of Justice to be substituted as proper defendant, as Department of Justice is "agency" under FOIA, and accordingly vacating order that had joined Executive Office for United States Attorneys and FBI as necessary parties). But see Peralta v. U.S. Attorney's Office, 136 F.3d 169, 173 (D.C. Cir. 1998) (dictum) (suggesting, despite both statutory language and agency structure, that "the FBI is subject to the FOIA in its own name"); Prison Legal News v. Lappin, 436 F. Supp. 2d 17, 22 (D.D.C. 2006) (finding that the Bureau of Prisons "exercises 'substantial independent authority'" and that, accordingly, the Bureau of Prisons, "despite its status as a component agency of the DOJ, is a proper defendant in this FOIA action"); Lair v. Dep't of the Treasury, No. 03-827, 2005 WL 645228, at *3 (D.D.C. Mar. 21, 2005) (relying on D.C. Circuit's dictum in Peralta and on district court's vacated memorandum opinion in Peralta to hold that Secret Service, Bureau of Alcohol, Tobacco, and Firearms, and Executive Office for United States Attorneys were proper defendants), reconsideration denied, 2005 WL 1330722 (D.D.C. June 3, 2005).

[90] See Trenk, 2006 WL 3359725, at *9 (concluding that plaintiff lacks standing to bring FOIA action because "[h]is name does not appear on the document requests, and he is not the client for which the requests were
(continued...)

It is clear that an agency in possession of records originating with another agency cannot refuse to process those records merely by advising the requester to seek them directly from the other agency.[91] In litigation,

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[90](...continued)
made"); The Haskell Co. v. U.S. Dep't of Justice, No. 05-1110, 2006 WL 627156, at *2 (D.D.C. Mar. 13, 2006) (dismissing case because plaintiff had no standing to sue agency on FOIA request submitted solely by its law firm); Three Forks Ranch Corp. v. Bureau of Land Mgmt., 358 F. Supp. 2d 1, 2 (D.D.C. 2005) (holding that "a FOIA request made by an attorney must clearly indicate that it is being made 'on behalf of' the corporation to give that corporation standing to bring a FOIA challenge"); Mahtesian v. OPM, 388 F. Supp. 2d 1047, 1050 (N.D. Cal. 2005) (finding that attorney's reference to anonymous client in FOIA request does not confer standing on that client); Maxxam, Inc. v. FDIC, No. 98-0989, 1999 WL 33912624, at *2 (D.D.C. Jan. 29, 1999) (finding that only plaintiff's attorney was real party in interest when FOIA request was made in attorney's, not plaintiff's, name); Payne, No. 97-0266SC, slip op. at 12-14 (D.N.M. Apr. 30, 1998) (dismissing plaintiff who sued as "concerned citizen" because "[i]t is the filing of his requests and their actual or constructive denials which distinguishes the harm suffered by [the actual requester] from the harm incurred by [the concerned citizen]"); Wade v. Dep't of Commerce, No. 96-0717, slip op. at 4 (D.D.C. Mar. 26, 1998) (finding failure to exhaust administrative remedies because plaintiff was not "'the person making'" the FOIA request (quoting 5 U.S.C. § 552(a)(6)(A)(i))); Unigard Ins. Co. v. Dep't of the Treasury, 997 F. Supp. 1339, 1342 (S.D. Cal. 1997) ("A person whose name does not appear on the request for disclosure lacks standing to sue under FOIA, even if his interest was asserted in the request." (citing United States v. McDonnell, 4 F.3d 1227, 1237 (3d Cir. 1993))); cf. Burka v. HHS, 142 F.3d 1286, 1290-91 (D.C. Cir. 1998) (refusing to award attorney fees to plaintiff who claimed he was suing for unnamed party, because of "dangers inherent in recognizing an 'undisclosed' client as the real plaintiff"); Doe v. FBI, 218 F.R.D. 256, 260 (D. Colo. 2003) (refusing to allow FOIA plaintiff to proceed pseudonymously). But see Archibald v. Roche, No. 01-1492, slip op. at 2 (D.D.C. Mar. 29, 2002) (allowing a plaintiff whose name did not appear on the initial FOIA request to amend his complaint in order to name a proper plaintiff, "in the interest of justice"); Olsen v. U.S. Dep't of Transp. Fed. Transit Admin., No. 02-00673, 2002 WL 31738794, at *2 n.2 (N.D. Cal. Dec. 2, 2002) (refusing to find lack of standing when plaintiff was not identified by his attorney in initial request, because agency's administrative appeal response itself acknowledged plaintiff's identity).

[91] See, e.g., In re Wade, 969 F.2d 241, 247-48 (7th Cir. 1992) (explaining that agency cannot avoid request or withhold documents merely by referring requester to another agency where documents originated); see also FOIA Update, Vol. XV, No. 3, at 6 (advising agencies of record-referral responsibilities); cf. Hardy v. DOD, No. 99-523, 2001 WL 34354945, at *11 (D. Ariz. Aug. 27, 2001) (ruling that an agency was not required to forward a FOIA request for personnel records about one of its retired employees to
(continued...)

the defendant agency ordinarily will include in its own court submissions affidavits from the originating agency to address any contested withholdings in these records.[92] (For a further discussion of agency referral practices, see Procedural Requirements, Referrals and Consultations, above.)

Lastly, although Rule 15(a) of the Federal Rules of Civil Procedure counsels that leave to amend complaints "shall be freely given when justice so requires,"[93] the decision to grant such leave is entrusted to the sound discretion of the district court.[94] Courts have recognized limitations on a plaintiff's ability to amend a FOIA Complaint, even when the plaintiff is proceeding pro se.[95] In particular, courts have rejected attempts to amend Complaints due to the plaintiff's undue delay,[96] when the Complaint

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[91](...continued)
OPM, where the records were now maintained). But cf. Snyder v. CIA, 230 F. Supp. 2d 17, 25 (D.D.C. 2002) (noting with approval agency's practice of closing pending requests that require coordination with other agencies even before coordination has been completed).

[92] See, e.g., Williams v. FBI, No. 92-5176, slip op. at 2 (D.C. Cir. May 7, 1993); Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 69 & n.15 (D.C. Cir. 1990); Fitzgibbon v. CIA, 911 F.2d 755, 757 (D.C. Cir. 1990); Greenberg v. U.S. Dep't of Treasury, 10 F. Supp. 2d 3, 11, 18 (D.D.C. 1998) (requiring agency or component that referred documents to justify nondisclosure); Jan-Xin Zang v. FBI, 756 F. Supp. 705, 706-07 & n.1 (W.D.N.Y. 1991); see also FOIA Update, Vol. XII, No. 3, at 3-4 ("OIP Guidance: Referral and Consultation Procedures"); FOIA Update, Vol. XIV, No. 3, at 6-8 (Department of Justice memorandum setting forth White House consultation process); cf. Peralta, 136 F.3d at 175 (remanding for consideration of whether referral procedures could result in "improper withholding" of referred documents).

[93] See Foman v. Davis, 371 U.S. 178, 182 (1962) (non-FOIA case); Katzman v. Sessions, 156 F.R.D. 35, 38 (E.D.N.Y. 1994) (holding that to defeat a motion to supplement pleadings, "the nonmovant must demonstrate either bad faith on the part of the moving party, the futility of the claims asserted within the application, or undue prejudice to the nonmovant") (non-FOIA case).

[94] See, e.g., Miss. Ass'n of Coops. v. Farmers Home Admin., 139 F.R.D. 542, 543 (D.D.C. 1991).

[95] See, e.g., Brown v. U.S. Patent & Trademark Office, No. 06-14716, 2007 WL 446601, at *1 (11th Cir. Feb. 13, 2007) (noting that "[a]lthough pro se pleadings are to be liberally construed, . . . ordinary rules of procedure and summary judgment still apply"). But see Eison, 75 F. Supp. 2d at 116 n.2 (recognizing that plaintiffs proceeding pro se are given "considerable latitude to correct superficial pleading errors").

[96] See Friedman v. FBI, 605 F. Supp. 306, 314-15 (N.D. Ga. 1984) (denying amendment when sought six years into litigation without sufficient cause);
(continued...)

as amended still would fail to state a justiciable claim,[97] when the plaintiff sought to dramatically alter the scope and nature of the FOIA litigation,[98] or when the plaintiff sought to add an unreasonable number of claims.[99]

Exhaustion of Administrative Remedies

Under the FOIA, administrative remedies must be exhausted prior to judicial review. When a FOIA plaintiff attempts to obtain judicial review without first properly undertaking full and timely administrative exhaus-

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[96](...continued)
see also Becker v. IRS, 1992 WL 67849, at *3 (N.D. Ill. Mar. 27, 1992) ("Any attempt by the [plaintiffs] to expand the nature of the search at this late date must be rejected.").

[97] See, e.g., Beech v. Comm'r, 190 F. Supp. 2d 1183, 1187 (D. Ariz. 2001) (dismissing Complaint with prejudice because it "could not be made viable by amendment"); Rzeslawski v. U.S. Dep't of Justice, No. 97-1156, slip op. at 7 (D.D.C. Mar. 16, 1999) (disallowing amendment to add defendants because administrative remedies were not exhausted); Lanter v. Dep't of Justice, No. 93-34, slip op. at 1-2 (W.D. Okla. Aug. 30, 1993) (noting that plaintiffs' amended complaint does "not show exhaustion of their administrative remedies, or other exception to the exhaustion requirements"), aff'd on other grounds, 19 F.3d 33 (10th Cir. 1994) (unpublished table decision).

[98] See, e.g., Caton v. Norton, No. 04-CV-439, 2005 WL 1009544, at *4 (D.N.H. May 2, 2005) (denying motion to amend Complaint where plaintiff sought to add claims barred by doctrines of sovereign immunity and exhaustion of administrative remedies); Szymanski v. DEA, No. 93-1314, 1993 WL 433592, at *2 (D.D.C. Oct. 6, 1993) ("This Court will not permit a F.O.I.A. complaint, properly filed, to become the narrow edge of a wedge which forces open the court house door to unrelated claims against unrelated parties."); Miss. Ass'n, 139 F.R.D. at 544 ("Where, however, the complaint, as amended, would radically alter the scope and nature of the case and bears no more than a tangential relationship to the original action, leave to amend should be denied."); see also Trenerry v. IRS, No. 90-C-444, 1993 WL 565354, at *3 (N.D. Okla. Oct. 28, 1993) ("Plaintiff's motion to amend the pleadings is untimely, seeks to add a new unrelated cause of action and appears on its face to be frivolous."). But see also Eison, 75 F. Supp. 2d at 114, 117 (allowing plaintiff to amend original Complaint in order to allege improper withholding of records, where original Complaint had asked for injunction against "pattern and practice" of delayed agency responses, which court deemed "now moot").

[99] Allnutt v. U.S. Trustee, No. 97-02414, slip op. at 8 (D.D.C. July 31, 1999) (allowing an amendment seeking to add six FOIA claims, but noting that further attempts to amend would be disallowed in order to prevent plaintiff from advancing "a never-ending case by perpetually amending his complaint to add the latest FOIA request"), appeal dismissed for lack of juris., No. 99-5410 (D.C. Cir. Feb. 2, 2000).

tion, the lawsuit is subject to ready dismissal because "exhaustion of administrative remedies is a mandatory prerequisite to a lawsuit under FOIA."[100] Exhaustion allows top-level officials of an agency to correct possible mistakes made at lower levels and thereby obviate unnecessary judicial review.[101]

Many courts have held that dismissal is appropriate under Rule 12(b)(1) of the Federal Rules of Civil Procedure, treating exhaustion under the FOIA as essentially the same as a jurisdictional requirement.[102] Inas-

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[100] Wilbur v. CIA, 355 F.3d 675, 676 (D.C. Cir. 2004) (per curiam) (citing Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 61-64, 65 n.9 (D.C. Cir. 1990)); see, e.g., Almy v. U.S. Dep't of Justice, No. 96-1207, 1997 WL 267884, at *3 (9th Cir. May 7, 1997) ("[T]he FOIA requires exhaustion of administrative remedies before the filing of a lawsuit."); Taylor v. Appleton, 30 F.3d 1365, 1367 (11th Cir. 1994) ("The FOIA clearly requires a party to exhaust all administrative remedies before seeking redress in the federal courts."); McDonnell v. United States, 4 F.3d 1227, 1240, 1241 (3d Cir. 1993) (same); Voinche v. U.S. Dep't of the Air Force, 983 F.2d 667, 669 (5th Cir. 1993) ("We conclude that the FOIA should be read to require that a party must present proof of exhaustion of administrative remedies prior to seeking judicial review."); see also Scherer v. U.S. Dep't of Educ., 78 F. App'x 687, 690 (10th Cir. 2003) (affirming dismissal based on failure to exhaust because while plaintiff's "labors may have been exhausting . . . he failed to pursue any of his requests as far as he could").

[101] Oglesby, 920 F.2d at 61; see also Taylor, 30 F.3d at 1369 ("Allowing a FOIA requester to proceed immediately to court to challenge an agency's initial response would cut off the agency's power to correct or rethink initial misjudgments or errors."); Martin v. Court Servs. & Offender Supervision Agency, No. 05-853, 2005 WL 3211536, at *3 (D.D.C. Nov. 17, 2005) (recognizing that administrative exhaustion "[g]ives the parties and the courts the benefit of the agency's experience and expertise"); Hogan v. Huff, No. 00-Civ.-6753, 2002 WL 1359722, at *4 (S.D.N.Y. June 21, 2002) (explaining that administrative appeal procedures "provide agencies an opportunity to correct internal mistakes").

[102] See, e.g., McDonnell, 4 F.3d at 1240 & n.9 (affirming dismissal for lack of subject matter jurisdiction because plaintiff failed to exhaust administrative remedies); Trenerry v. IRS, No. 95-5150, 1996 WL 88459, at *1 (10th Cir. Mar. 1, 1996) (confirming that district court lacked subject matter jurisdiction "where plaintiff has failed to exhaust her administrative remedies"); Hymen v. MSPB, 799 F.2d 1421, 1423 (9th Cir. 1986) (same); Hardy v. Daniels, No. 05-955, 2006 WL 176531, at *1 (D. Or. Jan. 23, 2006) ("Where a plaintiff has failed to exhaust . . . the district court will dismiss the case for lack of jurisdiction."); Robert VIII v. Dep't of Justice, No. 05-CV-2543, 2005 WL 3371480, at *7 (E.D.N.Y. Dec. 12, 2005) ("[A] court lacks subject matter jurisdiction over a requester's claim where the requester has failed to exhaust the administrative remedies provided under the FOIA statute."); Sny-

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much as exhaustion is required by the Administrative Procedure Act,[103] of which the FOIA is a part, this approach is well founded. Indeed, even those courts that term exhaustion as "prudential" in nature because the FOIA itself does not expressly require it nevertheless enforce the administrative exhaustion principle under the FOIA, albeit that they often view Rule 12(b)(6) as the appropriate vehicle for dismissal.[104] Regardless of the

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[102](...continued)
der v. DOD, No. 03-4992, slip op. at 5 (N.D. Cal. Feb. 2, 2005) ("[E]xhaustion goes to court's subject matter jurisdiction[.]"); Thomas v. IRS, No. 03-CV-2080, 2004 WL 3185320, at *1 (M.D. Pa. Nov. 16, 2004) (concluding that court lacks jurisdiction because plaintiff failed to exhaust his administrative remedies), aff'd, 153 F. App'x 89 (3d Cir. 2005); McMillan v. Togus Reg'l Office, VA, No. 03-CV-1074, 2003 WL 23185665, at *1 (E.D.N.Y. Nov. 18, 2003) (dismissing unexhausted FOIA claim because "[s]ubject matter jurisdiction is lacking"), aff'd, 120 F. App'x 849 (2d Cir. 2005); Scherer v. United States, 241 F. Supp. 2d 1270, 1277 (D. Kan. 2003) (granting government's motion to dismiss under Rule 12(b)(1) because plaintiff failed to exhaust administrative remedies), aff'd, 78 F. App'x 687 (10th Cir. 2003); Redding v. Christian, 161 F. Supp. 2d 671, 674 (W.D.N.C. 2001) ("[W]hen this action was filed, this court lacked jurisdiction over the subject matter of this case as a matter of law because plaintiff had not sought any administrative remedies, much less exhausted them."); Maples v. USDA, No. 97-5663, slip op. at 6 (E.D. Cal. Jan. 15, 1998) ("When a complaint contains an unexhausted request in its prayer for relief, the court must dismiss this portion for lack of subject matter jurisdiction."); Rabin v. U.S. Dep't of State, 980 F. Supp. 116, 119 (E.D.N.Y. 1997) (suggesting that defense of failure to exhaust is most properly raised in FRCP Rule 12(b)(1) dismissal motion); Thomas v. Office of the U.S. Attorney, 171 F.R.D. 53, 55 (E.D.N.Y. 1997) ("Failure to properly exhaust . . . precludes a federal court of subject matter jurisdiction over a requester's claims."); Jones v. Shalala, 887 F. Supp. 210, 214 (S.D. Iowa 1995) (declaring that failure to exhaust administrative remedies deprives court of jurisdiction to compel disclosure of records).

[103] See 5 U.S.C. § 704 (2000) (authorizing judicial review only of "[a]gency action made reviewable by statute and every final agency action for which there is no other adequate remedy in a court") (emphasis added); see also Darby v. Cisneros, 509 U.S. 137, 153 (1993) (explaining that exhaustion of administrative remedies is "effectively codified" in Administrative Procedure Act) (non-FOIA case).

[104] See, e.g., Hildalgo v. FBI, 344 F.3d 1256, 1258-59 (D.C. Cir. 2003) (opining that the exhaustion requirement is not jurisdictional because "the FOIA does not unequivocally make it so," but then explaining that exhaustion is required if "'the purposes of exhaustion' and the 'particular administrative scheme' support such a bar" (quoting Oglesby, 920 F.2d at 61)); Taylor, 30 F.3d at 1367 n.3 (stating that an unexhausted FOIA claim "should have been dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted"); Scherer v. Balkema, 840 F.2d 437, 443
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stated basis for dismissal, though, when a requester attempts to seek judicial review before the agency has had an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision, the Complaint should be dismissed for failure to exhaust administrative remedies.[105]

A plaintiff cannot evade proper FOIA administrative procedures by

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[104](...continued)
(7th Cir. 1988) (ruling that plaintiff failed to state a claim when he failed to allege exhaustion of administrative remedies); Bestor v. CIA, No. 04-2049, 2005 WL 3273723, at *3 (D.D.C. Sept. 1, 2005) (dismissing Complaint under Rule 12(b)(6) where plaintiff failed to "allege or demonstrate" that he exhausted his administrative remedies); Flowers v. IRS, 307 F. Supp. 2d 60, 66 (D.D.C. 2004) (stating that "the exhaustion requirement is a prudential consideration, not a jurisdictional prerequisite"); Gambini v. U.S. Customs Serv., No. 5:01-CV-300, 2001 U.S. Dist. LEXIS 21336, at *4-5 (N.D. Tex. Dec. 21, 2001) (dismissing Complaint under Rule 12(b)(6) because plaintiff had not exhausted administrative remedies); see also Jones v. U.S. Dep't of Justice, No. 04-1729, 2005 U.S. Dist. LEXIS 20097, at *2 (D.D.C. Sept. 12, 2005) (characterizing exhaustion as "jurisprudential doctrine" rather than jurisdictional requirement); Boyd v. Criminal Div., U.S. Dep't of Justice, No. 04-1100, 2005 WL 555412, at *4 (D.D.C. Mar. 9, 2005) (dismissing Complaint because plaintiff failed to exhaust his administrative remedies, but saying that "exhaustion requirement . . . is not jurisdictional"), aff'd, 475 F.3d 381 (D.C. Cir. 2007); Kennedy v. DHS, No. 03-6076, 2004 WL 2285058, at *4-5 (W.D.N.Y. Oct. 8, 2004) (noting that "[t]he precise nature of the exhaustion requirement is not well-settled," but concluding that it is "not jurisdictional"); cf. Sweetland v. Walters, 60 F.3d 852, 855 (D.C. Cir. 1995) (per curiam) (declaring it inappropriate for district court to find lack of jurisdiction, because federal defendant is not an agency for FOIA purposes; dismissal for failure "to state a claim upon which relief could be granted" found proper). But see, e.g., Oglesby, 920 F.2d at 61-62 ("Courts have consistently confirmed that the FOIA requires exhaustion . . . before an individual may seek relief in the courts.").

[105] See, e.g., Judicial Watch, Inc. v. FBI, 190 F. Supp. 2d 29, 33 (D.D.C. 2002) (citing Oglesby, 920 F.2d at 61-62); Makuch v. FBI, No. 99-1094, 2000 WL 915640, at *2 (D.D.C. Jan. 5, 2000) ("Under FOIA, a party must exhaust available administrative remedies before seeking judicial review." (citing Dettmann v. U.S. Dep't of Justice, 802 F.2d 1472, 1476-77 (D.C. Cir. 1986))); Schoenman v. FBI, No. 04-2202, 2006 WL 1582253, at *9 (D.D.C. June 5, 2006) ("[E]xhaustion of administrative remedies is required before a party can seek judicial review . . . ."); Trueblood v. U.S. Dep't of Treasury, 943 F. Supp. 64, 68 (D.D.C. 1996). But cf. Jones, No. 03-1647, slip op. at 3 (D.D.C. May 18, 2004) (allowing plaintiff to maintain unexhausted claim that was "substantially similar" to exhausted claim, because reaching its merits would not undermine purposes of administrative review), summary affirmance granted, No. 04-5498 (D.C. Cir. Jan. 20, 2006).

attempting to file his FOIA request as part of a judicial proceeding[106] or in the course of administratively appealing a previously filed FOIA request,[107] though he certainly may narrow the scope of an existing request at any time.[108] Along similar lines, a FOIA claim may well be dismissed on exhaustion grounds if the defendant agency is unable to locate the request in its files -- unless, of course, the plaintiff produces sufficient evidence that a

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[106] See Gillin v. IRS, 980 F.2d 819, 822-23 (1st Cir. 1992) (per curiam) (ruling that when "flawed" request was predicated upon a misunderstanding with agency but, within one week after submission, information provided by agency should have prompted requester to revise his request, requester cannot salvage request by clarification in litigation); Hillman v. Comm'r, No. 1:97-cv-760, 1998 U.S. Dist. LEXIS 12431, at *15 (W.D. Mich. July 10, 1998) (rejecting plaintiff's attempt to have discovery demand treated as access request because "a governmental agency is not required to respond to interrogatories disguised as a FOIA request"); Smith v. Reno, No. C-93-1316, 1996 U.S. Dist. LEXIS 5594, at *8 n.3 (N.D. Cal. Apr. 23, 1996) ("A request for documents in a complaint does not constitute a proper discovery request, much less a proper FOIA request."), aff'd sub nom. Smith v. City of Berkeley, 133 F.3d 929 (9th Cir. 1998) (unpublished table decision); Juda v. U.S. Dep't of Justice, No. 94-1521, slip op. at 4, 6 (D.D.C. Mar. 28, 1996) (plaintiff cannot interpose new request through vehicle of "motion for leave to pursue discovery"); Pray v. Dep't of Justice, 902 F. Supp. 1, 2-3 (D.D.C. 1995) (disallowing request to FBI field office "made only in response to the government's motion for summary judgment"), aff'd in part & remanded in part on other grounds, No. 95-5383, 1996 WL 734142, at *1 (D.C. Cir. Nov. 20, 1996); Pollack v. U.S. Dep't of Justice, No. 89-2569, 1993 WL 293692, at *4 (D. Md. July 23, 1993) (court lacks subject matter jurisdiction when request not submitted until after litigation filed), aff'd on other grounds, 49 F.3d 115 (4th Cir. 1995); see also Kowalczyk v. Dep't of Justice, 73 F.3d 386, 388 (D.C. Cir. 1996) ("Requiring an additional search each time the agency receives a letter that clarifies a prior request could extend indefinitely the delay in processing new requests."); cf. Payne, No. 97-0266SC, slip op. at 12 (D.N.M. Apr. 30, 1998) ("The FOIA creates a cause of action only for persons who have followed its procedures.").

[107] See Thomas, 171 F.R.D. at 55; see also Moore v. Aspin, 916 F. Supp. 32, 36 (D.D.C. 1996) ("Sending an appeal to a different agency does not initiate a proper FOIA request for that agency to conduct a search.").

[108] See Forest Guardians v. U.S. Dep't of the Interior, No. 02-1003, 2004 WL 3426434, at *11 (D.N.M. Feb. 28, 2004) (rejecting an agency's argument that the plaintiff's attempt to narrow the scope of its request -- during the course of litigation -- was tantamount to a failure to exhaust; "there is no evidence in record that the [agency] would reach a different conclusion if given the opportunity to decide a more narrow FOIA request"), rev'd & remanded on other grounds, 416 F.3d 1173 (10th Cir. 2005); cf. 5 U.S.C. § 552(a)(6)(B)(ii) (2000 & Supp. IV 2004) (providing that agency must allow requester opportunity to modify his request if it needs to extend its twenty-day time limit for processing by more than ten additional days).

request actually was made.[109] (For a further discussion of the proper submission of requests, see Procedural Requirements, Proper FOIA Requests, above.)

The FOIA permits requesters to treat an agency's failure to comply with its specific time limits as full, or "constructive," exhaustion of administrative remedies.[110] Thus, when an agency does not respond to a perfected request within the twenty-day (excepting Saturdays, Sundays, and legal

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[109] See, e.g., Arnold v. U.S. Secret Serv., No. 05-0450, 2006 WL 2844238, at *2 (D.D.C. Sept. 29, 2006) (holding that a "certified mail return receipt is not competent evidence of plaintiff's compliance with the FOIA's exhaustion requirement"); Schoenman v. FBI, No. 04-2202, 2006 WL 1126813, at *13 (D.D.C. Mar. 31, 2006) (dismissing FOIA claims where agencies contended that they never received requests, and noting that plaintiff provided no proof that draft requests on his counsel's computer were ever mailed and received; "[w]ithout a copy of a stamped envelope . . . or a returned receipt . . . [p]laintiff cannot meet the statutory requirements under FOIA"); Schoenman, 2006 WL 1582253, at *12 (dismissing claims where agency stated that appeals were never received, and finding that plaintiff failed to present clear evidence that draft appeal letters on his counsel's computer "were ever mailed to and received" by agency); Antonelli v. ATF, No. 04-1180, 2005 WL 3276222, at *5 (D.D.C. Aug. 16, 2005) (finding that plaintiff failed to sufficiently demonstrate that FOIA requests were submitted to agency, which could not locate them in its files, even though plaintiff produced copies of requests and asserted that he mailed them); see also Roum v. Bush, 461 F. Supp. 2d 40, 47 n.3 (D.D.C. 2006) (implying that plaintiff produced sufficient evidence that request actually was made when plaintiff provided receipt from U.S. Postal Service indicating that request was delivered to FBI); Linn v. U.S. Dep't of Justice, No. 92-1406, 1995 WL 631847, at *15-16 (D.D.C. Aug. 22, 1995) (ruling that when plaintiff introduces copy of appeal letter and attests that it was sent, case should not be dismissed for failure to exhaust administrative remedies). But see also Reyes v. U.S. Customs Serv., No. 05-173, 2005 WL 3274563, at *2 (D.D.C. July 28, 2005) (concluding, without elaboration, that plaintiff presented genuine issue of material fact as to whether his request was received by defendant agency, which had no record of it); Hammie v. Soc. Sec. Admin., 765 F. Supp. 1224, 1226 (E.D. Pa. 1991) (stating that in considering government's dismissal motion, court is required to accept plaintiff's averments that he submitted requests).

[110] See 5 U.S.C. § 552(a)(6)(C); see also FOIA Update, Vol. XVII, No. 4, at 2 (describing Electronic FOIA amendments' modification of Act's basic time limit from ten to twenty working days); Nurse v. Sec'y of the Air Force, 231 F. Supp. 2d 323, 328 (D.D.C. 2002) ("The FOIA is considered a unique statute because it recognizes a constructive exhaustion doctrine for purposes of judicial review upon the expiration of certain relevant FOIA deadlines.").

public holidays) statutory time limit set forth in the Act,[111] the requester is deemed to have exhausted his administrative remedies and can seek immediate judicial review, even though the requester has not filed an administrative appeal.[112] If a requester files suit before the twenty-day period has expired, the suit must be dismissed even if the agency still has failed to respond to the request after the twenty day period has expired because "the Court will only consider those facts and circumstances that existed at the time of the filing of the complaint, and not subsequent events."[113] In-

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[111] 5 U.S.C. § 552(a)(6)(A)(i).

[112] See, e.g., Pollack, 49 F.3d at 118-19 ("Under FOIA's statutory scheme, when an agency fails to comply in a timely fashion with a proper FOIA request, it may not insist on the exhaustion of administrative remedies unless the agency responds to the request before suit is filed."); Campbell v. Unknown Power Superintendent of the Flathead Irrigation & Power Project, No. 91-35104, 1992 WL 84315, at *1 (9th Cir. Apr. 22, 1992) (noting that exhaustion is deemed to have occurred if agency fails to respond to request within statutory time limit); Accuracy in Media, Inc. v. NTSB, No. 03-0024, 2006 WL 826070, at *6 (D.D.C. Mar. 29, 2006) (finding constructive exhaustion because plaintiff filed its FOIA Complaint seven months after NTSB received its request and before NTSB complied with it); Hall v. CIA, No. 04-0614, 2005 WL 850379, at *2 & n.6 (D.D.C. Apr. 13, 2005) (finding constructive exhaustion where plaintiff filed suit prior to CIA's belated response to his request, and rejecting agency's "novel" argument that it was somehow excused from FOIA's statutory time limit while awaiting final outcome of plaintiff's previous FOIA suit); see also FOIA Update, Vol. IV, No. 1, at 6 (discussing exhaustion); cf. Or. Natural Desert Ass'n, 409 F. Supp. 2d at 1247 (finding constructive exhaustion with respect to "cut-off" date challenge, even though plaintiff did not raise such claim in its administrative appeal, because document production from agency and referral agencies continued after plaintiff filed suit and plaintiff could not have foreseen effect of "cut-off" policy at time appeal was filed); Anderson v. USPS, 7 F. Supp. 2d 583, 586 (E.D. Pa. 1998) (finding that "vague positive response" from agency received after statutory time limit allows plaintiff to claim "constructive" exhaustion), aff'd, 187 F.3d 625 (3d Cir. 1999) (unpublished table decision).

[113] Judicial Watch, Inc. v. FBI, No. 01-1216, slip op. at 8 (D.D.C. July 26, 2002) (citing Judicial Watch, Inc. v. U.S. Dep't of Justice, No. 97-2089, slip op. at 11 (D.D.C. July 14, 1998) (citing, in turn, Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830 (1989) ("The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed."))); cf. Dorn v. Comm'r, No. 2:03CV539, 2005 WL 1126653, at *3-4 (M.D. Fla. May 12, 2005) (dismissing lawsuit where Complaint was filed prematurely, even though agency ultimately responded after twenty-day period), reconsideration denied, 2005 WL 2248857 (M.D. Fla. June 1, 2005). But cf. Judicial Watch, Inc. v. U.S. Dep't of Energy, 191 F. Supp. 2d 138, 139 (D.D.C. 2002) (erroneously permitting premature Complaint to be cured by filing of

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disputably, though, an agency's failure to comply with the statutory deadline neither requires nor empowers a court to ignore the agency's right to invoke applicable statutory exemptions and summarily order disclosure of any or all information sought.[114]

The special right to immediate judicial review that arises from the lack of a timely response lapses if an agency responds to a request at any time before the requester's FOIA suit is filed; in that situation, the requester must administratively appeal a denial and wait at least twenty working days for the agency to adjudicate that appeal -- as is required by 5 U.S.C. § 552(a)(6)(A)(ii) -- before commencing litigation.[115] This latter point was well established by the Court of Appeals for the District of Columbia Circuit in Oglesby v. U.S. Dep't of the Army, which held that "an administrative appeal is mandatory if the agency cures its failure to respond within the statutory period by responding to the FOIA request before suit is filed."[116] Thus, under Oglesby, if a FOIA requester waits beyond the twenty-day period for the agency's initial response and then, in fact, receives that response before suing the agency, the requester must exhaust his ad-

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[113](...continued)
"supplemental" Complaint).

[114] See Judicial Watch, Inc. v. USPS, 297 F. Supp. 2d 252, 270 (D.D.C. 2004) (refusing to grant plaintiff's request for immediate disclosure of documents as remedy for insufficient declaration); Barvick v. Cisneros, 941 F. Supp. 1015, 1019-20 (D. Kan. 1996) ("This court is persuaded that an agency's failure to respond within ten days does not automatically entitle a FOIA requester to summary judgment."); M.K. v. U.S. Dep't of Justice, No. 96 CIV. 1307, 1996 WL 509724, at *3 (S.D.N.Y. Sept. 9, 1996) ("[T]he government's failure to respond to M.K.'s request within the statutory . . . time limit does not give M.K. the right to obtain the requested documents; it merely amounts to an exhaustion of administrative remedies and allows M.K. to bring this lawsuit."). But cf. Hornes v. Executive Office for U.S. Attorneys, No. 04-2190, 2006 WL 2792680, at *3 (D.D.C. Sept. 27, 2006) (finding constructive exhaustion where plaintiff lodged his in forma pauperis application with court prior to agency's belated response -- even though, due to "administrative delay," Complaint was not filed by clerk until afterward).

[115] See, e.g., Oglesby, 920 F.2d at 63 (ruling that if requester receives agency response before filing suit -- even one that is untimely -- requester must submit an administrative appeal before filing suit); Smith v. FBI, 448 F. Supp. 2d 216, 220 (D.D.C. 2006) (same); Judicial Watch, Inc. v. Rossotti, 285 F. Supp. 2d 17, 26 (D.D.C. 2003) (same); see also FOIA Update, Vol. XII, No. 2, at 3-5 ("OIP Guidance: Procedural Rules Under the D.C. Circuit's Oglesby Decision").

[116] 920 F.2d at 63.

ministrative appeal rights before litigating the matter.[117] If an agency makes an adverse determination after the requester has filed suit, however, the requester need not first administratively appeal that determination before pressing forward with the court action.[118]

Regardless of whether the agency's response is timely, the requester's exhaustion obligation may be excused if the agency's response fails to supply notice of the right to file an administrative appeal, as required by 5 U.S.C. § 552(a)(6)(A)(i),[119] or ultimately to supply notice of the right to

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[117] Id. at 63-64; see, e.g., Almy v. U.S. Dep't of Justice, No. 96-1207, 1997 WL 267884, at *2-3 (7th Cir. May 7, 1997) (requester's failure to appeal agencies' "no records" responses constitutes a "failure to exhaust his administrative remedies"); Taylor, 30 F.3d at 1369 ("We therefore join the District of Columbia Circuit and the Third Circuit on this issue."); McDonnell, 4 F.3d at 1240 (applying Oglesby); Yang v. IRS, No. 06-1547, 2006 WL 2927548, at *2 (D. Minn. Oct. 12, 2006) (same); Hardy v. Lappin, No. 03-1949, 2005 WL 670753, at *1 (D.D.C. Mar. 21, 2005) (same); Allen v. IRS, No. 03-1698, 2004 WL 1638155, at *1 (D. Ariz. June 15, 2004) (same), aff'd on other grounds, 137 F. App'x 22 (9th Cir. 2005); Judicial Watch, Inc. v. FBI, 190 F. Supp. 2d 29, 33 (D.D.C. 2002) (same); Samuel v. U.S. Dep't of Justice, No. 93-0348, slip op. at 3-4 (D. Idaho Feb. 3, 1995) (same); Sloman v. U.S. Dep't of Justice, 832 F. Supp. 63, 66-67 (S.D.N.Y. 1993) (same); see also FOIA Update, Vol. XII, No. 2, at 3-5 ("OIP Guidance: Procedural Rules Under the D.C. Circuit's Oglesby Decision"). But cf. Or. Natural Desert Ass'n, 409 F. Supp. 2d at 1247 (finding some "difficulty in applying Oglesby" when agency responds in piecemeal fashion).

[118] See Pollack, 49 F.3d at 119 ("[I]t was error for the district court to conclude that it was somehow deprived of jurisdiction because [the requester] failed to file administrative appeals . . . during the litigation."); Crooker v. Tax Div. of the U.S. Dep't of Justice, No. 94-30129, 1995 WL 783236, at *8 (D. Mass. Nov. 17, 1995) (magistrate's recommendation) ("Plaintiff's complaint, in seeking the 'disclos[ure of] agency records being improperly withheld' remained alive to test the adequacy of the disclosures, once made."), adopted (D. Mass. Dec. 15, 1995), aff'd on other grounds per curiam, No. 96-1094 (1st Cir. Aug. 20, 1996). But see Voinche v. FBI, 999 F.2d 962, 963-64 (5th Cir. 1993) (holding that in action based on agency's failure to comply with FOIA's time limits for responses, disclosures made only after litigation commenced rendered action moot).

[119] See Ruotolo v. Dep't of Justice, 53 F.3d 4, 9 (2d Cir. 1995); Oglesby, 920 F.2d at 65; Leinbach v. U.S. Dep't of Justice, No. 05-744, 2006 WL 1663506, at *6 (D.D.C. June 14, 2006) (excusing the plaintiff's failure to file an administrative appeal, because the agency's response letter failed to provide him with "[correct] information regarding the administrative process to be followed"); Nurse, 231 F. Supp. 2d at 327-28 (finding constructive exhaustion because agency failed to inform requester of his right to appeal adverse decision); Lamb v. IRS, 871 F. Supp. 301, 303 (E.D. Mich. 1994) (de-

(continued...)

seek court review at the conclusion of the administrative appeal process.[120] However, so long as such notice is given, there is no particular formula or set of "magic words" that the agency must employ in giving it.[121] (For a further discussion of administrative notification requirements, see Procedural Requirements, Responding to FOIA Requests, above.) Furthermore, Oglesby counsels that a requester must file an administrative appeal within the time limit specified in an agency's FOIA regulations or else face dismissal for failure to exhaust administrative remedies.[122]

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[119](...continued)
claring that failure to inform requester of his right to appeal constitutes failure to comply with statutory time limits, thus permitting lawsuit); see also FOIA Update, Vol. VI, No. 4, at 6 (advising of consequences of agency failure to provide requester with statement of administrative appeal rights). But cf. Envtl. Prot. Info. Ctr. & Forest Issues Group v. U.S. Forest Serv., No. 03-cv-449, slip op. at 8 (N.D. Cal. Oct. 14, 2003) (holding that "[t]he requirements under 5 U.S.C. § 552(a)(6)(A)(i) pertain [only] to the agency's decision whether or not to release the requested files," not to its decision to provide records in a format different from that requested), rev'd & remanded on other grounds, 432 F.3d 945 (9th Cir. 2005).

[120] See Nurse, 231 F. Supp. 2d at 328-29 (chiding three agency offices for all failing to notify plaintiff of his right to judicial review of denial of administrative appeal).

[121] See Kay v. FCC, 884 F. Supp. 1, 2-3 (D.D.C. 1995) (letter which "gave the Plaintiff notice of his right to secure further agency review of the adverse determination, of the manner in which he could exercise that right, of the time limits for filing such request, and of the regulatory provisions containing general procedures pertaining to review applications 'held to' more than adequately fulfill[] the purposes behind the notice provision"); see also Jones, No. 94-2294, slip op. at 5 (D. Md. Jan. 18, 1995) (requester not relieved of appeal obligation simply because agency response included statement that requester would be notified if missing records were later located; response letter also advised that it constituted "final action" of agency component and notified plaintiff of right to administratively appeal).

[122] See Oglesby, 920 F.2d at 65 n.9 (citing regulations of agencies involved); Hamilton Sec. Group, Inc. v. HUD, 106 F. Supp. 2d 23 (D.D.C. 2000) (finding that requester failed to exhaust administrative remedies when it submitted administrative appeal one day after agency's regulatory time period had expired), summary affirmance granted, No. 00-5331, 2001 WL 238162 (D.C. Cir. Feb. 23, 2001) (per curiam); Voinche v. CIA, No. 96-1708, slip op. at 3 (W.D. La. Nov. 25, 1996) (plaintiff's filing of administrative appeal eleven months after agency's response justifies dismissal notwithstanding delay of almost four years by agency in responding to request), appeal dismissed as frivolous, 119 F.3d 3 (5th Cir. 1997) (unpublished table decision); Jones v. U.S. Dep't of Justice, No. 94-2294, slip op. at 6 (D. Md.
(continued...)

An agency response that merely acknowledges receipt of a request does not constitute a "determination" under the FOIA in that it neither denies records nor grants the right to appeal the agency's determination.[123] Significantly, though, the twenty-day time period does not run until the request is received by the appropriate office in the agency,[124] as set forth in

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[122](...continued)
Jan. 18, 1995) (awarding summary judgment to government when time limit prescribed by agency regulations for administrative appeal had expired); Lanter v. Dep't of Justice, No. 93-0034, slip op. at 2 (W.D. Okla. July 30, 1993) (court compelled to dismiss FOIA claim when plaintiff's administrative appeal from agency's response not filed in timely manner), aff'd, 19 F.3d 33 (10th Cir. 1994) (unpublished table decision); see also FOIA Update, Vol. XII, No. 2, at 4-5 (analyzing procedural requirements in light of Oglesby decision). But cf. Kennedy v. U.S. Dep't of Justice, No. 93-0209, slip op. at 2-3 (D.D.C. July 12, 1993) (when requester's affidavit attests to mailing of timely administrative appeal but agency affidavit denies receipt, court may permit requester additional time to submit another appeal and agency additional time to respond; "nothing in the FOIA statute or regulations requires the Plaintiff to do more than mail his administrative appeal in a timely fashion").

[123] See Martinez v. FBI, 3 Gov't Disclosure Serv. (P-H) ¶ 83,005, at 83,435 (D.D.C. Dec. 1, 1982); FOIA Update, Vol. XIII, No. 3, at 5 (advising that acknowledgment letters simply do not constitute responses for purposes of statutory deadlines); cf. Dickstein v. IRS, 635 F. Supp. 1004, 1006 (D. Alaska 1986) (letter referring requester to alternative "procedures which involved less red tape and bureaucratic hassle" not deemed to be denial). But cf. N.Y. Times Co. v. U.S. Dep't of Labor, 340 F. Supp. 2d 394, 399 (S.D.N.Y. 2004) (concluding that letter from agency that merely informed requester that submitter notice to 13,000 businesses would be required before final disclosure decision could be made was implicit denial of his administrative appeal).

[124] See Schoenman, 2006 WL 1126813, at *12 (recognizing that twenty-day period does not begin to run until agency receives request); Hutchins v. Dep't of Justice, No. 00-2349, 2005 WL 1334941, at *2 (D.D.C. June 6, 2005) ("Without any showing that the agency received the request, the agency has no obligation to respond to it."); see also *FOIA Post*, "Anthrax Mail Emergency Delays FOIA Correspondence" (posted 11/30/01) (noting that "[t]he processing of a FOIA request, with all applicable statutory deadlines, is triggered by an agency's 'receipt of . . . such request'" (quoting 5 U.S.C. § 552(a)(6)(A)(i))). But see Lion Raisins Inc. v. USDA, 354 F.3d 1072, 1077 n.5 (9th Cir. 2004) (holding without evident basis that constructive exhaustion occurred despite fact that plaintiff's administrative appeal was not received because agency mailroom became contaminated with anthrax spores).

the agency's regulations.[125] In fact, when an agency has regulations requiring that requests be made to specific offices for specific records,[126] a request will not be deemed received -- and no search for responsive records need be performed -- if the requester does not follow those regulations.[127]

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[125] See Brumley v. U.S. Dep't of Labor, 767 F.2d 444, 445 (8th Cir. 1985) (noting that request needed to be forwarded to proper office, so one or two day slippage in response time therefore was justified); Judicial Watch, Inc. v. U.S. Dep't of Justice, No. 97-2089, slip op. at 9-11 (D.D.C. July 14, 1998) (dismissing Complaint filed "prior to the existence of any statutory obligation" because FOIA offices had not even received request that was improperly addressed prior to suit being filed); Kessler v. United States, 899 F. Supp. 644, 645 (D.D.C. 1995) (because plaintiff submitted request to IRS Headquarters, not district office where he resided, "it is as if he had made no request at all on which the IRS could render a determination"); United States v. Agunbiade, No. 90-610, 1995 WL 351058, at *6 (E.D.N.Y. May 10, 1995) ("In failing to direct his requests, in accordance with agency-specific rules, to the appropriate parties and agencies from which he sought information, [the requester] ignored the most fundamental dictates of FOIA."), aff'd sub nom. United States v. Osinowo, Nos. 95-1334, 95-1519, 1996 WL 20514 (2d Cir. Jan. 19, 1996). But cf. Nat'l Ass'n of Criminal Def. Lawyers v. U.S. Dep't of Justice, No. 97-372, slip op. at 13 (D.D.C. June 26, 1998) (while acknowledging that complaint was amended to add request for which "the administrative process had [not] run its course," nevertheless awarding interim attorney fees based upon notion that lawsuit, not pre-existing administrative process, resulted in release of records in question), interlocutory appeal dismissed for lack of juris., 182 F.3d 981 (D.C. Cir. 1999).

[126] See, e.g., Department of Justice FOIA Regulations, 28 C.F.R. § 16.3 (2006).

[127] See Church of Scientology v. IRS, 792 F.2d 146, 150 (D.C. Cir. 1986); Flowers, 307 F. Supp. 2d at 68-69 (ruling that failure to file FOIA request that comports with agency's rules constitutes failure to exhaust administrative remedies); Leytman v. N.Y. Stock Exch., No. 95 CV 902, 1995 WL 761843, at *2 (E.D.N.Y. Dec. 6, 1995); see also Antonelli, 2005 WL 3276222, at *6 (dismissing FOIA claims because plaintiff submitted requests to confinement facility officials rather than to Federal Bureau of Prison's FOIA office as required by regulation); Matsey v. U.S. Dep't of Justice, No. 03-00889, 2005 WL 1017687, at *7 (D.D.C. May 2, 2005) (finding that plaintiff failed to exhaust because he did not send properly marked letter to particular official specified in agency regulations); Thomas, 2004 WL 3185320, at *1 (finding that plaintiff did not exhaust administrative remedies, because he did not send FOIA request to proper agency location in accordance with regulations); West v. Jackson, 448 F. Supp. 2d 207, 212 n.1 (D.D.C. 2006) (same); Nash v. U.S. Dep't of Justice, 992 F. Supp. 447, 449 (D.D.C. 1998) (rejecting plaintiff's argument that location of one agency component's records in second component's files necessitates separate search of first component's files, in absence of proper FOIA request to first component), sum-

(continued...)

(For a further discussion of time limits, see Procedural Requirements, Time Limits, above.) Additionally, even when a requester has "constructively" exhausted his administrative remedies by the agency's failure to respond determinatively to the request within the statutory time limits, the requester is not entitled to a Vaughn Index during the administrative process.[128]

Whether the agency has met or exceeded its twenty-day time limit for the processing of initial responses to a request, its twenty-day time limit for the processing of administrative appeals, or its ten-day extension of either time limit,[129] requesters have been deemed not to have constructively exhausted administrative remedies when they have failed to comply with necessary requirements of the FOIA's administrative process. This has been the case, for example, when requesters have failed to:

(1) provide required proof of identity[130] in first-party requests[131] or

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[127](...continued)
mary affirmance granted, No. 98-5096 (D.C. Cir. July 20, 1998); Rogers v. U.S. Nat'l Reconnaissance Office, No. 94-B-2934, slip op. at 5 (N.D. Ala. Sept. 13, 1995) (holding dismissal of Air Force appropriate when request is made to Department of Defense: "It is the plaintiff's burden to make his FOIA request to the agency component which he believes possesses responsive material. Plaintiff has provided no basis to shift that burden to the agency."). But cf. Lehrfeld v. Richardson, 132 F.3d 1463, 1466 (D.C. Cir. 1998) (assuming that proper FOIA request was made, rather than deciding "whether reference to a Vaughn index in a request for information suffices to put the agency on notice that the request is being made pursuant to the FOIA").

[128] See, e.g., Schaake v. IRS, No. 91-958, 1992 U.S. Dist. LEXIS 9418, at *11 (S.D. Ill. June 3, 1992); SafeCard Servs. v. SEC, No. 84-3073, slip op. at 3-5 (D.D.C. Apr. 21, 1986); see also FOIA Update, Vol. VII, No. 3, at 6 (counseling that Vaughn Index is not required at administrative level); Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 11 (D.D.C. 1995) ("Agencies need not provide a Vaughn Index until ordered by a court after the plaintiff has exhausted the administrative process."), aff'd on other grounds, 76 F.3d 1232 (D.C. Cir. 1996).

[129] See 5 U.S.C. § 552(a)(6)(A)-(B).

[130] See Summers v. U.S. Dep't of Justice, 999 F.2d 570, 572-73 (D.C. Cir. 1993) (holding that authorization for release of records need not be notarized, but can be attested to under penalty of perjury pursuant to 28 U.S.C. § 1746 (2000)); Lee v. U.S. Dep't of Justice, 235 F.R.D. 274, 286 (W.D. Pa. 2006) (dismissing FOIA claims because plaintiff failed to verify his identity in accordance with agency regulations by omitting his full name and place of birth from his request); Davis v. U.S. Attorney, Dist. of Md., No. 92-3233, slip op. at 2-3 (D. Md. July 5, 1994) (dismissing suit without prejudice when plaintiff failed to provide identification by notarized consent, attesta-
(continued...)

disclosure authorization by third parties;[132]

(2) "reasonably describe" the records sought;[133]

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[130](...continued)
tion under 28 U.S.C. § 1746, or alternative form of identification in conformity with agency regulations).

[131] See, e.g., Lilienthal v. Parks, 574 F. Supp. 14, 17-18 (E.D. Ark. 1983).

[132] See Pusa v. FBI, No. 99-04603, slip op. at 5 (C.D. Cal. Aug. 5, 1999) (dismissing case because plaintiff did not comply with agency regulations concerning third-party requests); Harvey v. U.S. Dep't of Justice, No. CV 92-176, slip op. at 17-18 (D. Mont. Jan. 9, 1996) (declining to grant motion for production of third-party records because plaintiff failed to submit authorization at the administrative level), aff'd on other grounds, 116 F.3d 484 (9th Cir. June 3, 1997) (unpublished table decision); Freedom Magazine v. IRS, No. 91-4536, 1992 U.S. Dist. LEXIS, at *10-13 (C.D. Cal. Nov. 13, 1992) (finding that court lacked jurisdiction when, prior to filing suit, plaintiff failed to provide waivers for third-party records as required by IRS regulations). But see Martin v. U.S. Dep't of Justice, No. 96-2866, slip op. at 7-8 (D.D.C. Dec. 15, 1999) (ruling that agency was not justified in refusing to process third-party request in absence of privacy waiver because agency's regulation on privacy waivers was permissive, not mandatory, but nevertheless dismissing complaint because all records would be subject to Exemption 7(C) protection in any event); Tanoue v. IRS, 904 F. Supp. 1161, 1165 (D. Haw. 1995) (finding exhaustion despite plaintiff's failure to provide third-party waiver for IRS "return information" because agency ignored request in mistaken belief that no action was necessary inasmuch as information was unreleasable without consent in any case); LaRouche v. U.S. Dep't of Justice, No. 90-2753, 1993 WL 388601, at *7 (D.D.C. June 25, 1993) (although third-party waivers were not submitted during administrative process, "they present solely legal issues which can properly be resolved by [the] Court").

[133] See, e.g., Gillin, 980 F.2d at 822-23 (deciding that a request for records "used as a basis to conclude there was a deficiency in [requester's] tax return" did not "reasonably describe" the records of the agency's field examination of requester's tax return, since the agency concluded after completion of its field examination that there was no deficiency); Marks v. U.S. Dep't of Justice, 578 F.2d 261, 263 (9th Cir. 1978); Dale v. IRS, 238 F. Supp. 2d 99, 104-05 (D.D.C. 2002) (finding that an agency is "under no obligation to release records that have not been reasonably described" and that a request that failed to conform to agency requirements "amounted to an all-encompassing fishing expedition . . . at taxpayer expense"); see also Voinche v. U.S. Dep't of the Air Force, 983 F.2d 667, 669 n.5 (5th Cir. 1993) (concluding that administrative remedies on fee waiver request were not exhausted when requester failed to amend request to achieve specificity required by agency regulations).

(3) comply with fee requirements;[134]

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[134] See, e.g., Pietrangelo v. U.S. Dep't of the Army, 155 F. App'x 526 (2d Cir. 2005) (affirming dismissal for failure to exhaust, despite agency's untimely response, because plaintiff neither paid nor requested waiver of assessed fees); Pollack, 49 F.3d at 119-20 (rejecting plaintiff's novel argument that untimeliness of agency response required it to provide documents free of charge); Kumar v. U.S. Dep't of Justice, No. 06-714, 2007 WL 537723, at *3 (D.D.C. Feb. 16, 2007) (concluding that "plaintiff failed to exhaust his administrative remedies because he did not pay the required fees associated with the search for records responsive to his FOIA request"); Ivey v. Snow, No. 05-CV-1095, 2006 WL 2051339, at *4 (D.D.C. July 20, 2006) (finding that plaintiff failed to exhaust administrative remedies, because he neither paid fees associated with requests nor sought fee waiver); Hicks v. Hardy, No. 04-769, 2006 WL 949918, at *2 (D.D.C. Apr. 12, 2006) (holding that "plaintiff cannot maintain his claim without paying the assessed fee," and explaining that this holds true "[r]egardless of whether . . . plaintiff 'filed' suit before or after receiving a request for payment"); Thorn v. United States, No. 04-1185, 2005 WL 3276285, at *1-2 (D.D.C. Aug. 11, 2005) (finding that plaintiff's administrative remedies were not exhausted, because he failed to pay assessed fees, and noting that "[c]ommencement of a civil action pursuant to FOIA does not relieve a requester of his obligation to pay any required fees"); Farrugia v. Executive Office for U.S. Attorneys, 366 F. Supp. 2d 56, 57 (D.D.C. 2005) (dismissing Complaint for failure to exhaust, because plaintiff failed to pay search fees that agency requested after it processed his request and properly informed him that records were available upon payment); Jeanes v. U.S. Dep't of Justice, 357 F. Supp. 2d 119, 123 (D.D.C. 2004) ("[E]xhaustion of administrative remedies does not occur until the required fees are paid or an appeal is taken from the denial of a request for a fee waiver."); Dale, 238 F. Supp. 2d at 107 (dismissing Complaint for failure to claim or establish entitlement to fee waiver or, alternatively, to commit to payment of fees); Ctr. to Prevent Handgun Violence, 981 F. Supp. at 23 (rejecting requester's "equitable tolling" argument; requester's agreement to accept sampling of documents for free does not excuse noncompliance with exhaustion requirement in subsequent fee waiver suit covering all records); Trueblood v. U.S. Dep't of the Treasury, 943 F. Supp. 64, 68 (D.D.C. 1996) ("Regardless of whether the plaintiff 'filed' suit before or after receiving a request for payment, the plaintiff has an obligation to pay for the reasonable copying and search fees assessed by the defendant."); Kuchta v. Harris, No. 92-1121, 1993 WL 87750, at *3-4 (D. Md. Mar. 25, 1993) (failure to either pay fees or request fee waiver halts administrative process and precludes exhaustion); Centracchio v. FBI, No. 92-0357, slip op. at 5 (D.D.C. Mar. 16, 1993) ("Plaintiff's failure to pay the deposit or request a waiver is fatal to his claim and requires dismissal . . . ."); Atkin v. EEOC, No. 91-2508, slip op. at 21-22 (D.N.J. Dec. 4, 1992) ("[E]xhaustion does not occur where the requester has failed to pay the assessed fees, even though the agency failed to timely process a request."), appeal dismissed for failure to prosecute, No. 93-5548 (3d Cir. Dec.

(continued...)

(4) pay authorized fees incurred in a prior request before making new requests;[135]

(5) present for review at the administrative appeal level any objection to earlier processing practices;[136]

(6) administratively request a waiver of fees;[137] or

(7) challenge a fee waiver denial at the administrative appeal

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[134](...continued)
6, 1993); see also Kong On Imp. & Exp. Co. v. U.S. Customs & Border Prot. Bureau, No. 04-2001, 2005 WL 1458279, at *2 (D.D.C. June 20, 2005) (dismissing Complaint for failure to exhaust administrative remedies because plaintiff did not pay processing fees until after he filed suit) (appeal pending); Atkin v. EEOC, No. 92-5522, slip op. at 5 n.3 (D.N.J. Jan. 24, 1994) (subject matter jurisdiction determined as of date that Complaint was filed; fact that plaintiff paid fees after suit was instituted does not confer jurisdiction); cf. Wiggins v. Nat'l Credit Union Admin., No. 05-2332, 2007 WL 259941, at *5 (D.D.C. Jan. 30, 2007) (finding that, despite plaintiff's failure to exhaust, "no purpose would be served by having this matter delayed until plaintiff pays the required fee" because agency "has already considered and processed plaintiff's request"); Sliney v. Fed. Bureau of Prisons, No. 04-1812, 2005 WL 839540, at *4 (D.D.C. Apr. 11, 2005) (recognizing that the plaintiff's failure to pay requested fees "constitutes a failure to exhaust," but excusing that failure to pay that duplication fee because the agency "produced no evidence" that it ever informed him of the fee amount). But see Hemmings v. Freeh, No. 95-738, 2005 WL 975626, at *3 (D.D.C. Apr. 25, 2005) (denying defendant's motion to dismiss, because plaintiff "cured" his failure to exhaust by paying assessed fees, even though he did so only after government filed its dismissal motion).

[135] See, e.g., Trenerry v. IRS, No. 95-5150, 1996 WL 88459, at *1 (10th Cir. Mar. 1, 1996); Crooker, 577 F. Supp. at 1219-20; Mahler v. Dep't of Justice, 2 Gov't Disclosure Serv. (P-H) ¶ 82,032, at 82,262 (D.D.C. Sept. 29, 1981).

[136] See, e.g., Halpern v. FBI, 181 F.3d 279, 289 (2d Cir. 1999) (approving FBI practice of seeking clarification of requester's possible interest in "cross-references," and dismissing portion of suit challenging failure to process those records when plaintiff did not dispute agency action until after suit was filed); Dettmann, 802 F.2d at 1477 (same); Lair v. Dep't of Treasury, No. 03-827, 2005 WL 645228, at *3 (D.D.C. Mar. 21, 2005) (determining that plaintiff exhausted his administrative remedies as to certain aspects of agency's action on his request, but not as to others), reconsideration denied, 2005 WL 1330722 (D.D.C. June 3, 2005).

[137] See, e.g., Ivey, 2006 WL 2051339, at *4; Antonelli, 2005 WL 3276222, at *8; Trenerry, 1996 WL 88459, at *2; Voinche, 983 F.2d at 669.

stage.[138]

Although it is not yet a settled point of law, the only possible exception to the FOIA's firm exhaustion requirement concerns requests for expedited access to records -- for which the agency has a ten-calendar-day response deadline.[139] Despite statutory language referring to administrative appeals of such requests,[140] the few courts that have considered the issue thus far have ruled that exhaustion of administrative remedies is not required prior to seeking court review of an agency's denial of requested expedited access.[141] In any event, however, the denial of expedited access

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[138] See, e.g., Fulton v. Executive Office for U.S. Attorneys, No. 05-1300, 2006 WL 1663526, at *3-4 (D.D.C. June 15, 2006) (dismissing Complaint because plaintiff did not pay fees or appeal denial of his fee waiver request); Boyd, 2005 WL 555412, at *4 ("Failure to pay the requested fees or to appeal the denial from a refusal to waive fees constitutes a failure to exhaust administrative remedies."); Oguaju v. Executive Office for U.S. Attorneys, No. 00-1930, slip op. at 1 n.1 (D.D.C. Sept. 25, 2003) (refusing to consider plaintiff's "motion to waive fees," because he failed to administratively appeal fee waiver denial), summary affirmance granted, No. 04-5407, 2005 U.S. App. LEXIS 23891 (D.C. Cir. Nov. 3, 2005); Mells v. IRS, No. 99-2030, 2001 U.S. Dist. LEXIS 1262, at *5 (D.D.C. Jan. 23, 2001) (deciding that plaintiff must pay fee or seek waiver from agency before challenging government's response concerning fees), subsequent opinion denying fee waiver, 2002 U.S. Dist. LEXIS 24275 (D.D.C. Nov. 21, 2002); Schwarz v. U.S. Dep't of Treasury, 131 F. Supp. 2d 142, 148 (D.D.C. 2000) ("Exhaustion of administrative remedies . . . includes payment of required fees or an appeal within the agency from a decision refusing to waive fees."), summary affirmance granted, No. 00-5453 (D.C. Cir. May 10, 2001); Tinsley v. Comm'r, No. 3:96-1769-P, 1998 WL 59481, at *4 (N.D. Tex. Feb. 9, 1998) (finding no exhaustion because plaintiff failed to appeal fee waiver denial).

[139] 5 U.S.C. § 552(a)(6)(E)(ii)(I).

[140] See 5 U.S.C. § 552(a)(6)(E)(ii)(II) (referring to "expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing").

[141] See ACLU v. U.S. Dep't of Justice, 321 F. Supp. 2d 24, 28-29 (D.D.C. 2004) (concluding that FOIA does not require administrative appeal of agency's denial of expedition request); Elec. Privacy Info. Ctr. v. U.S. Dep't of Justice, No. 03-2078, slip op. at 5 (D.D.C. Dec. 19, 2003) (finding that administrative appeal of refusal to grant expedited processing of request is required by "neither the statute nor applicable case law"); Judicial Watch, Inc. v. FBI, No. 01-1216, slip op. at 6 (D.D.C. July 26, 2002) (noting that the statutory language "provides for direct judicial review of an agency's failure to timely respond to a request for expedited processing"); Al-Fayed v. CIA, No. 00-2092, 2000 U.S. District LEXIS 21476, at *8 (D.D.C. Sept. 20, 2000) (concluding that "[n]othing in the statute or its legislative history" indicates

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to records, or the failure to act on such a request within ten days, certainly should not entitle a requester to seek immediate judicial review of the agency's failure to respond to the underlying request for records as well; if a requester files suit seeking access to records prior to the twenty-day time period within which an agency must respond to that underlying request, that suit is subject to ready dismissal for failure to exhaust administrative remedies.[142]

"Open America" Stays of Proceedings

When a requester who has constructively exhausted administrative remedies due to an agency's failure to comply with the FOIA's time deadlines files a suit in court, the court may retain jurisdiction over the case -- ordinarily through issuance of a stay of proceedings -- while allowing the agency additional time to complete its processing of the request. The FOIA itself explicitly permits such a stay if it can be shown that "exceptional circumstances exist and that the agency is exercising due diligence in responding to the request."[143] This provision of the FOIA provides an important "safety valve" for agencies that have been, and continue to be, overwhelmed by increasing numbers of FOIA requests.[144]

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[141](...continued)
that an administrative appeal of a denial of expedited processing is required before an applicant may seek judicial review), aff'd on other grounds, 254 F.3d 300 (D.C. Cir. 2001).

[142] See Dorn, 2005 WL 1126653, at *3-4 (dismissing lawsuit where Complaint was filed prematurely, even though agency ultimately responded after twenty-day period); Judicial Watch, Inc., No. 01-1216, slip op. at 8 (D.D.C. July 26, 2002) (dismissing plaintiff's Complaint seeking release of requested records, because it was filed prematurely; although the agency failed to timely respond to the Complaint, for dismissal purposes "the Court will only consider those facts and circumstances that existed at the time of the filing of the complaint, and not subsequent events"). But cf. Elec. Privacy Info. Ctr. v. Dep't of Justice, 416 F. Supp. 2d 30, 38-39 (D.D.C. 2006) (explaining that courts have "authority to impose concrete deadlines" on any agency that delays processing of expedited request beyond what is "as soon as practicable," and reasoning that delay is presumed when agency fails to respond to such request within twenty days).

[143] 5 U.S.C. § 552(a)(6)(C)(i)-(iii) (2000 & Supp. IV 2004).

[144] See Manna v. U.S. Dep't of Justice, No. 93-81, 1994 WL 808070, at *10 (D.N.J. Apr. 13, 1994) (noting "huge number of FOIA requests that have overwhelmed [agency's] human and related resources"); Cohen v. FBI, 831 F. Supp. 850, 854 (S.D. Fla. 1993) (explaining that court "cannot focus on theoretical goals alone, and completely ignore the reality that these agencies cannot possibly respond to the overwhelming number of requests received within the time constraints imposed by FOIA"); see also Natural
(continued...)

The leading case construing this FOIA provision is Open America v. Watergate Special Prosecution Force.[145] In Open America, the Court of Appeals for the District of Columbia Circuit held that "exceptional circumstances" may exist when an agency can show that it "is deluged with a volume of requests for information vastly in excess of that anticipated by Congress [and] when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A)."[146]

The Electronic Freedom of Information Act Amendments of 1996 explicitly redefined the term "exceptional circumstances" to exclude any "delay that results from a predictable agency workload of requests . . . unless the agency demonstrates reasonable progress in reducing its backlog of pending requests."[147] This definition of "exceptional circumstances" makes it difficult for agencies seeking a stay of proceedings to argue only the existence of a FOIA backlog as the basis for a stay.[148] At the same time, in

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[144](...continued)
Res. Def. Council v. Dep't of Energy, 191 F. Supp. 2d 41, 42 (D.D.C. 2002) (while noting that "it is commonly accepted that no federal agency can meet the impossibly rigorous timetable set forth in the [FOIA]," nevertheless granting motion for expedited release of records); *FOIA Post*, "Summary of Annual FOIA Reports for Fiscal Year 2003" (posted 7/29/04) (reporting that over three million requests were received governmentwide in Fiscal Year 2003); *FOIA Post*, "Supplemental Guidance on Annual FOIA Reports" (posted 8/13/01) (addressing backlog-related statistical compilations in annual FOIA reports); cf. *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (observing that Executive Order 13,392 obliges agencies to "identify ways to eliminate or reduce" backlogs, which "have long been a concern under the FOIA").

[145] 547 F.2d 605 (D.C. Cir. 1976).

[146] Id. at 616.

[147] Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 7(c), 110 Stat. 3048 (codified as amended at 5 U.S.C. § 552(a)(6)(C)(ii)); see also FOIA Update, Vol. XVIII, No. 3, at 3-7 (advising agencies regarding reporting of backlog-related information in annual FOIA reports, as of Fiscal Year 1998).

[148] See H.R. Rep. No. 104-795, at 18-19 (1996); see also Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 259 n.4 (D.D.C. 2005) ("An agency must show more than a great number of requests to establish[] exceptional circumstances under the FOIA."); Donham v. U.S. Dep't of Energy, 192 F. Supp. 2d 877, 882 (S.D. Ill. 2002) (refusing to accept agency's argument that its backlog qualifies as "exceptional circumstances" because "then the 'exceptional circumstances' provision would render meaningless the twenty-day response requirement"); Al-Fayed v. CIA, No. 00-2092, slip op. at 5 (D.D.C. Jan. 16, 2001) ("Rather than overturn Open
(continued...)

enacting the Electronic FOIA amendments, Congress specifically contemplated that other factors may be relevant to a court's determination as to whether "exceptional circumstances" exist: An agency's efforts to reduce its pending request backlog; the size and complexity of other requests being processed by the agency; the amount of classified material involved; and the number of requests for records by courts or administrative tribunals that are also pending.[149] Furthermore, the amendments include a companion provision that specifies that a requester's "refusal . . . to reasonably modify the scope of a request or arrange for an alternative time frame for processing . . . shall be considered as a factor in determining whether exceptional circumstances exist."[150]

In Open America, the D.C. Circuit ruled that the "due diligence" requirement in the FOIA may be satisfied by an agency's good faith processing of all requests on a "first-in/first-out" basis and that a requester's right to have his request processed out of turn requires a particularized showing of "exceptional need or urgency."[151] In so ruling, the D.C. Circuit rejected the notion that the mere filing of a lawsuit was a basis for such expedited treatment.[152] The Electronic FOIA amendments modified this first in/first

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[148](...continued)
America, the 1996 amendments merely explain that predictable agency workload and a backlog alone, will not justify a stay."), aff'd on other grounds, 254 F.3d 300 (D.C. Cir. 2001); Eltayib v. U.S. Coast Guard, No. 99-1033, slip op. at 3 (D.D.C. Nov. 11, 1999) (explaining intent of Electronic FOIA amendments' modification of FOIA's "exceptional circumstances" provision), aff'd on other grounds, 53 F. App'x 127 (D.C. Cir. 2002) (per curiam); see also FOIA Update, Vol. XVII, No. 4, at 10 (describing provisions of Electronic FOIA amendments).

[149] See H.R. Rep. No. 104-795, at 24-25, 1996 U.S.C.C.A.N. 3448, 3468 (1996) (specifying factors that may be considered in determining whether "exceptional circumstances" exist).

[150] 5 U.S.C. § 552(a)(6)(C)(iii); see also Sierra Club v. U.S. Dep't of Justice, 384 F. Supp. 2d 1, 31 (D.D.C. 2004) (finding that plaintiff's refusal to reasonably modify "extremely broad" request or to arrange alternate time frame for disclosure constituted "unusual circumstances" and relieved agency of statutory timeliness requirements); Peltier v. FBI, No. 02-4328, slip op. at 8 (D. Minn. Aug. 15, 2003) (granting a stay and explaining that the plaintiff's refusal "to modify the scope of his request supports a finding of exceptional circumstances"); Al-Fayed, No. 00-2092, slip op. at 6, 12 (D.D.C. Jan. 16, 2001) (granting an Open America stay and denigrating plaintiffs' ostensible efforts to limit scope of their requests as "more symbolic than substantive"), aff'd on other grounds, 254 F.3d 300 (D.C. Cir. 2001).

[151] See Open Am., 547 F.2d at 616.

[152] Id. at 615; see also Fiduccia v. U.S. Dep't of Justice, 185 F.3d 1035, (continued...)

out rule by explicitly allowing agencies to establish "multitrack" processing for requests, based on the amount of time and/or work involved in a particular request.[153] The amendments nevertheless preserved the principle that, within such multiple tracks, an agency's "due diligence" in handling its FOIA requests is shown by its consideration of those requests on a first-in, first-out basis.[154]

When the requirements of the statute and Open America -- as modified by the 1996 amendments -- are met, courts have readily granted agency motions to stay judicial proceedings to allow for additional time to complete the administrative processing of a request.[155] By contrast, such mo-

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[152](...continued)
1040-41 (9th Cir. 1999) (refusing to approve automatic preference for FOIA requesters who file suit, because it "would generate many pointless and burdensome lawsuits"); Cohen, 831 F. Supp. at 854 ("[L]ittle progress would result from allowing FOIA requesters to move to the head of the line by filing a lawsuit. This would do nothing to eliminate the FOIA backlog; it would merely add to the judiciary's backlog."); cf. Hunsberger v. U.S. Dep't of Justice, No. 94-0168, 1994 U.S. Dist. LEXIS, at *1-2 (D.D.C. May 3, 1994), summary affirmance granted, No. 94-5234 (D.C. Cir. Apr. 10, 1995) (forbidding requester from circumventing Open America stay by filing new complaint based on same request). But see Exner v. FBI, 542 F.2d 1121, 1123 (9th Cir. 1976) (adopting the approach of a concurring opinion in Open America, and holding that the filing of a suit can move a requester "up the line").

[153] Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 7(a), 110 Stat. 3048 (codified at 5 U.S.C. § 552(a)(6)(D)(i)).

[154] Id. § 7(a)(D)(ii) (codified at 5 U.S.C. § 552(a)(6)(D)(ii)).

[155] See, e.g., Ctr. for Pub. Integrity v. U.S. Dep't of State, No. 05-2313, 2006 WL 1073066, at *5 (D.D.C. Apr. 24, 2006) (finding exceptional circumstances where an agency experienced an unpredictable "increase in the number of FOIA requests for the two most recent fiscal years and also the unforseen increase in . . . [its FOIA staff's] other information access duties"); Elec. Privacy Info. Ctr. v. U.S. Dep't of Justice, No. 02-0063, 2005 U.S. Dist. LEXIS 18876, at *12-17 (D.D.C. Aug. 31, 2005) (approving stay where FBI faced "unanticipated amount of lengthy FOIA requests," showed "reasonable progress" in reducing its backlog, and demonstrated due diligence by adopting three-tiered processing system, as well as certain electronic processing techniques); Bower v. FDA, No. 03-224, 2004 WL 2030277, at *3 (D. Me. Aug. 30, 2004) (granting stay where FDA faced "enormous litigation demands" and demonstrated reasonable progress with its FOIA backlog); Appleton v. FDA, 254 F. Supp. 2d 6, 10-11 (D.D.C. 2003) (approving an Open America stay generally, but requiring parties to confer about precise scope of plaintiff's request and to propose appropriate length of stay); Cooper v. FBI, No. 99-2305, slip op. at 2, 4 (D.D.C. June 28, 2000) (granting (continued...)

tions have predictably proven unsuccessful when agencies have failed to set forth sufficient facts to demonstrate the propriety of such a stay.[156]

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[155](...continued)
defendant's stay motion for "at least" four months); Judicial Watch, Inc. v. U.S. Dep't of State, No. 99-1130, slip op. at 2 (D.D.C. Feb. 17, 2000) (approving ten-month stay because "unanticipated workload, the inadequate resources of the agency, and the complexity of many of the requests" constitute exceptional circumstances), appeal dismissed as interlocutory, No. 00-5095 (D.C. Cir. June 2, 2000); Emerson v. CIA, No. 99-0274, 1999 U.S. Dist. LEXIS 19511, at *3-4 (D.D.C. Dec. 16, 1999) (granting two-year stay because of "extraordinary circumstances" and multiple agency efforts to alleviate FOIA backlog); Summers v. CIA, No. 98-1682, slip op. at 4 (D.D.C. July 26, 1999) (finding that FBI's FOIA procedures are "fair and expeditious" and that exceptional circumstances exists, warranting six-month stay of proceedings); Judicial Watch, Inc. v. U.S. Dep't of Justice, No. 97-2869, slip op. at 6-8 (D.D.C. Aug. 25, 1998) (finding that agency exercised due diligence when both parties agreed that exceptional circumstances existed and requester failed to show exceptional need for records); Narducci v. FBI, No. 98-0130, slip op. at 1 (D.D.C. July 17, 1998) (ordering thirty-four-month stay because of "deluge[]" of requests coupled with "reasonable progress" in reducing backlog). See generally FOIA Update, Vol. XIX, No. 4, at 7 (describing FBI effort to reduce backlog through use of negotiation team); FOIA Update, Vol. XIX, No. 3, at 5-6 (describing Department of Justice efforts at backlog reduction).

[156] See, e.g., Leadership Conference on Civil Rights, 404 F. Supp. at 259 (rejecting agency's stay request predicated on "large backlog of pending FOIA requests, including 16 requests which take much longer to process than other[s]," reallocation of resources to respond to court orders, and "personnel issues"); The Wilderness Soc'y v. U.S. Dep't of the Interior, No. 04-0650, 2005 WL 3276256, at *10 (D.D.C. Sept. 12, 2005) (denying stay because agency failed to present any evidence to support claim that it faced unanticipated volume of FOIA requests); Eltayib, No. 99-1033, slip op. at 4 (D.D.C. Nov. 11, 1999) (denying stay and taking agency to task for failing to take any measures to comport with statutory requirements for showing reasonable progress); Los Alamos Study Group v. Dep't of Energy, No. 99-201, slip op. at 4-5 (D.N.M. Oct. 26, 1999) (declining to approve stay of proceedings predicated on agency's need to review sensitive materials, because such review "is part of the predictable agency workload of requests"); cf. Hall v. CIA, No. 04-0814, 2005 WL 850379, at *5 (D.D.C. Apr. 13, 2005) (refusing to accept the CIA's argument that a stay was warranted while the agency awaited "final guidance from the Court" on the plaintiff's previous lawsuit); Homick v. U.S. Dep't of Justice, No. 98-00557, slip op. at 2 (N.D. Cal. Oct. 27, 2004) (denying FBI's motion for stay because it "repeatedly failed to meet various [court imposed] deadlines . . . over more than two years"). But cf. Nat'l Sec. Archive v. U.S. Dep't of the Air Force, No. 05-571, 2006 WL 1030152, at *5 (D.D.C. Apr. 19, 2006) (finding that agency failed to process plaintiff's requests with due diligence, but declining to
(continued...)

Even in those instances in which some additional processing time is appropriate, courts have undertaken increasing scrutiny of agency claims that long delays are warranted.[157]

Of course, any stay necessarily includes the time required to consult with other agencies whose information is included in the responsive records, particularly when such review by the originating agency is mandatory.[158] In addition, an "Open America" stay should, when necessary, in-

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[156](...continued)
order immediate disclosure of unprocessed documents because they first had to be reviewed for declassification; "[r]elease of classified documents cannot be ordered without such review no matter how dilatory an agency might be").

[157] See Fiduccia, 185 F.3d at 1041 (overturning stay of proceedings allowed by district court, because delay was only "ordinary and expected"); Hendricks v. U.S. Dep't of Justice, No. 05-05-H, slip op. at 13 (D. Mont. Aug. 18, 2005) (concluding that FBI did not demonstrate exceptional circumstances sufficient to warrant stay for full length of time requested); Bower, 2004 WL 2030277, at *3 (approving seven-month stay, rather than leaving FDA "to its own, unmonitored devices" for full two-and-one-half-year period that it had requested); Ruiz v. U.S. Dep't of Justice, No. 00-0105, slip op. at 3 (D.D.C. Sept. 27, 2001) (acknowledging that the agency made "a satisfactory showing that a stay . . . is warranted," but reducing the stay's length from the thirty-three months requested to only seven months); Beneville v. U.S. Dep't of Justice, No. 98-6137, slip op. at 8 (D. Or. Dec. 17, 1998) (declining to approve full stay of proceedings requested by FBI regarding Unabomber files); Grecco v. Dep't of Justice, No. 97-0419, slip op. at 2 (D.D.C. Aug. 24, 1998) (granting two-year stay rather than four-year stay that was requested by FBI); see also Peralta v. FBI, No. 94-760, slip op. at 2 (D.D.C. June 6, 1997) (reducing Open America stay by four months because of enactment of Electronic FOIA amendments, and requiring that agency justify additional time needed for processing on basis of new statutory standard), vacated & remanded on other grounds, 136 F.3d 169 (D.C. Cir. 1998); cf. Donham, 192 F. Supp. 2d at 884 (refusing to set processing deadline, but also refusing to grant open-ended stay of proceedings); Gilmore v. U.S. Dep't of Energy, 4 F. Supp. 2d 912, 925 (N.D. Cal. 1998) ("Where a pattern and practice of late responses is alleged . . . a normal, predictable workload cannot constitute 'exceptional circumstances.'"), dismissed per stipulation, No. 95-0285 (N.D. Cal. Apr. 3, 2000).

[158] See, e.g., Gilmore v. U.S. Dep't of State, No. C 95-1098, slip op. at 25-26, 29 (N.D. Cal. Feb. 9, 1996) (An "agency receiving requests for information classified by another agency 'shall refer copies . . . to the originating agency for processing.'" (quoting Exec. Order No. 12,958 § 3.7(b), 3 C.F.R. 333 (1996), reprinted in 50 U.S.C. § 435 note (2000), and reprinted in abridged form in FOIA Update, Vol. XVI, No. 2, at 5-10); cf. Nat'l Sec. Archive, 2006 WL 1030152, at *4-5 (concluding that agency failed to exercise
(continued...)

clude the time required for preparation of a Vaughn Index.[159] While the Open America decision itself does not address the additional time needed by an agency to justify nondisclosure of any withheld records once they are processed, courts have, as a practical matter, tended to merge the record-processing and affidavit-preparation stages of a case when issuing stays of proceedings under Open America.[160] And when there is a large volume of responsive documents that have not been processed, a court may grant a stay of proceedings that provides for interim or "timed" releases and/or interim status reports on agency processing efforts.[161]

An "Open America" stay always may be denied when the requester can show an "exceptional need or urgency" for having his request processed out of turn.[162] Traditionally, such a showing was found if the requester's life or personal safety, or substantial due process rights, would be jeopard-

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[158](...continued)
due diligence in responding to plaintiff's requests, but nevertheless recognizing that it must complete declassification review process, which entails "referral to multiple agencies").

[159] See FOIA Update, Vol. IX, No. 4, at 5 (discussing relevant cases).

[160] See, e.g., Lisee, 741 F. Supp. at 989-90 ("Open America" stay granted for both processing records and preparing Vaughn Index); Ettlinger v. FBI, 596 F. Supp. 867, 878-79 (D. Mass. 1984) (same); Shaw v. Dep't of State, 1 Gov't Disclosure Serv. (P-H) ¶ 80,250, at 80,630 (D.D.C. July 31, 1980) (same).

[161] See, e.g., Al-Fayed v. CIA, No. 00-2092, slip op. at 12 (D.D.C. Jan. 16, 2001) (granting stays for four agencies, but requiring status reports every sixty days), aff'd on other grounds, 254 F.3d 300 (D.C. Cir. 2001); Raulerson v. Reno, No. 95-2053, slip op. at 1 (D.D.C. Sept. 11, 1998) (approving thirty-month stay to process over 19,000 pages, but ordering four interim status reports); Samuel Gruber Educ. Project v. U.S. Dep't of Justice, No. 90-1912, slip op at 6 (D.D.C. Feb. 8, 1991) (granting nearly two-year stay, but requiring six-month progress reports); Hinton v. FBI, 527 F. Supp. 223, 223-25 (E.D. Pa. 1981) (staying proceedings, but ordering interim releases at ninety-day intervals); cf. Bower, 2004 WL 2030277, at *3 (requiring FDA to produce status report at end of seven-month stay, which included estimated time by which document production would be completed).

[162] See Open Am., 547 F.2d at 616; see also Edmonds v. FBI, No. 02-1294, 2002 WL 32539613, at *4 (D.D.C. Dec. 3, 2002) (denying motion for an Open America stay even though it was justified by exceptional circumstances, and ordering expedited processing); Aguilera v. FBI, 941 F. Supp. 144, 149-52 (D.D.C. 1996) (finding initially that FBI satisfied "exceptional circumstances-due diligence test" warranting eighty-seven-month delay, but subsequently granting expedited access due to exigent circumstances), appeal dismissed, No. 98-5035 (D.C. Cir. Mar. 18, 1998).

ized by the failure to process a request immediately.[163] The Department of Justice, as a matter of administrative policy, also expedited FOIA requests when there was "widespread and exceptional media interest" in information which "involve possible questions about the government's integrity which affect public confidence."[164]

The Electronic FOIA amendments generally codified these requirements.[165] Under them, agencies must have regulations providing for the granting of expedited treatment in cases of "compelling need" or "in other cases determined by the agency."[166] "Compelling need" is defined by law to encompass a situation in which withholding of the requested records "could reasonably be expected to pose an imminent threat to the life or

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[163] See, e.g., Neely v. FBI, No. 97-0786, slip op. at 9 (W.D. Va. July 27, 1998) (granting expedited processing of FOIA request where plaintiff has pending motion for new criminal trial based on alleged false trial testimony and needs documents for proof), vacated & remanded on other grounds, 208 F.3d 461 (4th Cir. 2000); Ferguson v. FBI, 722 F. Supp. 1137, 1141-44 (S.D.N.Y. 1989) (need for documents, not otherwise available, in post-conviction challenge and upcoming criminal trial); Cleaver v. Kelley, 427 F. Supp. 80, 81 (D.D.C. 1976) (plaintiff facing multiple criminal charges carrying possible death penalty in state court); see also FOIA Update, Vol. IV, No. 3, at 3 ("OIP Guidance: When to Expedite FOIA Requests"); cf. Kitchen v. FBI, No. 94-5159, 1995 WL 311615, at *1 (D.C. Cir. Apr. 27, 1995) (per curiam) (requester has not shown sufficiently serious harm to warrant interlocutory appeal when deportation hearing not yet scheduled (citing Ray, 770 F. Supp. at 1550-51)); Billington v. U.S. Dep't of Justice, No. 92-462, slip op. at 3-5 (D.D.C. July 27, 1992) (expedited treatment denied despite pendency of prosecutions, when requester had not shown any likelihood that files contain "materially exculpatory information"). Compare Freeman v. U.S. Dep't of Justice, No. 92-557, slip op. at 6 (D.D.C. Oct. 2, 1992) (expedited processing granted when scope of request limited, Jencks Act material unavailable in state prosecution, and information useful to plaintiff's criminal defense might have been contained in requested documents), with Freeman v. U.S. Dep't of Justice, No. 92-557, 1993 WL 260694, at *5 (D.D.C. June 28, 1993) (denying further expedited treatment when processing "would require a hand search of approximately 50,000 pages, taking approximately 120 days"). But see Gilmore v. FBI, No. 93-2117, slip op. at 1, 3 (N.D. Cal. July 26, 1994) (expediting request despite showing of due diligence and exceptional circumstances, based upon perfunctory finding that "[p]laintiff has sufficiently shown that the information he seeks will become less valuable if the FBI processes his request on a first-in, first-out basis").

[164] Department of Justice FOIA Regulations, 28 C.F.R. § 16.5(d)(iv) (1996).

[165] See FOIA Update, Vol. XVII, No. 4, at 10 (describing Electronic FOIA amendment provisions).

[166] 5 U.S.C. § 552(a)(6)(E)(i); see also FOIA Update, Vol. XVII, No. 4, at 10.

physical safety of an individual."[167] Additionally, the Electronic FOIA amendments specify that expedited processing will be granted when there exists, "with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity."[168]

The D.C. Circuit, in discussing the second part of this statutory standard, has observed that "'[g]iven the finite resources generally available for filling FOIA requests, unduly generous use of the expedited processing procedure would unfairly disadvantage other requesters who do not qualify for its treatment.'"[169] It then held that a request for records pertaining to the deaths of Princess Diana and Dodi Al-Fayed did not satisfy the "urgency to inform" standard because the events at issue were over two years old, and "[a]lthough these topics may continue to be newsworthy, none of the events at issue is the subject of a currently unfolding story."[170] Lower courts have similarly limited the reach of this expedited access standard.[171]

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[167] 5 U.S.C. § 552(a)(6)(E)(v)(I).

[168] Id. § 552(a)(6)(E)(v)(II); see also 28 C.F.R. § 16.5(d) (specifying procedures for expedited processing, including when there is "[a]n urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information"); Tripp v. DOD, 193 F. Supp. 2d 229, 241 (D.D.C. 2002) (finding that plaintiff does not meet the criteria for expedited processing, because while she "has been the object of media attention," she is not primarily engaged in disseminating information to the media); cf. Appleton, 254 F. Supp. 2d at 10 n.5 (ruling that the plaintiff's advanced age is not a basis contemplated by the FOIA for expedited access).

[169] Al-Fayed v. CIA, 254 F.3d 300, 310 (D.C. Cir. 2001) (quoting H.R. Rep. No. 104-795, at 26).

[170] Id. at 311 (observing further that "[e]ven if the information sought is properly characterized as 'current,' it cannot fairly be said to concern a matter of 'exigency to the American public,'" and noting that "[t]here is no evidence in the record that there is substantial interest, either on the part of the American public or the media, in this particular aspect of plaintiff's allegations") (footnote omitted).

[171] See Tripp, 193 F. Supp. 2d at 242 (ruling that inasmuch as events giving rise to FOIA request were three years old, there was no "great news media interest" and thus no "urgent need" for requested information); see also IEEE Spectrum v. Dep't of Justice, No. 05-0865, slip op. at 2 (D.D.C. Feb. 16, 2006) (denying expedited processing where the plaintiff, a magazine, made only self-serving statements that the subject of the request was "a currently unfolding story" and "newsworthy"); Elec. Privacy Info. Ctr. v. DOD, 355 F. Supp. 2d 98, 102 (D.D.C. 2004) (denying expedited processing

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Absent truly exceptional circumstances, though, courts have generally declined to order expedited processing when records are "needed" for post-judgment attacks on criminal convictions,[172] or for use in other civil litigation.[173] Employing an extremely unusual tactic, one plaintiff sought in

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[171](...continued)
where plaintiff failed to show interest in particular data-mining software that was subject of its request, and instead relied on general public interest in "umbrella" subject of data mining); Elec. Privacy Info. Ctr. v. U.S. Dep't of Justice, No. 03-2078, slip op. at 10 (D.D.C. Dec. 19, 2003) (deciding that there was no urgency to inform the public that warranted expedited access, because "[t]he appearance of thirty-one newspaper articles does not make a story a matter of 'current exigency'"); see also *FOIA Post*, "FOIA Counselor Q&A" (posted 1/24/06) (discussing the meaning of the term "umbrella issue," and advising of its use "when considering public interest issues under the FOIA").

[172] See, e.g., Ruiz v. U.S. Dep't of Justice, No. 00-0105, slip op. at 3 (D.D.C. Sept. 27, 2001) ("To the extent that records are intended for use in an attack on plaintiff's criminal conviction, this situation does not constitute an exceptional need."); Edmond v. U.S. Attorney, 959 F. Supp. 1, 4 (D.D.C. 1997) (explaining that a "mere challenge to a conviction" is not sufficient to warrant expedited processing); Schweihs v. FBI, 933 F. Supp. 719, 723 (N.D. Ill. 1996) (denying expedited processing of records related to plaintiff's conviction, despite plaintiff's claims of ill health); Russell v. Barr, No. 92-2546, slip op. at 2 (D.D.C. Mar. 5, 1993) (holding "[p]laintiff's claim that the requested information may 'minister [his] defense in the civil proceeding and motion for a new trial' in his criminal proceeding" to be inadequate to justify expedition). But see Aguilera, 941 F. Supp. at 152-53 (ordering expedited processing for a request not scheduled for completion for nearly ninety months, because "[p]laintiff has demonstrated that he faces grave punishment, his reason to believe the documents may assist in his defense has been corroborated by objective proof, his request is limited in scope, and the criminal discovery process is unavailable").

[173] See, e.g., Price v. CIA, No. 90-1507, 1990 WL 141480, at *1 (4th Cir. Oct. 2, 1990) (affirming denial of expedited access to documents claimed to be needed for lawsuit soon to be barred by statute of limitations); Rogers v. U.S. Nat'l Reconnaissance Office, No. 94-B-2934, slip op. at 17 (N.D. Ala. Sept. 13, 1995) ("Courts have consistently rejected claims of urgency based on private litigation concerns."); Cohen, 831 F. Supp. at 854 (refusing to order expedited access for records needed in civil lawsuit); cf. Armstrong v. Bush, 807 F. Supp. 816, 819 (D.D.C. 1992) (according priority to additional FOIA requests added to those already subject of litigation, when responsive records might otherwise be destroyed). But see Edmonds, No. 02-1294, slip op. at 7 (D.D.C. Dec. 3, 2002) (granting expedition even though a pending lawsuit is what motivated plaintiff's requests, based upon the questionable reasoning that "[n]othing in the DOJ's regulation disqualified a plaintiff from obtaining expedited processing where the documents may
(continued...)

lieu of seeking expedited processing of his FOIA request to have a federal court stay his state habeas corpus proceedings pending a response to his FOIA request.[174] Rejecting such a novel stay application, the court found that it was constrained by the constitutional doctrine of Younger v. Harris[175] from interfering in the state court proceedings.[176] (See also further discussion under Procedural Requirements, Expedited Processing, above.)

Adequacy of Search

In many FOIA suits, the defendant agency will face challenges not only to its reliance on particular exemptions, but also to the nature and extent of its search for responsive documents. Sometimes, that is all that a plaintiff will dispute.[177] (For discussions of administrative considerations in conducting searches, see Procedural Requirements, Searching for Records, above.) To prevail in a FOIA action, the agency must show that it made "'a good-faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.'"[178] The fundamental question is not "'whether there might

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[173](...continued)
assist her in another lawsuit, nor is there any basis to conclude that a whistleblower who has brought suit against a government agency as a result of her firing cannot also satisfy the DOJ's regulation for expedited processing").

[174] See Sosa v. FBI, No. 93-1126, slip op. at 1 (D.D.C. Nov. 4, 1993); see also Arriaga v. West, No. 00-1171, 2000 WL 870867, at *2 (Vet. App. June 21, 2000) (dismissing for lack of jurisdiction plaintiff's mandamus petition that was filed in his attempt to require Secretary of Veterans Affairs to release records requested under FOIA and to stay proceedings before administrative board until his petition was decided).

[175] 401 U.S. 37 (1971).

[176] See Sosa, No. 93-1126, slip op. at 1 (D.D.C. Nov. 4, 1993).

[177] See, e.g., Iturralde v. Comptroller of Currency, 315 F.3d 311, 313 (D.C. Cir. 2003) (explaining that adequacy of agency's search is at issue); Perry v. Block, 684 F.2d 121, 126 (D.C. Cir. 1982) (noting that plaintiff contested only adequacy of search).

[178] Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 890 (D.C. Cir. 1995) (quoting Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990)); see Tavakoli-Nouri v. CIA, No. 00-3620, 2001 U.S. App. LEXIS 24676, at *7 (3d Cir. Oct. 18, 2001) (same); Maynard v. CIA, 986 F.2d 547, 559 (1st Cir. 1993) (noting that "crucial" search issue is whether agency's search was "'reasonably calculated to discover the requested documents'" (quoting SafeCard Servs. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991))); Maydak v. U.S. Dep't of Justice, 254 F. Supp. 2d 23, 38 (D.D.C. Mar. 21, 2003) ("In determining the adequacy of a FOIA search, the Court is guided by principles
(continued...)

exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate.'"[179] In other words, simply put, "the focus of the adequacy inquiry is not on the results."[180]

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[178](...continued)
of reasonableness.").

[179] Steinberg v. U.S. Dep't of Justice, 23 F.3d 548, 551 (D.C. Cir. 1994) (quoting Weisberg v. U.S. Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984)); see Citizens Comm'n on Human Rights v. FDA, 45 F.3d 1325, 1328 (9th Cir. 1995) (same); Nation Magazine, 71 F.3d at 892 n.7 (explaining that "there is no requirement that an agency [locate] all responsive documents"); Ethyl Corp. v. EPA, 25 F.3d 1241, 1246 (4th Cir. 1994) ("In judging the adequacy of an agency search for documents the relevant question is not whether every single potentially responsive document has been unearthed."); In re Wade, 969 F.2d 241, 249 n.11 (7th Cir. 1992) (declaring that issue is not whether other documents might exist, but whether search was adequate); Van Mechelen v. U.S. Dep't of the Interior, No. 05-5393, 2005 WL 3007121, at *2 (W.D. Wash. Nov. 9, 2005) (same); Atkin v. IRS, No. 04-CV-0080, 2005 WL 1155127, at *5 (N.D. Ohio Mar. 30, 2005) (same); Sephton v. FBI, 365 F. Supp. 2d 91, 101 (D. Mass. 2005) (explaining that FOIA does not require review of "every single file that might conceivably contain responsive information"), aff'd, 442 F.3d 27 (1st Cir. 2006); Snyder v. CIA, 230 F. Supp. 2d 17, 21 (D.D.C. 2002) (stipulating that FOIA does not require a search of "every conceivable area where responsive records might be found"); cf. Raulerson v. Reno, No. 96-120, slip op. at 5 (D.D.C. Feb. 26, 1999) (suggesting that agency's failure to locate complaints filed by plaintiff, the existence of which agency did not dispute, "casts substantial doubt" on adequacy of agency's search), summary affirmance granted, No. 99-5300 (D.C. Cir. Nov. 23, 1999).

[180] Hornbostel v. U.S. Dep't of the Interior, 305 F. Supp. 2d 21, 28 (D.D.C. 2003), aff'd, No. 03-5257, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004); see Grand Cent. P'ship v. Cuomo, 166 F.3d 473, 489 (2d Cir. 1999) ("'[T]he factual question . . . is whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant.'" (quoting SafeCard Servs., 926 F.2d at 1201)); In re Wade, 969 F.2d at 249 n.11 (declaring that issue is not whether other documents may exist, but whether search was adequate); Meeropol v. Meese, 790 F.2d 942, 952-53 (D.C. Cir. 1986) ("[A] search is not unreasonable simply because it fails to produce all relevant material; no search of this [large] size . . . will be free from error."); Elliot v. U.S. Attorney Gen., No. 06-1128, 2006 WL 3191234, at *3 (D.D.C. Nov. 2, 2006) (concluding that agency "conducted a search that was reasonable," even though no records were located); Judicial Watch v. Rossotti, 285 F. Supp. 2d 17, 26 (D.D.C. 2003) ("Perfection is not the standard by which the reasonableness of a FOIA search is measured."); Garcia v. U.S. Dep't of Justice, 181 F. Supp. 2d 356, 368 (S.D.N.Y. 2002) ("The agency is not expected to take extraordinary measures to find the requested records."); Citizens Against UFO Secrecy, Inc. v. DOD, No.

(continued...)

LITIGATION CONSIDERATIONS

The adequacy of any FOIA search, of course, is necessarily "dependent upon the circumstances of the case."[181] Searches through agency or component indices, for example, which contain records in which a requester is the subject of the record, have been held to be adequate in almost all instances.[182] With respect to the processing of "cross references" or "see

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[180](...continued)
99-00108, slip op. at 8 (D. Ariz. Mar. 30, 2000) (declaring that "[a] fruitless search result is immaterial if [d]efendant can establish that it conducted a search reasonably calculated to uncover all relevant documents"), aff'd, 21 F. App'x 774 (9th Cir. 2001); Boggs v. United States, 987 F. Supp. 11, 20 (D.D.C. 1997) (noting that the role of the court is to determine the reasonableness of the search, "not whether the fruits of the search met plaintiff's aspirations"); Freeman v. U.S. Dep't of Justice, No. 90-2754, slip op. at 3 (D.D.C. Oct. 16, 1991) ("The FOIA does not require that the government go fishing in the ocean for fresh water fish."). But see Raulerson, No. 96-120, slip op. at 5 (D.D.C. Feb. 26, 1999) (suggesting that the agency's failure to locate complaints filed by plaintiff, the existence of which the agency did not dispute, "casts substantial doubt" on the adequacy of the agency's search).

[181] Davis v. Dep't of Justice, 460 F.3d 92, 103 (D.C. Cir. 2006) ("The 'adequacy of an agency's search is measured by a standard of reasonableness, and is dependent upon the circumstances of the case.'" (quoting Schrecker v. Dep't of Justice, 349 F.3d 657, 663 (D.C. Cir. 2003))); Truitt v. Dep't of State, 897 F.2d 540, 542 (D.C. Cir. 1990); see Rugiero v. U.S. Dep't of Justice, 257 F.3d 534, 547 (6th Cir. 2001) ("The FOIA requires a reasonable search tailored to the nature of the request."); Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 28 (D.C. Cir. 1998) (same); Maynard, 986 F.2d at 559 (explaining that adequacy of search "depends upon the facts of each case"); Gavin v. SEC, No. 04-4522, 2005 WL 2739293, at *7 (D. Minn. Oct. 24, 2005) (finding the agency's search sufficient "in light of the facts of this case"); Landmark Legal Found. v. EPA, 272 F. Supp. 2d 59, 62 (D.D.C. 2003) (citing Weisberg, 745 F.2d at 1485); LaRouche v. U.S. Dep't of Justice, No. 90-2753, 2001 U.S. Dist. LEXIS 25416, at *5 (D.D.C. July 5, 2001) ("An examination of the . . . search must take into account the totality of the circumstances.").

[182] See, e.g., Church of Scientology Int'l v. U.S. Dep't of Justice, 30 F.3d 224, 230 (1st Cir. 1994) (finding to be sufficient agency's search of United States Attorney's Office computerized record system); Maynard, 986 F.2d at 562 (concluding that Treasury Department properly limited its search to its automated Treasury Enforcement Communications System (TECS)); Truesdale v. U.S. Dep't of Justice, No. 03-1332, 2005 WL 3273093, at *6 (D.D.C. July 22, 2005) (upholding DEA's search of its Narcotics and Dangerous Drugs Information System, which "identifies individuals by name, social security number, and/or date of birth" and provides "means for obtaining DEA investigative files"); Ledesma v. U.S. Marshals Serv., No. 04-1413, 2005 WL 405452, at *3 (D.D.C. Feb. 18, 2005) (finding that the United States Marshals Service properly searched for records concerning the plaintiff's deten-
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references" -- records in which the subject of the request is just mentioned -- only those parts of the file that pertain directly to the subject of the request.[183] Further,

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[182](...continued)
tion by using "the Prisoner Processing and Population Management/Prisoner Tracking . . . and Warrant Information Network systems"), summary affirmance granted, No. 05-5150, 2006 U.S. App. LEXIS 11218 (D.C. Cir. Apr. 19. 2006); Barreiro v. Executive Office for U.S. Attorneys, No. 03-0720, slip op. at 5 (D.D.C. Dec. 31, 2003) (upholding search for records concerning plaintiff's criminal case using computerized case-tracking system that permits retrieval of all prosecution records), aff'd, No. 04-5071, 2004 WL 2451753 (D.C. Cir. Nov. 1, 2004); Raulerson v. Ashcroft, 271 F. Supp. 2d 17, 22 (D.D.C. 2002) ("[I]f the FBI believes that a search of its [Central Records System] is sufficient, it need not go further."), dismissed for lack of prosecution, No. 03-5054 (D.C. Cir. Apr. 4, 2003); Blanton v. U.S. Dep't of Justice, 63 F. Supp. 2d 35, 41 (D.D.C. 1999) (finding no requirement to search informant files for references to individual when such references would be "flagged" by agency's "cross-reference" search for records about that individual), motion for partial reconsideration granted on other grounds, No. 93-1789 (D.D.C. June 2, 2000), aff'd, 64 F. App'x 787 (D.C. Cir. 2003) (per curiam); Murphy v. IRS, 79 F. Supp. 2d 1180, 1185 (D. Haw. 1999) (noting that because technical advice memoranda all would be logged into Technical Management Information System, search of that database was adequate); see also Campbell, 164 F.3d at 28 ("[T]he FBI need not conduct ELSUR (electronic surveillance) and tickler (temporary file) searches when the FOIA requester does not expressly ask it to do so. [It] has discretion to conduct a standard search in response to a general request . . . ."); Piper v. U.S. Dep't of Justice, 294 F. Supp. 2d 16, 24 (D.D.C. 2003) (refusing to fault an FBI Central Index search despite the fact that it did not turn up twenty-eight missing records; the possibility that "some documents may have slipped through the bureaucratic cracks of the vast administrative structure that is the FBI" does not make the FBI's search unreasonable), reconsideration denied, 312 F. Supp. 2d 17 (D.D.C. 2004). But see Summers v. U.S. Dep't of Justice, No. 89-3300, slip op. at 6 (D.D.C. June 13, 1995) (holding the agency's search inadequate despite the retrieval of over 30,000 responsive pages pertaining to former FBI Director J. Edgar Hoover's telephone logs and appointment calendars, because the agency's declaration did "not explain the search terms used, the type of search performed[,] and [did] not aver 'that all files likely to contain responsive materials . . . were searched'"); Steinberg v. U.S. Dep't of the Treasury, No. 93-2348, slip op. at 8 (D.D.C. Sept. 18, 1995) (declaring that search solely of TECS was inadequate when "it is reasonable to conclude that additional systems exist," that TECS does not include these record systems, and that it would not be unduly burdensome to search other systems).

[183] See Romero-Cicle v. U.S. Dep't of Justice, No. 05-2303, slip op. at 6 (D.D.C. Nov. 20, 2006) (declaring that "[s]ince plaintiff failed to raise the scope of the search issue in his administrative appeal, he is precluded from (continued...)

agencies that maintain field offices in various locations ordinarily are not obligated to search offices other than those to which the request has been directed.[184]

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[183](...continued)
challenging [the agency's] decision to limit its search for responsive records" now in litigation); Posner v. Dep't of Justice, 2 Gov't Disclosure Serv. (P-H) ¶ 82,229, at 82,650 (D.D.C. Mar. 9, 1982); see also FOIA Update, Vol. XVI, No. 3, at 3 (providing policy guidance on "scoping" of requests, and suggesting that an important consideration is that of fashioning ways "to devote [an agency's] limited resources to serving . . . FOIA requesters as efficiently and economically as reasonably possible"); accord Attorney General Ashcroft's FOIA Memorandum, reprinted in *FOIA Post* (posted 10/15/01) (emphasizing the importance of maintaining "a government that is fully functional and efficient").

[184] See, e.g., Kowalczyk v. Dep't of Justice, 73 F.3d 386, 389 (D.C. Cir. 1996) (stating that when "the requester clearly states that he wants all agency records . . . regardless of their location, but fails to direct the agency's attention to any particular office other than the one receiving the request, then the agency need pursue only a lead . . . that is both clear and certain"); Church of Scientology v. IRS, 792 F.2d 146, 150 (D.C. Cir. 1986) (finding that when agency regulations require requests be made to specific offices for specific records, there is no need to search additional offices when those regulations are not followed); Marks v. U.S. Dep't of Justice, 578 F.2d 261, 263 (9th Cir. 1978) (finding no duty to search FBI field offices when requester directed request only to FBI Headquarters and did not specify which field offices he wanted searched); Tooley v. Bush, No. 06-306, 2006 WL 3783142, at *13 (D.D.C. Dec. 21, 2006) ("Where a requester submits his request only to the FBI headquarters and not to individual field offices, the FBI is under no obligation to search all of its field offices."); Dayton Newspapers, Inc. v. VA, 257 F. Supp. 2d 988, 999-1001 (S.D. Ohio 2003) (granting summary judgment to agency because requested records were maintained by agency's regional offices, not central office where request was erroneously submitted); Maydak, 254 F. Supp. 2d at 44-45 (refusing to find search inadequate because agency has "no statutory obligation to proceed with a search of all of its field offices"); Prescott v. Dep't of Justice, No. 00-0187, slip op. at 7 (D.D.C. Aug. 10, 2001) (finding search of FBI Headquarters reasonable, based on Department of Justice regulations requiring requesters to direct their requests to individual FBI field offices in the first instance); Domingues v. FBI, No. 98-74612, slip op. at 7 (E.D. Mich. June 23, 1999) (magistrate's recommendation) (alternative holding) (suggesting that request to agency headquarters that does not ask for field office search does not "reasonably describe" field office records, so headquarters search is all that is required), adopted (E.D. Mich. July 29, 1999), aff'd, No. 99-1976, 2000 WL 1140594, at *1 (6th Cir. Aug. 7, 2000); AFGE v. U.S. Dep't of Commerce, 632 F. Supp. 1272, 1278 (D.D.C. 1986) (holding that agency's refusal to perform canvass of 356 bureau offices for multitude of files was justified), aff'd, 907 F.2d 203 (D.C. Cir. 1990). But see Krikorian v. (continued...)

It is incumbent upon an agency, of course, not to interpret the scope of a FOIA request too narrowly.[185] For example, a request that asks for all

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[184](...continued)
U.S. Dep't of State, 984 F.2d 461, 468-69 (D.C. Cir. 1993) (remanding so district court could explain why it was unnecessary for agency to search eleven regional security offices identified in article that formed basis for plaintiff's request); Kennedy v. U.S. Dep't of Justice, No. 03-6077, 2004 WL 2284691, at *4 (W.D.N.Y. Oct. 8, 2004) (holding that FBI was obliged to search its Buffalo Field Office, because it was "specifically mentioned" in request sent to FBI Headquarters -- even though plaintiff was informed that he could request records from Buffalo Field Office directly); Conteh v. FBI, No. 01-1330, slip op. at 5 (D.D.C. Apr. 1, 2002) (ordering defendant to explain why it failed to advise plaintiff that responsive records were located in two field offices so that plaintiff could submit his requests there); see also 28 C.F.R. §§ 16.3(a), 16.41(a) (2006) (specifying that FOIA and Privacy Act requests for records held by the FBI field offices must be submitted to the field office directly); cf. Friends of Blackwater v. U.S. Dep't of the Interior, 391 F. Supp. 2d 115, 122 (D.D.C. 2005) (determining that Interior Department regulations required Fish and Wildlife Service to forward request to Office of Secretary of Interior because that office likely maintained responsive records); Nat'l Res. Def. Council v. DOD, 388 F. Supp. 2d 1086, 1102 (C.D. Cal. 2005) (finding that DOD should have directed request for records concerning perchlorate (a chemical substance) to Air Force because DOD had appointed Air Force as lead component for perchlorate issues but had not informed public of that decision); The Wilderness Soc'y v. U.S. Dep't of the Interior, 344 F. Supp. 2d 1, 19, 20 (D.D.C. 2004) (finding, based on agency's own regulations, that it had "affirmative duty" to forward request to components that it reasonably knew might have responsive records, even though plaintiff -- an experienced FOIA requester -- directed its inquiry solely to four specific offices); *FOIA Post*, "FOIA Counselor Q&A" (posted 1/24/06) (discussing issue of whether agencies are obligated to forward incorrectly directed FOIA requests to other agencies and further explaining holding in Blackwater).

[185] See, e.g., Judicial Watch, Inc. v. DOD, No. 05-00390, 2006 WL 1793297, at *3 (D.D.C. June 28, 2006) (recognizing that "agencies have a duty to construe FOIA requests liberally," but finding "no compelling reason to construe Judicial Watch's request as covering all files related to strategic communication"); Wilderness Soc'y v. U.S. Bureau of Land Mgmt., No. 01-CV-2210, 2003 WL 255971, at *5 (D.D.C. Jan. 15, 2003) (refusing to grant summary judgment due to agency's narrow interpretation of request); Hemenway v. Hughes, 601 F. Supp. 1002, 1005 (D.D.C. 1985) (while recognizing ambiguity of request, rejecting agency conclusion that it had no record of "citizenship data" of foreign news correspondents when it maintained such information on "application forms" that were required to be filed by such correspondents); cf. FOIA Update, Vol. XVI, No. 3, at 3 (advising agencies to "interpret FOIA requests 'liberally' when determining which records are responsive to them" (quoting Nation Magazine, 71 F.3d
(continued...)

records pertaining to a specific subject and then, in addition, enumerates certain items within that subject should be interpreted broadly, according to a ruling by the Court of Appeals for the District of Columbia Circuit.[186] Chiding the agency for its "implausible reading," the D.C. Circuit explained that "[t]he drafter of a FOIA request might reasonably seek all of a certain set of documents while nonetheless evincing a heightened interest in a specific subset thereof,"[187] but it emphasized that the reverse would not be true: "We think it improbable, however, that a person who wanted only the subset would draft a request that first asks for the full set."[188] (For a further discussion of determining the scope of a FOIA request, see Procedural Requirements, Proper FOIA Requests, above.)

On another search-related point, the D.C. Circuit has expressly held that an agency "is not obligated to look beyond the four corners of the request for leads to the location of responsive documents."[189] Similarly, "[b]ecause the scope of a search is limited by a plaintiff's FOIA request, there is no general requirement that an agency search secondary references or variant spellings."[190] Nor is an agency required to undertake a new search

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[185](...continued)
at 890)).

[186] See LaCedra v. Executive Office for U.S. Attorneys, 317 F.3d 345, 348 (D.C. Cir. 2003); see also Fla. Immigration Advocacy Ctr. v. NSA, 380 F. Supp. 2d 1332, 1345 (S.D. Fla. 2005) (upholding an agency's search for records concerning the migration of "third country nationals," because the "[p]laintiff requested such a broad search," even though his request also listed countries of particular interest).

[187] LaCedra, 317 F.3d at 348.

[188] Id.

[189] Kowalczyk, 73 F.3d at 389 (holding that agency is not required to speculate about potential leads); see Williams v. Ashcroft, 30 F. App'x 5, 6 (D.C. Cir. 2002) (deciding that agency need not look for records not sought in initial FOIA request); Sheridan v. Dep't of the Navy, 9 F. App'x 55, 56 (2d Cir. 2001) (citing Kowalczyk); Gilchrist v. Dep't of Justice, No. 05-1540, 2006 WL 3091534, at *3 (D.D.C. Oct. 30, 2006) ("It was not unreasonable for EOUSA and USAO-MD staff to limit the searches to the specific document plaintiff identified in his FOIA request."); see also W. Ctr. for Journalism v. IRS, 116 F. Supp. 2d 1, 9 (D.D.C. 2000) (concluding that diligent search was shown when, even though not required to do so, agency searched for records beyond scope of request); cf. Nurse v. Sec'y of the Air Force, 231 F. Supp. 2d 323, 330 (D.D.C. 2002) (declaring that agency was not required to have "clairvoyant capabilities" in order to determine nature of request).

[190] Maynard, 986 F.2d at 560; Russell v. Barr, No. 92-2546, 1998 U.S. Dist. LEXIS 14515, at *6-7 (D.D.C. Aug. 28, 1998) (ruling that agency was not required to search for records under requester's wife's maiden name when re-
(continued...)

based on a subsequent "clarification" of a request, especially after the requester has examined the released documents.[191] Indeed, the D.C. Circuit has explicitly observed that "[r]equiring an additional search each time the agency receives a letter that clarifies a prior request could extend indefinitely the delay in processing new requests,"[192] and that "if the requester discovers leads in the documents he receives from the agency, he may pursue those leads through a second FOIA request."[193]

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[190](...continued)
quester provided only her married name); cf. Lowe v. FBI, No. 96-512, slip op. at 2-3 (E.D. Okla. July 31, 1998) (finding no improper withholding of records when plaintiff failed to provide agency with additional information requested in order to conduct a more thorough search); Spannaus, No. 92-372, slip op. at 6-7 (D.D.C. June 20, 1995) (holding that agency was not required to search files of individual known to be connected with bankruptcy proceedings when request sought records on proceedings, not on individual). But see Canning v. U.S. Dep't of Justice, 919 F. Supp. 451, 461 (D.D.C. 1994) (when records on subject of request filed under two different names and agency is aware of the dual filing, agency obligated to search under both names, especially after requester brought second name to agency's attention).

[191] See Kowalczyk, 73 F.3d at 388 ("A reasonable effort to satisfy [a] request does not entail an obligation to search anew based upon a subsequent clarification."); see also McQueen v. United States, 179 F.R.D. 522, 525 n.5 (S.D. Tex. 1998) ("FOIA contains no provision which obligates an agency to update FOIA disclosures." (citing U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 139-40 (1989))).

[192] Kowalczyk, 73 F.3d at 388; cf. Bonner v. U.S. Dep't of State, 928 F.2d 1148, 1152 (D.C. Cir. 1991) ("To require an agency to adjust or modify its FOIA responses based on post-response occurrences could create an endless cycle of judicially mandated reprocessing."); *FOIA Post*, "Use of 'Cut-Off' Dates for FOIA Searches" (posted 5/6/04) (advising agencies that it is "entirely reasonable" to search for records that are in their possession only as of the date upon which they commence a search, because otherwise they would be subject to a "potentially endless" cycle of searching).

[193] Id. at 389; see Nash v. U.S. Dep't of Justice, 992 F. Supp. 447, 449 (D.D.C.) ("The fact that some EOUSA information was located in BOP files when the BOP conducted its search for records maintained by the BOP does not require the EOUSA to conduct a separate search of its own files, absent receipt of a FOIA request submitted to the EOUSA."), summary affirmance granted, No. 98-5096, 1998 WL 545424 (D.C. Cir. July 20, 1998). But see Kefalos v. IRS, No. 2-97-117, 1998 WL 419983, at *9-10 (S.D. Ohio Apr. 3, 1998) (refusing to grant summary judgment because affidavit inadequate in face of allegation by plaintiff that documents released reference existence of other documents), subsequent opinion granting summary judgment to agency, No. 2-97-117, 1998 U.S. Dist. LEXIS 10432 (S.D. Ohio
(continued...)

LITIGATION CONSIDERATIONS

The proper scope of an agency's search is limited not only by what the requester asks for but also by the date the agency uses as a temporal limit for its search. Referred to as "cut-off" dates, these temporal limits are used to determine which agency records are encompassed within the scope of a request.[194] Courts have held that an agency's use of an inappropriate "cut-off" date can unduly restrict a FOIA request's temporal scope, thereby rendering the agency's subsequent search for responsive records unreasonable.[195] Searches conducted using a "cut-off" based on the date that the search begins (i.e., a "date-of-search cut-off") have been viewed by the courts much more favorably than a search that uses a less inclusive "cut-off," such as one based on the date of the request or of the request's receipt (i.e., a "date-of-request cut-off").[196]

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[193](...continued)
May 19, 1998).

[194] See *FOIA Post*, "Use of 'Cut-Off' Dates for FOIA Searches" (posted 5/6/04) (explaining importance of proper use of "cut-off" dates).

[195] See, e.g., Pub. Citizen v. Dep't of State, 276 F.3d 634, 643-44 (D.C. Cir. 2002) (finding an agency's search to be inadequate because the agency unjustifiably failed to use a later "cut-off" date that "might have resulted in the retrieval of more [responsive] documents"); McGehee v. CIA, 697 F.2d 1095, 1101 (D.C. Cir. 1983) (observing that "a temporal limit pertaining to FOIA searches . . . is only valid when the limitation is consistent with the agency's duty to take reasonable steps to ferret out requested documents"), vacated on other grounds on panel reh'g & reh'g en banc denied, 711 F.2d 1076 (D.C. Cir. 1983).

[196] See, e.g., Van Strum v. EPA, No. 91-35404, 1992 WL 197660, at *2 (9th Cir. Aug. 17, 1992) (agreeing that a date-of-search "cut-off" date is "the most reasonable date for setting the temporal cut-off in this case"); McGehee, 697 F.2d at 1104 (favoring a "date-of-search cut-off" because it "results in a much fuller search and disclosure" than does a "date-of-request cut-off"); see also Or. Natural Desert Ass'n v. Gutierrez, 409 F. Supp. 2d 1284, 1288 (D. Or. 2006) (suggesting that a date-of-search "cut-off" date might be more reasonable than a date-of-request "cut-off" date); Defenders of Wildlife v. U.S. Dep't of the Interior, 314 F. Supp. 2d 1, 12 n.10 (D.D.C. 2004) (recognizing that because the agency's FOIA regulations established a "date-of-search cut-off," records created after the agency's "FOIA search began . . . are not covered by [the FOIA] request"); cf. Ctr. for Biological Diversity v. U.S. Marine Corps, No. 00-2387, slip op. at 14 (D.D.C. Aug. 21, 2003) (ordering agency to disclose particular documents prepared after date of request, but noting that such action in this particular case would not require "any additional searches" because such documents "have already been identified"). But cf. Hall v. CIA, No. 98-1319, slip op. at 10 (D.D.C. Aug. 10, 2000) (explaining that "under CIA policy a search is [required] to be conducted [only] up to the date on which the agency sent out a letter acknowledging receipt of the FOIA request").

A date-of-search approach also has been preferred to a more expansive, but simply unworkable, "cut-off" based on the date that documents actually are released.[197] Indeed, one court realistically described a "date-of-release cut-off" as "inherently flawed," because it creates "an ever moving target for the production of documents under FOIA."[198] (For a further discussion of the proper scope of a FOIA request, see Procedural Requirements, Proper FOIA Requests, above.)

In extraordinarily onerous cases, an agency may not be compelled to undertake even an initially requested search that is of such range or magnitude as to make it "unreasonably burdensome."[199] Indeed, "'it is the requester's responsibility to frame requests with sufficient particularity to ensure that searches are not unreasonably burdensome . . . [because the] FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters.'"[200]

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[197] See Edmonds Inst. v. U.S. Dep't of the Interior, 383 F. Supp. 2d 105, 111 (D.D.C. 2005) (rejecting date-of-release "cut-off" date in favor of one based on date of search).

[198] Id.; cf. Bonner, 928 F.2d at 1152 ("To require an agency to adjust or modify its FOIA responses based on post-response occurrences could create an endless cycle of judicially mandated reprocessing.").

[199] Nation Magazine, 71 F.3d at 891-92 (rejecting demand that agency search "through 23 years of unindexed files for records pertaining" to subject, while remanding for focus on narrower search for dated memorandum in files indexed chronologically); see also AFGE v. U.S. Dep't of Commerce, 907 F.2d 203, 209 (D.C. Cir. 1990) (holding that a request that would require an agency "to locate, review, redact, and arrange for inspection a vast quantity of material" is "so broad as to impose an unreasonable burden upon the agency" (citing Goland v. CIA, 607 F.2d 339, 353 (D.C. Cir. 1978))); Brophy v. DOD, No. 05-360, 2006 WL 571901, at *6 (D.D.C. Mar. 8, 2006) (finding it "unduly burdensome" to impose broader search on agency, because request was "vague and indistinct"); Schrecker v. U.S. Dep't of Justice, 217 F. Supp. 2d 29, 35 (D.D.C. 2002) (rejecting as unreasonable requested search that would have required "hand-search through 574,726 linear feet" of unindexed records), aff'd, 349 F.3d 657 (D.C. Cir. 2003); cf. Lowry v. Soc. Sec. Admin., No. 00-1616, 2001 U.S. Dist. LEXIS 23474, at *29 (D. Or. Aug. 29, 2001) (recognizing that agencies need not conduct "unreasonably burdensome" searches, but concluding that agency's search is not "unreasonable" where it can be performed by "two employees working one 40-hour week" using "existing agency technology").

[200] Judicial Watch, Inc. v. Exp.-Imp. Bank, 108 F. Supp. 2d 19, 27 (D.D.C. 2000) (quoting Assassination Archives & Research Ctr. v. CIA, 720 F. Supp. 217, 219 (D.D.C. 1989)); see also 5 U.S.C. § 552(a)(3)(A) (requiring that a request "reasonably describe[]" the records sought); Campbell, 164 F.3d at 29 (explaining that a requester must establish a "sufficient predicate" to justify

(continued...)

On the other hand, while "[t]here is no requirement that an agency search every record system,"[201] an agency "'cannot limit its search to only one record system if there are others that are likely to turn up the information requested.'"[202] Stated another way, "if an agency has reason to know that certain places might well contain responsive documents, it is obligated under FOIA to search [those places] barring an undue burden."[203] Of

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[200](...continued)
searching for a particular type of record).

[201] Oglesby, 920 F.2d at 68 (citing cases); see Chamberlain, 957 F. Supp. at 294; Moore v. Aspin, 916 F. Supp. 32, 35 (D.D.C. 1996); see also Sheridan, 9 F. App'x 55, 58 (2d Cir. 2001) (suggesting that agency is under no obligation to search for records in place not initially specified by requester); Wheeler v. U.S. Dep't of Justice, No. 02-604, slip op. at 8 (D.D.C. Nov. 21, 2006) (stating that search was, by plaintiff's "own definition, reasonable").

[202] Campbell, 164 F.3d at 28 (quoting Oglesby, 920 F.2d at 68); see Negley v. FBI, 169 F. App'x 591, 595 (D.C. Cir. 2006) (reversing grant of summary judgment, because FBI did not specifically demonstrate that it searched for particular file designated by plaintiff); Wolf v. CIA, 357 F. Supp. 2d 112, 119 (D.D.C. 2004) (finding, based on references in documents independently obtained by plaintiff, that FBI should have searched particular file that likely contained responsive records), aff'd in part, rev'd in part & remanded all on other grounds, 473 F.3d 370 (D.C. Cir. 2007); Comer v. IRS, No. 97-76329, 1999 WL 1922219, at *1 (E.D. Mich. Sept. 30, 1999) (questioning agency's search because it failed to justify why it would not be feasible to search specific places that plaintiff requested be searched), subsequent opinion, 2000 WL 1566279 (E.D. Mich. Aug. 17, 2000), motion for reconsideration denied, 2000 WL 172771 (E.D. Mich. Oct. 5, 2000); cf. Davis, 460 F.3d at 105 ("[T]he methodology employed by the agency was extremely unlikely to produce the needed information, and it appears -- although we do not know for certain -- that there are readily available alternatives that would not impose an undue burden on the government."); Conteh, No. 01-1330, slip op. at 4-5 (D.D.C. Apr. 1, 2002) (chastising agency for not advising plaintiff of existence of records in field offices, reference to which was found when initial search was conducted; "[i]nstead, the parties and this Court unnecessarily are forced to expend time and resources to litigate the matter").

[203] Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 327 (D.C. Cir. 1999); see Jefferson v. U.S. Dep't of Justice, 168 F. App'x 448, 450 (D.C. Cir. 2005) (concluding that search was inadequate because it did not include particular database that agency acknowledged "might have files" responsive to request); Juda v. U.S. Customs Serv., No. 99-5333, 2000 WL 1093326, at *1-2 (D.C. Cir. June 19, 2000) (per curiam) (reversing grant of summary judgment where agency "fail[ed] to pursue clear leads to other existing records"); Hornbeck Offshore Transp., LLC v. U.S. Coast Guard, No. 04-1724, 2006 WL 696053, at *9-11 (D.D.C. Mar. 20, 2006) (finding that the
(continued...)

course, those places should be within the agency[204] or in a federal records center at which the agency has stored its records."[205]

When documents that are located as a result of an initial search suggest other fruitful areas to search, an agency might be required to explore those areas, because "the court evaluates the reasonableness of an agen-

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[203](...continued)
agency's search, which was limited to one office, "was reasonable, especially in light of its policies and the relevant time constraints, and the affidavits produced by the [a]gency detailing the searches employed and methodologies used"); Pub. Citizen v. Dep't of Educ., 292 F. Supp. 2d 1, 7-8 (D.D.C. 2003) (refusing to approve computerized search for records when those records did not contain requested information, but ordering instead manual review of 25,000 paper files).

[204] See Williams v. U.S. Attorney's Office, No. 03-CV-674, 2006 WL 717474, at *5 (N.D. Okla. Mar. 16, 2006) (noting that FOIA requires agency to search its own records and not those of third party, such as county jail records); Duggan v. U.S. Dep't of Justice, No. 03-10260, slip op. at 2 (D. Mass. Jan. 28, 2004) ("FOIA does not entitle the plaintiff to direct the Criminal Division [of the Department of Justice] to search the records of other agencies and agency components[.]"), aff'd, 109 F. App'x 439 (1st Cir. 2004) (per curiam); Garcia v. U.S. Dep't of Justice, 181 F. Supp. 2d 356, 368 (S.D.N.Y. 2002) ("The agency is not expected to take extraordinary measures to find the requested records."); Blanton v. U.S. Dep't of Justice, 182 F. Supp. 2d 81, 85 (D.D.C. 2001) ("FOIA does not impose an obligation on defendant to contact former employees to determine whether they know of the whereabouts of records that might be response to a FOIA request."), aff'd, 64 F. App'x 787 (D.C. Cir. 2003) (per curiam); Brunskill v. U.S. Dep't of Justice, No. 99-3316, slip op. at 4-5 (D.D.C. Mar. 19, 2001) (concluding that FBI has no obligation to search for records at Customs Service, because "there is no basis to compel defendant to conduct its search outside its own systems of records"). Contra Jackson v. U.S. Attorney's Office, 362 F. Supp. 2d 39, 42 (D.D.C. 2005) (suggesting that agency should have contacted former Assistant United States Attorney regarding whereabouts of directive that she authored); Comer v. IRS, No. 97-76329, 2001 U.S. Dist. LEXIS 16996, at *10 (E.D. Mich. Sept. 25, 2001) (deciding that "it is not unreasonable to attempt to question a former employee about the possible existence of documents related to one request," even while recognizing that the former employee might not remember the document or that the agency might be unable to locate him; cf. People for the Am. Way Found. v. U.S. Dep't of Justice, 451 F. Supp. 2d 6, 16 (D.D.C. 2006) (concluding that court-administered database (PACER) could and should be used as search tool) (appeal pending).

[205] See, e.g., Valencia-Lucena, 180 F.3d at 327 ("Pursuant to the regulations of the National Archives and Records Administration . . . agency records stored at a federal record center are deemed 'to be maintained by the agency which deposited the record.'" (quoting 36 C.F.R. § 1229.162 (1998))).

cy's search based on what the agency knew at [the search's] conclusion rather than what the agency speculated at its inception."[206] Of course, when a requester has set limitations on the scope of his request, either at the administrative stage[207] or in the course of litigation,[208] he cannot subsequently challenge the adequacy of the search on the ground that the agency limited its search accordingly. Moreover, the D.C. Circuit has held that when the subject of a request is involved in several separate matters, but information is sought regarding only one of them, an agency is not obligated to extend its search to other files or to other documents that are referenced in records retrieved in response to the initial search, so long as that search was reasonable and complete in and of itself.[209]

To prove the adequacy of its search, as in sustaining its use of ex-

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[206] Campbell, 164 F.3d at 28; see Truitt, 897 F.2d at 545-46 (admonishing agency to "admit and correct error when error is revealed" and conduct additional searches if requester suggests other areas in which to look). But cf. Hall v. U.S. Dep't of Justice, 63 F. Supp. 2d 14, 18 (D.D.C. 1999) (inviting plaintiff to make another FOIA request for records the existence of which were only "suggested" by documents already released).

[207] See Lechliter v. DOD, 371 F. Supp. 2d 589, 595 (D. Del. 2005) ("A requestor may not challenge the adequacy of a search after an agency limits the scope of a search in response to direction from the requestor."); Votehemp, Inc. v. DEA, No. 02-985, slip op. at 8-9 (D.D.C. Oct. 15, 2004) (concluding that narrowed search was adequate as agency and plaintiff had agreed to search of only three offices); Nation Magazine v. Dep't of State, No. 92-2303, 1995 WL 17660254, at *7 (D.D.C. Aug. 18, 1995) (holding search, which was limited to single DEA field office based on information supplied in request, to be "particularly appropriate here due to the fact that DEA must manually search its noninvestigative records").

[208] See Nation Magazine, 1995 WL 17660254, at *7-8 (holding that plaintiff was bound to scope of request as narrowed in litigation).

[209] Steinberg, 23 F.3d at 552 (concluding that "[otherwise] an agency . . . might be forced to examine virtually every document in its files, following an interminable trail of cross-referenced documents like a chain letter winding its way through the mail"); see also Davy v. CIA, 357 F. Supp. 2d 76, 84 (D.D.C. 2004) (finding that adequacy of agency's search was not undermined by fact that records referenced in released documents were not provided to plaintiff; the "FOIA cannot be used to troll for documents, which, if they even exist, appear barely tangential to the subject of" a request); Canning v. U.S. Dep't of Justice, 848 F. Supp. 1037, 1050 (D.D.C. 1994) (adequacy of search not undermined by fact that requester has received additional documents mentioning subject through separate request, when such documents are "tagged" to name of subject's associate). See generally Campbell, 164 F.3d at 28 ("[T]he proper inquiry is whether the requesting party has established a sufficient predicate to justify searching for a particular type of record.").

emptions, an agency relies upon its declarations, which should be "relatively detailed, nonconclusory, and submitted in good faith."[210] Such declarations should show "that the search method was reasonably calculated to uncover all relevant documents."[211] This ordinarily is accomplished by a

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[210] Pollack v. Bureau of Prisons, 879 F.2d 406, 409 (8th Cir. 1989); see Miller v. U.S. Dep't of State, 779 F.2d 1378, 1383 (8th Cir. 1986) ("An agency may prove the reasonableness of its search through affidavits of responsible agency officials so long as the affidavits are relatively detailed, nonconclusory, and submitted in good faith."); Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344, 1351 (D.D.C. 1983) (same); Perry, 684 F.2d at 127 ("[A]ffidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA."); Goland, 607 F.2d at 352 (finding agency's description of withheld material to be "specifically described and justified"); Triestman v. U.S. Dep't of Justice, 878 F. Supp. 667, 672 (S.D.N.Y. 1995) ("[A]ffidavits attesting to the thoroughness of an agency search of its records and its results are presumptively valid."); see also FOIA Update, Vol. IV, No. 1, at 6 (discussing what constitutes "adequate search"); cf. *FOIA Post*, "Use of 'Cut-Off' Dates for FOIA Searches" (posted 5/6/04) (explaining importance of proper use of "cut-off" dates in determining appropriate temporal limits of search).

[211] Oglesby, 920 F.2d at 68 (declaring that although agency was not required to search "every" record system, "[a]t the very least, [it] was required to explain in its affidavit that no other record system was likely to produce responsive documents"); see Church of Scientology, 792 F.2d at 151 (ruling that agency affidavit should describe general structure of agency's file system, which makes further search difficult); Ferranti v. ATF, 177 F. Supp. 2d 41, 47 (D.D.C. 2001) ("Affidavits that include search methods, locations of specific files searched, descriptions of searches of all files likely to contain responsive documents, and names of agency personnel conducting the search are considered presumptively sufficient."), summary affirmance granted, No. 01-5451, 2002 WL 31189766, at *1 (D.C. Cir. Oct. 2, 2002); see also Papa v. United States, 281 F.3d 1004, 1013 (9th Cir. 2002) (reversing grant of summary judgment because "nothing in the record certif[ies] that all the records . . . have been produced"); Steinberg, 23 F.3d at 552 (finding description of search inadequate when it failed "to describe in any detail what records were searched, by whom, and through what process"); Oglesby, 920 F.2d at 68; Peay v. U.S. Dep't of Justice, No. 04-1859, 2006 WL 83497, at *2 (D.D.C. Jan. 12, 2006) (denying summary judgment because agency did not describe Federal Records Center search or explain why particular archival box that it located and focused on there "would likely contain all responsive documents"); Judicial Watch v. FDA, 407 F. Supp. 2d 70, 74 (D.D.C. 2005) (finding that agency declarations sufficiently described search by detailing "scope and method used" to search for records and by providing "details about the specific offices" searched), aff'd in pertinent part, rev'd in other part & remanded on other grounds, 449 F.3d 141 (D.C. Cir. 2006); Antonelli v. ATF, No. 04-1180, 2005 WL 3276222, at *11 (D.D.C.

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declaration that identifies the types of files that an agency maintains, states the search terms that were employed to search through the files selected for the search, and contains an averment that all files reasonably expected to contain the requested records were, in fact, searched.[212] In re-

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[211](...continued)
Aug. 16, 2005) (rejecting an agency's declaration that merely stated which offices were "contacted in an attempt to locate any responsive documents" but that did not "describe the searches undertaken or the file systems searched"); Tarullo v. DOD, 170 F. Supp. 2d 271, 274 (D. Conn. 2001) (deciding that absence in agency's declaration of description of scope and nature of search "makes it impossible" to find that search was reasonable); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 34 F. Supp. 2d 28, 46 (D.D.C. 1998) (denying unprecedented partial summary judgment motion filed by agency against itself and requiring "restrictive and rigorous" search because of "egregious" agency conduct); Law Firm of Tidwell Swaim & Assocs. v. Herrmann, No. 3:97-2097, 1998 WL 740765, at *4 (N.D. Tex. Oct. 16, 1998) (denying summary judgment because of dispute as to proper scope of agency search). But see Maynard, 986 F.2d at 560 (refusing to find that district court abused its discretion when it denied as untimely plaintiff's motion for reconsideration based on allegation that agency "improperly limited its search").

[212] See, e.g., Iturralde, 315 F.3d at 313-14 (explaining requirements for adequate search); Valencia-Lucena, 180 F.3d at 326 (same); Schmidt v. DOD, No. 3:04-1159, 2007 WL 196667, at *2 (D. Conn. Jan. 23, 2007) (finding that agency conducted adequate search based on the agency's affidavits which detailed "the timeliness of the search, the manner in which the search was conducted, the specific places that were searched, and the retrieval of the relevant documents"); McCoy v. United States, No. 1:04-CV-101, 2006 WL 463106, at *13 (N.D. W. Va. Feb. 24, 2006) (denying the Executive Office for United States Attorneys' motion for summary judgment as to the adequacy of its search, because the declaration "failed to set forth the methods and records systems used by the EOUSA to conduct [its] search"); Gilchrist v. Dep't of Justice, No. 05-1540, 2006 WL 463257, at *3 (D.D.C. Feb. 24, 2006) (denying an agency's motion for summary judgment because its declaration "neither describes the records searched nor the method by which agency staff conducted the search"); Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice, 405 F. Supp. 2d 2, 3 (D.D.C. 2005) (concluding that agency conducted adequate search, because its declarations "set forth the terms and nature of . . . [the] search and, perhaps even more significantly, they state[d] that the locations most likely to contain responsive documents were extensively searched"); Kidd v. U.S. Dep't of Justice, 362 F. Supp. 2d 291, 295 (D.D.C. Mar. 30, 2005) (finding an agency's search adequate because its declaration sufficiently described "records and databases searched . . . general processes employed in the searches . . . dates the searches were performed . . . the offices which conducted searches . . . and the records located"); Landmark Legal Found., 272 F. Supp. 2d at 66 (finding a search affidavit to be suffi-
(continued...)

cent years, courts have been increasingly stringent in enforcing this requirement.[213]

It is not necessary that the agency employee who actually performed the search supply an affidavit describing the search; rather, the affidavit of an official responsible for supervising or coordinating the search efforts should be sufficient in any FOIA litigation case to fulfill the "personal knowledge" requirement of Rule 56(e) of the Federal Rules of Civil Procedure.[214] (For a further discussion of this "personal knowledge" requirement,

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[212](...continued)
cient because it "identifi[ed] the affiants and their roles in the agency, discuss[ed] how the FOIA request was disseminated with their office and the scope of the search, which particular files were searched, and the chronology of the search"); Garcia v. U.S. Dep't of Justice, 181 F. Supp. 2d 356, 368 (S.D.N.Y. 2002) ("To fulfill the adequate search requirement of the [FOIA], the government should identify the searched files and recite facts which enable the district court to satisfy itself that all appropriate files have been searched.").

[213] See, e.g., Toolasprashad v. Bureau of Prisons, No. 06-1187, 2006 U.S. Dist. LEXIS 82397, at *3-4 (D.D.C. Nov. 13, 2006) (denying agency's motion for summary judgment because declaration neither described search that yielded records nor specified "search terms" used); Jefferson v. Bureau of Prisons, No. 05-848, 2006 WL 3208666, at *7 (D.D.C. Nov. 7, 2006) (concluding that the agencies' declarations were inadequate because they did not "describe the systems of records each agency maintains, detailed the method of retrieving records, or averred that the agency identified and searched all files reasonably likely to contain responsive records"); Friends of Blackwater, 391 F. Supp. 2d at 122 (concluding that agency's failure to locate documents known to exist, when combined with affidavit that did not specify terms used in conducting search, rendered search inadequate); Maydak v. U.S. Dep't of Justice, 362 F. Supp. 2d 316, 326 (D.D.C. Mar. 30, 2005) (finding an agency's declaration to be inadequate where it contained "no information about the search terms and the specific files searched" and failed to specifically aver that "all files likely to contain responsive records were searched"); Boyd v. U.S. Marshals Serv., No. 99-2712, 2002 U.S. Dist. LEXIS 27734, at *2-3 (D.D.C. Mar. 15, 2002) (rejecting declarations that did not identify search terms used, locations searched, and reasons for searching only particular locations).

[214] See, e.g., Carney v. U.S. Dep't of Justice, 19 F.3d 807, 814 (2d Cir. 1994) ("An affidavit from an agency employee responsible for supervising a FOIA search is all that is needed to satisfy Rule 56(e); there is no need for the agency to supply affidavits from each individual who participated in the actual search."); Maynard, 986 F.2d at 560 (same); SafeCard, 926 F.2d at 1202 (ruling that employee "in charge of coordinating the [agency's] search and recovery efforts [is] most appropriate person to provide a comprehensive affidavit"); see also Patterson v. IRS, 56 F.3d 832, 841 (7th Cir. 1995)
(continued...)

see Litigation Considerations, Summary Judgment, below.)

While the initial burden certainly rests with an agency to demonstrate the adequacy of its search,[215] once that obligation is satisfied, the

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[214](...continued)
(holding appropriate declarant's reliance on standard search form completed by his predecessor); Lewis v. EPA, No. 06-2660, 2006 WL 3227787, at *3 (E.D. Pa. Nov. 3, 2006) (holding that the agency employee's declaration was admissible because the employee's "statements [were] based either on 'personal examination' of the responsive documents or on information provided to him by employees under his supervision"); Brophy, 2006 WL 571901, at *5 ("Although the government's declarants here did not physically perform the searches for responsive records, they satisfy the requirement of personal knowledge and qualify as competent witnesses concerning the FOIA searches."); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 160-61 (D.D.C. 2004) (ruling that declarations from employee who coordinated agency's searches satisfied personal knowledge requirement); Kay v. FCC, 976 F. Supp. 23, 33 n.29 (D.D.C. 1997) ("Generally, declarations accounting for searches of documents that contain hearsay are acceptable."), aff'd, 172 F.3d 919 (D.C. Cir. 1998) (unpublished table decision); Mehl v. EPA, 797 F. Supp. 43, 46 (D.D.C. 1992) (ruling that agency employee with "firsthand knowledge" of relevant files was appropriate person to supervise search undertaken by contractor); Spannaus v. U.S. Dep't of Justice, No. 85-1015, slip op. at 7 (D. Mass. July 13, 1992) (finding affidavit of agency employee sufficient when third party claimed to have knowledge of additional documents and employee contacted that individual); cf. Bingham v. U.S. Dep't of Justice, No. 05-0475, 2006 WL 3833950, at *3-4 (D.D.C. Dec. 29, 2006) (concluding that the declarant had sufficient knowledge of the subject matter and, "therefore, need not have been employed by the responding agency at the time of the facts underlying the requested records"); Homer J. Olsen, Inc. v. U.S. Dep't of Transp. Fed. Transit Admin., No. 02-00673, 2002 WL 31738794, at *5 n.4 (N.D. Cal. Dec. 2, 2002) (sustaining objection to declaration from employee who had no personal knowledge about what records were produced by regional office in response to a request). But see Katzman v. CIA, 903 F. Supp. 434, 438-39 (E.D.N.Y. 1995) (finding declaration from agency's FOIA coordinator inadequate when agency initially misidentified requester's attorney as subject of request, and requiring declarations from supervisors in each of agency's three major divisions attesting that search was conducted for correct subject).

[215] See Patterson, 56 F.3d at 840; Maynard, 986 F.2d at 560; Miller, 779 F.2d at 1378; Weisberg, 705 F.2d at 1351; see also Santos v. DEA, 357 F. Supp. 2d 33, 37 (D.D.C. 2004) ("Conclusory statements that the agency has reviewed the relevant files are insufficient to support summary judgment."); Williams v. U.S. Attorney's Office, No. 96-1367, slip op. at 5 (D.D.C. Sept. 21, 1999) (explaining that to prove adequacy of search, agency's affidavit should describe "where and how it looked for responsive records" and
(continued...)

agency's position can be rebutted "only by showing that the agency's search was not made in good faith,"[216] because agency declarations are "entitled to a presumption of good faith."[217] Consequently, a requester's

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[215](...continued)
"what it was looking for"); Bennett v. DEA, 55 F. Supp. 2d 36, 40 (D.D.C. 1999) (pointing out that affidavit must provide details of scope of search; "simply stating that 'any and all records' were searched is insufficient").

[216] Maynard, 986 F.2d at 560 (citing Miller, 779 F.2d at 1383); see, e.g., Carney, 19 F.3d at 812; Weisberg, 705 F.2d at 1351-52; Wilson v. DEA, 414 F. Supp. 2d 5, 12 (D.D.C. 2006) (finding that the plaintiff failed to rebut the agency's "initial showing of a good faith search"); Graves v. EEOC, No. 02-6842, slip op. at 11 (C.D. Cal. Mar. 26, 2004) (declaring that once agency demonstrates adequacy of its search, burden shifts to plaintiff "to supply direct evidence of bad faith" to defeat summary judgment), aff'd, 144 F. App'x 626 (9th Cir. 2005), cert. denied, 126 S. Ct. 1800 (2006); Windel v. United States, No. 3:02-CV-306, 2004 WL 3363406, at *3 (D. Alaska Sept. 30, 2004) (concluding that plaintiff's "mere recitation" that several individuals should have been contacted as part of agency's search did not constitute evidence of bad faith); Tota v. United States, No. 99-0445E, 2000 WL 1160477, at *2 (W.D.N.Y. 2000) (explaining that to avoid summary judgment in favor of agency, plaintiff must show "bad faith," by "presenting specific facts showing that documents exist" that were not produced); cf. Accuracy in Media, Inc., No. 03-00024, 2006 WL 826070, at *9-10 (D.D.C. Mar. 29, 2006) (reasoning that "a requester cannot challenge the adequacy of a search based on the underlying actions that are the subject of the request, [and that] it may challenge the adequacy of a search by arguing that the search itself, rather than the underlying agency actions, was conducted in bad faith"); Brophy, 2006 WL 571901, at *8 (finding that an agency's search was conducted in good faith, even though the agency "was deplorably tardy in releasing the documents that were found"); Judicial Watch, Inc., 337 F. Supp. 2d at 161 (finding that plaintiff's attempt to discredit search with its own declaration was "insufficient to overcome the personal knowledge-based" declarations submitted by agency, which fully described its search; concluding further that any failings associated with the agency's first search did not undermine its second search, which was "sufficient under the law"); Harvey v. U.S. Dep't of Justice, No. 92-176, slip op. at 10 (D. Mont. Jan. 9, 1996) ("The purported bad faith of government agents in separate criminal proceedings is irrelevant to [the] question of the adequate, good faith search for documents responsive to a FOIA request."), aff'd on other grounds, 116 F.3d 484 (9th Cir. 1997) (unpublished table decision).

[217] Chilingirian v. U.S. Attorney Executive Office, 71 F. App'x 571, 572 (6th Cir. 2003) (citing U.S. Dep't of State v. Ray, 502 U.S. 164, 179 (1991)); see, e.g., Coyne v. United States, 164 F. App'x 141, 142 (2d Cir. 2006) (per curiam) (citing Grand Cent. P'ship, 166 F.3d at 489); Peltier v. FBI, No. 03-CV-9055, 2005 WL 735964, at *4 (W.D.N.Y. Mar. 31, 2005) (citing Carney, 19 F.3d at 812); Butler v. Soc. Sec. Admin., No. 03-0810, slip op. at 5 (W.D. La.
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LITIGATION CONSIDERATIONS

"'[m]ere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them.'"[218] Even when a requested document indisputably exists or once

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[217](...continued)
June 25, 2004), aff'd on other grounds, No. 04-30854, 2005 WL 2055928 (5th Cir. Aug. 26, 2005); Wood v. FBI, 312 F. Supp. 2d 328, 340 (D. Conn. 2004) (citing Carney, 19 F.3d at 812), aff'd in part, rev'd in part on other grounds & remanded, 432 F.3d 78 (2d Cir. 2005); Piper, 294 F. Supp. 2d at 24 (citing Ground Saucer Watch, Inc. v. CIA, 692 F.2d 770, 771 (D.C. Cir. 1981)).

[218] Steinberg, 23 F.3d at 552 (quoting SafeCard, 926 F.2d at 1201); see Kucernak v. FBI, No. 96-17143, 1997 WL 697377, at *1 (9th Cir. Nov. 4, 1997) ("Mere allegations that the government is shielding or destroying documents does [sic] not undermine the adequacy . . . of the search."); Oglesby, 920 F.2d at 67 n.13 ("[H]ypothetical assertions are insufficient to raise a material question of fact with respect to the adequacy of the agency's search."); Nat'l Inst. of Military Justice v. DOD, 404 F. Supp. 2d 325, 350 (D.D.C. 2005) (upholding the agency's search, and explaining that the plaintiff's "conclusory assertion" failed to overcome "the detailed declarations submitted by the [agency]"); Citizens for Responsibility & Ethics in Wash., 405 F. Supp. 2d at 5 (rejecting plaintiff's assertion that additional documents must exist "given the magnitude of the [alleged] scandal" that was the subject of its request); Lair v. U.S. Dep't of the Treasury, No. 03-827, 2005 WL 645228, at *4 (D.D.C. Mar. 21, 2005) (explaining that the plaintiff's "insistence that the ATF controls specific additional documents . . . does not alter the court's determination of adequacy"), reconsideration denied, 2005 WL 1330722, at *2 (D.D.C. June 3, 2005); Martinale v. CIA, No. 03-1632, 2005 WL 327119, at *3 (D.D.C. Feb. 9, 2005) ("Plaintiff's strong belief that defendants possess responsive documents beyond those disclosed is nothing more than speculation, and therefore is insufficient to raise a genuine issue of material fact with respect to the adequacy of the searches[.]"); Jones-Edwards v. Appeal Bd. of the NSA/Cent. Sec. Serv., 352 F. Supp. 2d 420, 422 (S.D.N.Y. 2005) (alternative holding) ("Plaintiff's belief . . . that the NSA did not make a reasonable search -- because if it had it would have found something -- is not enough to withstand . . . [the agency's] motion for summary judgment."), aff'd, No. 05-0962, 2006 WL 2620313, at *2 (2d Cir. Sept. 12, 2006); Flowers v. IRS, 307 F. Supp. 2d 60, 67 (D.D.C. 2004) (stating that "'purely speculative claims about the existence and discoverability of other documents'" are not enough to rebut presumption of good faith (quoting SafeCard, 926 F.2d at 1200)); Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep't of State, 818 F. Supp. 1291, 1295 (N.D. Cal. 1992) ("Plaintiff's incredulity at the fact that no responsive documents were uncovered . . . does not constitute evidence of unreasonableness or bad faith."); see also Students Against Genocide v. Dep't of State, 257 F.3d 828, 839 (D.C. Cir. 2001) ("[T]hat the Department gave SAGE more information than it requested does not undermine the conclusion that its search was reasonable and adequate."); Boyd, 2005 WL 555412, at *4 (D.D.C. Mar. 9, 2005) (rejecting claims that searches were inadequate as

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existed, summary judgment will not be defeated by an unsuccessful search for the document, so long as the search was diligent.[219] Indeed, "[n]othing

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[218](...continued)
plaintiff did not identify any particular missing records or suggest that there were other files that should have been searched); cf. NARA v. Favish, 541 U.S. 157, 174 (noting realistically that "[a]llegations of government misconduct are easy to 'allege and hard to disprove'" (quoting Crawford-El v. Britton, 523 U.S. 574, 585 (1998) (non-FOIA case))), reh'g denied, 541 U.S. 1057 (2004). But see Meyer v. Fed. Bureau of Prisons, 940 F. Supp. 9, 14 (D.D.C. 1996) (reference to responsive pages in agency memorandum, coupled with equivocal statement in declaration that it "appears" responsive pages do not exist, requires further clarification by agency); Katzman v. Freeh, 926 F. Supp. 316, 320 (E.D.N.Y. 1996) (because additional documents were referenced in released documents, summary judgment was withheld "until defendant releases these documents or demonstrates that they either are exempt from disclosure or cannot be located").

[219] See Twist v. Gonzales, 171 F. App'x 855, 855 (D.C. Cir. 2005) (ruling that failure to locate specific documents does not render search inadequate or demonstrate that search was conducted in bad faith); Nation Magazine, 71 F.3d at 892 n.7 ("Of course, failure to turn up [a specified] document does not alone render the search inadequate."); Citizens Comm'n, 45 F.3d at 1328 (adequacy of search not undermined by inability to locate 137 out of 1000 volumes of responsive material, absent evidence of bad faith, and when affidavit contained detailed, nonconclusory account of search); Maynard, 986 F.2d at 564 ("'The fact that a document once existed does not mean that it now exists; nor does the fact that an agency created a document necessarily imply that the agency has retained it.'" (quoting Miller, 779 F.2d at 1385)); Elliott v. NARA, No. 06-1246, 2006 WL 3783409, at *3 (D.D.C. Dec. 21, 2006) ("An agency's search is not presumed unreasonable because it fails to find all the requested information."); Burnes v. CIA, No. 05-242, 2005 WL 3275895, at *2 (D.D.C. Sept. 14, 2005) ("An agency's failure to find a particular document does not undermine the determination that the search was adequate."); Judicial Watch v. U.S. Dep't of Transp., No. 02-566, 2005 WL 1606915, at *7 (D.D.C. July 7, 2005) (upholding search even though some responsive records, which once existed, were destroyed prior to plaintiff's request); People for the Ethical Treatment of Animals v. USDA, No. 03-195, 2005 WL 1241141, at *4 (D.D.C. May 24, 2005) (rejecting plaintiff's argument that search was inadequate simply because disclosed documents refer to others that were not produced or listed in Vaughn Index); Barfield v. U.S. Dep't of Justice, No. 04-0636, 2005 WL 551808, at *6 (D.D.C. Mar. 8, 2005) (finding an agency's search to be adequate, despite its failure to locate particular documents, because it was "directed to the locations where such records might reasonably be expected to be located, if they exist or ever existed"); Allen v. U.S. Secret Serv., 335 F. Supp. 2d 95, 99 (D.D.C. 2004) ("[T]he fact that plaintiff [independently] discovered one document that possibly should have been located by the Service does not render the search process unreasonable."); DiPietro v. Executive Office for U.S. Attor-
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in the law requires the agency to document the fate of documents it cannot find."[220] And when an agency does subsequently locate additional docu-

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[219](...continued)
neys, 357 F. Supp. 2d 177, 182 (D.D.C. 2004) ("An agency's unsuccessful search for records that once may have existed does not render the search inadequate."); Piper, 294 F. Supp. 2d at 23-24 (stating that because the "inquiry regarding the adequacy of a search is the search itself and not the results thereof," the fact that documents were missing is insufficient to rebut otherwise-adequate affidavits demonstrating the reasonableness of the search); Grace v. Dep't of Navy, No. 99-4306, 2001 WL 940908, at *4 (N.D. Cal. Aug. 13, 2001) (finding "more than reasonably adequate" an agency search for misplaced personnel records); Tolotti v. IRS, No. 97-003, 2000 WL 1274235, at *1 (D. Nev. July 14, 2000) ("Obviously the agency cannot produce destroyed documents."); Coal. on Political Assassinations v. DOD, No. 99-0594, slip op. at 7 (D.D.C. Mar. 29, 2000) (reasoning that even if the agency once possessed responsive records, the agency's unsuccessful search was nevertheless thorough and well-explained and thus the agency "fulfilled its obligation under the FOIA"), aff'd, 12 F. App'x 13 (D.C. Cir. 2001); Kay, 976 F. Supp. at 33 (explaining that search not inadequate simply because plaintiff received in discovery documents not produced in response to FOIA request; discovery "may differ from FOIA disclosure procedures"); Antonelli v. U.S. Parole Comm'n, No. 93-0109, slip op. at 2 (D.D.C. Feb. 23, 1996) ("While it is undisputed that [plaintiff] provided the U.S. Marshals Service with a copy of the document he now seeks, the fact that the USMS cannot find it is not evidence of an insufficient search."); Shewchun v. INS, No. 95-1920, slip op. at 7 (D.D.C. Dec. 10, 1996) ("Nor does plaintiff's identification of undisclosed documents that he has obtained through other sources render the search unreasonable."), summary affirmance granted, No. 97-5044 (D.C. Cir. June 5, 1997). But see Boyd, 2002 U.S. Dist. LEXIS 27734, at *4 (stating that the agency's declaration should have explained why a particular report, which was known to exist, was not located, and requiring the agency to "explain its failure to locate this report in a future motion"); Trentadue v. FBI, No. 04-772, slip op. at 5-6 (D. Utah May 5, 2004) (finding search insufficient in light of specific evidence proffered by plaintiff that certain documents do exist and were not found through FBI's automated search); Tran v. U.S. Dep't of Justice, No. 01-0238, 2001 U.S. Dist. LEXIS 21552, at *12-13 (D.D.C. Nov. 20, 2001) (finding that "it is not enough for [an agency] to simply state that [the] documents are destroyed or missing" without providing more explanation), motion for summary judgment granted, 2002 WL 535815 (D.D.C. Mar. 12, 2002); Kronberg, 875 F. Supp. at 870-71 (requiring government to provide additional explanation for absence of documentation required by statute and agency regulations to be created, when plaintiff presented evidence that other files, reasonably expected to contain responsive records, were not identified as having been searched).

[220] Roberts v. U.S. Dep't of Justice, No. 92-1707, 1995 WL 356320, at *2 (D.D.C. Jan. 28, 1993); see Miller, 779 F.2d at 1385 ("Thus, the Department
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ments, or documents initially believed to have been lost or destroyed, courts generally have accepted this as evidence of the agency's good-faith efforts.[221]

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[220](...continued)
is not required by the Act to account for documents which the requester has in some way identified if it has made a diligent search for those documents in places in which they might be expected to be found."); Ferranti v. U.S. Dep't of Justice, No. 03-2385, 2005 WL 3040823, at *2 (D.D.C. Jan. 28, 2005) (rejecting plaintiff's "contention that EOUSA should account for previously possessed records"); see also Physicians Comm. for Responsible Med. v. Glickman, 117 F. Supp. 2d 1, 4 (D.D.C. 2000) (while acknowledging that individuals might have had personal "emails and telephone conversations," nevertheless declaring that "[t]here is no evidence . . . that the agency ever had [these] records," despite plaintiff's insistence to the contrary). But see Valencia-Lucena, 180 F.3d at 328 (suggesting that unless it would be "fruitless" to do so, agency is required to seek out employee responsible for record "when all other sources fail to provide leads to the missing record" and when "there is a close nexus . . . between the person and the particular record").

[221] See Maynard, 986 F.2d at 565 ("Rather than bad faith, we think that the forthright disclosure by the INS that it had located the misplaced file suggests good faith on the part of the agency."); Meeropol, 790 F.2d at 953 (rejecting the argument that later-produced records call the adequacy of a search into question, because "[i]t would be unreasonable to expect even the most exhaustive search to uncover every responsive file"); Goland, 607 F.2d at 370 (refusing to undermine validity of agency's prior search because one week following decision by court of appeals agency had discovered numerous, potentially responsive, additional documents several months earlier); Peay v. Dep't of Justice, No. 04-1859, 2006 WL 1805616, at *1 (D.D.C. June 29, 2006) (noting that newly discovered responsive records were not evidence of agency bad faith, but rather was "oversight and, at worst, ineptness on the part of the previous reviewer"); Nat'l Inst. of Military Justice, 404 F. Supp. 2d at 333-34 (stating that "[a]lthough the agency was not initially diligent, that alone does not demonstrate bad faith, especially in light of the subsequent efforts to search for responsive records"); Corbeil v. U.S. Dep't of Justice, No. 04-2265, 2005 WL 3275910, at *3 (D.D.C. Sept. 26, 2005) ("[A]n agency's prompt report of the discovery of additional responsive materials may be viewed as evidence of its good faith efforts to comply with its obligations under FOIA."); Lechliter, 371 F. Supp. 2d at 593 (finding that agency acted in good faith by locating additional documents after error associated with its initial search was corrected); Landmark Legal Found., 272 F. Supp. 2d at 63 (emphasizing that the "continuing discovery and release of documents does not provide that the original search was inadequate, but rather shows good faith on the part of the agency that it continues to search for responsive documents"); Campaign for Responsible Transplantation v. FDA, 219 F. Supp. 2d 106, 111 (D.D.C. 2002) (suggesting that the discovery of fifty-five additional documents amounted to a "pro-
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LITIGATION CONSIDERATIONS

Mootness and Other Grounds for Dismissal

As is generally the case in any other civil litigation, a FOIA lawsuit may be barred from consideration on its merits due to mootness or the doctrines of issue or claim preclusion, or because some other factor warrants dismissal.

In a FOIA lawsuit, the courts can grant a requester relief only when an agency has improperly withheld agency records.[222] Therefore, if, during litigation, it is determined that all documents found responsive to the underlying FOIA request have been released in full to the requester, the suit should be dismissed as moot because there is no justiciable case or controversy.[223] Similarly, if a FOIA plaintiff's Complaint alleges only an unreason-

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[221](...continued)
verbial 'drop in the bucket'" in light of the voluminous number of documents located as a result of the agency's search); Torres v. CIA, 39 F. Supp. 2d 960, 963 (N.D. Ill. 1999) (rejecting challenge to the adequacy of search when "a couple of pieces of paper -- having no better than marginal relevance" -- were uncovered during additional searches); Klunzinger v. IRS, 27 F. Supp. 2d 1015, 1024 (W.D. Mich. 1998) (concluding that continued release of responsive documents attests to agency's good faith in providing complete response); Gilmore v. NSA, No. 92-3646, 1993 U.S. Dist. LEXIS 7694, at *27 (N.D. Cal. Apr. 30, 1993) (acceptance of plaintiff's "'perverse theory that a forthcoming agency is less to be trusted in its allegations than an unyielding agency'" would "'work mischief in the future by creating a disincentive for the agency to reappraise its position'" (quoting Military Audit Project v. Casey, 656 F.2d 724, 754 (D.C. Cir. 1981))), aff'd, 76 F.3d 386 (9th Cir. 1995) (unpublished table decision); cf. Envtl. Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 583 (D.D.C. 2005) (concluding that EPA conducted reasonable searches despite discovery of documents not initially found; stating that while EPA's initial searches were flawed, EPA had remedied such preliminary deficiencies).

[222] See 5 U.S.C. § 552(a)(4)(B) (2000 & Supp. IV 2004); see also Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 150 (1980); Summers v. Dep't of Justice, 140 F.3d 1077, 1080 (D.C. Cir. 1998) ("When an agency declines to produce a requested document, the agency bears the burden . . . of proving the applicability of claimed statutory exemptions.").

[223] See, e.g., Hall v. CIA, 437 F.3d 94, 99 (D.C. Cir. 2006) (finding that the agency's release of documents without seeking payment mooted plaintiff's "arguments that the district court's denial of a fee waiver was substantively incorrect"); Brown v. U.S. Dep't of Justice, 169 F. App'x 537, 540 (11th Cir. 2006) (per curiam) (holding that FOIA claim became moot when documents were released); Parenti v. IRS, 70 F. App'x 470, 471 (9th Cir. 2003) (holding that FOIA claim is moot if search was adequate and all responsive documents were produced); Lepelletier v. FDIC, 23 F. App'x 4, 6 (D.C. Cir. 2001) (refusing to consider case further because plaintiff "received all -- indeed
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able delay in responding to a FOIA request and the agency subsequently responds by processing the requested records, the FOIA lawsuit should be dismissed as moot.[224]

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[223](...continued)
more than -- the relief he initially sought . . . [c]onsequently, his appeal is moot . . . ."); Anderson v. HHS, 3 F.3d 1383, 1384 (10th Cir. 1993) (citing Carter v. VA, 780 F.2d 1479, 1481 (9th Cir. 1986), and DeBold v. Stimson, 735 F.2d 1037, 1040 (7th Cir. 1984)); Walsh v. VA, No. 03-C-0225, slip op. at 2 (E.D. Wis. Feb. 10, 2004) (pointing out that "'[i]n FOIA cases, mootness occurs when requested documents have already been produced'" (quoting Matter of Wade, 969 F.2d 241, 248 (7th Cir. 1992))); cf. Haji v. ATF, No. 03 Civ. 8479, 2004 WL 1783625, at *2-3 (S.D.N.Y. Aug. 10, 2004) (holding that plaintiff's request is moot because requested files, if ever in existence, were destroyed at World Trade Center during attacks of September 11, 2001); Long v. ATF, 964 F. Supp. 494, 497-98 (D.D.C. 1997) (holding that agency's grant of fee waiver renders moot issue of requester's status for purposes of assessing fees on that request). But see also Marin Inst. for the Prevention of Drug & Other Alcohol Problems v. HHS, No. 98-17345, 2000 WL 964620, at *1 (9th Cir. July 11, 2000) (finding no mootness when release of document at issue was "surreptitious[]" and not necessarily document plaintiff requested); Hudson v. FBI, No. 04-4079, 2005 WL 2347117, at *1-2 (N.D. Cal. Sept. 26, 2005) (refusing to dismiss plaintiff's Complaint as moot because, although disputed documents were released and FOIA claims were resolved, related Privacy Act access claims had yet to be adjudicated); Nw. Univ. v. USDA, 403 F. Supp. 2d 83, 86 (D.D.C. 2005) (finding no mootness despite belated release of documents because plaintiff challenged adequacy of defendant's document production); Boyd v. U.S. Marshals Serv., No. 99-2712, 2000 U.S. Dist. LEXIS 14025, at *2 (D.D.C. Sept. 25, 2000) (refusing to dismiss case despite fact that all responsive, nonexempt records were released, because agency "[has] yet to explain [its] redactions or withholdings"); Looney v. Walters-Tucker, 98 F. Supp. 2d 1, 3 (D.D.C. 2000) (refusing to dismiss a case as moot where all records located as responsive were produced, because "[i]n a FOIA case, courts always have jurisdiction to determine the adequacy of search"), aff'd per curiam sub nom. Looney v. FDIC, 2 F. App'x 8 (D.C. Cir. 2001); cf. Anderson v. HHS, 907 F.2d 936, 941 (10th Cir. 1990) (declaring that although plaintiff had already obtained all responsive documents in private civil litigation, albeit subject to protective order, plaintiff's FOIA litigation to obtain documents free from any such restriction remained viable).

[224] See, e.g., Voinche v. FBI, 999 F.2d 962, 963 (5th Cir. 1993) (dismissing case as moot because only issue in case was "tardiness" of agency response, which was made moot by agency disclosure determination); Atkins v. Dep't of Justice, No. 90-5095, 1991 WL 185084, at *1 (D.C. Cir. Sept. 18, 1991) ("The question whether DEA complied with the [FOIA's] time limitation in responding to [plaintiff's] request is moot because DEA has now responded to this request."); Tijerina v. Walters, 821 F.2d 789, 799 (D.C. Cir. 1987) ("'[H]owever fitful or delayed the release of information, . . . if we are
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In Payne Enterprises v. United States,[225] however, the Court of Appeals for the District of Columbia Circuit held that when records are routinely withheld at the initial processing level, but consistently released after an administrative appeal, and when this situation results in continuing injury to the requester, a lawsuit challenging that practice is ripe for adjudication and is not subject to dismissal on the basis of mootness.[226] The defendant agency's "voluntary cessation" of that practice in Payne did not moot the case when the plaintiff challenged the agency's policy as an

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[224](...continued)
convinced appellees have, however belatedly, released all nonexempt material, we have no further judicial function to perform under the FOIA.'" (quoting Perry v. Block, 684 F.2d 121, 125 (D.C. Cir. 1982))); Amaya-Flores v. DHS, No. 06-CA-225, 2006 WL 3098777, at *3 (W.D. Tex. Oct. 30, 2006) (finding that Voinche is controlling precedent because "a review of Plaintiff's Complaint shows that her allegations relate only to a delay in obtaining a FOIA response and not [to] the improper withholding of documents"); Walsh, No. 03-C-0225, slip op. at 3-4 (E.D. Wis. Feb. 10, 2004) (finding a claim for declaratory relief to be "without merit" because although the agency failed to respond within the FOIA's time limits, it released all records, thus ending any "actual controversy between the parties") (internal quotations omitted); Potts v. U.S. Dep't of the Treasury, No. 3:02-1599, 2003 WL 22872408, at *2 (N.D. Tex. Oct. 8, 2003) (magistrate's recommendation) ("To the extent that Plaintiffs' complaint is based on the tardiness of Defendant's response to their FOIA requests, their claim has been rendered moot because the [agency] produced the documents."), adopted, 2003 WL 22952825 (N.D. Tex. Nov. 5, 2003); Gambini v. U.S. Customs Serv., No. 5:01-CV-300, 2001 U.S. Dist. LEXIS 21336, at *4 (N.D. Tex. Dec. 21, 2001) (same); Fisher v. FBI, 94 F. Supp. 2d 213, 216 (D. Conn. 2000) (finding the lawsuit moot and explaining that "[t]he fact that the records came after some delay is not necessarily tantamount to an improper denial of the records; rather, it is an unfortunate consequence of the kind of repetitious requests made by plaintiff").

[225] 837 F.2d 486 (D.C. Cir. 1988).

[226] Id. at 488-93; see also Gilmore v. U.S. Dep't of Energy, 4 F. Supp. 2d 912, 924 (N.D. Cal. 1998) (finding "independent cause of action" for agency's failure to respond within statutory time limits, despite correctness of agency's disclosure determination), dismissed per stipulation, No. 95-0285 (N.D. Cal. Apr. 3, 2000). But see Walsh v. VA, 400 F.3d 535, 537 (7th Cir. 2005) (holding that theoretical possibility of plaintiff having to wait again for records in future FOIA request is insufficient to keep plaintiff's claim alive); OSHA Data/CIH, Inc. v. U.S. Dep't of Labor, 105 F. Supp. 2d 359, 368 (D.N.J. 1999) (refusing to permit claim to go forward when no proof existed that agency would routinely refuse to release data for period of time), aff'd, 220 F.3d 153 (3d Cir. 2000); Reg'l Mgmt. Corp. v. Legal Servs. Corp., 10 F. Supp. 2d 565, 573 (D.S.C. 1998) (refusing to permit further consideration of moot claim as there was no evidence of continuing injury to requester from "isolated event"), aff'd, 186 F.3d 457 (4th Cir. 1999).

unlawful wrong that otherwise would continue unremedied.[227] Although Payne has been used as the springboard for suits by plaintiffs contending that individual agencies have engaged in a "pattern and practice" of ignoring their obligations under the FOIA, in most of these cases plaintiffs have not found a sympathetic reception to their complaints.[228]

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[227] Payne Enters., 837 F.2d at 491; see also, e.g., Hercules, Inc. v. Marsh, 839 F.2d 1027, 1028 (4th Cir. 1988) (holding that threat of disclosure of agency telephone directory not mooted by release because new request for subsequent directory pending; agency action thus "capable of repetition yet evading review") (reverse FOIA suit); Better Gov't Ass'n v. Dep't of State, 780 F.2d 86, 90-91 (D.C. Cir. 1986) (holding that challenge to fee waiver standards as applied was moot, but challenge to facial validity of standards was ripe and not moot); Or. Natural Desert Ass'n v. Gutierrez, 409 F. Supp. 2d 1237, 1244-45 (D. Or. 2006) (refusing to find mootness, despite release of documents, due to plaintiff's concern regarding future ability to obtain documents in light of agency's "cut-off" and referral regulations); Pub. Citizen v. Office of the U.S. Trade Representative, 804 F. Supp. 385, 387 (D.D.C. 1992) (stating that despite the disclosure of the specific records requested, a court retains jurisdiction when a plaintiff challenges an "agency's policy to withhold temporarily, on a regular basis, certain types of documents"). But see Atkins v. Dep't of Justice, 1991 WL 185084, at *1 (D.C. Cir. Sept. 18, 1991) ("The question whether DEA complied with the [FOIA's] time limitation in responding to [plaintiff's] request is moot because DEA has now responded to this request."); cf. McDonnell Douglas Corp. v. NASA, 109 F. Supp. 2d 27, 29 (D.D.C. 2000) (holding that the "voluntary cessation" doctrine does not apply in the "reverse" FOIA context; when "the FOIA request underlying the litigation" is withdrawn, the case is moot).

[228] See, e.g., Reg'l Mgmt. Corp. v. Legal Servs. Corp., 186 F.3d 457, 464-65 (4th Cir. 1999) (refusing to consider challenge to alleged policy of non-disclosure of documents relating to ongoing investigations because claim was not "ripe"); Gilmore v. NSA, No. 94-16165, 1995 WL 792079, at *1 (9th Cir. Dec. 11, 1995) (refusing to grant injunction for alleged "systemic agency abuse" in responding to FOIA requests where system of handling requests was "reasonable" and records were "diverse and complex," requiring "painstaking review"); Pub. Employees for Envtl. Responsibility v. U.S. Dep't of the Interior, No. 06-182, 2006 WL 3422484, at *9-10 (D.D.C. Nov. 28, 2006) (denying injunctive relief as there is neither evidence of a policy or practice violating FOIA, nor a cognizable danger that alleged FOIA violation will recur); Ctr. for Individual Rights v. U.S. Dep't of Justice, No. 03-1706, slip op. at 10-12 (D.D.C. Sept. 21, 2004) (denying declaratory and injunctive relief that had been sought to prevent agency's delayed responses to plaintiff's future FOIA requests); Swan View Coal. v. USDA, 39 F. Supp. 2d 42, 47 (D.D.C. 1999) (refusing to grant declaratory relief where agency's failure to timely respond was "an aberration"); cf. Eison v. Kallstrom, 75 F. Supp. 2d 113, 114, 117 (S.D.N.Y. 1999) (allowing plaintiff to amend original complaint in order to allege improper withholding of records, where original com-

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Dismissal of a FOIA lawsuit also can be appropriate when the plaintiff fails to prosecute the suit,[229] or records are publicly available under a separate statutory scheme upon payment of fees,[230] or if the claims presented are not ripe.[231] Additionally, a FOIA plaintiff's status as a fugitive

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[228](...continued)
plaint had asked for injunction against "pattern and practice" of delayed agency responses, which court deemed "now moot"). But see Gutierrez, 409 F. Supp. 2d at 1245 (finding the case not moot because the plaintiff was "concerned about [his] ability to obtain documents in light of the ["cut-off" and referral] regulations"); Gilmore v. U.S. Dep't of Energy, 33 F. Supp. 2d 1184, 1189 (N.D. Cal. 1998) (allowing discovery on "pattern and practice" claim of agency delay in processing FOIA requests), dismissed per stipulation, No. 95-0285 (N.D. Cal. Apr. 3, 2000).

[229] See, e.g., Antonelli v. Executive Office for U.S. Attorneys, No. 92-2416, 1994 WL 245567, at *1 (7th Cir. June 6, 1994) (affirming district court's dismissal of Complaint when, seven months after plaintiff's Complaint was found defective for lack of specificity, plaintiff had failed to amend); Fuller v. FCI Fort Dix, No. 03-1676, 2006 WL 1550000, at *1 (D.D.C. June 1, 2006) (holding that summary judgment was conceded where the plaintiff "failed to file a response by the extended deadline"); Colon v. Huff, No. 00-0201, slip op. at 2-3 (M.D. Pa. June 2, 2000) (dismissing suit for plaintiff's failure to prosecute and failure to keep court apprised of his current address); Nuzzo v. FBI, No. 95-1708, 1996 WL 741587, at *2 (D.D.C. Oct. 8, 1996) (after appropriate warning, dismissing action against several defendants because of plaintiff's failure to respond to motions for summary judgment).

[230] See Kleinerman v. Patent & Trademark Office, No. 82-295, 1983 WL 658, at *1 (D. Mass. Apr. 25, 1983) (dismissing FOIA action because Patent and Trademark Act gave plaintiff independent right of access provided he paid for records); cf. Perales v. DEA, 21 F. App'x 473, 474 (7th Cir. 2001) (dismissing a suit brought to obtain access to an "implementing regulation," because "§ 552(a)(3) of the FOIA does not cover material already made available through publication in the Federal Register").

[231] See, e.g., Odle v. Dep't of Justice, No. 05-2711, 2005 WL 2333833, at *2 (N.D. Cal. Sept. 22, 2005) (holding that, as the defendants no longer assert a "Glomar" defense, the plaintiff's claim regarding defendants' use of that defense became moot, and that the plaintiff's contention that the defendants were unlawfully withholding documents was not ripe for adjudication as the defendants were in the midst of reviewing and processing the requested documents); Doe v. Veneman, 230 F. Supp. 2d 739, 746 (W.D. Tex. 2002) (dismissing claims regarding "other pending FOIA requests" as "too broad for the Court to effectively review because such requests are numerous, request a variety of information, and are still pending with administrative agencies"); Rodrequez v. USPS, No. 90-1886, 1991 WL 212202, at *2 (D.D.C. Oct. 2, 1991) (finding case not yet ripe, absent submission of further information enabling identification of plaintiff's records from among those
(continued...)

may warrant dismissal under the "fugitive disentitlement doctrine."[232] (For a further discussion of fugitives and their FOIA requests, see Procedural Requirements, FOIA Requesters, above). However, dismissal is not necessarily appropriate when a plaintiff dies, as a FOIA claim may be continued by a properly substituted party.[233]

Another reason for dismissing a FOIA lawsuit involves the doctrine of res judicata, sometimes also referred to as "claim preclusion."[234] Res judicata precludes relitigation of an action when it is brought by a plaintiff against the same agency for the same documents, the withholding of which previously has been adjudicated.[235] Res judicata does not prevent

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[231](...continued)
of thirty-six persons with same name); Nat'l Sec. Archive v. U.S. Dep't of Commerce, No. 87-1581, 1987 WL 27208, at *1 (D.D.C. Nov. 25, 1987) (dismissing a fee waiver case because "of the incomplete nature of the administrative record and the lack of a final administrative decision").

[232] See Maydak v. U.S. Dep't of Educ., 150 F. App'x 136, 138 (3d Cir. 2005) (affirming the district court's dismissal of plaintiff's FOIA suit under the "fugitive disentitlement doctrine" because "there was enough of a connection between Maydak's fugitive status and his FOIA case to justify application of the doctrine" (citing Ortega-Rodriguez v. United States, 507 U.S. 234, 246-49 (1993) (concluding that "absent some connection between a defendant's fugitive status and his appeal, as provided when a defendant is at large during 'the ongoing appellate process,' the justifications advanced for dismissal of fugitives' pending appeals generally will not apply) (citation omitted))); see also Doyle v. U.S. Dep't of Justice, 668 F.2d 1365, 1365 (D.C. Cir. 1981) (upholding the district court's dismissal of the plaintiff's FOIA Complaint, and noting that so long as the plaintiff remains a federal fugitive "it is the general rule that he may not demand that a federal court service his complaint").

[233] See Sinito v. U.S. Dep't of Justice, 176 F.3d 512, 515-16 (D.C. Cir. 1999) (finding that FOIA cause of action survives death of original requester, but restricting substitution of parties to successor or representative of deceased, pursuant to Rule 25 of Federal Rules of Civil Procedure); D'Aleo v. Dep't of the Navy, No. 89-2347, 1991 U.S. Dist. LEXIS, at *2-4 (D.D.C. Mar. 27, 1991) (appointing as plaintiff deceased plaintiff's sister, who was executrix of his estate). But cf. Hayles v. U.S. Dep't of Justice, No. H-79-1599, slip op. at 3 (S.D. Tex. Nov. 2, 1982) (dismissing case upon death of plaintiff when no timely motion for substitution was filed).

[234] See generally FOIA Update, Vol. VI. No. 3, at 6 (discussing "preclusion doctrines" under the FOIA).

[235] See Schwarz v. Nat'l Inst. of Corr., No. 98-1230, 1998 WL 694510, at *1 (10th Cir. Oct. 15, 1998) (affirming dismissal of case because plaintiff's argument that defendant was not party to earlier action was found to be
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consideration of a FOIA lawsuit, though, when the plaintiff in the earlier, non-FOIA case involving the same records could not raise a FOIA claim.[236]

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[235](...continued)
without factual basis); Wrenn v. Shalala, No. 94-5198, 1995 WL 225234, at *1 (D.C. Cir. Mar. 8, 1995) (affirming dismissal of requests that were subject of plaintiff's previous litigation, but reversing dismissal on "claims that were not and could not have been litigated in that prior action"); Hanner v. Stone, No. 92-2565, 1993 WL 302206, at *1 (6th Cir. Aug. 6, 1993) (holding that under doctrine of res judicata, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in a prior action") (emphasis added); NTEU v. IRS, 765 F.2d 1174, 1177 (D.C. Cir. 1985) (refusing to consider successive FOIA suits for documents that were "identical except for the year involved"); Lane v. Dep't of Justice, No. 1:02-CV-06555, 2006 WL 1455459, at *6 (E.D.N.Y. May 22, 2006) (holding that res judicata barred the plaintiff's claims against the FBI because the claims had already been adjudicated and because the plaintiff "failed to take the necessary action to contest that decision"); Taylor v. Blakey, No. 03-0173, 2005 U.S. Dist. LEXIS 40594, at *12-14 (D.D.C. May 12, 2005) (dismissing suit based on res judicata because plaintiff's interests were legally identical to those of plaintiff's virtual representative who litigated and lost identical FOIA request in Tenth Circuit); Tobie v. Wolf, No. 01-3899, 2002 WL 1034061, at *1 (N.D. Cal. May 8, 2002) (finding privity between "officers of the same government," and therefore dismissing the suit, because the plaintiff previously litigated the same issues against a component of the agency named as a co-defendant in a later suit); Katz v. U.S. Dep't of Justice, 596 F. Supp. 196, 196 (E.D. Mo. 1984) (declaring that, of course, "[a] plaintiff cannot continuously relitigate the same cause of action against the same defendant"); Church of Scientology v. IRS, 569 F. Supp. 1165, 1169 (D.D.C. 1983) ("Where the issues, documents, and plaintiffs are identical in both the prior and present FOIA litigation, the issue of exemption cannot be relitigated.") (internal quotations omitted), vacated & remanded on other grounds, 792 F.2d 146 (D.C. Cir. 1986); see also Greyshock v. U.S. Coast Guard, No. 94-563, slip op. at 2-3 (D. Haw. Jan. 25, 1996) ("All of the claims brought in the instant actions were undeniably claims which either were or could have been brought in this first action in the District Court for the District of Columbia. For that reason alone, plaintiff is precluded from any further pursuit of these claims in this or any other court."), aff'd in part & rev'd in part on other grounds, 107 F.3d 16 (9th Cir. 1997) (unpublished table decision); cf. Peltier v. FBI, No. 02-4328, slip op. at 4-5 (D. Minn. Oct. 24, 2006) (magistrate's recommendation) (dictum) (finding that plaintiff's New York FOIA action appears to preclude the instant case pursuant to the principles of claim and issue preclusion, and further finding that although "the New York FOIA action is presently on appeal[, this] does not undermine the preclusive effect of the [New York] district court's final judgment"), adopted (D. Minn. Feb. 9, 2007).

[236] See North v. Walsh, 881 F.2d 1088, 1093-95 (D.C. Cir. 1989) (deciding
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In addition, res judicata is not applicable where there has been a change in the factual circumstances or legal principles applicable to the lawsuit.[237]

When parallel FOIA suits are brought by the same party for the same records, dismissal may be appropriate by operation of the "first-filed" rule.[238] This rule holds that "[w]hen lawsuits involving the same controversy are filed in more than one jurisdiction, the general rule is that the court that first acquired jurisdiction has priority."[239] The "first-filed" rule differs from res judicata because in the latter a case involving the same parties already has been decided, whereas in the former the cases are still pend-

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[236](...continued)
that claim for records under FOIA was not barred by prior discovery prohibition for same records in criminal case in which FOIA claim could not have been interposed).

[237] See, e.g., Negley v. FBI, 169 F. App'x 591, 594 (D.C. Cir. 2006) (holding that res judicata was inapplicable because both lawsuits -- one to obtain records from Sacramento office and other to obtain records from San Francisco office -- did not involve same "nucleus of facts"; declaring further that the "FOIA does not limit a party to a single request, and because the records maintained by an FBI office may change over time, a renewal of a previous request inevitably raises new factual questions"); Croskey v. U.S. Office of Special Counsel, No. 96-5114, 1997 WL 702364, at *3 (D.C. Cir. Oct. 17, 1997) (finding res judicata inapplicable because document was not in existence when earlier litigation was brought); Hanner v. Stone, No. 92-1579, 1992 WL 361382, at *1 (6th Cir. Dec. 8, 1992) (determining that present claim was not precluded under doctrine of res judicata when appellate court had previously adjudicated claim that was similar, but involved different issue); ACLU v. U.S. Dep't of Justice, 321 F. Supp. 2d 24, 34 (D.D.C. 2004) (finding res judicata inapplicable where changed circumstances -- namely, Attorney General's decision to declassify records in question -- altered legal issues surrounding plaintiff's FOIA request); Wolfe v. Froehlke, 358 F. Supp. 1318, 1319 (D.D.C. 1973) (stating that lawsuit was not barred where national security status had changed), aff'd, 510 F.2d 654 (D.C. Cir. 1974); cf. Primorac v. CIA, 277 F. Supp. 2d 117, 120 (D.D.C. 2003) (dismissing case on basis of res judicata despite plaintiff's argument that automatic declassification section of Executive Order 12,958 was unavailable to him in previous lawsuit for same records and fact that it was still unavailable because it was not yet effective); Bernson v. ICC, 635 F. Supp. 369, 371 (D. Mass. 1986) (refusing to accept argument that changed circumstances rendered inapplicable previous decision affirming invocation of FOIA exemption, and dismissing claim based on res judicata).

[238] See McHale v. FBI, No. 99-1628, slip op. at 8-9 (D.D.C. Nov. 7, 2000) (dismissing "essentially duplicative action").

[239] Biochem Parma, Inc. v. Emory Univ., 148 F. Supp. 2d 11, 13 (D.D.C. 2001) (citing Columbia Plaza Corp. v. Sec. Nat'l Bank, 525 F.2d 620, 627 (D.C. Cir. 1975)) (non-FOIA cases).

ing, but both rules proceed from the same goal -- to minimize redundant litigation and thereby conserve judicial resources.[240]

Collateral estoppel, or "issue preclusion," also may foreclose further consideration of a FOIA suit.[241] Collateral estoppel precludes relitigation of an issue previously litigated by one party to the action.[242] For example, if an agency's search for records already has been found to be adequate, a plaintiff should not be able to question that same search in a subsequent action.[243] While collateral estoppel may be somewhat more problematic in the FOIA context where there is not necessarily an express or implied legal relationship between the plaintiff in the first action and the plaintiff in the successive suit,[244] the risk of conflicting decisions on the same set of rec-

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[240] See McHale, No. 99-1628, slip op. at 3 (D.D.C. Nov. 7, 2000) (describing purpose of "first-filed" rule as "conserv[ation of] judicial resources"); see also Flynn v. Place, 63 F. Supp. 2d 18, 25 (D.D.C. 1999) (explaining that purpose of res judicata doctrine is to "protect[] adversaries from expensive and vexatious multiple lawsuits, [and] conserve[] judicial resources") (non-FOIA case).

[241] See generally FOIA Update, Vol. VI, No. 3, at 6.

[242] See Yamaha Corp. of Am. v. United States, 961 F.2d 245, 254 (D.C. Cir. 1992) (non-FOIA case); Church of Scientology v. U.S. Dep't of the Army, 611 F.2d 738, 750-51 (9th Cir. 1980) (declaring that complete identity of plaintiff and document at issue precludes relitigation); see also FOIA Update, Vol. VI, No. 3, at 6; cf. Cotton v. Heyman, 63 F.3d 1115, 1118 nn.1-2 (D.C. Cir. 1995) (holding that doctrine of direct estoppel, which precludes relitigating issue finally decided in "separate proceeding" within same suit, prevented Smithsonian Institution from challenging district court determination that it is subject to FOIA on appeal from award of attorney fees; however, "Smithsonian is free to relitigate the issue against another party in a separate proceeding"). But see North, 881 F.2d at 1093-95 (finding issue preclusion inapplicable when exemption issues raised in FOIA action differ from relevancy issues raised in prior action for discovery access to same records); Hall v. CIA, No. 04-00814, 2005 WL 850379, at *3 (D.D.C. Apr. 13, 2005) (holding doctrine of collateral estoppel inapplicable where plaintiff previously challenged adequacy of search and exemption's validity but in instant case, by contrast, sought immediate production of documents and reduction or waiver of fees).

[243] See, e.g., Allnutt v. U.S. Dep't of Justice, 99 F. Supp. 2d 673, 677 (D. Md. 2000) (refusing, "[i]n accord with basic res judicata principles," to reconsider adequacy of search issue that was decided by another court), aff'd per curiam sub nom. Allnut v. Handler, 8 F. App'x 225 (4th Cir. 2001).

[244] See Favish v. Office of Indep. Counsel, 217 F.3d 1168, 1171 (9th Cir. 2000) (refusing to find that an attorney who represented the plaintiff in a previous case was precluded from relitigating the releasability of death-

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ords suggests that relaxed notions of privity -- which courts have allowed in other contexts[245] -- are particularly appropriate in FOIA cases.[246] As with the doctrine of res judicata, collateral estoppel is not applicable to a subsequent lawsuit if there is an intervening material change in the law or factual predicate.[247]

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[244](...continued)
scene photographs of former Deputy White House Counsel Vincent Foster, because the identity of interests was viewed by the second appellate court as only "an abstract interest in enforcement of FOIA") (internal quotations omitted), rev'd on other grounds sub nom. NARA v. Favish, 541 U.S. 157, reh'g denied, 541 U.S. 1057 (2004); see also *FOIA Post*, "Supreme Court to Hear FOIA and Privacy Act Cases Back-to-Back" (posted 9/30/03; supplemented 10/10/03) (describing unusual circumstances of Favish case); cf. Doe v. Glickman, 256 F.3d 371, 380 (5th Cir. 2001) (permitting third-party intervention in "reverse" FOIA suit in order to avoid collateral estoppel effect of decision potentially adverse to third-party interests); Robertson v. DOD, 402 F. Supp. 1342, 1347 (D.D.C. 1973) (concluding that private citizen's interest in subsequent FOIA action was not protected by government in prior "reverse" FOIA suit over same documents, because interests were not "congruent").

[245] See, e.g., Montana v. United States, 440 U.S. 147, 155-56 (1979) (finding that that government was estopped from rearguing a question that was "definitely and actually litigated and adjudged" in a state court decision, even though the government was not a party to that state court action, because the government had a "sufficient laboring oar" in the state court proceeding "to actuate principles of estoppel") (internal quotations omitted) (non-FOIA case).

[246] Compare Accuracy in Media, Inc. v. Nat'l Park Serv., 194 F.3d 120, 123 (D.C. Cir. 1999) (affirming district court denial of access to photographs of former Deputy White House Counsel Vincent Foster death scene, on basis of invasion of privacy), with Favish, 217 F.3d at 1174 (remanding case to district court to view same photographs in camera in order to balance asserted "public interest" against surviving family's privacy interests).

[247] See, e.g., Croskey, 1997 WL 702364, at *5 (concluding that access to investigator's notes and impressions of witnesses adjudicated in prior proceeding was "sufficiently different" from witness statements themselves to bar application of collateral estoppel); Minnis v. USDA, 737 F.2d 784, 786 n.1 (9th Cir. 1984) (declaring that "an intervening Supreme Court decision clarifying an issue that had been uncertain in the lower courts defeats collateral estoppel"); McQueen v. United States, 264 F. Supp. 2d 502, 513-14 (S.D. Tex. 2003) (refusing to find that collateral estoppel prevented plaintiff from litigating "requests for information that may not be essentially identical," despite agency's argument that the contested documents were "the same kinds . . . but for different years").

LITIGATION CONSIDERATIONS

"Vaughn Index"

A distinguishing feature of FOIA litigation is that the defendant agency bears the burden of sustaining its action of withholding records.[248] The most commonly used device for meeting this burden of proof is the "Vaughn Index," fashioned by the Court of Appeals for the District of Columbia Circuit in a case entitled Vaughn v. Rosen.[249]

The Vaughn decision requires agencies to prepare an itemized index, correlating each withheld document (or portion) with a specific FOIA exemption and the relevant part of the agency's nondisclosure justification.[250] Such an index allows the trial court "to make a rational decision [about] whether the withheld material must be produced without actually viewing the documents themselves . . . [and] to produce a record that will render [its] decision capable of meaningful review on appeal."[251] It also helps to

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[248] See 5 U.S.C. § 552(a)(4)(B) (2000 & Supp. IV 2004); see also Natural Res. Def. Council v. NRC, 216 F.3d 1180, 1190 (D.C. Cir. 2000) (explaining that the "FOIA itself places the burden on the agency to sustain the lawfulness of specific withholdings in litigation") (Government in the Sunshine Act case); Brady-Lunny v. Massey, 185 F. Supp. 2d 928, 931 (C.D. Ill. 2002) ("Since the Government is the party refusing to produce the documents, it bears the burden of showing that the documents are not subject to disclosure.").

[249] 484 F.2d 820 (D.C. Cir. 1973); see, e.g., Canning v. U.S. Dep't of Justice, 848 F. Supp. 1037, 1042 (D.D.C. 1994) ("Agencies are typically permitted to meet [their] heavy burden by 'filing affidavits describing the material withheld and the manner in which it falls within the exemption claimed.'" (quoting King v. U.S. Dep't of Justice, 830 F.2d 210, 217 (D.C. Cir. 1987))).

[250] See Vaughn, 484 F.2d at 827; accord King, 830 F.2d at 217.

[251] King, 830 F.2d at 219; see, e.g., Maine v. U.S. Dep't of the Interior, 298 F.3d 60, 65 (1st Cir. 2002); Rugiero v. U.S. Dep't of Justice, 257 F.3d 534, 544 (6th Cir. 2001) (explaining that Vaughn Index enables court to make "independent assessment" of agency's exemption claims), Campaign for Responsible Transplantation v. FDA, 219 F. Supp. 2d 106, 116 (D.D.C. 2002) ("Without a proper Vaughn index, a requester cannot argue effectively for disclosure and this court cannot rule effectively."); Cucci v. DEA, 871 F. Supp. 508, 514 (D.D.C. 1994) ("An adequate Vaughn index facilitates the trial court's duty of ruling on the applicability of certain invoked FOIA exemptions, gives the requester as much information as possible that he may use to present his case to the trial court and thus enables the adversary system to operate."); cf. Antonelli v. Sullivan, 732 F.2d 560, 562 (7th Cir. 1984) (holding that no Vaughn Index is required when small number of documents is at issue and affidavit contains sufficient detail); Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat'l R.R. Passenger Corp., No. 02-126, 2003 WL 21146674, at *6 (M.D. Fla. May 13, 2003) ("'Vaughn indexes are most

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"create balance between the parties."[252]

Thus, if a court finds that an index is not sufficiently detailed, it should require one that is more detailed.[253] Alternatively, if a Vaughn In-

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[251](...continued)
useful in cases involving thousands of pages of documents.'" (quoting Miscavige v. IRS, 2 F.3d 366, 368 (11th Cir. 1993))), rev'd & remanded on other grounds, 116 F. App'x 251 (11th Cir. 2004), cert. denied, 543 U.S. 1121 (2005).

[252] Long v. U.S. Dep't of Justice, 10 F. Supp. 205, 209 (N.D.N.Y. 1998); see, e.g., Judicial Watch, Inc. v. FDA, 449 F.3d 141, 146 (D.C. Cir. 2006) (noting that the agency would have "a nearly impregnable defensive position" but for its burden to justify nondisclosure); Odle v. Dep't of Justice, No. 05-2711, 2006 WL 1344813, at *5 (N.D. Cal. May 17, 2006) (observing that Vaughn Index "afford[s] the person making a FOIA request a meaningful opportunity to contest the soundness of withholding"); Peter S. Herrick's Customs & Int'l Trade Newsletter v. U.S. Customs & Border Prot., No. 04-0377, 2005 WL 3274073, at *2 (D.D.C. Sept. 22, 2005) ("The purpose of the Vaughn index is to provide fertile ground upon which to germinate the seeds of adversarial challenge."); Edmonds v. FBI, 272 F. Supp. 2d 35, 44 (D.D.C. 2003) (explaining that affidavits must "'strive to correct the asymmetrical distribution of knowledge that characterizes FOIA litigation'" (quoting King, 830 F.2d at 218)); see also Kern v. FBI, No. 94-0208, slip op. at 5 (C.D. Cal. Sept. 14, 1998) (opining that one purpose of Vaughn Index is "to afford the requester an opportunity to intelligently advocate release of the withheld documents"); cf. Fiduccia v. U.S. Dep't of Justice, 185 F.3d 1035, 1042 (9th Cir. 1999) (pointing out that Vaughn Index is not required where it is unnecessary to be particularly concerned about adversarial balance).

[253] See Davin v. U.S. Dep't of Justice, 60 F.3d 1043, 1065 (3d Cir. 1995) (remanding case for further proceedings and suggesting that another, more detailed Vaughn Index be required); Church of Scientology Int'l v. U.S. Dep't of Justice, 30 F.3d 224, 230-40 (1st Cir. 1994) (same); Wiener v. FBI, 943 F.2d 972, 979 (9th Cir. 1991) (remanding case for a more thorough Vaughn Index); Herrick's Newsletter, 2005 WL 3274073, at *2 (directing agency to "re-file the Vaughn index with specific identifications of 'low 2' and 'high 2' status for the information that is withheld under Exemption 2"); Antonelli v. ATF, No. 04-1180, 2005 WL 3276222, at *9 n.8 (D.D.C. Aug. 16, 2005) (directing the agency "to file a less confusing, detailed declaration and corresponding Vaughn index"); Elec. Privacy Info. Ctr. v. DHS, 384 F. Supp. 2d 100, 120 (D.D.C. 2005) (permitting agencies to submit revised Vaughn Index to correct inadequacies in original); Nat'l Res. Def. Council v. DOD, 388 F. Supp. 2d 1086, 1089 (C.D. Cal. 2005) (ordering submission of new Vaughn Index because original was too conclusory to support exemption claims); Santos v. DEA, 357 F. Supp. 2d 33, 37-38 (D.D.C. 2004) (requiring supplemental declaration because initial one failed to provide "sufficient detail" to establish connection between exemptions invoked and doc-
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dex is inadequate to support withholding, it certainly may be supplemented through the court's in camera review of the withheld material.[254] (See

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[253](...continued)
uments withheld); Madison Mech., Inc. v. NASA, No. 99-2854, 2003 WL 1477014, at *4 (D.D.C. Mar. 20, 2003) (magistrate's recommendation) (recommending that another Vaughn Index be required because of deficiencies in first one), adopted (D.D.C. Mar. 31, 2003); Wilderness Soc'y v. Bureau of Land Mgmt., No. 01-2210, 2003 WL 255971, at *7 (D.D.C. Jan. 15, 2003), modified (D.D.C. Feb. 4, 2003) (requiring supplemental Vaughn Index to correct conclusory and generalized exemption claims); Coleman v. FBI, 972 F. Supp. 5, 9 (D.D.C. 1997) (rejecting narratives on "deleted page sheets" that apply to multiple documents and requiring agency to redo index to "inform the court as to the contents of individual documents and the applicability of the various Exemptions"); see also Bryce v. Overseas Private Inv. Corp., No. 96-595, slip op. at 10 (W.D. Tex. Sept. 28, 1998) ("An agency may submit a revised index at any time prior to the summary judgment hearing." (citing Coastal States Gas Corp. v. Dep't of Energy, 644 F.2d 969, 971, 981 (3d Cir. 1981))); cf. Windel v. United States, No. A02-306, 2004 WL 3363406, at *4 (D. Alaska Sept. 30, 2004) (rejecting the government's attempt to justify withholdings with a letter that "describes in general terms, the exemptions claimed," and ordering submission "of a proper Vaughn index" that contains "sufficient detail regarding the bases for exemption").

[254] See, e.g., Lion Raisins Inc. v. USDA, 354 F.3d 1072, 1082 (9th Cir. 2004) (acknowledging that "[u]nder certain limited circumstances, we have endorsed the use of in camera review of government affidavits as the basis for FOIA decisions"); Fiduccia, 185 F.3d at 1042-43 (suggesting likewise that notwithstanding Wiener, 943 F.2d at 979, in camera inspection could by itself be sufficient); Maynard v. CIA, 986 F.2d 547, 557 (1st Cir. 1993) ("Where, as here, the agency, for good reason, does not furnish publicly the kind of detail required for a satisfactory Vaughn index, a district court may review the documents in camera."); Simon v. U.S. Dep't of Justice, 980 F.2d 782, 784 (D.C. Cir. 1992) (holding that despite inadequacy of Vaughn Index, in camera review, "although admittedly imperfect . . . is the best way to [en]sure both that the agency is entitled to the exemption it claims and that the confidential source is protected"); see also High Country Citizens Alliance v. Clarke, No. 04-CV-00749, 2005 WL 2453955, at *8 (D. Colo. Sept. 29, 2005) (finding in camera review necessary due to insufficient descriptions of withheld documents in Vaughn Index); Carbe v. ATF, No. 03-1658, 2004 WL 2051359, at *8 n.5 (D.D.C. Aug. 12, 2004) (denying plaintiff's request for in camera inspection, because Vaughn Index adequately described withheld information); Twist v. Ashcroft, 329 F. Supp. 2d 50, 54 (D.D.C. 2004) ("[I]n camera review of the withheld documents (or of the portions withheld) is proper if the agency affidavits are insufficiently detailed to permit review of exemption claims[.]"), aff'd per curiam on other grounds, 171 F. App'x 855 (D.C. Cir. Nov. 16, 2004); Nat'l Wildlife Fed'n v. U.S. Forest Serv., 861 F.2d 1114, 1116 (9th Cir. 1988) ("[W]here a trial court properly reviewed contested documents in camera, an adequate factual basis for the
(continued...)

the further discussion of this point under Litigation Considerations, In Camera Inspection, below.)

There is no set formula for a Vaughn Index; instead, it is the function, not the form that is important.[255] Indeed, the D.C. Circuit has eloquently

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[254](...continued)
decision exists."); Hornbostel v. U.S. Dep't of the Interior, 305 F. Supp. 2d 21, 30 (D.D.C. 2003) (commenting that while Vaughn Index description of documents was "slightly ambiguous," correctness of exemption claims was demonstrated through in camera examination), aff'd, No. 03-5257, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004); cf. Judicial Watch, Inc. v. Dep't of the Army, 402 F. Supp. 2d 241, 249 & n.6 (D.D.C. 2005) (ordering in camera inspection to review accuracy of agency's descriptions of withheld information after inadvertent disclosure revealed existence of discrepancies and inaccuracies in Vaughn Index), summary judgment granted in part, 435 F. Supp. 2d 81 (D.D.C. 2006); Fla. Immigrant Advocacy Ctr. v. NSA, 380 F. Supp. 2d 1332, 1338 (S.D. Fla. 2005) (conducting in camera inspection "to satisfy an 'uneasiness' or 'doubt' that the exemption claim may be overbroad given the nature of the Plaintiff's arguments"). But see also Wiener, 943 F.2d at 979 (suggesting that "[i]n camera review of the withheld documents by the [district] court is not an acceptable substitute for an adequate Vaughn index"); cf. Peltier v. FBI, No. 03-CV-905, 2005 WL 735964, at *11 (W.D.N.Y. Mar. 31, 2005) (acknowledging that "in camera review is particularly frowned upon in the context of Exemption 1 withholdings . . . [h]owever, Defendant's insufficient Vaughn index leaves this Court with no choice but to conduct further review"), renewed mot. for summary judgment granted, 2006 WL 462096, at *2 (W.D.N.Y. Feb. 24, 2006), aff'd, No. 06-1405, 2007 WL 627534 (2d Cir. Feb. 23, 2007).

[255] Jones v. FBI, 41 F.3d 238, 242 (6th Cir. 1994); see Fiduccia, 185 F.3d at 1044 ("Any form . . . may be adequate or inadequate, depending on the circumstances."); Church of Scientology, 30 F.3d at 231 (agreeing that there is no set formula for a Vaughn Index); Gallant v. NLRB, 26 F.3d 168, 172-73 (D.C. Cir. 1994) (holding that justification for withholding provided by agency may take any form as long as agency offers "reasonable basis to evaluate [it]s claim of privilege"); Vaughn v. United States, 936 F.2d 862, 867 (6th Cir. 1991) ("A court's primary focus must be on the substance, rather than the form, of the information supplied by the government to justify withholding requested information."); Hornbeck v. U.S. Coast Guard, No. 04-1724, 2006 WL 696053, at *6 (D.D.C. Mar. 20, 2006) ("[T]he precise form of the agency's submission -- whether it be an index, a detailed declaration, or a narrative -- is immaterial."); Voinche v. FBI, 412 F. Supp. 2d 60, 65 (D.D.C.) ("[I]t is the function of a Vaughn index rather than its form that is important, and a Vaughn index is satisfactory as long as it allows a court to conduct a meaningful de novo review of the agency's claim of exemption."), summary judgment granted, 425 F. Supp. 2d 134 (D.D.C. 2006) (appeal pending); Tax Analysts v. IRS, 414 F. Supp. 2d 1, 4-5 (D.D.C. 2006) (recognizing that substance of government's justification for withholding
(continued...)

observed that "a Vaughn index is not a work of literature; agencies are not graded on the richness or evocativeness of their vocabularies."[256] Likewise, the sufficiency of a Vaughn Index is not determined by reference to the length of its document descriptions.[257] What "'is required is that the requester and the trial judge be able to derive from the index a clear explanation of why each document or portion of a document withheld is putatively exempt from disclosure.'"[258] As one court has explained:

> A true Vaughn index identifies discrete portions of documents and identifies the exemption pertaining to each portion of the document. In most cases, such an index provides the date, source, recipient, subject matter and nature of each document in sufficient detail to permit the requesting party to argue effectively against the claimed exemptions and for the court to assess the applicability of the claimed exemptions.[259]

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[255](...continued)
takes precedence over form in which it is presented) (appeal pending); cf. People for the Ethical Treatment of Animals v. USDA, No. 03-195, 2005 WL 1241141, at *4 (D.D.C. May 24, 2005) (stating that the agency "may submit other materials to supplement its Vaughn index, such as affidavits, that give the court enough information to determine whether the claimed exemptions are properly applied" (citing Judicial Watch, Inc. v. USPS, 297 F. Supp. 2d 252, 257 (D.D.C. 2004))).

[256] Landmark Legal Found. v. IRS, 267 F.3d 1132, 1138 (D.C. Cir. 2001); see Coldiron v. U.S. Dep't of Justice, 310 F. Supp. 2d 44, 52 (D.D.C. 2004) ("Rarely does the court expect to find in briefs, much less Vaughn indices, anything resembling poetry.").

[257] See Judicial Watch, Inc., 449 F.3d at 146 ("[W]e focus on the functions of the Vaughn index, not the length of the document descriptions, as the touchstone of our analysis.").

[258] Manna v. U.S. Dep't of Justice, 832 F. Supp. 866, 873 (D.N.J. 1993) (quoting Hinton v. Dep't of Justice, 844 F.2d 126, 129 (3d Cir. 1988)), aff'd, 51 F.3d 1158 (3d Cir. 1995); see Jones, 41 F.3d at 242 (holding an agency's Vaughn Index adequate when it "'enables the court to make a reasoned independent assessment of the claim[s] of exemption'" (quoting Vaughn, 936 F.2d at 866-67)). But see People for the Am. Way Found. v. NSA, No. 06-206, slip op. at 11 n.5 (D.D.C. Nov. 20, 2006) (reminding that "a Vaughn index is not required . . . where it 'could cause the very harm that [the exemption] was intended to prevent'" (quoting Linder v. NSA, 94 F.3d 693, 697 (D.C. Cir. 1996) (non-FOIA case)).

[259] St. Andrews Park, Inc. v. U.S. Dep't of Army Corps of Eng'rs, 299 F. Supp. 2d 1264, 1271 (S.D. Fla. 2003); see also Cole v. U.S. Dep't of Justice, No. 05-674, 2006 WL 2792681, at *5 (D.D.C. Sept. 27, 2006) (noting that index specified: "(1) the type of document, (2) the exact location of the
(continued...)

When a Vaughn Index meets these criteria, it is "'accorded a presumption of good faith.'"[260] Of course, "[t]he degree of specificity of itemization, justification, and correlation required in a particular case will . . . depend on the nature of the document at issue and the particular exemption assert-

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[259](...continued)
withheld information in the document, (3) the applicable FOIA exemptions for all withheld information, and (4) a brief description of the withheld information"); Edmonds Inst. v. U.S. Dep't of the Interior, 383 F. Supp. 2d 105, 109 (D.D.C. 2005) (explaining that Vaughn Index "should contain a short description of the content of each individual document sufficient to allow" its exemption use to be tested); Dorsett v. U.S. Dep't of the Treasury, 307 F. Supp. 2d 28, 34 (D.D.C. 2004) (describing adequate Vaughn Index).

[260] Carney v. U.S. Dep't of Justice, 19 F.3d 807, 812 (2d Cir. 1994) (quoting SafeCard Servs. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991)); see, e.g., Jones, 41 F.3d at 242 (reiterating that agency affidavits entitled to presumption of good faith); Cohen v. FBI, No. 93-1701, slip op. at 4 (D.D.C. Oct. 11, 1994) ("[M]inor contradictions in defendants' affidavits do not evince intentional misrepresentation on their part."); see also Church of Scientology, 30 F.3d at 233 (explaining that a good-faith presumption is applicable only "when the agency has provided a reasonably detailed explanation for its withholdings . . . court may not without good reason second-guess an agency's explanation, but it also cannot discharge its de novo review obligation unless that explanation is sufficiently specific"); Coastal Delivery Corp. v. U.S. Customs Serv., 272 F. Supp. 2d 958, 962 (C.D. Cal. 2003) (explaining that a plaintiff's disagreement with the conclusions reached in a Vaughn Index is not a sufficient basis for challenging it, and observing that "such a challenge is . . . appropriate [only] when the defendant does not provide sufficient explanation of its position to allow for disagreement"), appeal dismissed voluntarily, No. 03-55833 (9th Cir. 2003); Butler v. DEA, No. 05-1798, 2006 WL 398653, at *2 (D.D.C. Feb. 16, 2006) (noting presumption of good faith accorded to agency affidavits); Dean v. FDIC, 389 F. Supp. 2d 780, 791 (D. Ky. 2005) (concluding that the agency's Vaughn Index was entitled to a presumption of good faith because it contained sufficient detail "to permit the court to make a fully informed decision" about the propriety of the agency's nondisclosure); Caton v. Norton, No. 04-CV-439, 2005 WL 3116613, at *11 (D.N.H. Nov. 21, 2005) (concluding that mistakes in processing FOIA request, which agency "convincingly explained," were not sufficient to overcome "presumption of good faith" given to its declaration); cf. NARA v. Favish, 541 U.S. 157, 174-75 (requiring "meaningful evidentiary showing" to overcome "presumption of legitimacy accorded to the Government's official conduct," because "[a]llegations of government misconduct are easy to 'allege and hard to disprove'" (quoting Crawford-El v. Britton, 523 U.S. 574, 585 (1998) (non-FOIA case))), reh'g denied, 541 U.S. 1057 (2004); *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (discussing how unsubstantiated allegations of official misconduct are insufficient to establish "public interest" in disclosure of third-party records, as enunciated in Favish).

ed."[261]

A document specifically denominated as a "Vaughn Index" per se is not even essential, so long as the nature of the withheld information is adequately attested to by the agency.[262] What is essential, however, is that

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[261] Info. Acquisition Corp. v. Dep't of Justice, 444 F. Supp. 458, 462 (D.D.C. 1978); see, e.g., Landmark Legal Found., 267 F.3d at 1138 (chiding plaintiff for his criticism of repetitive nature of Vaughn Index, given that "thousands of documents belonged in the same category"); Citizens Comm'n on Human Rights v. FDA, 45 F.3d 1325, 1328 (9th Cir. 1995) (finding adequate, for responsive records consisting of 1000 volumes of 300 to 400 pages each, agency's volume-by-volume summary when Vaughn Indexes "specifically describe the documents' contents and give specific reasons for withholding them"); Davis v. U.S. Dep't of Justice, 968 F.2d 1276, 1282 n.4 (D.C. Cir. 1992) (opining that precise matching of exemptions with specific withheld items "may well be unnecessary" when all government's generic claims have merit); Vaughn, 936 F.2d at 868 (approving category-of-document approach when over 1000 pages were withheld under Exemptions 3, 5, 7(A), 7(C), 7(D), and 7(E)); Odle, 2006 WL 1344813, at *9 (recognizing that "the detail required in a Vaughn index depends on the specific exemption claimed"); Tax Analysts, 414 F. Supp. 2d at 4 (concluding that agency need not justify withholdings on a document-by-document basis because it invoked only one exemption); Coldiron, 310 F. Supp. 2d at 52 (explaining that repetition in Vaughn Index is to be expected, especially when "each redacted passage concerns the same, classified subject"); NTEU v. U.S. Customs Serv., 602 F. Supp. 469, 473 (D.D.C. 1984) (reasoning that the fact that only one exemption is involved "nullif[ies] the need to formulate the type of itemization and correlation system required by the Court of Appeals in Vaughn"), aff'd, 802 F.2d 525 (D.C. Cir. 1986); Agee v. CIA, 517 F. Supp. 1335, 1337-38 (D.D.C. 1981) (accepting index listing fifteen categories when more specific index would compromise national security); cf. Lardner v. U.S. Dep't of Justice, No. 03-0180, 2005 WL 758267, at *20 (D.D.C. Mar. 31, 2005) (finding that agency need not amend Vaughn Index to include names of clemency applicants who were subjects of withheld advisory letters, because that would shed no light on whether categorical withholding under Exemption 5 was proper).

[262] See, e.g., Judicial Watch, Inc., 449 F.3d at 146 (stating that an agency may "submit other measures in combination with or in lieu of the index itself," such as supporting affidavits, or seek in camera review of the documents); Wishart v. Comm'r, No. 98-17248, 1999 WL 985142, at *1 (9th Cir. Oct. 27, 1999) (suggesting that Vaughn Index is unnecessary if declarations are detailed enough); Miscavige v. IRS, 2 F.3d 366, 368 (11th Cir. 1993) (deciding that separate document expressly designated as "Vaughn Index" is unnecessary when agency "declarations are highly detailed, focus on the individual documents, and provide a factual base for withholding each document at issue"); Voinche, 412 F. Supp. 2d at 65 (explaining that an agency "does not have to provide an index per se, but can satisfy its

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the Vaughn Index expressly indicate for each document that any reasonably segregable information has been disclosed.[263] In this connection, the Court of Appeals for the District of Columbia Circuit has repeatedly held that it is reversible error for a district court not to make a finding of segregability.[264]

Indeed, the D.C. Circuit has even ruled that if the segregability issue

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[262](...continued)
burden by other means, such as submitting the documents in question for an in camera review or by providing a detailed affidavit or declaration"); Queen v. Gonzales, No. 96-1387, 2005 WL 3204160, at *2 (D.D.C. Nov. 15, 2005) (explaining that "[a]gency affidavits can satisfy Vaughn's requirements" if they are detailed sufficiently to permit de novo review) (appeal pending); Doyharzabal v. Gal, No. 7:00-2995-24, 2004 WL 2444124, at *3 (D.S.C. Sept. 13, 2004) (finding agency's affidavit to be "equivalent" to Vaughn Index); Judicial Watch, 297 F. Supp. 2d at 257 (noting that agency may submit materials in "'any form'" as long as reviewing court has reasonable basis to evaluate exemption claim (quoting Gallant, 26 F.3d at 173)); Goulding v. IRS, No. 97 C 5728, 1998 WL 325202, at *7 (N.D. Ill. June 8, 1998) ("A Vaughn index is not necessary in every case, so long as the function it serves is sufficiently performed by the agency's affidavits or declarations."); Ferri v. U.S. Dep't of Justice, 573 F. Supp. 852, 856-57 (W.D. Pa. 1983) (holding that 6000 pages of unindexed grand jury testimony were sufficiently described); cf. Minier v. CIA, 88 F.3d 796, 804 (9th Cir. 1996) ("[W]hen a FOIA requester has sufficient information to present a full legal argument, there is no need for a Vaughn index.").

[263] See, e.g., Isley v. Executive Office for U.S. Attorneys, No. 98-5098, 1999 WL 1021934, at *7 (D.C. Cir. Oct. 21, 1999) ("The segregability requirement applies to all documents and all exemptions in the FOIA."); Krikorian v. Dep't of State, 984 F.2d 461, 467 (D.C. Cir. 1993) (remanding for segregability determination for "each of the withheld documents"); Edmonds Inst., 383 F. Supp. 2d at 108 ("The Vaughn index should contain a description of the segregability analysis . . . ."); Nat'l Res. Def. Council, 388 F. Supp. 2d at 1105 (denying summary judgment because agency "completely fail[ed] to analyze segregability"); The Wilderness Soc'y v. U.S. Dep't of the Interior, 344 F. Supp. 2d 1, 19 (D.D.C. 2004) (rejecting a "blanket declaration that all facts are so intertwined [as] to prevent disclosure under the FOIA" (citing Animal Legal Def. Fund, Inc. v. Dep't of the Air Force, 44 F. Supp. 2d 295, 301-02 (D.D.C. 1999))).

[264] See Kimberlin v. Dep't of Justice, 139 F.3d 944, 950 (D.C. Cir. 1998) (stating that it is reversible error for district court to fail to make segregability finding, and remanding for such a finding); Schiller v. NLRB, 964 F.2d 1205, 1210 (D.C. Cir. 1992) (same); see also Animal Legal Def. Fund, 44 F. Supp. 2d at 299 (chastising agency for failing to discharge "its duty under § 552(b)"); FOIA Update, Vol. XIV, No. 3, at 11-12 ("OIP Guidance: The 'Reasonable Segregation' Obligation") (urging agencies to heed this requirement, based upon emerging case law).

has not first been raised by the parties, the district court has "an affirmative duty" to consider the matter "sua sponte."[265] (For further discussions of this issue, see Procedural Requirements, "Reasonably Segregable" Obligation, above, and Litigation Considerations, "Reasonably Segregable" Requirements, below.) Questions regarding segregability also may be resolved through in camera inspection of documents by the district court, when necessary.[266] (For a further discussion of in camera inspection, see Litigation Considerations, In Camera Inspection, below.)

When voluminous records are at issue, courts have approved the use of Vaughn Indexes based upon representative samplings of the withheld documents.[267] This special procedure "allows the court and the parties to

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[265] Trans-Pac. Policing Agreement v. U.S. Customs Serv., 177 F.3d 1022, 1028 (D.C. Cir. 1999); see also Hornbeck, 2006 WL 696053, at *7 ("[D]istrict courts are required to consider segregability issues even when the parties have not specifically raised such claims."); Perry-Torres v. U.S. Dep't of State, 404 F. Supp. 2d 140, 144 (D.D.C. 2005) (noting court's sua sponte duty to consider segregability); Elec. Privacy Info. Ctr., 384 F. Supp. 2d at 111 n.4 (same).

[266] See Solar Sources, Inc. v. United States, 142 F.3d 1033, 1039 (7th Cir. 1998) (finding that in camera review, coupled with sworn agency declaration, "provided the district court with a sufficient factual basis to determine that the documents were properly withheld"); Becker v. IRS, 34 F.3d 398, 406 (7th Cir. 1994) (finding remand unnecessary as judge "did not simply rely on IRS affidavits describing the documents, but conducted an in camera review" (citing Hopkins v. HUD, 929 F.2d 81, 85 (2d Cir. 1991) (holding that absence of district court's findings on segregability warrants "remand with instructions to the district court to examine the inspector reports in camera"))).

[267] See, e.g., Neely v. FBI, 208 F.3d 461, 467 (4th Cir. 2000) (suggesting that, on remand, district court "resort to the well-established practice . . . of randomly sampling the documents in question"); Solar Sources, 142 F.3d at 1038-39 (approving use of sample of 6000 pages out of five million); Jones, 41 F.3d at 242 (approving sample comprising two percent of total number of documents at issue); Meeropol v. Meese, 790 F.2d 942, 956-57 (D.C. Cir. 1986) (allowing sampling of every 100th document when approximately 20,000 documents were at issue); Weisberg v. U.S. Dep't of Justice, 745 F.2d 1476, 1490 (D.C. Cir. 1984) (approving index of sampling of withheld documents, with over 60,000 pages at issue, even though no example of certain exemptions was provided); Hornbeck, 2006 WL 696053, at *6 ("When dealing with voluminous records, a court will sanction an index or agency declaration that describes only a representative sample of the total number of documents."); Nat'l Res. Def. Council, 388 F. Supp. 2d at 1089 (ordering parties to agree upon "representative sample" from more than 6500 documents that will provide basis for Vaughn Index); Jefferson v. O'Brien, No. 96-1365, slip op. at 5 (D.D.C. Feb. 22, 2000) (approving sample index of

(continued...)

reduce a voluminous FOIA exemption case to a manageable number of items" for the Vaughn Index and, "[i]f the sample is well-chosen, a court can, with some confidence, 'extrapolate its conclusions from the representative sample to the larger group of withheld materials.'"[268] Once a representative sampling of the withheld documents is agreed to, however, the agency's subsequent release of some of those documents may destroy the representativeness of the sample and thereby raise questions about the propriety of withholding other responsive documents that were not included in the sample.[269] In recognition of this danger, the D.C. Circuit has held

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[267](...continued)
approximately four percent of responsive records); see also Wash. Post v. DOD, 766 F. Supp. 1, 15-16 (D.D.C. 1991) (deciding that with more than 14,000 pages of responsive material involved, agency should produce detailed Vaughn Index for sample of files, such sample to be determined by parties or court); cf. Piper v. U.S. Dep't of Justice, 294 F. Supp. 2d 16, 20 (D.D.C. 2003) (noting that the parties agreed to sample of 357 pages out of 80,000 to be discussed in Vaughn Index); Kronisch v. United States, No. 83 CIV. 2458, 1995 WL 303625, at *1, *13 n.1 (S.D.N.Y. May 18, 1995) (holding sampling of fifty documents selected by plaintiff, out of universe of approximately 30,000 pages, to be appropriate basis for resolution of discovery dispute). But see Martinson v. Violent Drug Traffickers Project, No. 95-2161, 1996 WL 571791, at *8 (D.D.C. Aug. 7, 1996) ("This Court does not believe that 173 pages of located documents is even close to being 'voluminous.'"); SafeCard Servs. v. SEC, No. 84-3073, 1988 WL 58910, at *3-5 (D.D.C. May 19, 1988) (concluding that burden of indexing relatively small number of requested documents (approximately 200) was insufficient to justify sampling).

[268] Bonner v. U.S. Dep't of State, 928 F.2d 1148, 1151 (D.C. Cir. 1991) (quoting Fensterwald v. CIA, 443 F. Supp. 667, 669 (D.D.C. 1977)); see FlightSafety Servs. Corp. v. Dep't of Labor, 326 F.3d 607, 612-13 (5th Cir. 2003) (per curiam) (approving use of representative sample that was offered to district court for in camera inspection, because sample was "adequate" to demonstrate that no reasonably segregable information could be extracted from withheld records); Campaign for Responsible Transplantation v. FDA, 180 F. Supp. 2d 29, 34 (D.D.C. 2001) (approving representative sampling of one of many applications for investigational new drugs, all of which are "essentially uniform," but allowing plaintiff to select one to be sampled); cf. Halpern v. FBI, No. 94-365, 2002 WL 31012157, at *14 (W.D.N.Y. Aug. 31, 2001) (magistrate's recommendation) (opining in dicta that sampling would be inappropriate for the 116 pages at issue), adopted (W.D.N.Y. Oct. 16, 2001).

[269] See Bonner, 928 F.2d at 1153-54 (explaining that the sample should "uncover[] no excisions or withholdings improper when made," but also noting that "[t]he fact that some documents in a sample set become releasable with the passage of time does not, by itself, indicate any agency lapse"); Meeropol, 790 F.2d at 960 (finding error rate of twenty-five percent (continued...)

that an agency "must justify its initial withholdings and is not relieved of that burden by a later turnover of sample documents," and that "the district court must determine whether the released documents were properly redacted [when] initially reviewed."[270]

Many agencies use "coded" Vaughn Indexes -- which break certain FOIA exemptions into several categories, explain the particular nondisclosure rationales for each category, and then mark the exemption and category on the particular documents at issue.[271] Courts have generally accepted the use of such "coded" indexes when "[e]ach deletion was correlated specifically and unambiguously to the corresponding exemption . . . [which] was adequately explained by functional categories . . . [so as to] place[] each document into its historical and investigative perspective."[272]

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[269](...continued)
"unacceptably high"); Schrecker v. U.S. Dep't of Justice, 14 F. Supp. 2d 111, 117 (D.D.C. 1998) (ordering reprocessing of all documents because of problems with representative sampling).

[270] Bonner, 928 F.2d at 1154; see also Davin, 60 F.3d at 1053 (plaintiff's agreement to sampling does not relieve government of obligation to disclose reasonably segregable, nonexempt material in all responsive documents, including those not part of sample).

[271] See, e.g., Jones, 41 F.3d at 242-43 (noting that coded indices "have become accepted practice"); Maynard, 986 F.2d at 559 & n.13 (noting use by FBI and explaining format); Queen, 2005 WL 3204160, at *2 (same); accord 5 U.S.C. § 552(b) (second and third sentences following exemptions; requiring document markings as part of initial administrative processing).

[272] Keys v. U.S. Dep't of Justice, 830 F.2d 337, 349-50 (D.C. Cir. 1987); see, e.g., Judicial Watch, Inc., 449 F.3d at 147 (explaining that a Vaughn Index may utilize "codes and categories," so long as they are "sufficiently particularized to carry the agency's burden of proof"); Blanton v. Dep't of Justice, 64 F. App'x 787, 789 (D.C. Cir. 2003) (stating that "coding . . . adequately describes the documents and justifies the exemptions"); Maynard, 986 F.2d at 559 n.13 (explaining that "use of coded indices has been explicitly approved by several circuit courts"); Garcia v. U.S. Dep't of Justice, 181 F. Supp. 2d 356, 370 (S.D.N.Y. 2002) (accepting adequacy of agency's coded Vaughn Index); Baez v. FBI, 443 F. Supp. 2d 717, 723 (E.D. Pa. 2006) (upholding use of coded Vaughn Index where agency "redacted only identifying information and administrative markings"); Heeney v. FDA, No. 97-5461, 1999 U.S. Dist. LEXIS 23365, at *23 (C.D. Cal. Mar. 16, 1999) (finding agency's coded declaration to be sufficient), aff'd, 7 F. App'x 770 (9th Cir. 2001); Canning, 848 F. Supp. at 1043 ("[T]here is nothing inherently improper about the use of a coding system."); Steinberg v. U.S. Dep't of Justice, 801 F. Supp. 800, 803 (D.D.C. 1992), aff'd in pertinent part & remanded in part, 23 F.3d 548 (D.C. Cir. 1994) (refusing to find coded Vaughn Index inadequate); cf. Fiduccia, 185 F.3d at 1043-44 (observing that "[t]he form of
(continued...)

Innovative formats for "coded" affidavits have been found acceptable, so long as they enhance the ultimate goal of overall "descriptive accuracy" of the affidavit.[273]

The D.C. Circuit has gone so far as to hold that the district court judge's review of only the expurgated documents -- an integral part of the "coded" affidavit -- was sufficient in a situation in which the applicable exemption was obvious from the face of the documents.[274] However, this approach has been found inadequate when the coded categories are too "far ranging" and more detailed subcategories could be provided.[275] Indeed, when numerous pages of records are withheld in full, a "coded" affidavit

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[272](...continued)
disclosure is not critical" and that "redacted documents [can be] an entirely satisfactory (perhaps superior) alternative to a Vaughn index or affidavit performing this function"); Davin, 60 F.3d at 1051 ("While the use of the categorical method does not per se render a Vaughn index inadequate, an agency using justification codes must also include specific factual information concerning the documents withheld and correlate the claimed exemptions to the withheld documents."), on remand, No. 92-1122, slip op. at 6 (W.D. Pa. Apr. 9, 1998) (approving revised coded Vaughn Index), aff'd, 176 F.3d 471 (3d Cir. 1999) (unpublished table decision). But see Wiener, 943 F.2d at 978-79 (rejecting coded affidavits on belief that such categorical descriptions fail to give requester sufficient opportunity to contest withholdings); Samuel Gruber Educ. Project v. U.S. Dep't of Justice, 24 F. Supp. 2d 1, 8 (D.D.C. 1998) (magistrate's recommendation) (suggesting that coded Vaughn Indexes have been "near[ly] universal[ly] condemnation"), adopted with modifications, No. 90-1912 (D.D.C. Mar. 17, 1998).

[273] See Nat'l Sec. Archive v. Office of the Indep. Counsel, No. 89-2308, 1992 WL 1352663, at *3-4 (D.D.C. Aug. 28, 1992) (finding "alphabetical classification" properly employed to facilitate coordination of agency justifications where information was withheld by multiple agencies under various exemptions); see also King, 830 F.2d at 225; Canning, 848 F. Supp. at 1043.

[274] Delaney, Migdail & Young, Chartered v. IRS, 826 F.2d 124, 128 (D.C. Cir. 1987); see Whittle v. Moschella, 756 F. Supp. 589, 595 (D.D.C. 1991) ("For two large redactions, the contents are not readily apparent, but since the information there redacted was provided by confidential sources, it is entirely protected from disclosure."); see also King, 830 F.2d at 221 ("Utilization of reproductions of the material released to supply contextual information about material withheld is clearly permissible, but caution should be exercised in resorting to this method of description."); cf. Fiduccia, 185 F.3d at 1043 (recognizing that a Vaughn Index is "a superfluity" when the plaintiff and the court can ascertain the nature of information withheld by reviewing the redacted documents).

[275] See King, 830 F.2d at 221-22. But see Canning, 848 F. Supp. at 1044-45 (approving coded Vaughn Index for classified information and differentiating it from that filed in King).

that does not specifically correlate multiple exemption claims to particular portions of the pages withheld has been found to be impermissibly conclusory.[276]

Agencies employing "coded" indexes ordinarily attach copies of the records released in part -- i.e., the "expurgated" documents -- as part of their public Vaughn submission.[277] But agencies seeking to justify withholding records from first-party FOIA requesters should be mindful of the fact that the public filing of expurgated documents about the individual requester (or even detailed descriptions of them in briefs) may constitute a "disclosure" under subsection (b) of the Privacy Act of 1974.[278] Unless proceeding under seal, or with the prior written consent of the requester, an agency should strive to make such a disclosure only in accordance with one of the exceptions set forth in the Privacy Act -- such as its "routine use" exception or its "court order" exception.[279]

Although an agency ordinarily must justify its withholdings on a

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[276] See Coleman v. FBI, No. 89-2773, 1991 WL 333709, at *4 (D.D.C. Apr. 3, 1991) (allowing "coded" affidavit for expurgated pages, but rejecting it as to pages withheld in full), summary affirmance granted, No. 92-5040, 1992 WL 373976 (D.C. Cir. Dec. 4, 1992); see also Williams v. FBI, No. 90-2299, 1991 WL 163757, at *3-4 (D.D.C. Aug. 6, 1991) (finding "coded" affidavit insufficiently descriptive as to documents withheld in their entireties).

[277] See, e.g., Maynard, 986 F.2d at 559 n.13 (explaining coded Vaughn procedure); Queen, 2005 WL 3204160, at *3 (noting that the agency attached redacted pages to its coded declaration and "labeled each redaction with an exemption code").

[278] 5 U.S.C. § 552a(b) (2000 & Supp. IV 2004); see, e.g., Krohn v. U.S. Dep't of Justice, No. 78-1536, slip op. at 2-7 (D.D.C. Mar. 19, 1984), vacated in part on other grounds (D.D.C. Nov. 29, 1984); Citizens Bureau of Investigation v. FBI, No. C78-80, slip op. at 3 (N.D. Ohio Dec. 12, 1979); see also Langingham v. U.S. Navy, No. 83-3238, slip op. at 2-3 (D.D.C. Sept. 25, 1984), summary judgment granted (D.D.C. Jan. 7, 1985), aff'd per curiam, 813 F.2d 1236 (D.C. Cir. 1987).

[279] 5 U.S.C. § 552a(b)(3), (11); see also, e.g., 66 Fed. Reg. 36593, 36593 (July 12, 2001) (listing routine uses applicable to records in Justice Department's Civil Division Case File System); 63 Fed. Reg. 8666, 8667-68 (Feb. 20, 1998) (listing routine uses applicable to records in United States Attorneys' Offices' Civil Case Files); cf. Blazy v. Tenet, 979 F. Supp. 10, 27 (D.D.C. 1997) (agreeing to an uncontested order to seal Privacy Act-protected documents released pursuant to a routine use, while chiding the plaintiff that "[h]aving obtained three volumes of released documents through this litigation, [he] somewhat ironically complains that the government improperly filed these documents with the Court in violation of his privacy rights"), summary affirmance granted, No. 97-5330, 1998 WL 315583 (D.C. Cir. May 12, 1998).

page-by-page or document-by-document basis, under certain circumstances courts have approved withholdings of entire, but discrete, categories of records which encompass similar information.[280] Most commonly, courts have permitted the withholding of records under Exemption 7(A) on a category-by-category or "generic" basis.[281] While the outermost contours

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[280] See Judicial Watch, Inc., 449 F.3d at 148 (concluding that the agency's "decision to tie each document to one or more claimed exemptions in its index and then summarize the commonalities of the documents in a supporting affidavit is a legitimate way of serving those functions"); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 223-24 (1978) (stating that language of Exemption 7(A) "appears to contemplate that certain generic determinations may be made"); Crooker v. ATF, 789 F.2d 64, 66-67 (D.C. Cir. 1986) (distinguishing between unacceptable "blanket" exemptions and permissible generic determinations); Pully v. IRS, 939 F. Supp. 429, 433-38 (E.D. Va. 1996) (accepting categorization of 5624 documents into twenty-six separate categories protected under several exemptions); see also U.S. Dep't of Justice v. Landano, 508 U.S. 165, 179 (1993) ("There may well be other generic circumstances in which an implied assurance of confidentiality fairly can be inferred."); U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 776 (1989) (instructing that "categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction"); cf. Coleman v. FBI, 972 F. Supp. 5, 8 (D.D.C. 1997) ("For an agency to break from the norm of a document-by-document index, the agency must at least argue that a 'categorical' index is warranted.").

[281] See, e.g., Robbins Tire, 437 U.S. at 218-23 (endorsing government's position "that a particularized, case-by-case showing is neither required nor practical, and that witness statements in pending unfair labor practice proceedings are exempt as a matter of law from disclosure [under Exemption 7(A)] while the hearing is pending"); Solar Sources, 142 F.3d at 1040 (reiterating that detailed Vaughn Index is not generally required in Exemption 7(A) cases); In re Dep't of Justice, 999 F.2d 1302, 1309 (8th Cir. 1993) (en banc); Dickerson v. Dep't of Justice, 992 F.2d 1426, 1428, 1433-34 (6th Cir. 1993) (approving FBI justification of Exemption 7(A) for documents pertaining to disappearance of Jimmy Hoffa on "category-of-document" basis by supplying "a general description of the contents of the investigatory files, categorizing the records by source or function"); Lewis v. IRS, 823 F.2d 375, 389 (9th Cir. 1987) ("The IRS need only make a general showing that disclosure of its investigatory records would interfere with its enforcement proceedings."); Bevis v. Dep't of State, 801 F.2d 1386, 1389 (D.C. Cir. 1986); W. Journalism Ctr. v. Office of the Indep. Counsel, No. 96-5178, 1997 WL 195516, at *1 (D.C. Cir. Mar. 11, 1997) ("[A]ppellee was not required to describe the records retrieved in response to appellants' request, or the harm their disclosure might cause, on a document-by-document basis, as appellee's description of the information contained in the three categories it devised is sufficient to permit the court to determine whether the information retrieved is exempt from disclosure."); see also Citizens Comm'n, 45

(continued...)

of what constitutes acceptable "generic" Exemption 7(A) Vaughn declarations are sometimes unclear,[282] it appears well established that if the agency has (1) defined its Exemption 7(A) categories functionally, (2) conducted a document-by-document review in order to assign documents to the proper category, and (3) explained how the release of each category of information would interfere with the enforcement proceedings, the description will be found sufficient.[283] (See the discussion of Vaughn Indexes under Exemption 7(A), above.) Moreover, when "a claimed FOIA exemption consists of a generic [exemption], dependent upon the category of records rather than the subject matter which each individual record contains [so

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[281](...continued)
F.3d at 1328 (for responsive records consisting of 1000 volumes of 300 to 400 pages each, volume-by-volume summary held adequate when Vaughn Indexes sufficiently describe the documents' contents and give specific reasons for withholding them"); Gavin v. SEC, No. 04-4522, 2005 WL 2739293, at *3 (D. Minn. Oct. 24, 2005) (recognizing propriety of categorical approach to justify use of Exemption 7(A)); FOIA Update, Vol. V, No. 2, at 3-4 (describing appropriate affidavits for cases involving Exemption 7(A)). But see Detroit Free Press v. U.S. Dep't of Justice, 174 F. Supp. 2d 597, 601 (E.D. Mich. 2001) (ordering in camera review because Vaughn Index statements concerning potential harm from release of any information about disappearance of former Teamsters president Jimmy Hoffa were undermined by publication of specifics concerning Hoffa investigation); cf. Inst. for Justice & Human Rights v. Executive Office of the U.S. Attorney, No. C 96-1469, 1998 WL 164965, at *6-7 (N.D. Cal. Mar. 18, 1998) (refusing to permit agency to justify Exemption 7(A) withholdings by category when it had already submitted Vaughn Indexes justifying withholdings on document-by-document basis).

[282] Compare Curran v. Dep't of Justice, 813 F.2d 473, 476 (1st Cir. 1987) (approving category entitled "other sundry items of information" because "[a]bsent a 'miscellaneous' category of this sort, the FBI would, especially in the case of one-of-a-kind records, have to resort to just the sort of precise description which would itself compromise the exemption"), and May v. IRS, No. 90-1123-CV-W-2, 1991 WL 328041, at *2-3 (W.D. Mo. Dec. 9, 1991) (approving categories of "intra-agency memoranda" and "work sheets"), with Bevis, 801 F.2d at 1390 ("categories identified only as 'teletypes,' or 'airtels,' or 'letters'" held inadequate).

[283] See In re Dep't of Justice, 999 F.2d at 1309 (citing Bevis, 801 F.2d at 1389-90); Manna v. U.S. Dep't of Justice, 815 F. Supp. 798, 806 (D.N.J. 1993); see also Dickerson, 992 F.2d at 1433 (enumerating categories of information withheld); Judicial Watch, Inc. v. FBI, No. 00-745, 2001 WL 35612541, at *5 (D.D.C. Apr. 20, 2001) (same); Curran, 813 F.2d at 476 (same); May, 1991 WL 328041, at *3-4 (same); Docal v. Bennsinger, 543 F. Supp. 38, 44 n.12 (M.D. Pa. 1981) (enumerating categories of "interference"); cf. Curran, 813 F.2d at 476 (stating that FBI affidavit met Bevis test and therefore finding it unnecessary to determine whether Bevis test is too demanding).

that] resort to a Vaughn index is futile,"[284] such generic descriptions can also satisfy an agency's Vaughn obligation with regard to other exemptions as well.[285]

In a broad range of contexts, most courts have refused to require agencies to file public Vaughn Indexes that are so detailed as to reveal sensitive information the withholding of which is the very issue in the litigation.[286] Therefore, in camera affidavits are frequently utilized in Exemp-

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[284] Church of Scientology v. IRS, 792 F.2d 146, 152 (D.C. Cir. 1986).

[285] See Reporters Comm., 489 U.S. at 779-80 (authorizing "categorical" protection of information under Exemption 7(C)); Gallant, 26 F.3d at 173 (approving categorical withholding of names under Exemption 6); Church of Scientology, 792 F.2d at 152 (finding generic exemption under IRS Exemption 3 statute, 26 U.S.C. § 6103 (2000), appropriate if "affidavit sufficiently detailed to establish that the document or group of documents in question actually falls into the exempted category"); Antonelli v. FBI, 721 F.2d 615, 617-19 (7th Cir. 1983) (holding that no index required in third-party request for records when agency categorically neither confirmed nor denied existence of records on particular individuals absent showing of public interest in disclosure); Brown v. FBI, 658 F.2d 71, 74 (2d Cir. 1981) (protecting personal information under Exemption 6); Pully, 939 F. Supp. at 433-38 (accepting categorical descriptions for documents protected under Exemptions 3 (in conjunction with 26 U.S.C. § 6103(a)), 5 (attorney-client privilege), 7(A), 7(C), and 7(E) -- 5624 documents arranged into twenty-six categories); May, 1991 WL 328041, at *3-4 (protecting withholdings under both Exemption 7(A) and Exemption 3 (in conjunction with 26 U.S.C. § 6103)); NTEU, 602 F. Supp. at 472-73 (finding no index required for forty-four crediting plans withheld under Exemption 2); see also FOIA Update, Vol. X, No. 2, at 6 (discussing categorical Exemption 7(C) balancing under Reporters Committee). But see Judicial Watch, Inc., 402 F. Supp. 2d at 251 ("The fact that federal employees have an identifiable privacy interest in avoiding disclosures of information that could lead to annoyance or harassment . . . does not authorize a 'blanket exemption' for the names of all government employees."); McNamara v. U.S. Dep't of Justice, 949 F. Supp. 478, 483 (W.D. Tex. 1996) (rejecting apparent categorical indices for criminal files on third parties that were withheld under Exemptions 6 and 7(C) because "there is no way for the court to tell whether some, a portion of some, or all the documents being withheld fall within any of the exemptions claimed"); cf. Church of Scientology, 30 F.3d at 234 ("[A] categorical approach to nondisclosure is permissible only when the government can establish that, in every case, a particular type of information may be withheld regardless of the specific surrounding circumstances.").

[286] See, e.g., Landano, 508 U.S. at 180 ("To the extent that the Government's proof may compromise legitimate interests, of course, the Government still can attempt to meet its burden with in camera affidavits."); Bassiouni v. CIA, 392 F.3d 244, 246 (7th Cir. 2004) ("The risk to intelligence

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tion 1 cases when a public description of responsive documents would compromise national security.[287] (For a further discussion of this point, see

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[286](...continued)
sources and methods comes from the details that would appear in a Vaughn index . . . ."), cert. denied, 545 U.S. 1129 (2005); Lion Raisins, 354 F.3d at 1084 (vouching that an agency need not "disclose facts that would undermine the very purpose of its withholding"); Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1089, 1093 (9th Cir. 1997) ("Indeed we doubt that the agency could have introduced further proof without revealing the actual contents of the withheld materials."); Oglesby v. U.S. Dep't of the Army, 79 F.3d 1172, 1176 (D.C. Cir. 1996) ("The description and explanation the agency offers should reveal as much detail as possible as to the nature of the document without actually disclosing information that deserves protection."); Maynard, 986 F.2d at 557 (emphasizing that although public declaration "lacked specifics, a more detailed affidavit could have revealed the very intelligence sources or methods that the CIA wished to keep secret"); Lewis, 823 F.2d at 380 ("[A] Vaughn index of the documents here would defeat the purpose of Exemption 7(A). It would aid [the requester] in discovering the exact nature of the documents supporting the government's case against him earlier than he otherwise would or should."); Curran, 813 F.2d at 476 (agency should not be forced "to resort to just the sort of precise description which would itself compromise the exemption"); Church of Scientology v. U.S. Dep't of the Army, 611 F.2d 738, 742 (9th Cir. 1980) (recognizing that "the government need not specify its objections in such detail as to compromise the secrecy of the information"); Baez, 443 F. Supp. 2d at 723 ("[I]t is hard to see how the government could have provided . . . more information about the redactions without disclosing the redacted information itself."); Odle, 2006 WL 1344813, at *9 (explaining that the Vaughn Index must "disclose 'as much as possible without thwarting the claimed exemption's purposes'" (quoting Wiener, 943 F.2d at 977)); Herrick's Newsletter, 2005 WL 3274073, at *4 ("The Court will not require an agency to describe the withheld material with such specificity as to result in the constructive equivalent of actual disclosure."); Berman v. CIA, 378 F. Supp. 2d 1209, 1215-16 (E.D. Cal. 2005) (recognizing that because the CIA's declaration "is part of the public record," it must of necessity support the withholding of intelligence sources and methods through the use of "terms that are general").

[287] See, e.g., Doyle v. FBI, 722 F.2d 554, 556 (9th Cir. 1983) (approving use of in camera affidavits in certain cases involving national security exemption); Edmonds, 272 F. Supp. 2d at 46 (approving the use of an in camera affidavit because "extensive public justification would threaten to reveal the very information for which a FOIA exemption is claimed"); Pub. Educ. Ctr., Inc. v. DOD, 905 F. Supp. 19, 22 (D.D.C. 1995) (same); Keys v. U.S. Dep't of Justice, No. 85-2588, slip op. at 3 (D.D.C. May 12, 1986) (noting "the inherent problems that necessarily arise whenever a FOIA affiant is confronted with the need to be circumspect" due to national security concerns), aff'd on other grounds, 830 F.2d at 337; Peltier v. FBI, No. 03-CV-905, (continued...)

Litigation Considerations, In Camera Inspection, below.) This same important principle also has been applied to other FOIA exemptions -- for example, in Exemption 5 cases,[288] in Exemption 7(A) cases,[289] in Exemption 7(C) cases,[290] and in Exemption 7(D) cases.[291] However, in all cases in which explanations for withholding are presented in camera, the agency is obliged to ensure that it first has set forth on the public record an explanation that

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[287](...continued)
2006 WL 462096, at *1 (W.D.N.Y. Feb. 24, 2006) (allowing submission of in camera Vaughn Index to justify withholding pursuant to Exemption 1), aff'd, No. 06-1405, 2007 WL 627534 (2d Cir. Feb. 23, 2007); see also CIA v. Sims, 471 U.S. 159, 179 (1985) (recognizing that "the mere explanation of why information must be withheld can convey [harmful] information").

[288] See, e.g., Ethyl Corp. v. EPA, 25 F.3d 1241, 1250 (4th Cir. 1994) ("If the district court is satisfied that the EPA cannot describe documents in more detail without breaching a properly asserted confidentiality, then the court is still left with the mechanism provided by the statute -- to conduct an in camera review of the documents."); Wolfe v. HHS, 839 F.2d 768, 771 n.3 (D.C. Cir. 1988) (en banc) ("Where the index itself would reveal significant aspects of the deliberative process, this court has not hesitated to limit consideration of the Vaughn index to in camera inspection.").

[289] See, e.g., Alyeska Pipeline Serv. v. EPA, No. 86-2176, 1987 WL 17071, at *3 (D.D.C. Sept. 9, 1987) ("[R]equiring a Vaughn index in this matter will result in exactly the kind of harm to defendant's law enforcement proceedings which it is trying to avoid under exemption 7(A)."), aff'd on other grounds, 856 F.2d 309 (D.C. Cir. 1988); Dickerson v. Dep't of Justice, No. 90-60045, 1991 WL 337422, at *3 (E.D. Mich. July 31, 1991), aff'd, 992 F.2d 1426 (6th Cir. 1993).

[290] See Canning v. Dep't of Justice, No. 01-2215, slip op. at 6 (D.D.C. May 27, 2005) (permitting agency to file portion of declaration in camera in order to avoid compromising Exemption 7(C) position).

[291] See, e.g., Carpenter v. U.S. Dep't of Justice, 470 F.3d 434, 442 (1st Cir. 2006) (explaining that, in the instant Exemption 7(C) case, "[e]ven if [plaintiff] had asserted a valid public interest, the appropriate method for a detailed evaluation of the competing interests would have been through an in camera review because a standard Vaughn index might result in disclosure of the very information that the government attempted to protect"); Landano, 508 U.S. at 180 (ruling that government can meet its burden with in camera affidavits in order to avoid identification of sources in Exemption 7(D) withholdings); Church of Scientology, 30 F.3d at 240 n.23 (same); Keys, 830 F.2d at 349 (announcing that there is no requirement to produce Vaughn Index in "degree of detail that would reveal precisely the information that the agency claims it is entitled to withhold"); Doe v. U.S. Dep't of Justice, 790 F. Supp. 17, 21 (D.D.C. 1992) ("[A] meaningful description beyond that provided by the Vaughn code utilized in this case would probably lead to disclosure of the identity of sources.").

is as complete as possible without compromising the sensitive information.[292]

With regard to the timing of the creation of a Vaughn Index, it is well settled that a requester is not entitled to receive one during the administrative process.[293] Furthermore, courts generally do not require the submission of a Vaughn Index prior to the time at which a dispositive motion is filed; this standard practice is based upon the need to maintain an orderly and efficient adjudicative process in FOIA cases, and upon the practical reality that some form of affidavit, declaration, or index virtually always accompanies the defendant agency's motion for summary judgment.[294] Efforts to compel the preparation of Vaughn Indexes prior to the filing of an agency's dispositive motion are typically denied as premature.[295]

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[292] See Lion Raisins, 354 F.3d at 1084 (overturning district court decision that relied on in camera review of sealed declaration, and remanding for creation of Vaughn Index); Armstrong v. Executive Office of the President, 97 F.3d 575, 580-81 (D.C. Cir. 1996) (citing Lykins v. U.S. Dep't of Justice, 725 F.2d 1455, 1465 (D.C. Cir. 1984)); Philippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976); cf. Al Najjar v. Ashcroft, No. 00-1472, slip op. at 7 (D.D.C. July 22, 2003) (rejecting agencies' overly broad in camera submissions, and requiring agencies to augment public record before any ruling is made on dispositive motions).

[293] See, e.g., Schwarz v. U.S. Dep't of Treasury, 131 F. Supp. 2d 142, 147 (D.D.C. 2000) ("[T]here is no requirement that an agency provide a . . . 'Vaughn' index on an initial request for documents."); Edmond v. U.S. Attorney, 959 F. Supp. 1, 5 (D.D.C. 1997) (rejecting, as premature, request for Vaughn Index when agency had not processed plaintiff's request); see also FOIA Update, Vol. VII, No. 3, at 6; cf. Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 11 (D.D.C. 1995); Schaake v. IRS, No. 91-958, slip op. at 7-8 (S.D. Ill. June 3, 1992).

[294] See, e.g., Tannehill v. Dep't of the Air Force, No. 87-1335, slip op. at 1 (D.D.C. Aug. 20, 1987) (noting that standard practice is to await filing of agency's dispositive motion before deciding whether additional indexes will be necessary); British Airports Auth. v. CAB, 2 Gov't Disclosure Serv. (P-H) ¶ 81,234, at 81,654 (D.D.C. June 25, 1981) (explaining that "standard practice which has developed is for the Court to commit the parties to a schedule for briefing summary judgment motions," with "defendant typically fil[ing] first and simultaneously with or in advance of filing submit[ting] supporting affidavits and indices").

[295] See, e.g., Miscavige, 2 F.3d at 369 ("The plaintiff's early attempt in litigation of this kind to obtain a Vaughn Index . . . is inappropriate until the government has first had a chance to provide the court with the information necessary to make a decision on the applicable exemptions."); Gerstein v. CIA, No. 06-4643, 2006 WL 3462659, at *5 (N.D. Cal. Nov. 29, 2006) (denying plaintiff's request for Vaughn Index because agencies had not yet

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"Reasonably Segregable" Requirements

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt."[296] Added as part of the 1974 FOIA amendments,[297] this important provision was designed to narrow the focus of the application of exemptions from documents to specific segments of information within them.[298] Of course, the segments of information, if dis-

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[295](...continued)
begun responding to plaintiff's FOIA requests); Bassiouni v. CIA, 248 F. Supp. 2d 795, 797 (N.D. Ill. 2003) (finding plaintiff's request for a Vaughn Index premature because the case was "only in the initial stages"); Pyne v. Comm'r, No. 98-00253, 1999 WL 112532, at *3 (D. Haw. Jan. 6, 1999) (denying motion to compel submission of Vaughn Index as "premature" when agency had not yet refused to release records or provided supporting affidavit for nondisclosure); Stimac v. U.S. Dep't of Justice, 620 F. Supp. 212, 213 (D.D.C. 1985) (denying as premature motion to compel Vaughn Index on ground that "filing of a dispositive motion, along with detailed affidavits, may obviate the need for indexing the withheld documents"); see also Payne v. U.S. Dep't of Justice, No. 95-2968, 1995 WL 601112, at *1 (E.D. La. Oct. 11, 1995) (refusing to order Vaughn Index at "nascent" stage of litigation, i.e., when defendants had not even answered plaintiff's Complaint); Cohen v. FBI, 831 F. Supp. 850, 855 (S.D. Fla. 1993) (confirming that Vaughn Index is not required when "Open America" stay is granted "because no documents have been withheld on the grounds that they are exempt from disclosure"). But see Keeper of Mountains Found. v. U.S. Dep't of Justice, No. 06-cv-00098, 2006 WL 1666262, at *3 (S.D. W. Va. June 14, 2006) (granting the plaintiff's request for a Vaughn Index prior to the agency's dispositive motion, because production "at this stage of the litigation, rather than later at the summary judgment stage, is the more efficient and fair approach"); Providence Journal Co. v. U.S. Dep't of the Army, 769 F. Supp. 67, 69 (D.R.I. 1991) (finding contention that Vaughn Index must await dispositive motion to be "insufficient and sterile" when agency "has not even indicated when it plans to file such a motion"); cf. Schulz v. Hughes, 250 F. Supp. 2d 470, 475 (E.D. Pa. 2003) (ruling that upon payment of fees, agency should prepare Vaughn Index for any documents it refuses to release); ACLU v. DOD, 339 F. Supp. 2d 501, 504-05 (S.D.N.Y. 2004) (ordering production of a Vaughn Index prior to the filing of the defendants' dispositive motion, due to the "glacial pace at which defendant agencies have been responding to the plaintiffs' requests," which evinces "an indifference to the commands of FOIA and fails to afford accountability of government").

[296] 5 U.S.C. § 552(b) (2000 & Supp. IV 2004) (sentence immediately following exemptions).

[297] Pub. L. No. 93-502, 88 Stat. 1561.

[298] See Billington v. U.S. Dep't of Justice, 233 F.3d 581, 586 (D.C. Cir. (continued...)

closed, must have some meaning.[299] Furthermore, it must be technically feasible within the particular form of the requested record to segregate the exempt information from the nonexempt information.[300]

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[298](...continued)
2000) (emphasizing that the FOIA's segregability requirement limits exemption claims to "discrete units of information; to withhold an entire document, all units of information in that document must [be exempt]"); Schiller v. NLRB, 964 F.2d 1205, 1209 (D.C. Cir. 1992) ("'The focus in the FOIA is information not documents and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material.'" (quoting Mead Data Cent., Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977))); see also Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 14 (Feb. 1975); FOIA Update, Vol. XIV, No. 3, at 11-12 ("OIP Guidance: The 'Reasonable Segregation' Obligation"). But cf. Piper & Marbury, L.L.P. v. USPS, No. 99-2383, 2001 WL 214217, at *4 (D.D.C. Mar. 6, 2001) (magistrate's recommendation) (erroneously extrapolating from the segregability mandate the notion that "there is no authority for the proposition that entire documents are exempt from FOIA"), adopted (D.D.C. Mar. 30, 2001).

[299] See Thomas v. U.S. Dep't of Justice, No. 1:04-CV-112, 2006 WL 722141, at *4 (E.D. Tex. Mar. 15, 2006) (noting that redacting telephone recordings for segregable information "would have left nothing meaningful to release"); Nat'l Sec. Archive Fund, Inc. v. CIA, 402 F. Supp. 2d 211, 220-21 (D.D.C. 2005) (concluding that no reasonably segregable information exists, because "the non-exempt information would produce only incomplete, fragmented, unintelligible sentences composed of isolated, meaningless words"); Givner v. Executive Office for U.S. Attorneys, No. 99-3454, slip op. at 17-18 (D.D.C. Mar. 1, 2001) (deciding that agencies may withhold nonexempt information if it amounts to "'essentially meaningless words and phrases'" (quoting Neufield v. IRS, 646 F.2d 661, 663 (D.C. Cir. 1981))); Warren v. Soc. Sec. Admin., No. 98-0116E, 2000 WL 1209383, at *5 (W.D.N.Y. Aug. 22, 2000) (reasoning that documents are not reasonably segregable when the only nonexempt information amounts to "little more than templates"), aff'd in pertinent part, 10 F. App'x 20 (2d Cir. 2001); Pub. Citizen v. Dep't of State, 100 F. Supp. 2d 10, 25 (D.D.C. 2000) ("The district court judge 'is not called upon to take on the role of censor going through a line-by-line analysis for each document and removing particular words.'" (quoting Ray v. Turner, 587 F.2d 1187, 1197 (D.C. Cir. 1978))), aff'd in part, rev'd in part & remanded on other grounds, 276 F.3d 674 (D.C. Cir. 2002); cf. Solar Sources, Inc. v. United States, 142 F.3d 1033, 1039 (7th Cir. 1998) ("[C]ourts should not order segregation when such a process would be significantly unwieldy.").

[300] See, e.g., Swope v. U.S. Dep't of Justice, 439 F. Supp. 2d 1, 7 (D.D.C. 2006) (concluding that "the exempt and nonexempt portions of the telephone conversations could not be reasonably segregated," based on the Bureau of Prisons' explanation that it lacked the technical capability to do
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As a general rule, "[t]he 'segregability requirement applies to all documents and all exemptions in the FOIA.'"[301] To meet this requirement, agency declarations must address the issue "with reasonable specificity."[302] Indeed, conclusory language in agency declarations that does not provide a specific basis for segregability findings by district courts may be found inadequate.[303] Nevertheless, a court might be able to make its own segre-

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[300](...continued)
so); Butler v. Fed. Bureau of Prisons, No. 05-643, 2005 WL 3274573, at *5 (D.D.C. Sept. 27, 2005) (holding that because the agency relied on a rudimentary tape recorder to segregate information "the exempt and non-exempt portions of telephone conversation could not be reasonably segregated"); see also McMillian v. Fed. Bureau of Prisons, No. 03-1210, 2004 WL 4953170, at *8 (D.D.C. July 23, 2004) (upholding defendant's position that exempt and nonexempt portions of telephone conversation were inextricably intertwined because even if tape was made of only plaintiff's side of conversation, comments would be out of context and misleading); cf. 5 U.S.C. § 552(a)(4)(B) (codifying standard of "technical feasibility" in several parts of Act, including subsection (b), as practical matter; speaking also of "substantial weight" to be given agency "feasibility" determinations).

[301] Hornbostel v. U.S. Dep't of the Interior, 305 F. Supp. 2d 21, 34 (D.D.C. 2003) (quoting Ctr. for Auto Safety v. EPA, 731 F.2d 16, 21 (D.C. Cir. 1984)); see McSheffrey v. Executive Office for U.S. Attorneys, 13 F. App'x 3, 4 (D.C. Cir. 2001) (remanding with explicit instructions that the district court "determine whether any portion of these documents can be segregated for release"); Mays v. DEA, 234 F.3d 1324, 1328 (D.C. Cir. 2000) (remanding to determine whether "any intelligible portion of the contested pages can be segregated for release"). But see Judicial Watch, Inc. v. U.S. Dep't of Justice, 432 F.3d 366, 371 (D.C. Cir. 2005) (holding that "[i]f a document is fully protected as [attorney] work product, then segregability is not required").

[302] Elec. Privacy Info Ctr. v. TSA, No. 03-1846, 2006 WL 626925, at *8 (D.D.C. Mar. 12, 2006) (explaining that a "line-by-line" review is not required as the court considers "a variety of factors to determine if Defendants' segregability justifications [are] sufficiently detailed and reasonable, rather than requiring a specific checklist of form language"); Animal Legal Def. Fund v. Dep't of the Air Force, 44 F. Supp. 2d 295, 301 (D.D.C. 1999) (citing Armstrong v. Executive Office of the President, 97 F.3d 575, 578 (D.C. Cir. 1996)); see Judicial Watch v. HHS, 27 F. Supp. 2d 240, 246 (D.D.C. 1998) ("If a court is to make specific findings of segregability without conducting in camera review in every FOIA case, the government simply must provide more specific information in its Vaughn affidavits.").

[303] See Pa. Dep't of Pub. Welfare v. HHS, No. 05-1285, 2006 WL 3792628, at *17 (W.D. Pa. Dec. 21, 2006) (concluding that agency's declaration is too broad and fails to provide factual recitation as to segregability); Voinche v. FBI, 412 F. Supp. 2d 60, 69 (D.D.C. 2006) (denying summary judgment as to Exemption 7(E) because the agency provided "nothing but conclusory

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gability determination, even in the absence of an adequate analysis in an agency's declaration.[304]

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[303](...continued)
statements as to the impossibility of segregating any portions of the released material without even citing specifically which withheld documents it was referring to") (appeal pending); Nat'l Res. Def. Council v. DOD, 388 F. Supp. 2d 1086, 1106 (C.D. Cal. 2005) (finding that the segregability analysis is not met based on a "boilerplate statement . . . , which conclusorily asserts [that] all reasonably segregable information has been released"); Gavin v. SEC, No. 04-4522, 2005 WL 2739293, at *4 (D. Minn. Oct. 24, 2005) (ordering agency to provide detailed affidavits as record is insufficient to enable determination as to whether agency has sustained its burden of reasonable segregability), reconsideration denied, 2006 WL 208783 (D.D.C. Jan. 26, 2006); Edmonds Inst. v. U.S. Dep't of the Interior, 383 F. Supp. 2d 105, 110 (D.D.C. 2005) (directing defendant to produce more detailed Vaughn Index because its "generalized paragraph on segregability" does not suffice); The Wilderness Soc'y v. U.S. Dep't of the Interior, 344 F. Supp. 2d 1, 19 (D.D.C. 2004) (holding that "a blanket declaration that all facts are so intertwined to prevent disclosure . . . does not constitute a sufficient explanation of non-segregability"); Wiener v. FBI, No. 83-1720, slip op. at 13 (C.D. Cal. Sept. 27, 2004) (finding that agency's conclusory justifications fail to meet agency's burden of proof regarding segregability); Dorsett v. U.S. Dep't of the Treasury, 307 F. Supp. 2d 28, 41 (D.D.C. 2004) (denying summary judgment in part "[b]ecause of [agency's] inadequate and conclusory segregability explanation," and ordering renewed motion with affidavit solely addressing segregability); Animal Legal Def. Fund, 44 F. Supp. 2d at 301 (holding that conclusory statement regarding segregability is "patently insufficient"); see also Patterson v. IRS, 56 F.3d 832, 839 (7th Cir. 1995) ("[B]ecause the [agency declaration] lumps all of the withheld information together in justifying nondisclosure, the district court could not have independently evaluated whether exempt information alone was being withheld or deleted in each instance.").

[304] See, e.g., Becker v. IRS, 34 F.3d 398, 406 (7th Cir. 1994) (finding remand unnecessary because judge "did not simply rely on IRS affidavits describing the documents, but conducted an in camera review"); Gutman v. U.S. Dep't of Justice, 238 F. Supp. 2d 284, 296 (D.D.C. 2003) (approving declaration that justified segregability determination based on inclusion of facts from withheld documents); Ferranti v. ATF, 177 F. Supp. 2d 41, 47 (D.D.C. 2001) (while recognizing a "substantial defect" in a declaration that fails to refer explicitly to segregability, nevertheless determining independently that the segregability requirement met by the "narrow scope of the categorical withholdings[,] . . . the good faith declaration that only such properly withheld information was redacted, and a careful review of the actual documents that plaintiff submitted"), summary affirmance granted, No. 01-5451, 2002 WL 31189766, at *1 (D.C. Cir. Oct. 2, 2002); see also Rugiero v. U.S. Dep't of Justice, 234 F. Supp. 2d 697, 710 (E.D. Mich. 2002) (ordering in camera review because "plaintiff has raised enough doubt" about segre-
(continued...)

Traditionally, the district court's segregability obligation arose upon a plaintiff's specific complaint or argument about the defendant agency's compliance with that statutory requirement.[305] In Trans-Pacific Policing Agreement v. United States Customs Service,[306] however, the Court of Appeals for the District of Columbia Circuit treated this obligation as a sua sponte requirement for the district court -- i.e., one to be met automatically even if the plaintiff had not raised the issue -- and it reversed a district court judgment on that basis alone.[307]

This means that even in the absence of a specific challenge by a FOIA plaintiff, an agency's Vaughn declaration readily can be found insufficient if it attempts to "justify withholding an entire document simply by showing that it contains some exempt material."[308] As a result, summary judgment may be denied to an agency if its declarations do not adequately demonstrate that all reasonably segregable, nonexempt information has been disclosed.[309] (For a further discussion of summary judgment require-

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[304](...continued)
gability issue); see also Campaign for Family Farms v. Veneman, No. 99-1165, 2001 WL 1631459, at *3 (D. Minn. July 19, 2001) (deciding sua sponte that zip codes and dates of signature entries on petition are not "reasonably segregable," because of "distinct possibility" that release of that information would thwart protected privacy interest).

[305] See, e.g., Summers v. Dep't of Justice, 140 F.3d 1077, 1081 (D.C. Cir. 1998); Judicial Watch v. HHS, 27 F. Supp. 2d 240, 246-47 & n.2 (D.D.C. 1998).

[306] 177 F.3d 1022 (D.C. Cir. 1999).

[307] Id. at 1027 (indicating that district court had duty to consider reasonable segregability even though requester never sought segregability finding); see Isley v. Executive Office for U.S. Attorneys, No. 98-5098, 1999 WL 1021934, at *7 (D.C. Cir. Oct. 21, 1999) (explaining that district court erred in failing to make segregability finding even though plaintiff failed to raise issue at trial); Brunetti v. FBI, 357 F. Supp. 2d 97, 111 (D.D.C. 2004) (noting that the district court "has a duty to consider the segregability of the withheld information sua sponte"); Schrecker v. U.S. Dep't of Justice, 74 F. Supp. 2d 26, 29 (D.D.C. 1999) ("[D]istrict courts are required to consider segregability issues even when the parties have not specifically raised such claims."), aff'd in pertinent part & rev'd in part, 254 F.3d 162 (D.C. Cir. 2001). But cf. Nicolaus v. FBI, 24 F. App'x 807, 809 (9th Cir. 2001) (refusing to consider plaintiff's segregability argument because he failed to raise it in his opening appellate brief).

[308] Mead Data, 566 F.2d at 260; see Kimberlin v. Dep't of Justice, 139 F.3d 944, 950 (D.C. Cir. 1998).

[309] See, e.g., Nat'l Res. Def. Council, 388 F. Supp. 2d at 1105-06 (denying defendants' motion for summary judgment, in part, because Vaughn Index
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ments, see Litigation Considerations, Summary Judgment, below.) Moreover, a district court decision may be remanded entirely on procedural grounds -- even if it correctly rules for the agency in all substantive exemption respects -- if it fails to make segregability findings.[310]

Ultimately, the agency's duty to deal with "reasonably segregable," nonexempt portions of records arises first at the administrative level and, indeed, an agency's careful action at this level may forestall problems later on. (For a discussion of document segregation at the administrative level, see Procedural Requirements, "Reasonably Segregable" Obligation, above.) This is so because, as previously noted, "regardless of whether a particular FOIA request proceeds to litigation, the obligation nonetheless is the same -- it 'applies to all documents and all exemptions in the FOIA.'"[311]

In Camera Inspection

The FOIA specifically authorizes in camera examination of docu-

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[309](...continued)
failed to provide segregability analysis); Wilderness Soc'y, 344 F. Supp. 2d at 19 (same); Animal Legal Def. Fund, 44 F. Supp. 2d at 301 (denying government's motion for summary judgment, in part, because declaration was insufficient on segregability issue). But see ACLU v. DOD, 389 F. Supp. 2d 547, 567-68 (S.D.N.Y. 2005) (granting government's motion for summary judgment with regard to segregability based on in camera review of Vaughn Index and classified declarations).

[310] See, e.g., James Madison Project v. NARA, No. 02-5089, 2002 WL 31296220, at *1 (D.C. Cir. Oct. 11, 2002) (per curiam) (remanding, despite ruling in favor of the government on exemptions, for a "more precise finding" on segregability); McSheffrey v. Executive Office for U.S. Attorneys, 13 F. App'x 3, 4 (D.C. Cir. 2001) (remanding with explicit instructions that the district court "determine whether any portion of these documents can be segregated for release"); Isley, 1999 WL 1021934, at *7 (remanding case for segregability finding); Kimberlin, 139 F.3d at 950 ("[W]e must remand this case to the district court to determine whether any of the withheld documents contains material that can be segregated and disclosed . . . ."); Wiener v. FBI, 943 F.2d 972, 988 (9th Cir. 1991) (holding that "district court erred by failing to make specific findings on the issue of segregability" and remanding for "specific finding that no information contained in each document or substantial portion of a document withheld is segregable"); cf. Johnson v. Executive Office for U.S. Attorneys, 310 F.3d 771, 777 (D.C. Cir. 2002) (approving of district court's sua sponte segregability determination). But see Carpenter v. U.S. Dep't of Justice, 470 F.3d 434, 443 (1st Cir. 2006) (concluding that, although district court failed to find expressly that there were no reasonably segregable portions, the district court's in camera inspection afforded it an opportunity to make this determination).

[311] FOIA Update, Vol. XIV, No. 3, at 12 (quoting Ctr. for Auto Safety, 731 F.2d at 21).

ments,[312] but whether to employ this tool of judicial review is a matter firmly committed to the "'broad discretion of the trial court judge.'"[313] Courts typically exercise their discretionary authority to order in camera inspection in exceptional rather than routine cases,[314] primarily because in cam-

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[312] See 5 U.S.C. § 552(a)(4)(B); see also S. Conf. Rep. No. 93-1200, at 9 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6287.

[313] Horowitz v. Peace Corps, 428 F.3d 271, 282 (D.C. Cir. 2005) (quoting Spirko v. USPS, 147 F.3d 992, 996 (D.C. Cir. 1998) (quoting, in turn, Lam Lek Chong v. DEA, 929 F.2d 729, 735 (D.C. Cir. 1991) (quoting, in turn, Carter v. U.S. Dep't of Commerce, 830 F.2d 388, 392 (D.C. Cir. 1987)))); accord Quiñon v. FBI, 86 F.3d 1222, 1227 (D.C. Cir. 1996); see, e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224 (1978) ("The in camera review provision is discretionary by its terms[.]"); Halpern v. FBI, 181 F.3d 279, 295 (2d Cir. 1999) (noting that in camera "review would have been appropriate," but leaving this to "the trial court's discretion on remand"), on remand, No. 94-CV-365A, 2002 WL 31012157, at *14 (W.D.N.Y. Aug. 31, 2002) (magistrate's recommendation) (denying plaintiff's motion for in camera inspection), adopted (W.D.N.Y. Oct. 17, 2002); Jernigan v. Dep't of the Air Force, No. 97-35930, 1998 WL 658662, at *1 n.3 (9th Cir. Sept. 14, 1998) ("Section 552(a)(4)(B) empowers, but does not require, a district court to examine the contents of agency records in camera . . . ."); Parsons v. Freedom of Info. Act Officer, No. 96-4128, 1997 WL 461320, at *1 (6th Cir. Aug. 12, 1997) (explaining that district court has discretion to conduct in camera inspection, but that it is neither "favored nor necessary" so long as adequate factual basis for decision exists); Armstrong v. Executive Office of the President, 97 F.3d 575, 579 (D.C. Cir. 1996) (finding that district court did not abuse its discretion when it undertook in camera review of one document, but not of another (similarly characterized) document); Miscavige v. IRS, 2 F.3d 366, 368 (11th Cir. 1993) (holding that in camera review "is discretionary and not required, absent an abuse of discretion"); Ingle v. Dep't of Justice, 698 F.2d 259, 267 (6th Cir. 1983) (listing four factors courts should consider before exercising discretion to review records in camera); Pons v. U.S. Customs Serv., No. 93-2094, 1998 U.S. Dist. LEXIS 6084, at *4 (D.D.C. Apr. 23, 1998) ("The ultimate criterion is whether the district judge believes that in camera inspection is necessary to make a responsible de novo determination on the agency's compliance with the FOIA statute.").

[314] See, e.g., Robbins Tire, 437 U.S. at 224 (explaining that in camera review provision "is designed to be invoked when the issue before the District Court could not be otherwise resolved"); PHE, Inc. v. U.S. Dep't of Justice, 983 F.2d 248, 252-53 (D.C. Cir. 1993) (observing that in camera review is generally disfavored, but permissible on remand arising from inadequate affidavit); Elec. Privacy Info. Ctr. v. DHS, 384 F. Supp. 2d 100, 119 (D.D.C. 2005) ("[C]ourts disfavor in camera inspection and it is more appropriate in only the exceptional case."); Iowa Citizens for Cmty. Improvement v. USDA, 256 F. Supp. 2d 946, 957 (S.D. Iowa 2002) (declaring that court should not be "super-administrator" that conducts in camera review in every FOIA

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era review "circumvents the adversarial process,"[315] but also because of the burdens involved.[316]

In camera review is unnecessary and inappropriate when agencies meet their burden of proof by means of sufficiently detailed affidavits.[317] In

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[314](...continued)
case); Animal Legal Def. Fund, Inc. v. Dep't of the Air Force, 44 F. Supp. 2d 295, 304 (D.D.C. 1999) ("'[I]n camera review should not be resorted to as a matter of course . . . .'" (quoting Quiñon, 86 F.3d at 1228)); Guccione v. Nat'l Indian Gaming Comm'n, No. 98-CV-164, 1999 U.S. Dist. LEXIS 15475, at *3 (S.D. Cal. Aug. 5, 1999) ("[I]n camera review is a last resort, to be used only when the propriety of the withholding cannot otherwise be determined.").

[315] Jones v. FBI, 41 F.3d 238, 243 (6th Cir. 1994) (citing Vaughn v. United States, 936 F.2d 862, 866 (6th Cir. 1991)); see McNamera v. U.S. Dep't of Justice, 974 F. Supp. 946, 956 (W.D. Tex. 1997) (suggesting that Vaughn Index is preferable to in camera inspection because "it keeps in tact [sic] our system of adversarial dispute resolution").

[316] See, e.g., Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1978) ("In camera inspection requires effort and resources and therefore a court should not resort to it routinely on the theory that 'it can't hurt.'"); Robert v. HHS, No. 01-CV-4778, 2005 WL 1861755, at *6 (E.D.N.Y. Aug. 1, 2005) (declaring that courts should not "spend scarce judicial resources for in camera review where defendant's affidavits are sufficiently descriptive and make clear that the privileges asserted apply").

[317] See, e.g., Nowak v. United States, No. 98-56656, 2000 WL 60067, at *2 (9th Cir. Jan. 21, 2000) (finding in camera review unnecessary where affidavits were sufficiently detailed); Young v. CIA, 972 F.2d 536, 538 (4th Cir. 1992) (rejecting in camera inspection when affidavits and Vaughn Indexes were sufficiently specific); Silets v. U.S. Dep't of Justice, 945 F.2d 227, 229-32 (7th Cir. 1991) (en banc) (same); Vaughn v. United States, 936 F.2d 862, 869 (6th Cir. 1991) (finding in camera review "neither favored nor necessary where other evidence provides adequate detail and justification"); Local 3, Int'l Bhd. of Elec. Workers v. NLRB, 845 F.2d 1177, 1180 (2d Cir. 1988) (rejecting in camera review because "detailed affidavit was sufficient"); Safeway, Inc. v. IRS, No. 05-3182, 2006 WL 3041079, at *10 (N.D. Cal. Oct. 24, 2006) (denying the plaintiff's request for in camera review because the agency "has sustained its burden of proof with respect to the documents as to which the Court has granted summary judgment"); Elec. Privacy, 384 F. Supp. 2d at 120 (finding in camera review unnecessary based on defendants' descriptions and justifications); Ocean Conservancy v. Evans, 260 F. Supp. 2d 1162, 1189-90 (M.D. Fla. 2003) (holding that the "[c]ourt's primary role in reviewing a government's claimed exemption under FOIA is not to conduct in camera review," and finding affidavits sufficient to justify exemption claims); Taylor v. U.S. Dep't of Justice, 257 F. Supp. 2d 101, 114 (D.D.C. 2003) (finding in camera review to be unnecessary because of ade-
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camera review is one of several options that may be ordered, however, when agency affidavits are insufficiently detailed to permit meaningful review of exemption claims.[318]

In camera review also may be ordered in other circumstances.[319] If

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[317](...continued)
quacy of defendant's affidavit and Vaughn Index); Falwell v. Executive Office of the President, 158 F. Supp. 2d 734, 738 (W.D. Va. 2001) (finding "no justification" for in camera review because the agency's affidavit provides "more than sufficient information to make a reasoned decision" as to the agency's compliance with the FOIA); Ligorner v. Reno, 2 F. Supp. 2d 400, 405 (S.D.N.Y. 1998) ("In camera review is only necessary when the evidence presented by the government is insufficient on its face to establish that non-disclosure is required, or when there is some evidence of agency bad faith.").

[318] See, e.g., Halpern, 181 F.3d at 295 (observing that "[in camera] review would have been appropriate" because agency affidavit was conclusory, but noting that "such action is one best left to the trial court's discretion"; Spirko, 147 F.3d at 997 ("If the agency fails to provide a sufficiently detailed explanation to enable the district court to make a de novo determination of the agency's claims of exemption, the district court then has several options, including inspecting the documents in camera."); Quiñon, 86 F.3d at 1229 ("[W]here an agency's affidavits merely state in conclusory terms that documents are exempt from disclosure, an in camera review is necessary."); In re Dep't of Justice, 999 F.2d 1302, 1310 (8th Cir. 1993) (en banc) ("If the [Vaughn Index] categories remain too general, the district court may also examine the disputed documents in camera to make a first hand determination."); Judicial Watch, Inc. v. Dep't of the Army, 435 F. Supp. 2d 81, 92 (D.D.C. 2006) (stating that the court "undertook an onerous in camera review" because the agency failed to provide a detailed Vaughn Index, and further declaring that the "FOIA mandates broad disclosure, and the right to withholding information constitute a narrow exception, not an exploitable rule"); Dohse v. Potter, No. 8:04CV355, 2005 WL 2180090, at *1 (D. Neb. Sept. 8, 2005) (granting plaintiff's motion for in camera review because of defendant's insufficiently detailed declaration). But cf. J.P. Stevens & Co. v. Perry, 710 F.2d 136, 142 (4th Cir. 1983) (holding that district court erred in conducting in camera inspection because Exemption 7(A) Vaughn affidavit was sufficient to show "interference" on category-by-category basis); Associated Builders & Contractors v. NLRB, No. 98-612, slip op. at 4 (S.D. Ohio Feb. 21, 2001) (deciding that in camera inspection is not required even if the agency's Vaughn Index is inadequate, so long as the court "is able to make an independent, reasoned judgment about the contents of the documents at issue and the applicability of the exemptions asserted").

[319] Cole v. U.S. Dep't of Justice, No. 05-674, 2006 WL 2792681, at *5 (D.D.C. Sept. 27, 2006) (stating that in camera review is appropriate when "the affidavit is 'insufficiently detailed to permit meaningful review of ex-
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the number of records involved is relatively small, in camera review may be utilized to save both the court and the parties time and resources.[320] In this regard, in camera review of a small sample of a larger set of documents

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[319](...continued)
emption claims' . . . where there is evidence of bad faith on the part of the agency, or where the judge wishes to resolve an uneasiness about the government's 'inherent tendency to resist disclosure'") (citations omitted); Hull v. U.S. Dep't of Labor, No. 04-cv-01264, slip op. at 16 (D. Colo. Dec. 2, 2005) (explaining that the following factors are considered in deciding whether to grant in camera review: "whether the affidavits submitted by the agency [were] too vague to allow review of the agency's claims, whether the number and size of the documents at issue would place an 'onerous burden' on the Court, and any evidence of agency bad faith in withholding the documents"); Dean v. FDIC, 389 F. Supp. 2d 780, 789 (E.D. Ky. 2005) (stating that the following factors should be considered when determining whether in camera review is appropriate: "'(1) judicial economy; (2) actual agency bad faith, either in the FOIA action or in the underlying activities that generated the records requested; (3) strong public interest; and (4) whether the parties request in camera review'" (quoting Rugiero v. U.S. Dep't of Justice, 257 F.3d 534, 543 (6th Cir. 2001))).

[320] See Quiñon, 86 F.3d at 1228 (suggesting that number of documents is "another . . . factor to be considered" when determining whether in camera review is appropriate); Maynard v. CIA, 986 F.2d 547, 558 (1st Cir. 1993) ("In camera review is particularly appropriate when the documents withheld are brief and limited in number."); Currie v. IRS, 704 F.2d 523, 530 (11th Cir. 1983) ("Thorough in camera inspection of the withheld documents where the information is extensive and the claimed exemptions are many . . . is not the preferred method of determining the appropriateness of the government agency's characterization of the withheld information."); Tax Analysts v. IRS, No. 94-923, 1999 U.S. Dist. LEXIS 19514, at *14 (D.D.C. Nov. 3, 1999) (noting, as factor justifying in camera review, minimal burden on court where only one sentence is to be reviewed); Local 32B-32J, Serv. Employees Int'l Union, AFL-CIO v. GSA, No. 97 Civ. 8509, 1998 WL 726000, at *11 (S.D.N.Y. Oct. 15, 1998) (observing that in camera review is "ordered most often in cases in which only a small number of documents are to be examined"); Steinberg v. U.S. Dep't of Justice, 179 F.R.D. 357, 364 (D.D.C. Apr. 28, 1998) (ordering in camera inspection of seven documents "[i]n the interests of efficiency"); see also Klunzinger v. IRS, 27 F. Supp. 2d 1015, 1028 (W.D. Mich. 1998) ("The withheld documents in this case are far too numerous to be considered the proper subject of an in camera inspection."); Animal Legal Def. Fund, 44 F. Supp. 2d at 304 (rejecting in camera review, but requiring agency to "submit a more detailed affidavit" in order to conserve judicial resources); Smith v. ATF, 977 F. Supp. 496, 503 (D.D.C. 1997) (finding that "judicial economy is best served" by allowing correction of deficient affidavits rather than by in camera review of two documents).

may be warranted.[321] Additionally, when a discrepancy is found to exist between representations in an agency's affidavit and other information that the agency has publicly disclosed about the withheld records, in camera inspection may be an appropriate method to resolve that discrepancy.[322]

Similarly, in camera inspection may be ordered in cases in which the plaintiff alleges that the government has waived its right to claim an exemption.[323] Further, in camera inspection may be used to verify that an agency has released all reasonably segregable information,[324] or to ascertain whether a district court properly ruled on the merits of a case.[325] (For a further discussion of appellate matters, see Litigation Considerations, Considerations on Appeal, below.)

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[321] See, e.g., Carter, 830 F.2d at 393 n.16 (suggesting that for voluminous documents, "selective inspection of . . . documents [is] often an appropriate compromise"); N.Y. Pub. Interest Research Group v. EPA, 249 F. Supp. 2d 327, 331 (S.D.N.Y. 2003) (discussing fact that in camera review was conducted of representative sample of documents); Wilson v. CIA, No. 89-3356, 1991 WL 226682, at *3 (D.D.C. Oct. 15, 1991) (ordering fifty-document sample of approximately 1000 pages withheld in whole or in part, selected equally by parties, for in camera examination); Wilson v. Dep't of Justice, No. 87-2415, 1991 WL 120052, at *4 (D.D.C. June 18, 1991) (requiring sample of eight of approximately eighty withheld documents, to be selected equally by each side, for detailed in camera description); Agee v. CIA, 517 F. Supp. 1335, 1336 (D.D.C. 1981) (utilizing "random" in camera review); cf. Young, 972 F.2d at 549 (rejecting a per se rule that would require in camera review "whenever the examination could be completed quickly"). But cf. Lame v. U.S. Dep't of Justice, 654 F.2d 917, 927 (3d Cir. 1981) (holding in camera sampling of law enforcement documents insufficient).

[322] See Mehl v. EPA, 797 F. Supp. 43, 46 (D.D.C. 1992) (conducting in camera inspection because affidavits contradicted published report).

[323] See Pub. Citizen v. U.S. Dep't of State, 787 F. Supp. 12, 13 (D.D.C. 1992) (finding exemptions properly invoked after reviewing records in camera), aff'd, 11 F.3d 198 (D.C. Cir. 1993).

[324] Jefferson v. U.S. Dep't of Justice, No. 01-1418, slip op. at 31 n.13 (D.D.C. Mar. 31, 2003) (deciding to hold in abeyance a segregability determination for documents claimed to be exempt on the basis of Exemption 5 of the FOIA until in camera inspection is completed); Citizens Progressive Alliance v. U.S. Bureau of Indian Affairs, 241 F. Supp. 2d 1342, 1359 (D.N.M. 2002) (noting that "all segregable portions of the documents have been released," a finding verified by in camera inspection).

[325] See, e.g., FlightSafety Servs. Corp. v. Dep't of Labor, 326 F.3d 607, 612 (5th Cir. 2003) (per curiam) (affirming district court's judgment after reviewing documents in camera); Tax Analysts v. IRS, 294 F.3d 71, 73 (D.C. Cir. 2002) (same).

LITIGATION CONSIDERATIONS

In camera review is most likely to be ordered when there is actual evidence of bad faith on the part of the agency;[326] indeed, in this circumstance, in camera review may be "particularly appropriate."[327] Moreover, even with the submission of adequately detailed affidavits -- and in the absence of any bad faith in the agency's FOIA processing -- in camera inspection may be undertaken based upon "evidence of bad faith or illegality with regard to the underlying activities which generated the documents at issue."[328] The Court of Appeals for the Sixth Circuit, in particular, has rea-

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[326] Rugiero v. U.S. Dep't of Justice, 257 F.3d 534, 547 (6th Cir. 2001) (finding that the requester failed to demonstrate "strong evidence of bad faith that calls into question the district court's decision not to conduct an in camera review").

[327] Quiñon, 86 F.3d at 1228; see, e.g., Jones, 41 F.3d at 242-43 (reviewing, at request of both parties, documents compiled as part of FBI's widely criticized COINTELPRO operations during 1960s and 1970s because of "evidence of bad faith or illegality with regard to the underlying activities which generated the documents at issue"); cf. Ford v. West, No. 97-1342, 1998 WL 317561, at *3 (10th Cir. June 12, 1998) ("'[M]ere allegations of bad faith' should not 'undermine the sufficiency of agency submissions.'" (quoting Minier v. CIA, 88 F.3d 796, 803 (9th Cir. 1996))); Silets, 945 F.2d at 231 (finding mere assertion, as opposed to actual evidence, of bad faith on part of agency insufficient to warrant court's in camera review); Askew v. United States, No. 05-CV-200, 2006 WL 3307469, at *7 (E.D. Ky. Nov. 13, 2006) (holding that "the plaintiff has not overcome the presumption of good faith attending the Vaughn Index and, thus, . . . a wholesale in camera inspection of the documents is not necessary"); Neuhausser v. U.S. Dep't of Justice, No. 6:03-531, 2006 WL 1581010, at *4 (E.D. Ky. June 6, 2006) (finding in camera review to be unnecessary because defendant provided detailed Vaughn Index and plaintiff failed to present substantial evidence of bad faith); McCoy v. United States, No. 04-CV-101, 2006 WL 463106, at *16 (N.D. W. Va. Feb. 24, 2006) (magistrate's recommendation) (finding in camera review to be unwarranted "[b]ecause the defendant has sufficiently demonstrated that the claimed exemptions apply, and because there is no showing of bad faith"), adopted (N.D. W. Va. Aug. 23, 2006); Kennedy v. U.S. Dep't of Justice, No. 03-CV-6077, 2004 WL 2284691, at *5 (W.D.N.Y. Oct. 8, 2004) (finding in camera review to be unnecessary because plaintiff presented no substantial evidence of bad faith). But see Hull, No. 1:04-cv-01264, slip op. at 19-20 (D. Colo. Dec. 2, 2005) (stating that although the plaintiff's evidence of bad faith "is not sufficient to disturb [the court's] findings regarding the documents withheld under Exemption 4," the plaintiff's evidence, coupled with the defendant's conclusory and vague affidavits, strengthens the court's conclusion on the necessity for in camera review of the documents withheld under Exemption 5).

[328] Jones, 41 F.3d at 242-43; see Detroit Free Press v. U.S. Dep't of Justice, 174 F. Supp. 2d 597, 601 (E.D. Mich. 2001) (ordering in camera submissions because of questions about "the veracity of" the agency's justification

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soned that in camera review is appropriate in such a case in order to reassure the plaintiff and the public that justice has been served.[329]

In camera review often is employed in cases involving national security, where detailed public affidavits may be impracticable.[330] (For a further discussion of in camera review of classified materials, see Exemption 1, In Camera Submissions, above.) Even in national security cases, however, it has been observed that "a district court exercises a wise discretion when it limits the number of documents it reviews in camera."[331] Sometimes in these cases, in addition to in camera inspection, an agency will employ in camera declarations to explain the basis for its withholdings.[332]

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[328](...continued)
for withholding documents, which "rais[e] questions of bad faith"); see also Summers v. Dep't of Justice, 140 F.3d 1077, 1085 (D.C. Cir. 1998) (Silberman, J., concurring) (urging in camera review of the "Official and Confidential" files of former FBI Director J. Edgar Hoover "to fully understand the enormous public interest in these materials"). But see, e.g., Accuracy in Media, Inc. v. Nat'l Park Serv., 194 F.3d 120, 125 (D.C. Cir. 1999) (holding that alleged "evidentiary discrepancies" identified in published materials concerning highly publicized suicide of Deputy White House Counsel Vincent Foster was not evidence of bad faith warranting in camera review of death-scene and autopsy photographs).

[329] See Jones, 41 F.3d at 242-43.

[330] See, e.g., Pub. Citizen v. Dep't of State, 11 F.3d 198, 200-01 (D.C. Cir. 1993) (tacitly approving use of in camera inspection to determine whether Exemption 1 protection waived); Weberman v. NSA, 668 F.2d 676, 678 (2d Cir. 1982) (finding in camera inspection of classified affidavit appropriate when "[d]isclosure of the details . . . might result in serious consequences to the nation's security"); Edmonds v. FBI, 272 F. Supp. 2d 35, 46-47 (D.D.C. 2003) (agreeing, after reviewing "the extensive confidential material submitted [for in camera review, that] this is one of those 'occasion[s] when extensive public justification would threaten to reveal the very information for which a FOIA exemption is claimed'" (quoting Lykins v. United States, 725 F.2d 1455, 1463 (D.C. Cir. 1984))).

[331] Armstrong, 97 F.3d at 580 ("First, [limited in camera review] makes it less likely that sensitive information will be disclosed. Second, if there is an unauthorized disclosure, having reduced the number of people with access to the information makes it easier to pinpoint the source of the leak.").

[332] See, e.g., Maynard, 986 F.2d at 557 (noting that in camera declarations filed); Hunt v. CIA, 981 F.2d 1116, 1118 (9th Cir. 1992) (same); ACLU v. DOD, 389 F. Supp. 2d 547, 567-68 (S.D.N.Y. 2005) (concluding that there is no segregable information based on in camera review of two classified declarations and Vaughn Index); Peltier v. FBI, No. 03-CV-905, 2005 WL 735964, at *11 (W.D.N.Y. Mar. 31, 2005) (finding need for supplemental
(continued...)

LITIGATION CONSIDERATIONS

Although in camera declarations should be used sparingly,[333] government agencies defending cases since the events of September 11, 2001, have found it increasingly necessary to rely on in camera declarations due to the sensitive matters at issue.[334]

To be sure, it has been held that a district court may properly review in camera declarations only if it publicly explains its rationale for so doing and ensures that the agency has provided as complete a public explanation as possible without jeopardizing the sensitive, exempt information.[335]

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[332](...continued)
Vaughn Index, in camera declaration, or traditional in camera review) (appeal pending); Haddam v. FBI, No. 01-434, slip op. at 12 (D.D.C. Sept. 8, 2004) (noting that "[f]requently the issue of in camera, ex parte affidavits arises in FOIA cases involving Exemption 1"); Edmonds, 272 F. Supp. 2d at 43 (noting agency use of in camera supplement to public declaration); Springmann v. U.S. Dep't of State, No. 93-1238, slip op. at 2-3 (D.D.C. Feb. 24, 2000) (granting renewed motion for summary judgment after reviewing in camera affidavit); see also Dow Jones Co. v. FERC, 219 F.R.D. 167, 171 (C.D. Cal. 2003) (explaining that agency submitted disputed record in camera); cf. Canning v. Dep't of Justice, No. 01-2215, slip op. at 6 (D.D.C. May 27, 2005) (granting the agency's motion for leave to file a declaration in camera because the "declaration is very personal in nature, and releasing any additional information would seriously compromise the secrecy claimed in this case").

[333] See Armstrong, 97 F.3d at 580-81 ("[T]he use of in camera affidavits has generally been disfavored."); Pub. Citizen v. Dep't of State, 100 F. Supp. 2d 10, 27 (D.D.C. 2000) (explaining that "[w]hile . . . in camera declarations are disfavored as a first line of defense," the agency had already submitted "three public declarations" amounting to a "threshold showing on the public record"), aff'd in pertinent part & rev'd in part on other grounds, 276 F.3d 674 (D.C. Cir. 2002).

[334] See, e.g., Edmonds, 272 F. Supp. 2d at 43 (noting use of ex parte supplementary affidavit and extensive in camera Vaughn Index in case involving problems after September 11, 2001 in FBI's translation unit); ACLU, 389 F. Supp. 2d at 567-68 (approving use of in camera classified declarations and Vaughn Index in case involving records related to CIA requesting DOD to detain Iraqi suspect without identifying him); Al Najjar v. Ashcroft, No. 00-1472, slip op. at 2 (D.D.C. July 22, 2003) (noting that three Department of Justice components submitted "substantial portions of their moving papers and Vaughn index in camera and ex parte" in case involving secret, classified evidence pertaining to detainee).

[335] See Lion Raisins Inc. v. USDA, 354 F.3d 1072, 1083 (9th Cir. 2004) (holding that "resort to in camera review is appropriate only after [agency] has submitted as much detail in the form of public affidavits and testimony as possible"); Armstrong, 97 F.3d at 580 (holding that district court "must
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Additionally, in limited circumstances, in camera, ex parte oral testimony may be permitted, but when it is taken, it should be transcribed and maintained under seal.[336] Regardless of whether the court inspects documents or receives testimony in camera, however, counsel for the plaintiff ordinarily is not entitled to participate in these in camera proceedings.[337]

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[335](...continued)
both make its reasons for [relying on an in camera declaration] clear and make as much as possible of the in camera submission available to the opposing party" (citing Lykins, 725 F.2d at 1465)); Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (requiring "as complete a public record as is possible" before examining classified affidavits in camera); see also Haddam, No. 01-434, slip op. at 15 (D.D.C. Sept. 8, 2004) (declaring that, after a full in camera review of the record, the court believed that the instant case "involves a set of circumstances necessitating the use of in camera, ex parte submission of affidavits, Vaughn indices and other material normally provided in the public record," and accordingly allowing the agency to rely on these submissions to justify invoking Exemption 1); Al Najjar, No. 00-1472, slip op. at 7 (D.D.C. July 22, 2003) (requiring agencies to "create a more complete public record of their responses to plaintiffs' FOIA requests"); cf. Pub. Citizen Health Research Group v. U.S. Dep't of Labor, 591 F.2d 808, 809 (D.C. Cir. 1978) (ruling that the district court should not have refused to examine an affidavit proffered in camera in an Exemption 6 case, because the affidavit was "the only matter available . . . that would have enabled [the court] to properly decide de novo the propriety of" the agency's exemption claim).

[336] See Pollard v. FBI, 705 F.2d 1151, 1154 (9th Cir. 1983) (acknowledging that ex parte testimony was not recorded, and advising that "wiser course" for future cases would be to record it); Physicians for Soc. Responsibility v. U.S. Dep't of Justice, No. 85-0169, slip op. at 3 (D.D.C. Aug. 23, 1985) (noting that the transcript of in camera review was ordered "sealed and secured"); cf. Martin v. U.S. Dep't of Justice, No. 85-3091, slip op. at 3 (3d Cir. July 2, 1986) (ordering nonexempt portion of in camera transcript disclosed).

[337] See Solar Sources, Inc. v. United States, 142 F.3d 1033, 1040 (7th Cir. 1998) ("[T]he general rule is that counsel are not entitled to participate in in camera FOIA proceedings."); Arieff, 712 F.2d at 1470-71 & n.2 (prohibiting participation by plaintiff's counsel even when information withheld was personal privacy information); Pollard, 705 F.2d at 1154 (finding no reversible error when court not only reviewed affidavit and documents in camera, but also received authenticating testimony ex parte); Salisbury v. United States, 690 F.2d 966, 973 n.3 (D.C. Cir. 1982); Weberman, 668 F.2d at 678; cf. Ellsberg v. Mitchell, 709 F.2d 51, 61 (D.C. Cir. 1983) (holding that plaintiff's counsel is not permitted to participate in in camera review of documents arguably covered by state secrets privilege) (non-FOIA case). But cf. Lederle Labs. v. HHS, No. 88-249, 1988 WL 47649, at *1-2 (D.D.C. May 2, 1988) (issuing a restrictive protective order in an Exemption 4 case that ap-
(continued...)

LITIGATION CONSIDERATIONS

If a court undertakes in camera inspection, it necessarily establishes an adequate factual basis for determining the applicability of the claimed exemptions.[338] This should be true regardless of the adequacy of an agency's affidavit.[339]

Summary Judgment

Summary judgment is the procedural vehicle by which nearly all FOIA cases are resolved,[340] because "in FOIA cases there is rarely any fac-

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[337](...continued)
peared to permit counsel for the requester to review contested business information).

[338] See Nat'l Wildlife Fed'n v. U.S. Forest Serv., 861 F.2d 1114, 1116 (9th Cir. 1988) ("[W]here a trial court properly reviewed contested documents in camera, an adequate factual basis for the decision exists."); City of Va. Beach v. U.S. Dep't of Commerce, 995 F.2d 1247, 1252 n.12 (4th Cir. 1993) ("By conducting in camera review, the district court established an adequate basis for its decision."); see also Lissner v. U.S. Customs Serv., 241 F.3d 1220, 1223 (9th Cir. 2001) (reversing district court decision on Exemption 7(C) applicability because appellate court's own in camera review revealed "nothing in the unredacted documents that is particularly personal").

[339] See, e.g., Church of Scientology, Inc. v. U.S. Dep't of the Army, 611 F.2d 738, 743 (9th Cir. 1979) (holding that despite "conclusory" affidavits, after in camera inspection trial court had "adequate factual basis" for its decision); see also Lion Raisins, 354 F.3d at 1082 ("Under certain limited circumstances, we have endorsed the use of in camera review of government affidavits as the basis for FOIA decisions."); Fiduccia v. U.S. Dep't of Justice, 185 F.3d 1035, 1042-43 (9th Cir. 1999) (suggesting, notwithstanding Wiener v. FBI, 943 F.2d 972, 979 (9th Cir. 1991), that in camera inspection could by itself be sufficient); Spirko, 147 F.3d at 997 (ruling that in camera inspection is one alternative for district court when agency fails sufficiently to detail its exemption claims). But see Wiener, 943 F.2d at 979 ("In camera review of the withheld documents by the court is not an acceptable substitute for an adequate Vaughn index."); St. Andrews Park, Inc. v. U.S. Dep't of the Army Corps of Eng'rs, 299 F. Supp. 2d 1264, 1271 & 1272 n.5 (S.D. Fla. 2003) (declaring in camera review to be "not dispositive" when agency's affidavit found to be inadequate, even while suggesting that exemption claims "appear . . . to be justified").

[340] See, e.g., Wickwire Gavin, P.C. v. USPS, 356 F.3d 588, 591 (4th Cir. 2004) (declaring that FOIA cases are generally resolved on summary judgment); Cooper Cameron Corp. v. U.S. Dep't of Labor, 280 F.3d 539, 543 (5th Cir. 2002) ("Summary judgment resolves most FOIA cases."); Harrison v. Executive Office for U.S. Attorneys, 377 F. Supp. 2d 141, 145 (D.D.C. 2005) ("FOIA cases are typically and appropriately decided on motions for sum-
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tual dispute . . . only a legal dispute over how the law is to be applied to the documents at issue."[341] Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure, which provides, in part, that the "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact."[342] So long as there are no material facts at issue and no facts susceptible to divergent inferences bearing upon an issue critical to disposition of the case," summary judgment is appropriate.[343] Of course, an agency's failure to respond to a FOIA request in a timely manner does not, by itself, jus-

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[340](...continued)
mary judgment."); Raytheon Aircraft Co. v. U.S. Army Corps of Eng'rs, 183 F. Supp. 2d 1280, 1283 (D. Kan. 2001) ("FOIA cases . . . are especially amenable to summary judgment because the law, rather than the facts, is the only matter in dispute."); Sanderson v. IRS, No. 98-2369, 1999 WL 35290, at *2 (E.D. La. Jan. 25, 1999) (observing that summary judgment is the usual means for disposing of FOIA cases); Pub. Employees for Envtl. Responsibility v. EPA, 978 F. Supp. 955, 959 (D. Colo. 1997) ("FOIA claims are typically resolved on summary judgment[.]"), appeal dismissed voluntarily, No. 97-1384 (10th Cir. Nov. 25, 1997); Cappabianca v. Comm'r, U.S. Customs Serv., 847 F. Supp. 1558, 1562 (M.D. Fla. 1994) ("[O]nce documents in issue are properly identified, FOIA cases should be handled on motions for summary judgment." (citing Miscavige v. IRS, 2 F.3d 366, 369 (11th Cir. 1993))).

[341] Gray v. Sw. Airlines, Inc., 33 F. App'x 865, 869 n.1 (9th Cir. 2002) (Reinhardt, J., dissenting) (citing Schiffer v. FBI, 78 F.3d 1405, 1409 (9th Cir. 1996)) (non-FOIA case).

[342] Fed. R. Civ. P. 56(c); see, e.g., McClain v. U.S. Dep't of Justice, 17 F. App'x 471, 474 (7th Cir. 2001) ("[T]he purpose of summary judgment is to isolate and dispose of factually unsupported claims[.]").

[343] Alyeska Pipeline Serv. v. EPA, 856 F.2d 309, 314 (D.C. Cir. 1988); see, e.g., Plazas-Martinez v. DEA, 891 F. Supp. 1, 3 (D.D.C. 1995) ("Plaintiff's submission does create a dispute on an issue of fact; it is not a material issue, however."); Kuffel v. U.S. Bureau of Prisons, 882 F. Supp. 1116, 1122 (D.D.C. 1995) (holding that plaintiff's disagreement with application of exemptions does not constitute a dispute as to material facts precluding summary judgment "because he does not put forth any facts to prove that they were wrongfully applied"); Patterson v. IRS, No. 90-1941, 1992 WL 477021, at *1 (S.D. Ind. Nov. 3, 1992) ("[T]he disputed fact must be outcome determinative."), aff'd in part, rev'd & remanded in part on other grounds, 56 F.3d 841 (7th Cir. 1995); cf. Horowitz v. Peace Corps, No. 00-0848, slip op. at 9-10 (D.D.C. Oct. 12, 2001) (denying both parties' motions for summary judgment because of conflicting evidence on the timing of a decision -- a "significant material fact" with respect to the applicability of Exemption 5), aff'd in pertinent part & rev'd in other part, 428 F.3d 271 (D.C. Cir. 2005).

tify an award of summary judgment to the requester.[344]

The Court of Appeals for the District of Columbia Circuit has held that "a motion for summary judgment adequately underpinned is not defeated simply by bare opinion or an unaided claim that a factual controversy persists."[345] For example, summary judgment will not be defeated by unsupported claims that an agency is withholding information that already is in the public domain.[346] Nor will summary judgment necessarily be precluded by discrepancies in the agency's page counts, particularly when the

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[344] See Tri-Valley CAREs v. U.S. Dep't of Energy, No. 03-3926, 2004 WL 2043034, at *18 (N.D. Cal. Sept. 10, 2004) ("[A] lack of timeliness does not preclude summary judgment for an agency in a FOIA case."), aff'd in pertinent part & remanded, No. 04-17232, 2006 WL 2971651 (9th Cir. Oct. 16, 2006); Hornbostel v. U.S. Dep't of the Interior, 305 F. Supp. 2d 21, 28 (D.D.C. 2003) (same); St. Andrews Park, Inc. v. U.S. Dep't of the Army Corps. of Eng'rs, 299 F. Supp. 2d 1264, 1269 (S.D. Fla. 2003) ("Defendant's exceeding the prescribed 20-day time limit to adjudicate the FOIA denial appeal does not entitle Plaintiffs to [summary] judgment."); Iacoe v. IRS, No. 98-C-0466, 1999 WL 675322, at *4 (E.D. Wis. July 23, 1999) ("The effect of the agency's failure to meet the time limit is merely to permit the requester to bring an action in district court . . . ."); Barvick v. Cisneros, 941 F. Supp. 1015, 1019-20 (D. Kan. 1996) ("This court is persuaded that an agency's failure to respond within [the statutory time limits] does not automatically entitle a FOIA requester to summary judgment.").

[345] Alyeska Pipeline, 856 F.2d at 314; see Mace v. EEOC, 197 F.3d 329, 330 (8th Cir. 1999) ("[S]peculative claims about [the] existence of other documents cannot rebut [the] presumption of good faith afforded [to] agency affidavits." (citing SafeCard Servs. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991))); Germosen v. Cox, No. 98 Civ. 1294, 1999 WL 1021559, at *18-19 (S.D.N.Y. Nov. 9, 1999) (ruling that plaintiff cannot defeat summary judgment by speculating that further evidence will develop to support his allegations), appeal dismissed for failure to prosecute, No. 00-6041 (2d Cir. Sept. 12, 2000); Iacoe, 1999 WL 675322, at *4 ("Plaintiff's speculations about a cover-up are insufficient to overcome the presumption of good faith to which the agency's declaration is entitled."); Judicial Watch, Inc. v. HHS, 27 F. Supp. 2d 240, 243-44 (D.D.C. 1998) (explaining that plaintiff's "bare suspicion" will not call into question adequacy of agency's search); Gale v. FBI, 141 F.R.D. 94, 96 (N.D. Ill. 1992) (holding that plaintiff's "own self-serving statements [alone] are insufficient to create a genuine issue of material fact barring summary judgment"); see also Marks v. United States, 578 F.2d 261, 263 (9th Cir. 1978) ("Conclusory allegations unsupported by factual data will not create a triable issue of fact.").

[346] See Steinberg v. U.S. Dep't of Justice, 179 F.R.D. 357, 360 (D.D.C. 1998) (finding that summary judgment is not defeated "with pure conjecture about the possible content of withheld information, raising 'some metaphysical doubt as to the material facts'" (quoting Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986))).

agency has processed a voluminous number of pages, so long as the agency has supplied a "well-detailed and clear" explanation for the differences.[347] Moreover, a plaintiff -- even one appearing pro se -- will be found to have conceded the government's factual assertions if he fails to contest them, once it is clear that he understands his responsibility to do so.[348]

In a FOIA case, the agency has the burden of justifying nondisclosure,[349] and it must sustain its burden by submitting detailed affidavits[350]

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[347] Master v. FBI, 926 F. Supp. 193, 197-98 (D.D.C. 1996), summary affirmance granted, 124 F.3d 1309 (D.C. Cir. 1997) (unpublished table decision); see also Piper v. U.S. Dep't of Justice, 294 F. Supp. 2d 16, 23-24 (D.D.C. 2003) (finding "no material issue to rebut the Government's good faith presumption in the processing of [plaintiff's] FOIA request" merely because of "gaps in the serialization of the files").

[348] See McNamara v. Nat'l Credit Union Ass'n, 264 F. Supp. 2d 1, 4 (D.D.C. 2002) (treating as conceded defendant's statement of material facts because plaintiff filed motion to dismiss without prejudice rather than opposition to summary judgment motion); Knight v. FDA, No. 95-4097, 1997 WL 109971, at *1 (D. Kan. Feb. 11, 1997) (accepting as "reasonable and fair" agency's processing of plaintiff's request and granting agency summary judgment "[i]n the absence of any argument from the plaintiff"); Nuzzo v. FBI, No. 95-1708, 1996 WL 741587, at *2 (D.D.C. Oct. 8, 1996) (granting defendant agency's unopposed summary judgment motion); Butler v. Dep't of the Air Force, 888 F. Supp. 174, 179 (D.D.C. 1995) (ruling that because plaintiff failed to controvert agency's factual assertions, they must be accepted as true), aff'd per curiam, No. 96-5111 (D.C. Cir. May 6, 1997); see also Hart v. FBI, No. 94 C 6010, 1995 WL 170001, at *2 (N.D. Ill. Apr. 7, 1995) (holding that "plaintiff has not asserted any facts which convince this Court that the FBI has any records which relate to him or has failed to conduct an adequate search"), aff'd, 91 F.3d 146 (7th Cir. July 16, 1996) (unpublished table decision); cf. Ruotolo v. IRS, 28 F.3d 6, 8-9 (2d Cir. 1994) (finding that although plaintiffs were generally aware of summary judgment rules, district court should have specifically notified them of consequences of not complying with litigation deadlines before dismissing case).

[349] See 5 U.S.C. § 552(a)(4)(B) (2000 & Supp. IV 2004); see, e.g., U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 755 (1989); Wishart v. Comm'r, No. 98-17248, 1999 WL 985142, at *1 (9th Cir. June 25, 1999); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980); Judicial Watch, Inc. v. Dep't of the Army, 402 F. Supp. 2d 241, 245 (D.D.C. 2005) (stating that "the defendant agency has the burden of justifying nondisclosure"); Dean v. FDIC, 389 F. Supp. 2d 780, 789 (E.D. Ky. 2005) ("The government bears the burden of proving that its withholdings under FOIA were lawful.").

[350] See, e.g., O'Harvey v. Office of Workers' Compensation Programs, No. 96-33015, 1997 WL 31589, at *1 (9th Cir. Jan. 21, 1997) (holding that when

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that identify the documents at issue and explain why they fall under the claimed exemptions.[351] (A federal statute specifically permits unsworn declarations (i.e., without notarizations) to be utilized in all cases in which affidavits otherwise would be required.[352]) The widespread use of Vaughn Indexes, of course, means that affidavits, in the form of Vaughn Indexes, will nearly always be submitted in FOIA lawsuits, notwithstanding Rule 56's language making affidavits optional in general. (For a further discussion of Vaughn Indexes, see Litigation Considerations, Vaughn Index, above.)

As one court has put it, "[s]ummary judgment is available to the defendant in a FOIA case when the agency proves that it has fully discharged its obligations under the FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester."[353] Summary judgment may be granted solely on the basis of agency affidavits if they are clear, specific, and reasonably detailed, if they describe the withheld information in a factual and nonconclusory manner, and if there is no contradictory evidence on the record or evidence of agency bad faith.[354] If all of these requisites are met, such affida-

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[350](...continued)
the district court relied on the agency's denial letter "[w]ithout an affidavit or oral testimony, [it] lacked a factual basis to make its decision"); Judicial Watch, 402 F. Supp. 2d at 245 (noting that an agency may meet its burden "by providing the requester with a Vaughn index, adequately describing each withheld document and explaining the exemption's relevance").

[351] See Summers v. Dep't of Justice, 140 F.3d 1077, 1080 (D.C. Cir. 1998); King v. U.S. Dep't of Justice, 830 F.2d 210, 217 (D.C. Cir. 1987); Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973); cf. McClain, 17 F. App'x at 474 (holding that there is no entitlement to Vaughn Index unless plaintiff shows that he made specific request for records and agency withheld them pursuant to FOIA exemptions); Harrison, 377 F. Supp. 2d at 145-46 (reasoning that a court may grant summary judgment based on the agency's affidavits or declarations if they describe "'the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith'" (quoting Military Audit Project v. Casey, 656 F. 2d 724, 738 (D.C. Cir. 1981))).

[352] 28 U.S.C. § 1746 (2000); see Summers v. U.S. Dep't of Justice, 999 F.2d 570, 572-73 (D.C. Cir. 1993).

[353] Miller v. U.S. Dep't of State, 779 F.2d 1378, 1382 (8th Cir. 1985).

[354] See, e.g., L.A. Times Commc'ns v. Dep't of the Army, 442 F. Supp. 2d 880, 899-900 (C.D. Cal. 2006) (granting summary judgment based on the agency's detailed and nonconclusory declarations, and noting that the
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vits are usually accorded substantial weight by the courts.[355]

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[354](...continued)
agency's position "is not controverted by contrary evidence in the record or any evidence of agency bad faith"); Lane v. Dep't of Justice, No. 1:02-CV-06555, 2006 WL 1455459, at *11 (E.D.N.Y. May 22, 2006) (granting summary judgment "because the defendants provide a detailed and non-conclusory affidavit that indicates there is no genuine factual dispute"); Assassination Archives & Research Ctr. v. CIA, 177 F. Supp. 2d 1, 8 (D.D.C. 2001) (pointing out that a "mere assertion of bad faith is not sufficient to overcome a motion for summary judgment" (citing Hayden v. NSA, 608 F.2d 1381, 1387 (D.C. Cir. 1979))), aff'd, 334 F.3d 55 (D.C. Cir. 2003); Barvick, 941 F. Supp. at 1018 (declaring that summary judgment is available "when the agency offers adequate affidavits establishing that it has complied with its FOIA obligations"); Hemenway v. Hughes, 601 F. Supp. 1002, 1004 (D.D.C. 1985) (recognizing that in FOIA cases, summary judgment does not hinge on existence of genuine issue of material fact, but rather on whether agency affidavits are reasonably specific, demonstrate logical use of exemptions, and are not controverted by evidence in record or by bad faith) (applying standard developed in national security context to Exemption 6); cf. Niagara Mohawk Power Corp. v. U.S. Dep't of Energy, 169 F.3d 16, 18 (D.C. Cir. 1999) (finding agency affidavits conclusory and denying summary judgment despite plaintiff's failure to controvert agency assertions by remaining silent); Kamman v. IRS, 56 F.3d 46, 49 (9th Cir. 1995) (finding that agency failed to satisfy burden of proof and awarding summary judgment to plaintiff when agency affidavits "are nothing more than 'conclusory and generalized allegations'"); Voinche v. FBI, 46 F. Supp. 2d 26, 30 (D.D.C. 1999) (denying summary judgment when agency provided conclusory affidavit to support invocation of Exemption 7(A)); Demma v. U.S. Dep't of Justice, No. 93 C 7296, 1995 WL 360731, at *3 (N.D. Ill. June 15, 1995) (denying summary judgment when affidavits addressed only one subject of plaintiff's multiple-subject request), appeal dismissed voluntarily, No. 96-1231 (7th Cir. June 12, 1996).

[355] See, e.g., In re Wade, 969 F.2d 241, 246 (7th Cir. 1992) ("Without evidence of bad faith, the veracity of the government's submissions regarding reasons for withholding the documents should not be questioned."); Gardels v. CIA, 689 F.2d 1100, 1104 (D.C. Cir. 1982); Taylor v. Dep't of the Army, 684 F.2d 99, 106-07 (D.C. Cir. 1982); Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 10 (D.D.C. 1995), aff'd on other grounds, 76 F.3d 1232 (D.C. Cir. 1996); see also Sephton v. FBI, 365 F. Supp. 2d 91, 97 (D. Mass. 2005) (declaring that the plaintiff's evidence "is insufficient to rebut the presumption of good faith" given to the agency's affidavits), aff'd, 442 F.3d 27 (1st Cir. 2006); Piper, 294 F. Supp. 2d at 20 ("Upon a finding that the affidavits are sufficient, the court need not conduct further inquiry into their veracity."); Coastal Delivery Corp. v. U.S. Customs Serv., 272 F. Supp. 2d 958, 962 (C.D. Cal. 2003) ("Disagreeing with the [agency's] conclusion [concerning applicability of an exemption] is not a reason to challenge the Vaughn Index."), appeal dismissed voluntarily, No. 03-55833 (9th Cir. Aug. 26, 2003).

LITIGATION CONSIDERATIONS

In certain circumstances, opinions or conclusions may be asserted in agency affidavits, especially in cases in which disclosure would compromise national security.[356] On the other hand, "[c]ourts have consistently held that a requester's opinion disputing the risk created by disclosure is not sufficient to preclude summary judgment for the agency when the agency possessing the relevant expertise has provided sufficiently detailed affidavits."[357]

Rule 56(e) of the Federal Rules of Civil Procedure provides that the affidavit must be based upon the personal knowledge of the affiant, must demonstrate the affiant's competency to testify as to matters stated, and must set forth only facts that would be admissible in evidence.[358] "Gratuitous recitations of the affiant's own interpretation of the law," however, are

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[356] See Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 927 (D.C. Cir. 2003) (crediting the government's predictive judgments concerning harm to national security that could result from release of requested information); Gardels, 689 F.2d at 1106 (recognizing that there is "necessarily a region for forecasts in which informed judgment as to potential harm should be respected"); Halperin v. CIA, 629 F.2d 144, 149 (D.C. Cir. 1980) (declaring that "courts must take into account . . . that any affidavit of threatened harm to national security will always be speculative"); Hoch v. CIA, 593 F. Supp. 675, 683-84 (D.D.C. 1984), aff'd, 807 F.2d 1227 (D.C. Cir. 1990) (unpublished table decision); see also Moore v. FBI, No. 83-1541, slip op. at 2 (D.D.C. Aug. 30, 1984) (finding that "particular incident" was sufficiently identified given national security nature of documents), aff'd, 762 F.2d 138 (D.C. Cir. 1985) (unpublished table decision).

[357] Struth v. FBI, 673 F. Supp. 949, 954 (E.D. Wis. 1987); see, e.g., Goldberg v. U.S. Dep't of State, 818 F.2d 71, 78-79 (D.C. Cir. 1987) (Exemption 1); Spannaus v. U.S. Dep't of Justice, 813 F.2d 1285, 1289 (4th Cir. 1987) (Exemption 7(A)); Curran v. Dep't of Justice, 813 F.2d 473, 477 (1st Cir. 1987) (Exemption 7(A)); Gardels, 689 F.2d at 1106 n.5 (Exemptions 1 and 3); People for the Am. Way Found. v. NSA/Cent. Sec. Serv., 462 F. Supp. 2d 21, 33-34 (D.D.C. 2006) (Exemption 1); Edmonds v. U.S. Dep't of Justice, 405 F. Supp. 2d 23, 27-30 (D.D.C. 2005) (Exemption 1); Whalen v. U.S. Marine Corps, 407 F. Supp. 2d 54, 56-59 (D.D.C. 2005) (Exemptions 1 and 3); Wheeler v. U.S. Dep't of Justice, 403 F. Supp. 2d 1, 6-7, 10-12 (D.D.C. 2005) (Exemption 1); Windels, Marx, Davies & Ives v. Dep't of Commerce, 576 F. Supp. 405, 410-11 (D.D.C. 1983) (Exemptions 2 and 7(E)); see also Sephton, 365 F. Supp. 2d at 101 (stating that the plaintiff's speculation "is not adequate to rebut the presumption of good faith generated by the agency's affidavits in the context of litigation pursuant to FOIA"); Lindsey v. NSC, No. 84-3897, slip op. at 3 (D.D.C. July 12, 1985) (holding that a FOIA plaintiff cannot defeat summary judgment by saying that he will raise genuine issue "at a time of his own choosing").

[358] Fed. R. Civ. P. 56(e).

inappropriate.[359]

The affidavit or declaration of an agency official who is knowledgeable about the way in which information is processed and is familiar with the documents at issue satisfies the personal knowledge requirement.[360]

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[359] Doolittle v. U.S. Dep't of Justice, 142 F. Supp. 2d 281, 285 n.5 (N.D.N.Y. 2001) ("The practice of submitting legal arguments through the declaration . . . is improper, and such arguments will not be considered."); Peters v. IRS, No. 00-2143, slip op. at 5 (D.N.J. Feb. 23, 2001) ("Argument of the facts and the law shall not be contained in the affidavits."); Alamo Aircraft Supply, Inc. v. Weinberger, No. 85-1291, 1986 U.S. Dist. LEXIS 29010, at *3 (D.D.C. Feb. 21, 1986) (reproving agency declaration for "several gratuitous recitations of the affiant's own interpretation of the law").

[360] See, e.g., Spannaus, 813 F.2d at 1289 (holding that declarant's attestation "to his personal knowledge of the procedures used in handling [the] request and his familiarity with the documents in question" is sufficient); Schrecker v. U.S. Dep't of Justice, 217 F. Supp. 2d 29, 35 (D.D.C. 2002) (rejecting argument that affidavit was hearsay because affiant was "responsible for the FBI's compliance with FOIA litigation and is therefore not merely speculating about the FBI activities"), aff'd, 349 F.3d 657 (D.C. Cir. 2003); Gerstein v. U.S. Dep't of Justice, No. 03-04893, 2005 U.S. Dist. LEXIS 41276, at *13-14 (N.D. Cal. Sept. 30, 2005) (denying the plaintiff's motion to strike the agency's declaration, inasmuch as the declarant permissibly included "facts relayed from individuals who had first-hand knowledge," and because the declarant had "first-hand knowledge of what happens when a court seals a warrant"); Hoffman v. U.S. Dep't of Justice, No. 98-1733, slip op. at 7 (W.D. Okla. Apr. 16, 1999) (finding personal knowledge requirement was met because declarant was "aware of what was done by virtue of information provided to him in his official capacity"); Cucci v. DEA, 871 F. Supp. 508, 513 (D.D.C. 1994) (finding that declarant "had the requisite personal knowledge based on her examination of the records and her discussion with a representative of the [state police]" to attest that information was provided with express understanding of confidentiality); Laborers' Int'l Union v. U.S. Dep't of Justice, 578 F. Supp. 52, 55-56 (D.D.C. 1983) (finding affiant competent when observations were based on review of investigative report and upon general familiarity with nature of investigations similar to that documented in requested report), aff'd, 772 F.2d 919 (D.C. Cir. 1984); see also Madison Mech., Inc. v. NASA, No. 99-2854, 2003 WL 1477014, at *6 (D.D.C. Mar. 20, 2003) (magistrate's recommendation) (requiring agency to submit revised affidavits stating "fully and precisely" declarant's basis for personal knowledge), adopted (D.D.C. Mar. 31, 2003); Avondale Indus. v. NLRB, No. 96-1227, 1998 WL 34064938, at *3 (E.D. La. Mar. 23, 1998) (holding that there is no requirement that author of records prepare Vaughn Index); Coleman v. FBI, No. 89-2773, slip op. at 8-9 (D.D.C. Dec. 10, 1991) ("The law does not require the affiant preparing a Vaughn Index to be personally familiar with more than the procedures used in processing the particular request."), summary affirmance granted, No. 92-5040

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Similarly, in instances in which an agency's search is questioned, an affidavit of an agency employee responsible for coordinating the search efforts satisfies the personal knowledge requirement.[361] Likewise, in justifying the withholding of classified information under Exemption 1, the affiant is required only to possess document-classification authority for the records in question, not personal knowledge of the particular substantive area that is the subject of the request.[362] However, affiants must establish that they

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[360](...continued)
(D.C. Cir. Dec. 4, 1992); cf. Kamman, 56 F.3d at 49 (rejecting affidavit that revealed that signer "did not even review the actual documents at issue" and attested only "that the documents are in a file that is marked with the name of a taxpayer other than [plaintiff]"); Canning v. Dep't of Justice, No. 92-0463, slip op. at 4-5 (D.D.C. June 26, 1995) (finding personal knowledge requirement was met where affidavit established affiant's authority to review withheld grand jury records, and affiant personally reviewed such records); FOIA Update, Vol. XIX, No. 3, at 2 (advising that agency FOIA officers are authorized to review grand jury materials for purposes of FOIA administration, notwithstanding strict secrecy requirements of Rule 6(e) of Federal Rules of Criminal Procedure (citing Canning)).

[361] See, e.g., Carney v. U.S. Dep't of Justice, 19 F.3d 807, 814 (2d Cir. 1994), aff'g in pertinent part, rev'g & remanding in part, No. 92-CV-6204, slip op. at 12 (W.D.N.Y. Apr. 27, 1993) ("There is no basis in either the statute or the relevant caselaw to require that an agency effectively establish by a series of sworn affidavits a 'chain of custody' over its search process. The format of the proof submitted by defendant -- declarations of supervisory employees, signed under penalty of perjury -- is sufficient for purposes of both the statute and Fed. R. Civ. P. 56."); Maynard v. CIA, 986 F.2d 547, 560 (1st Cir. 1993) ("[A]n agency need not submit an affidavit from the employee who actually conducted the search. Instead, an agency may rely on an affidavit of an agency employee responsible for supervising the search."); SafeCard, 926 F.2d at 1202 (finding that employee "in charge of coordinating the [agency's] search and recovery efforts [is the] most appropriate person to provide a comprehensive affidavit"); Perry-Torres v. U.S. Dep't of State, 404 F. Supp. 2d 140, 142 (D.D.C. 2005) (stating that "affidavits may be submitted by an official who coordinated the search, and need not be from each individual who participated in the search"); Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys., No. 98 Civ. 4608, 1998 WL 690371, at *4 (S.D.N.Y. Sept. 30, 1998) ("[I]t is even routine to accept affidavits from agency officials who have supervised but not personally conducted a FOIA search."), aff'd, 182 F.3d 900 (2d Cir. 1999) (unpublished table decision).

[362] See Holland v. CIA, No. 92-1233, 1992 WL 233820, at *8-9 (D.D.C. Aug. 31, 1992); McTigue v. U.S. Dep't of Justice, No. 84-3583, slip op. at 8-9 (D.D.C. Dec. 3, 1985), aff'd, 808 F.2d 137 (D.C. Cir. 1987).

are personally familiar with all of the withheld records,[363] and they should not be selected solely on the basis that they occupy particular positions in the agency.[364]

Discovery

Discovery is the exception, not the rule, in FOIA cases.[365] If it occurs -- and determinations of whether and under what conditions discovery is permitted are always vested in the sound discretion of the district court[366]

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[363] See Kamman, 56 F.3d at 49 (rejecting affidavit that revealed that signer "did not even review the actual documents at issue," and that attested only "that the documents are in a file that is marked with the name of a taxpayer other than [plaintiff]"); Sellar v. FBI, No. 84-1611, slip op. at 3 (D.D.C. July 22, 1988).

[364] See Timken Co. v. U.S. Customs Serv., 3 Gov't Disclosure Serv. (P-H) ¶ 83,234, at 83,975 n.9 (D.D.C. June 24, 1983) (rejecting attestations of affiant who merely sampled documents that staff had reviewed for him); cf. Marriott Int'l Resorts, L.P. v. United States, 437 F.3d 1302, 1308 (Fed. Cir. 2006) (holding that "the head of an Agency can, when [the step is] carefully undertaken, delegate authority to invoke the deliberative process privilege on the Agency's behalf") (non-FOIA case).

[365] See, e.g., Heily v. U.S. Dep't of Commerce, 69 F. App'x 171, 174 (4th Cir. 2003) (per curiam) ("It is well-established that discovery may be greatly restricted in FOIA cases."); Van Mechelen v. U.S. Dep't of the Interior, No. 05-5393, 2005 WL 3007121, at *5 (W.D. Wash. Nov. 9, 2005) (observing that "discovery is not ordinarily part of a FOIA case"); Wheeler v. CIA, 271 F. Supp. 2d 132, 139 (D.D.C. 2003) ("Discovery is generally unavailable in FOIA actions."); Hardy v. DOD, No. 99-523, 2001 WL 3435945, at *4 (D. Ariz. Aug. 27, 2001) ("[D]iscovery is not favored in FOIA cases."); Judicial Watch, Inc. v. Exp.-Imp. Bank, 108 F. Supp. 2d 19, 25 (D.D.C. 2000) ("[D]iscovery in a FOIA action is generally inappropriate."); Pub. Citizen Health Research Group v. FDA, 997 F. Supp. 56, 72 (D.D.C. 1998) ("Discovery is to be sparingly granted in FOIA actions."), aff'd in part, rev'd in part & remanded, 185 F.3d 898 (D.C. Cir. 1999); Katzman v. Freeh, 926 F. Supp. 316, 319 (E.D.N.Y. 1996) ("[D]iscovery in a FOIA action is extremely limited . . . .").

[366] See Wood v. FBI, 432 F.3d 78, 84-85 (2d Cir. 2005) (recognizing that "[a] district court has broad discretion to manage pre-trial discovery" (citing Grand Cent. P'ship v. Cuomo, 166 F.3d 473, 488 (2d Cir. 1999))); Becker v. IRS, 34 F.3d 398, 406 (7th Cir. 1994); Maynard v. CIA, 986 F.2d 547, 567 (1st Cir. 1993); Gillin v. IRS, 980 F.2d 819, 823 (1st Cir. 1992) (per curiam); Nolan v. U.S. Dep't of Justice, 973 F.2d 843, 849 (10th Cir. 1992); N.C. Network for Animals, Inc. v. USDA, No. 90-1443, 1991 WL 10757, at *4 (4th Cir. Feb. 5, 1991) ("The district court should exercise its discretion to limit discovery in this as in all FOIA cases, and may enter summary judgment on the basis of agency affidavits when they are sufficient to resolve issues . . . ."); Petrus v.

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-- discovery ordinarily is limited to the scope of an agency's search, its indexing and classification procedures, and similar factual matters.[367] The

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[366](...continued)
Brown, 833 F.2d 581, 583 (5th Cir. 1987) ("A trial court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined."); Meeropol v. Meese, 790 F.2d 942, 960-61 (D.C. Cir. 1986) (same, with respect to broad district court discretion); see also Anderson v. HHS, 80 F.3d 1500, 1507 (10th Cir. 1996) (holding that district court did not abuse its discretion in denying plaintiff discovery on attorney fees issue).

[367] See Heily, 69 F. App'x at 174 (explaining that when discovery is permitted, generally it is "limited to the scope of agency's search and its indexing and classification procedures"); see, e.g., Tax Analysts v. IRS, 214 F.3d 179, 185 (D.C. Cir. 2000) (remanding for discovery on "narrow and fact-specific question" concerning disclosability of specific type of document); Ruotolo v. Dep't of Justice, 53 F.3d 4, 11 (2d Cir. 1995) (holding that discovery on scope of burden that search would entail should have been granted); Weisberg v. U.S. Dep't of Justice, 627 F.2d 365, 371 (D.C. Cir. 1980) (finding discovery appropriate to inquire into adequacy of document search); Bangoura v. U.S. Dep't of the Army, No. 05-0311, 2006 WL 3734164, at *6 (D.D.C. Dec. 8, 2006) (allowing limited discovery regarding adequacy of agency's search); MacLean v. DOD, No. 04CV2425, 2005 WL 628021, at *1 (S.D. Cal. Mar. 16, 2005) (granting limited discovery on the basis that the discovery that the plaintiff seeks "is necessary to support an argument that the claimed exemptions are inapplicable, and . . . the information sought is within the exclusive province of the Government"); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 127 F. Supp. 2d 228, 230 (D.D.C. 2000) (permitting depositions to be taken about parameters of FOIA search); Long v. U.S. Dep't of Justice, 10 F. Supp. 2d 205, 210 (N.D.N.Y. 1998) (finding discovery appropriate to test adequacy of search); Pub. Citizen, 997 F. Supp. at 72 (holding that discovery is limited to "investigating the scope of the agency search for responsive documents, the agency's indexing procedures, and the like"); see also Wash. Post Co. v. U.S. Dep't of Justice, No. 84-3581, slip op. at 1-2 (D.D.C. Aug. 2, 1990) (permitting discovery, in Exemption 7(B) case, on issue of whether it is more probable than not that disclosure would seriously interfere with fairness of pending or "truly imminent" trial or adjudication); Silverberg v. HHS, No. 89-2743, 1990 WL 599452, at *1-2 (D.D.C. June 26, 1990) (permitting discovery, in Exemption 4 case, of responses by private drug-testing laboratories to agency's inquiry concerning whether their "performance test results" are customarily released to public); ABC, Inc. v. USIA, 599 F. Supp. 765, 768-70 (D.D.C. 1984) (ordering agency head to submit to deposition on issue of whether transcripts of tape-recorded telephone calls constitute "personal records" or "agency records"); cf. United States v. Owens, 54 F.3d 271, 277 (6th Cir. 1995) (allowing discovery on issue of ownership of joint state/federal task force records in action by United States to enjoin state court disclosure order under state public records law). But see Pa. Dep't of Pub. Welfare v. United States, No.

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major exception to this limited scope of discovery is when the plaintiff raises a sufficient question as to the agency's good faith in processing documents or any other respect.[368] In any case, however, before being permit-

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[367](...continued)
99-175, 1999 WL 1051963, at *3 (W.D. Pa. Oct. 12, 1999) (allowing limited discovery "regarding the authenticity and completeness of the material produced by HHS, as well as the methodology used to compile it," because plaintiff "'does not know the contents of the information sought and is, therefore, helpless to contradict the government's description of the information or assist the trial judge'" (quoting Davin v. U.S. Dep't of Justice, 60 F.3d 1043, 1049 (3d Cir. 1995))), appeal dismissed voluntarily, No. 01-1886 (3d Cir. Apr. 24, 2002).

[368] See, e.g., Carney v. U.S. Dep't of Justice, 19 F.3d 807, 812 (2d Cir. 1994) ("In order to justify discovery once the agency has satisfied its burden, the plaintiff must make a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations, or provide some tangible evidence that an exemption claimed by the agency should not apply or summary judgment is otherwise inappropriate.") (citations omitted); Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice, No. 05-2078, 2006 WL 1518964, at *3-6 (D.D.C. June 1, 2006) (granting the plaintiff's motion for discovery in the form of time-limited depositions because the plaintiff raised a sufficient question of bad faith on the part of government to "warrant limited discovery for the purpose of exploring the reasons behind [purported] delays in processing [plaintiff's] FOIA requests"); Caton v. Norton, No. 04-CV-439, 2005 WL 1009544, at *5 (D.N.H. May 2, 2005) (holding that plaintiff's showing of bad faith entitled him to limited discovery regarding allegedly altered document); Gilmore v. U.S. Dep't of Energy, 33 F. Supp. 2d 1184, 1190 (N.D. Cal. 1998) (permitting discovery when plaintiff claimed existence of pattern and practice of unreasonable delay in responding to FOIA requests, but limiting discovery to agency's "policies and practices for responding to FOIA requests, and the resources allocated to ensure its compliance the FOIA time limitations"); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 34 F. Supp. 2d 28, 46 (D.D.C. 1998) (allowing discovery "under the rigorous supervision of a Magistrate Judge" concerning alleged illegal destruction and removal of records subsequent to plaintiff's FOIA request), partial summary judgment granted, 83 F. Supp. 2d 105 (D.D.C. 1999); Hawthorn Mgmt. Servs. v. HUD, No. 3:96CV2435, 1997 WL 821767, at *3 (D. Conn. Dec. 18, 1997) (permitting discovery because affiant's failure to disclose all pertinent information concerning bidding process in initial declaration amounted to "bad faith"); cf. Accuracy in Media, Inc. v. Nat'l Park Serv., 194 F.3d 120, 124 (D.C. Cir. 1999) (upholding denial of discovery based on "speculative criticism" of agency's search); Grand Cent. P'ship, 166 F.3d at 489 (finding discovery unwarranted based on plaintiff's "speculation that there must be more documents" and that agency acted in "bad faith" by not producing them); Jones v. FBI, 41 F.3d 238, 249 (6th Cir. 1994) (finding discovery unwarranted when court convinced that agency "has acted in good faith and has prop-
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ted discovery, a FOIA plaintiff must adequately explain to the court exactly how the specific discovery requested will uncover information that would create a genuine issue of material fact.[369]

Even if a FOIA plaintiff surmounts this considerable barrier to discovery, there are certain areas that nevertheless are not within the permissible bounds of discovery in any event. A FOIA plaintiff should not be permitted to extend his discovery efforts into the agency's thought processes for claiming particular exemptions.[370] Moreover, discovery should not

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[368](...continued)
erly withheld responsive material"; declaring fact that agency destroyed documents prior to receipt of FOIA request was not evidence of lack of "good faith"); Voinche v. FBI, 412 F. Supp. 2d 60, 72 (D.D.C. 2006) (denying discovery because the plaintiff neither provided evidence of bad faith nor established a "relationship between the testimony he seeks and the present FOIA action") (appeal pending).

[369] See O'Neill v. U.S. Dep't of Justice, No. 06-0671, 2006 WL 3538991, at *2 (E.D. Wis. Dec. 7, 2006) (denying plaintiff's motion to compel discovery as information sought is irrelevant to instant FOIA case); Morley v. CIA, No. 03-2545, 2006 WL 280645, at *2 (D.D.C. Feb. 6, 2006) (stating that the plaintiff's Rule 56(f) declaration merely addresses "his and the public's interest in the disclosure of documents relating to the assassination of President John F. Kennedy, rather than [his] inability to file his opposition to Defendant's motion for summary judgment," and finding that the plaintiff's argument therefore is not a basis for allowing discovery); Judicial Watch, Inc. v. U.S. Dep't of Justice, No. 99-1883, slip op. at 16 (D.D.C. June 9, 2005) (denying discovery under Fed. R. Civ. P. 56(f) because plaintiff did not adequately demonstrate any need for discovery); Ctr. for Nat'l Sec. Studies v. Dep't of Justice, No. 01-2500, 2002 U.S. Dist. LEXIS 2983, at *5 (D.D.C. Feb. 21, 2002) ("In order to obtain discovery under Fed. R. Civ. P. 56(f), a plaintiff must demonstrate that 'it cannot for reasons stated present by affidavit facts essential to justify [its] opposition.'" (quoting Carpenter v. Fed. Nat'l Mortgage Ass'n, 174 F.3d 231, 237 (D.C. Cir. 1999))), rev'd on other grounds, 331 F.3d 918 (D.C. Cir. 2003); Code v. FBI, No. 95-1892, 1997 WL 150070, at *8 (D.D.C. Mar. 26, 1997) (citing Strang v. U.S. Arms Control & Disarm. Agency, 864 F.2d 859, 861 (D.C. Cir. 1989)); SMS Data Prod. Group v. U.S. Dep't of the Air Force, No. 88-0481, 1989 WL 201031, at *5 (D.D.C. May 11, 1989) ("In the absence of substantial questions concerning the substantive content of defendant's affidavits, further discovery is inappropriate."); accord Fed. R. Civ. P. 56(f) (describing procedure for summary judgment when affidavits are unavailable).

[370] See Ajluni v. FBI, 947 F. Supp. 599, 608 (N.D.N.Y. 1996) (explaining that discovery not permitted into the "thought processes of [the] agency in deciding to claim a particular FOIA exemption"); Murphy v. FBI, 490 F. Supp. 1134, 1136 (D.D.C. 1980) (stating that "discovery is limited to factual disputes . . . [and that] the thought processes of the agency in deciding to
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be permitted when a plaintiff seeks by it to obtain the contents of withheld documents -- the matter that lies at the very heart of a FOIA case.[371]

Discovery also should not be permitted when the plaintiff is plainly using the FOIA lawsuit as a means of questioning investigatory action taken by the agency or the underlying reasons for undertaking such investigations.[372] Courts will refuse to "allow [a] plaintiff to use this limited discov-

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[370](...continued)
claim a particular FOIA exemption . . . are protected from disclosure").

[371] See, e.g., Tax Analysts v. IRS, 410 F.3d 715, 722 (D.C. Cir. 2005) (reasoning that "[Appellant's] demand for further inquiry into the substance of the documents would, if granted, turn FOIA on its head, awarding Appellant in discovery the very remedy for which it seeks to prevail in the suit"); Local 3, Int'l Bhd. of Elec. Workers v. NLRB, 845 F.2d 1177, 1179 (2d Cir. 1988) (finding plaintiff not entitled to discovery that would be tantamount to disclosure of contents of exempt documents); Pollard v. FBI, 705 F.2d 1151, 1154 (9th Cir. 1983) (affirming denial of discovery when directed to substance of withheld documents at issue); Fla. Immigrant Advocacy Ctr. v. NSA, 380 F. Supp. 2d 1332, 1343 (S.D. Fla. 2005) (observing that discovery is impermissible when the plaintiff is seeking to obtain "information [that] would not be available to it under the FOIA and may be classified or otherwise protected by disclosure by statute"); Schiller v. INS, 205 F. Supp. 2d 648, 654 (W.D. Tex. 2002) (refusing to permit discovery that sought "information . . . for which [plaintiffs] filed the FOIA request"); Pub. Citizen, 997 F. Supp. at 73 (same); Katzman, 926 F. Supp. at 319 (same); Moore v. FBI, No. 83-1541, slip op. at 6 (D.D.C. Mar. 9, 1984) (denying discovery requests that "would have to go to the substance of the classified materials" at issue, and noting that "[t]his is precisely the case when the court can and should exercise its discretion to deny that discovery"), aff'd, 762 F.2d 138 (D.C. Cir. 1985) (unpublished table decision); Laborers' Int'l Union v. U.S. Dep't of Justice, 578 F. Supp. 52, 56 (D.D.C. 1983) (sustaining government's objections to interrogatories when answers would "serve to confirm or deny the authenticity of the document held by plaintiff"), aff'd, 772 F.2d 919 (D.C. Cir. 1984).

[372] See RNR Enters. v. SEC, 122 F.3d 93, 98 (2d Cir. 1997) (finding no abuse of discretion in district court denial of discovery propounded for "investigative purposes"); Flowers v. IRS, 307 F. Supp. 2d 60, 72 (D.D.C. 2004) (scolding plaintiff, who "may be unhappy with the search results," for seeking discovery in her FOIA case in order to conduct investigation of the agency's rationale for tax audit); Cecola v. FBI, No. 94 C 4866, 1995 WL 143548, at *3 (N.D. Ill. Mar. 31, 1995) (disallowing deposition concerning factual basis for assertion of Exemption 7(A), because "there is concern that the subject of the investigation not be alerted to the government's investigative strategy"); Williams v. FBI, No. 90-2299, 1991 WL 163757, at *3 (D.D.C. Aug. 6, 1991) ("An agency's rationale for undertaking an investigation of the Plaintiff is not the proper subject of FOIA discovery requests."); (continued...)

ery opportunity as a fishing expedition [for] investigating matters related to separate lawsuits."[373]

Discovery should be denied altogether if the court is satisfied from the agency's affidavits that "no factual dispute remains,"[374] and when the

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[372](...continued)
see also Freedman v. Dep't of Justice, No. 78-4257, slip op. at 3-4 (D. Kan. Jan. 3, 1990) (denying discovery concerning electronic surveillance investigative practices).

[373] Changzhou Laosan Group v. U.S. Customs & Border Prot. Bureau, No. 04-1919, 2005 WL 913268, at *7 (D.D.C. Apr. 20, 2005) (denying the plaintiff's request for discovery because "the purpose of FOIA is not to serve as a tool for obtaining discovery for an administrative forfeiture proceeding"); Tannehill v. Dep't of the Air Force, No. 87-1335, 1987 WL 25657, at *2 (D.D.C. Nov. 12, 1987) (limiting discovery to determination of FOIA issues, not to underlying personnel decision); see Al-Fayed v. CIA, No. 00-2092, slip op. at 17 (D.D.C. Dec. 11, 2000) (terming plaintiff's discovery request "a fishing expedition" and refusing to grant it), aff'd on other grounds, 254 F.3d 300 (D.C. Cir. 2001); Immanuel v. Sec'y of Treasury, No. 94-884, 1995 WL 464141, at *1 (D. Md. Apr. 4, 1995) (rejecting discovery that would constitute "a fishing expedition into all the possible funds held by the Department of [the] Treasury which may fall within the terms of [plaintiff's] broad FOIA request. Such an expedition is certainly not going to come at the government's expense when it is evident that [plaintiff] seeks this information only for his own commercial use."), aff'd on other grounds, No. 95-1953, 1996 WL 157732 (4th Cir. Apr. 5, 1996); cf. Carpenter v. U.S. Dep't of Justice, No. 3:05CV172, 2005 WL 1290678, at *2 (D. Conn. Apr. 28, 2005) (noting that the plaintiff is seeking discovery for a criminal case pending in another district, and finding therefore that the plaintiff's argument -- to keep cases in two separate districts in order to minimize any inappropriate impact -- is unpersuasive because if the "plaintiff can find a way of using any such documents to his advantage, he will inject them into the criminal case"); United States v. Chrein, 368 F. Supp. 2d 278, 284 (S.D.N.Y. 2005) (explaining that "a FOIA request cannot be used as simply a way to get around discovery rules, and limitations, of a civil action"); Ctr. for Individual Rights v. U.S. Dep't of Justice, No. 03-1706, slip op. at 5-6 (D.D.C. June 29, 2004) ("'FOIA rights are unaffected by the requester's involvement in other litigation; an individual may therefore obtain under FOIA information that may be useful in non-FOIA litigation, even when the documents sought could not be obtained through discovery.'" (quoting North v. Walsh, 881 F.2d 1088, 1099 (D.C. Cir. 1989))).

[374] Schrecker v. U.S. Dep't of Justice, 217 F. Supp. 2d 29, 35 (D.D.C. 2002), aff'd, 349 F.3d 657 (D.C. Cir. 2003); see Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978), vacated in other part & reh'g denied, 607 F.2d 367 (D.C. Cir. 1979); Van Mechelen, 2005 WL 3007121, at *5 (finding discovery to be unwarranted because government satisfied its burden of proof); see also
(continued...)

affidavits are "relatively detailed" and submitted in good faith.[375] Consequently, discovery should routinely be denied when the plaintiff's "efforts are made with [nothing] more than a 'bare hope of falling upon something that might impugn the affidavits'" submitted by the defendant agency.[376]

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[374](...continued)
Becker, 34 F.3d at 406 (finding that district court did not err by granting summary judgment to government without addressing plaintiff's motion for discovery; explaining that the judge "must have been satisfied that discovery was unnecessary when she concluded that the IRS's search was reasonable and ruled in favor of the IRS on summary judgment").

[375] See Wood, 432 F.3d at 85 (affirming denial of discovery, and holding that the "district court did not abuse its discretion in finding [plaintiff's conjectural] assertion insufficient to overcome the government's good faith showing"); SafeCard, 926 F.2d at 1200-02 (affirming decision to deny discovery as to adequacy of search, on ground that agency's affidavits were sufficiently detailed); Military Audit Project v. Casey, 656 F.2d 724, 751 (D.C. Cir. 1981) (affirming trial court's refusal to permit discovery when plaintiffs had failed to raise "substantial questions concerning the substantive content of the [defendants'] affidavits"); Citizens for Responsibility & Ethics in Wash. v. Nat'l Indian Gaming Comm'n, No. 05-00806, 2006 WL 3628954, at *11 (D.D.C. Dec. 12, 2006) (finding no extraordinary basis to grant discovery because alleged deficiencies in agency's affidavits are not legally significant and there is no evidence of bad faith); Reid v. USPS, No. 05-cv-294, 2006 WL 1876682, at *5 (S.D. Ill. July 5, 2006) (denying discovery because "[d]efendant's submissions are adequate on their face"); Fla. Immigrant Advocacy Ctr., 380 F. Supp. 2d at 1343 (denying discovery because agency's affidavit was "sufficiently detailed, nonconclusory and submitted in good faith"); Allen v. U.S. Secret Serv., 335 F. Supp. 2d 95, 100 (D.D.C. 2004) (denying discovery because the "[p]laintiff has not established that the affidavits are incomplete or made in bad faith"); Broaddrick v. Executive Office of the President, 139 F. Supp. 2d 55, 64 (D.D.C. 2001) (denying discovery because agency affidavits were sufficiently detailed) (Privacy Act case); Pease v. U.S. Dep't of Interior, No. 1:99CV113, slip op. at 6 (D. Vt. Sept. 11, 1999) ("'[D]iscovery relating to the agency's search and the exemptions it claims for withholding records generally is unnecessary if the agency's submissions are adequate on their face.'" (quoting Carney, 19 F.3d at 812)); Hunt v. U.S. Marine Corps, 935 F. Supp. 46, 50 (D.D.C. 1996) (denying discovery because "defendants have met their burden of showing that they made a good faith effort to conduct a search for the requested records, using methods reasonably expected to produce the desired information"); cf. Animal Legal Def. Fund, Inc. v. Dep't of the Air Force, 44 F. Supp. 2d 295, 304 (D.D.C. 1999) (finding agency affidavit insufficient but ordering more detailed affidavit and Vaughn Index rather than permitting discovery); Long, 10 F. Supp. 2d at 210 (allowing discovery because agency affidavit was found to be insufficient).

[376] Pub. Citizen, 997 F. Supp. at 73 (quoting Founding Church of Scientol-
(continued...)

In any event, "'curtailment of discovery' is particularly appropriate where the court makes an in camera inspection."[377] Permissible discovery should take place, if at all, only after the government moves for summary judgment and submits its supporting affidavits and memorandum of law, which contain its evidentiary proof in the case.[378]

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[376](...continued)
ogy v. NSA, 610 F.2d 824, 836-37 n.101 (D.C. Cir. 1979)); see Military Audit Project, 656 F.2d at 751-52; Kay v. FCC, 976 F. Supp. 23, 34 n.35 (D.D.C. 1997) (concluding that because plaintiff failed to submit "concrete evidence of bad faith," discovery was actually sought only to discredit agency declaration), aff'd, 172 F.3d 919 (D.C. Cir. 1998) (unpublished table decision); see also Physicians Comm. for Responsible Med. v. Glickman, 117 F. Supp. 2d 1, 4 (D.D.C. 2000) ("Discovery to pursue a suspicion or a hunch is unwarranted.") (Federal Advisory Committee Act case).

[377] Ajluni v. FBI, 947 F. Supp. 599, 608 (N.D.N.Y. 1996) (quoting Katzman, 926 F. Supp. at 320); see Mehl v. EPA, 797 F. Supp. 43, 46 (D.D.C. 1992) (employing in camera review, rather than discovery, to resolve inconsistency between representations in Vaughn Index and agency's prior public statements); Laborers' Int'l, 772 F.2d at 921.

[378] See, e.g., Miscavige v. IRS, 2 F.3d 366, 369 (11th Cir. 1993) ("The plaintiff's early attempt in litigation of this kind . . . to take discovery depositions is inappropriate until the government has first had a chance to provide the court with the information necessary to make a decision on the applicable exemptions."); see Farese v. U.S. Dep't of Justice, No. 86-5528, slip op. at 6 (D.C. Cir. Aug. 12, 1987) (affirming denial of discovery filed prior to affidavits, because the discovery "sought to short-circuit the agencies' review of the voluminous amount of documentation requested"); Simmons v. U.S. Dep't of Justice, 796 F.2d 709, 711-12 (4th Cir. 1986) (approving district court's decision denying discovery because agency affidavit filed with summary judgment motion made need for discovery "moot"); Military Audit Project, 656 F.2d at 750 (finding no abuse of discretion where agency affidavits were not "inadequate . . . let alone conclusory"); Piron v. Dep't of Justice, No. C00-1287, slip. op. at 2-3 (W.D. Wash. Jan. 10, 2001) (quoting Department of Justice's Freedom of Information Act Guide & Privacy Act Overview 597-98 (May 2000) to the effect that "[p]ermissible discovery . . . should take place, if at all, only after the government moves for summary judgment," in denying discovery on the ground that the government had not yet submitted its summary judgment motion), subsequent opinion (W.D. Wash. May 9, 2001); Founding Church of Scientology v. U.S. Marshals Serv., 516 F. Supp. 151, 156 (D.D.C. 1980) (barring discovery until defendant has opportunity to submit second Vaughn affidavit). But see Long, 10 F. Supp. 2d at 210 (allowing discovery prior to government's motion for summary judgment only to test adequacy of search); Ctr. for Nat'l Sec. Studies v. INS, No. 87-2068, slip op. at 2 (D.D.C. July 27, 1988) (permitting discovery on issue of agency's "due diligence" in processing responsive records even prior to filing of government's affidavit because of discerned "discrepan-
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Lastly, it is worth noting that the courts have held that, in appropriate cases, the government can conduct discovery against a FOIA plaintiff,[379] though case law is split on the question of whether in a FOIA case a party can take discovery against a private citizen.[380]

Waiver of Exemptions in Litigation

Because the FOIA directs district courts to review agency actions de novo,[381] an agency is not barred from invoking a particular exemption in litigation merely because that exemption was not cited in responding to the

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[378](...continued)
cies" in agency's representations as to when processing would be completed), summary judgment granted, 1990 WL 236133 (D.D.C. Dec. 19, 1990).

[379] See, e.g., In re Engram, No. 91-1722, 1992 WL 120211, at *3 (4th Cir. June 2, 1992) (per curiam) (permitting discovery regarding how plaintiff obtained defendant's document as relevant to issue of waiver under Exemption 5); Weisberg v. U.S. Dep't of Justice, 749 F.2d 864, 868 (D.C. Cir. 1984) (ruling that agency "should be able to use the discovery rules in FOIA suits like any other litigant"); McSheffrey v. Executive Office for U.S. Attorneys, No. 98-0650, slip op. at 3 (D.D.C. Sept. 8, 1999) (recognizing that by conducting discovery against plaintiff, government could have confirmed receipt of agency's response to FOIA request), aff'd on other grounds, 13 F. App'x 3 (D.C. Cir. 2001). But cf. Kurz-Kasch, Inc. v. DOD, 113 F.R.D. 147, 148 (S.D. Ohio 1986) (indicating mistakenly that "only . . . agencies of the government" can be subject to discovery in FOIA cases).

[380] Compare In re Shackelford, No. 93-25, slip op. at 1 (D.D.C. Feb. 19. 1993) ("[P]laintiff's effort to depose two former FBI Special Agents, now retired, concerning the purpose and conduct of the investigation of John Lennon over twenty years ago, is beyond the scope of allowable discovery in a [FOIA] action."), with Judicial Watch, Inc. v. U.S. Dep't of Commerce, No. 95-133, 2000 WL 33243469, at *1-2 (D.D.C. Dec. 5, 2000) (allowing discovery to be taken regarding White House e-mails sent to and from the Department of Commerce and the Democratic National Committee "that would reasonably lead to evidence that the DOC was not complying with [plaintiff's] first FOIA request"), and Judicial Watch, 34 F. Supp. 2d at 33-35 (noting in passing that depositions had been taken of several former agency employees); see also Kurz-Kasch, 113 F.R.D. at 148 (refusing, in a case of first impression, to allow a FOIA plaintiff to depose a private citizen, on the mistaken ground that under the FOIA "discovery rules . . . apply . . . only against agencies of the government"); cf. Forest Guardians v. U.S. Forest Serv., No. 99-615, slip op. at 4 (D.N.M. Mar. 29, 2000) (disallowing discovery by information submitters against FOIA requesters, who had received submitted records from defendant agency in redacted form, when discovery was sought for purpose of determining whether requesters made further disclosures) (reverse FOIA case).

[381] 5 U.S.C. § 552(a)(4)(B) (2000 & Supp. IV 2004).

request at the administrative level.[382] Failure to raise an exemption in a timely fashion in litigation at the district court level, however, may result in its waiver.[383]

Although an agency should not be required to plead its exemptions in its Answer to a Complaint,[384] it has been held that "'agencies [may] not

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[382] See, e.g., Young v. CIA, 972 F.2d 536, 538-39 (4th Cir. 1992) ("an agency does not waive FOIA exemptions by not raising them during the administrative process" (citing Dubin v. Dep't of Treasury, 555 F. Supp. 408, 412 (N.D. Ga. 1981)), aff'd, 697 F.2d 1093 (11th Cir. 1983)); Living Rivers, Inc. v. U.S. Bureau of Reclamation, 272 F. Supp. 2d 1313, 1318 (D. Utah 2003) (citing Young); Sinito v. U.S. Dep't of Justice, No. 87-0814, 2000 U.S. Dist. LEXIS 22504, at *25 (D.D.C. July 12, 2000) ("[A]n agency is not barred from invoking a particular exemption in litigation merely because that exemption was not cited in responding to the request at the administrative level."); Frito-Lay v. EEOC, 964 F. Supp. 236, 239 (W.D. Ky. 1997) ("[A]n agency's failure to raise an exemption at any level of the administrative process does not constitute a waiver of that defense."); Farmworkers Legal Servs. v. U.S. Dep't of Labor, 639 F. Supp. 1368, 1370-71 (E.D.N.C. 1986) ("The relevant cases universally hold that exemption defenses are not too late if initially raised in the district court."); see also Pohlman, Inc. v. SBA, No. 4:03CV01241, slip op. at 26 (E.D. Mo. Sept. 30, 2005) (concluding that agency was not barred from invoking Exemption 3 in litigation merely because Exemption 3 was not raised at administrative level); Leforce & McCombs, P.C. v. HHS, No. 04-176, slip op. at 13 (E.D. Okla. Feb. 3, 2005) (explaining that privilege claim under Exemption 5 is not waived by agency's failure to invoke it at administrative stage); Conoco Inc. v. U.S. Dep't of Justice, 521 F. Supp. 1301, 1306 (D. Del. 1981) (holding that agency is not barred from asserting work-product claim under Exemption 5 merely because it had not acceded to plaintiff's demand for Vaughn Index at administrative level), aff'd in part, rev'd in part & remanded, 687 F.2d 724 (3d Cir. 1982). But cf. AT&T Info. Sys. v. GSA, 810 F.2d 1233, 1236 (D.C. Cir. 1987) (holding that in "reverse" FOIA context -- when standard of review is "arbitrary [and] capricious" standard based upon "whole" administrative record -- agency may not at litigation stage initially offer its reasons for refusal to withhold material); Gilday v. U.S. Dep't of Justice, No. 85-292, slip op. at 5 (D.D.C. July 22, 1985) (ruling that agency rationale asserted initially in litigation in defense of denial of fee waiver cannot correct shortcomings of administrative record).

[383] See, e.g., Ryan v. Dep't of Justice, 617 F.2d 781, 792 & n.38a (D.C. Cir. 1980) (refusing to allow an agency to invoke an exemption not previously "raised," proclaiming instead that "an agency must identify the specific statutory exemptions relied upon, and do so at least by the time of the district court proceedings").

[384] See, e.g., Sciba v. Bd. of Governors of the Fed. Reserve Sys., No. 04-1011, 2005 WL 758260, at *1 n.3 (D.D.C. Apr. 1, 2005) (recognizing that

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make new exemption claims to a district court after the judge has ruled in the other party's favor,' nor may they 'wait until appeal to raise additional claims of exemption or additional rationales for the same claim.'"[385] Thus, an agency's failure to preserve its exemption positions can lead to serious

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[384](...continued)
agency is not required to raise any exemption in its Answer); Lawrence v. United States, 355 F. Supp. 2d 1307, 1311 (M.D. Fla. 2004) (finding that IRS did not waive its right to invoke exemptions when it did not include them in its Answer to plaintiff's Amended Complaint); Frito-Lay, 964 F. Supp. at 239 & n.4 (distinguishing between affirmative defenses, which are waived if not raised, and FOIA exemption claims, which are not waived, and declaring that "[p]laintiff has had ample notice of and opportunity to rebut Defendant's defenses"); Johnson v. Fed. Bureau of Prisons, No. 90-H-645-E, slip op. at 4-5 (N.D. Ala. Nov. 1, 1990); Farmworkers Legal Servs., 639 F. Supp. at 1371; Berry v. Dep't of Justice, 612 F. Supp. 45, 47 (D. Ariz. 1985); see also AFGE v. U.S. Dep't of Commerce, 907 F.2d 203, 206-07 (D.C. Cir. 1990). But see Ray v. U.S. Dep't of Justice, 908 F.2d 1549, 1557 (11th Cir. 1990) (suggesting that all exemptions must be raised by defendant agency "'in a responsive pleading'" (quoting Chilivis v. SEC, 673 F.2d 1205, 1208 (11th Cir. 1982))), rev'd on other grounds sub nom. U.S. Dep't of State v. Ray, 502 U.S. 164 (1991); Maccaferri Gabions, Inc. v. U.S. Dep't of Justice, No. 95-2576, slip op. at 4-6 (D. Md. Mar. 26, 1996) (holding that government's withholding pursuant to FOIA exemption constitutes affirmative defense which must be set forth in its Answer, but finding that government's reference to exemption in its Answer and requester's knowledge of basis for withholding cured any pleading defect), appeal dismissed voluntarily, No. 96-1513 (4th Cir. Sept. 19, 1996); cf. Kansi v. U.S. Dep't of Justice, 11 F. Supp. 2d 42, 43 (D.D.C. 1998) (finding that requester lost entitlement to litigate fee waiver claim by not raising issue in Complaint).

[385] Senate of P.R. v. U.S. Dep't of Justice, 823 F.2d 574, 580 (D.C. Cir. 1987) (quoting Holy Spirit Ass'n v. CIA, 636 F.2d 838, 846 (D.C. Cir. 1980)); Tax Analysts v. IRS, 152 F. Supp. 2d 1, 25-26 (D.D.C. 2001) (citing Grumman Aircraft Eng'g Corp. v. Renegotiation Bd., 482 F.2d 710, 721-22 (D.C. Cir. 1973)), aff'd in pertinent part, rev'd in part, 294 F.3d 71 (D.C. Cir.), reh'g en banc denied (D.C. Cir. Aug. 5, 2002). But see Williams v. FBI, No. 91-1054, 1997 WL 198109, at *2 (D.D.C. Apr. 16, 1997) (distinguishing the rule in a case where exemption was raised first in a motion for reconsideration, because the "policy militating against piecemeal litigation is less weighty where the district court proceedings are not yet completed"), appeal dismissed, No. 98-5249 (D.C. Cir. Oct. 7, 1998); Judicial Watch of Fla., Inc. v. U.S. Dep't of Justice, 102 F. Supp. 2d 6, 12 & n.4 (D.D.C. 2000) (explaining that agency may not raise exemption for first time in brief replying to plaintiff's response to motion for summary judgment, but may raise it in future motion for summary judgment, thereby affording plaintiff opportunity to respond); cf. Steinberg v. U.S. Dep't of Justice, No. 93-2409, slip op. at 10 (D.D.C. July 14, 1997) (offering agency option of either further justifying withholding documents in full under Exemption 7(C) or invoking another exemption, such as Exemption 7(D)).

waiver consequences as FOIA litigation progresses -- not only during the initial district court proceedings,[386] but also at the appellate level,[387] and even following a remand.[388]

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[386] See, e.g., Rosenfeld v. U.S. Dep't of Justice, 57 F.3d 803, 811 (9th Cir. 1995) (holding new exemption claims waived when raised for first time after district court ruled against government on its motion for summary judgment); Ray, 908 F.2d at 1551 (same); Scheer v. U.S. Dep't of Justice, No. 98-1613, slip op. at 4-5 (D.D.C. July 24, 1999) (denying a motion for reconsideration to present new exemption claims, partly because defendant did not show "why, through the exercise of due diligence, it could not have presented this evidence before judgment was rendered"), remanded per stipulation, No. 99-5317 (D.C. Cir. Nov. 2, 2000); Miller v. Sessions, No. 77-C-3331, 1988 WL 45519, at *1-2 (N.D. Ill. May 2, 1988) (holding "misunderstanding" on part of government counsel of court's order to submit additional affidavits insufficient to overcome waiver, and denying motion for reconsideration); Powell v. U.S. Dep't of Justice, No. C-82-326, slip op. at 4 (N.D. Cal. June 14, 1985) (holding that government may not raise Exemption 7(D) for documents declassified during pendency of case when only Exemption 1 was raised at outset); cf. Judicial Watch, Inc. v. U.S. Dep't of Energy, No. 01-0981, slip op. at 3-4 (D.D.C. May 26, 2004) (purporting to refuse to allow the government to "raise[] the presidential communication privilege" after summary judgment was granted to plaintiff, based upon the wholly mistaken belief that the government was seeking to do so when in fact it merely was citing to a recent such case as an example of the flawed analysis undertaken by the court on the matter of threshold Exemption 5 applicability) (on motion for reconsideration). But cf. Piper v. U.S. Dep't of Justice, 374 F. Supp. 2d 73, 78 (D.D.C. 2005) (opining that while FOIA exemptions not raised at the initial district court proceedings ordinarily may be waived, if disclosure "will impinge on rights of third parties that are expressly protected by FOIA . . . district courts not only have the discretion, but sometimes the obligation to consider newly presented facts and to grant" post-judgment relief); accord Senate of P.R., 823 F.2d at 581 (holding firmly and portentiously that "the district judge did not abuse his discretion when he evaluated the situation at hand as one inappropriate for application of a rigid 'press it at the threshold, or lose it for all times' approach to the agency's FOIA exemption claims").

[387] See, e.g., Jordan v. U.S. Dep't of Justice, 591 F.2d 753, 779-80 (D.C. Cir. 1978) (en banc) (refusing to consider government's Exemption 7 claim first raised in "supplemental memorandum" filed one month prior to appellate oral argument).

[388] See, e.g., Fendler v. Parole Comm'n, 774 F.2d 975, 978 (9th Cir. 1985) (barring government from raising Exemption 5 on remand to protect presentence report because it was raised for first time on appeal); Ryan, 617 F.2d at 792 & n.38a (holding government barred from invoking Exemption 6 on remand because it was "raised" for first time on appeal, and defining "raised" to mean, in effect, "fully Vaughned"); cf. Benavides v. U.S. Bureau of

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This lesson was underscored by the Court of Appeals for the District of Columbia Circuit's decision in Maydak v. United States Department of Justice.[389] In Maydak, the D.C. Circuit refused to allow the defendant agency to invoke underlying FOIA exemptions when its initial Exemption 7(A) basis for nondisclosure became no longer applicable due to the completion of the underlying law enforcement proceedings.[390] While recognizing that it previously had allowed agencies to raise new exemptions when there was "a substantial change in the factual context of the case,"[391] the D.C. Circuit ruled that the termination of underlying enforcement proceedings and the resultant expiration of the applicability of Exemption 7(A) did not meet this standard.[392]

Indeed, in Maydak the D.C. Circuit refused to recognize that the temporal nature of Exemption 7(A) necessitates a practical approach to processing investigatory law enforcement records.[393] Rather, it denied the

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[388](...continued)
Prisons, 995 F.2d 269, 273 (D.C. Cir. 1993) ("[T]he government is not entitled to raise defenses to requests for information seriatim until it finds a theory that the court will accept, but must bring all its defenses at once before the district court.") (Privacy Act access case). Compare Wash. Post Co. v. HHS, 795 F.2d 205, 208-09 (D.C. Cir. 1986) (finding that "privilege" prong of Exemption 4 may not be raised for first time on remand -- even though "confidential" prong was previously raised -- absent sufficient extenuating circumstances), and Wash. Post Co. v. HHS, 865 F.2d 320, 327 (D.C. Cir. 1989) (prohibiting agency from raising new aspect of previously raised prong of Exemption 4), with Lame v. U.S. Dep't of Justice, 767 F.2d 66, 71 n.7 (3d Cir. 1985) (permitting new exemptions to be raised on remand, as compared to raising new exemptions on appeal). But see also Morgan v. U.S. Dep't of Justice, 923 F.2d 195, 199 n.5 (D.C. Cir. 1991) (remanding for the district court to determine whether a sealing order actually prohibits disclosure under the FOIA, but noting that the government can invoke other exemptions "if the court determines that the seal does not prohibit disclosure").

[389] 218 F.3d 760 (D.C. Cir. 2000).

[390] Id. at 767.

[391] Id. (citing, e.g., Senate of P.R., 823 F.2d at 580-81).

[392] Id. at 767-68 (proclaiming that the only change in the "factual context" of the case was the "simple resolution of other litigation, hardly an unforeseeable difference").

[393] See *FOIA Post*, "Supreme Court Is Asked to Review Law Enforcement Case" (posted 5/30/01) (describing the D.C. Circuit's approach to Exemption 7(A) in the Maydak case); see also Senate of P.R., 823 F.2d at 581 (describing circumstances in which, "[f]rom a practical standpoint," further proceedings might well be required in order to allow the agency to invoke
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agency the ability to invoke any FOIA exemption that had not been "raised" at the district court level.[394] "Raising" an exemption means more than merely identifying, noting, or generally describing it, according to the D.C. Circuit: It means invoking it "as a defense in a manner in which the district court could rule on the issue."[395]

The Maydak ruling, though, may have been a direct result of the D.C. Circuit's perception of "tactical maneuvering" by the government at the FOIA requester's expense.[396] Indeed, when another D.C. Circuit panel subsequently was presented with a similar situation, in August v. FBI, it took pains to point out that it did not intend to "adopt[] a rigid 'press it at the threshold or lose it for all times' approach to . . . agenc[ies'] FOIA exemption claims."[397] Significantly, that panel emphasized the fact that the full court in Jordan v. United States Department of Justice[398] had adopted a "flexible approach to handling belated invocations of FOIA exemptions," which it said actually was "affirmed" in Maydak.[399] The D.C. Circuit in August acknowledged three circumstances that might permit the government belatedly to invoke FOIA exemptions: a substantial change in the factual context of a case; an interim development in an applicable legal doctrine; or pure mistake.[400]

Moreover, in two rulings issued shortly after August, another panel of

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[393](...continued)
other exemptions once Exemption 7(A) no longer is applicable).

[394] 218 F.3d at 765.

[395] Id. (citing Ryan, 617 F.2d at 792 n.38a). But see United We Stand Am., Inc. v. IRS, 359 F.3d 595, 598, 603 (D.C. Cir. 2004) (leaving to the district court on remand the question of "[w]hether one of the nine exemptions applies" to the disputed record despite the fact that the agency only "reserve[d] the right . . . to assert any applicable exemption claim(s)").

[396] August v. FBI, 328 F.3d 697, 701 (D.C. Cir. 2003) (characterizing agency's conduct in Maydak).

[397] Id. at 699 (quoting Senate of P.R., 823 F.2d at 581).

[398] 591 F.2d 753 (D.C. Cir. 1978) (en banc).

[399] August, 328 F.3d at 700 (harmonizing Maydak and Jordan); see also Summers v. U.S. Dep't of Justice, No. 98-1837, slip op. at 7 (D.D.C. Apr. 13, 2004) (interpreting Maydak to require the government to raise all claimed exemptions at some time during the district court proceedings -- but not requiring "that all exemptions . . . be raised at the same time").

[400] August, 328 F.3d at 700 (citing Jordan); see, e.g., Judicial Watch v. Dep't of the Army, 466 F. Supp. 2d 112, 124 (D.D.C. 2006) (granting reconsideration to correct agency's error and afford intervenor an opportunity to raise exemptions).

the D.C. Circuit suggested that an agency's belated raising of FOIA exemptions might be appropriate under an additional circumstance -- namely, when the legal basis for an agency's initial decision on a FOIA request is rejected in litigation. In United We Stand America, Inc. v. IRS,[401] the primary issue was whether a requested record should be considered a congressional document or an "agency record."[402] At the district court level, the agency actually "reserved the right" to invoke exemptions if the court disagreed with the agency's determination that the record was a congressional document and thus not subject to the FOIA.[403] On appeal, the D.C. Circuit determined that the document was at least partially an "agency record," and it remanded the case to the district court to decide the applicability of any exemption claims that the agency previously had "reserved."[404] Similarly, in LaCedra v. Executive Office for United States Attorneys,[405] the D.C. Circuit found as a matter of law that the agency's interpretation of a FOIA request was "implausible," but nonetheless explicitly permitted the agency on remand to raise exemption claims for the additional records that would be considered responsive, on the basis that "[n]othing in Maydak requires an agency to invoke any exemption applicable to a record the agency in good faith believes has not been requested."[406]

The consequence of this line of cases is that, especially within the D.C. Circuit, agencies should be sure to carefully coordinate with their principal litigation counsel in any FOIA lawsuit in which underlying FOIA exemptions or overlapping FOIA defenses are involved.[407] As a matter of general practice, a prudent course of action would be to obtain the court's permission to raise the threshold defense first in order to specifically reserve the right to invoke the remaining exemptions at a later date, if necessary.[408] Of course, if for some reason the district court does not permit

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[401] 359 F.3d 295 (D.C. Cir. 2004).

[402] Id. at 597.

[403] Id. at 598.

[404] Id. at 603.

[405] 317 F.3d 345 (D.C. Cir. 2003).

[406] Id. at 348.

[407] See *FOIA Post*, "Supreme Court Declines to Review Waiver Case" (posted 8/7/01) (advising agencies to give especially careful attention to litigation-waiver issues in wake of Maydak).

[408] See United We Stand Am., 359 F.3d at 598 (permitting agency to raise on remand exemptions reserved in its district court papers, in which it stated: "Should the Court determine that the documents in question constitute agency records for purposes of the FOIA . . . the defendant reserves the right, pursuant to the statute, to assert any applicable exemption

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this pragmatic approach, then the agency, in order to guard against any possible finding of waiver, could raise all applicable exemption claims in its initial district court summary judgment submissions.[409] (See the further discussion of this issue under Exemption 7(A), above.) Although the failure to submit an entirely adequate Vaughn affidavit will not necessarily result in a waiver of exemptions and justify the granting of summary judg-

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[408](...continued)
claim(s), prior to disclosure, and to litigate further any such exemption claims"); accord Senate of P.R., 823 F.2d at 581 (holding that "the district judge did not abuse his discretion when he evaluated the situation at hand as one inappropriate for application of a rigid 'press it at the threshold, or lose it for all times' approach to the agency's FOIA exemption claims").

[409] See Jefferson v. Dep't of Justice, 284 F.3d 172, 179 (D.C. Cir. 2002) (foreclosing government's ability to invoke Exemption 6 in allowing remand only to determine whether records meet law enforcement threshold for invocation of Exemption 7(C); "the government's invocation on appeal of Exemption 6 comes too late"); Smith v. U.S. Dep't of Justice, 251 F.3d 1047, 1051-52 (D.C. Cir. 2001) (rejecting agency's Exemption 3 claim and refusing to remand to the district court to allow the agency "there for the first time raise certain other exemptions from the FOIA" (citing Maydak)); Ayyad v. U.S. Dep't of Justice, No. 00-960, 2002 WL 654133, at *4 n.6 (S.D.N.Y. Apr. 18, 2002) (finding no need to decide the applicability of "numerous additional claims of exemption" that were thoroughly raised by the agency (out of its concern with waiver), because the "documents are so clearly covered by exemption 7(A)"); see also Trentadue v. Integrity Comm., No. 04-4200, slip op. at 4-5 (10th Cir. Sept. 27, 2005) (remanding case due to termination of law enforcement investigation upon which Exemption 7(A) claim was based, and directing district court to consider applicability of other exemptions that were raised in district court proceedings but never were ruled upon); Sciba, 2005 WL 758260, at *1 n.3 (explaining that to avoid waiver, an exemption must be "raised at a point in the district court proceedings that gives the court an adequate opportunity to consider it"); cf. Boyd v. U.S. Marshals Serv., No. 99-2712, 2002 U.S. Dist. LEXIS 27734, at *6 (D.D.C. Mar. 15, 2002) (finding that while the defendant agencies relied exclusively on Exemption 7(A) at the administrative level, they avoided waiver of other exemptions by invoking them "after being served with the complaint"); Pub. Citizen v. Dep't of Educ., 292 F. Supp. 2d 1, 4-5 (D.D.C. 2003) (rejecting agency's argument that fees should be paid for broad-based search because it was raised for first time in court, which the court claimed would "frustrate . . . the efficient and prompt administration of the FOIA"). But see also Cotner v. U.S. Parole Comm'n, 747 F.2d 1016, 1018-19 (5th Cir. 1984) (recognizing that new exemptions may be raised on remand due to a "fundamental" change in the government's position that was "not calculated to gain any tactical advantage in this particular case"); Chilivis v. SEC, 673 F.2d 1205, 1208 (11th Cir. 1982) (deciding that government is not barred from invoking other exemptions after reliance on Exemption 7(A) was rendered untenable by conclusion of underlying law enforcement proceeding).

ment against an agency,[410] the most prudent practice for agency defendants is to ensure that their initial Vaughn affidavits contain sufficiently detailed justifications of every exemption that they plan to invoke on the basis of all known facts.[411]

Sanctions

The FOIA does not authorize any award of monetary damages to a requester,[412] either for an agency's unjustified refusal to release requested

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[410] See Coastal States Gas Corp. v. Dep't of Energy, 644 F.2d 969, 982 (3d Cir. 1981) (finding it abuse of discretion to refuse to consider revised index and instead award "partial judgment" to plaintiff, even though corrected index was submitted one day before oral argument on plaintiff's "partial judgment" motion); cf. Wilkinson v. FBI, No. 80-1048, slip op. at 3 (C.D. Cal. June 17, 1987) (providing government thirty days to further justify exemptions but, after reviewing subsequent declarations, finding same faults with new declarations as with original ones and ordering in camera review). But see Carroll v. IRS, No. 82-3524, slip op. at 28 (D.D.C. Jan. 31, 1986) (holding affidavits insufficient and affording agencies no further opportunities to reassert their claims because "[a]fter years of litigation, the suit must be resolved").

[411] See Maine v. U.S. Dep't of the Interior, 285 F.3d 126, 137 (1st Cir.) (refusing to afford the defendant an opportunity on remand to remedy an affidavit insufficiency discerned by the appellate court), aff'd in pertinent part & rev'd & vacated in other part on reh'g, 298 F.3d 60 (1st Cir. 2002); Coastal States, 644 F.2d at 981 (suggesting that agencies might be restricted to one Vaughn affidavit); see also ABC, Inc. v. USIA, 599 F. Supp. 765, 768 (D.D.C. 1984) (denying government's request to first litigate "agency record" issue and to raise other exemptions only if threshold defense fails); cf. Homick v. U.S. Dep't of Justice, No. 98-00557, slip op. at 3-4 (N.D. Cal. Oct. 27, 2004) (refusing to allow the submission of an additional Vaughn Index for a group of documents not processed prior to the hearing date, and noting that the "[p]laintiff requested this information in 1992 and filed a FOIA complaint in 1998").

[412] See Eltayib v. U.S. Coast Guard, 53 F. App'x 127, 127 (D.C. Cir. 2002) (declaring that the FOIA "does not authorize the collection of damages"); O'Toole v. IRS, 52 F. App'x 961, 962 (9th Cir. 2002) (same); O'Meara v. IRS, No. 97-3383, 1998 WL 123984, at *1 (7th Cir. Mar. 12, 1998) ("FOIA . . . does not authorize sanctions as a remedy for failure to disclose documents. Instead, courts are limited to ordering the production of agency records, and assessing reasonable attorney fees and litigation costs against the United States."); Ross v. United States, No. 06-0963, 2006 WL 3250831, at *10 (D.D.C. Nov. 10, 2006) ("It is well-settled that monetary damages are not available under FOIA."); Serrano v. U.S. Dep't of Justice INS, No. 01-0521, 2001 WL 1190993, at *2 n.1 (E.D. La. Oct. 5, 2001) ("FOIA does not authorize an action for money damages against the agency or its personnel."); Butler

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records[413] or for alleged improper disclosure of information.[414] The Act does, however, provide that in certain narrowly prescribed circumstances agency employees who arbitrarily or capriciously withhold information may be subject to disciplinary action. Specifically, subsection (a)(4)(F) of the FOIA, as amended, provides:

> Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the [United States Office of] Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the with-

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[412](...continued)
v. Nelson, No. 96-48, 1997 WL 580331, at *3 (D. Mont. May 16, 1997) ("Section 552 of Title 5 includes a comprehensive and defined list of remedies available; the conspicuous absence of a provision allowing an action for money damages convinces the court that Plaintiff may not seek damages under the FOIA."); Stabasefski v. United States, 919 F. Supp. 1570, 1573 (M.D. Ga. 1996) ("[T]he remedial measures available under the Freedom of Information Act are limited to injunctive relief, costs, and attorney's fees." (citing 5 U.S.C. § 552(a)(4)(B), (E))); see also Whitfield v. U.S. Dep't of the Treasury, No. 04-0679, 2006 WL 2434923, at *7 (D.D.C. Aug. 22, 2006) (commenting that "[p]laintiff's request for damages would fail" because FOIA provides injunctive relief only).

[413] See Schwartz v. U.S. Patent & Trademark Office, No. 95-5349, 1996 U.S. App. LEXIS 4609, at *2-3 (D.C. Cir. Feb. 22, 1996); Thompson v. Walbran, 990 F.2d 403, 405 (8th Cir. 1993); Wren v. Harris, 675 F.2d 1144, 1147 (10th Cir. 1982); Gilbert v. Soc. Sec. Admin., No. 93-C-1055, slip op. at 10 (E.D. Wis. Dec. 28, 1994); Bologna v. Dep't of the Treasury, No. 93-1495, 1994 WL 381975, at *4 (D.N.J. Mar. 29, 1994); Duffy v. United States, No. 87-C-10826, slip op. at 31-32 (N.D. Ill. May 29, 1991); Daniels v. St. Louis Veterans Admin. Reg'l Office, 561 F. Supp. 250, 251 (E.D. Mo. 1983); Diamond v. FBI, 532 F. Supp. 216, 233 (S.D.N.Y. 1981), aff'd on other grounds, 707 F.2d 75 (2d Cir. 1983).

[414] See Crumpton v. Stone, 59 F.3d 1400, 1406 (D.C. Cir. 1995) (holding that agency decision to disclose information under FOIA constitutes "a discretionary function exempt from suit under the [Federal Tort Claims Act]"); Sterling v. United States, 798 F. Supp. 47, 48 & n.2 (D.D.C. 1992) (ruling that neither FOIA nor Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2000), authorizes award of monetary damages for alleged improper disclosure), summary affirmance granted, No. 93-5264 (D.C. Cir. Mar. 11, 1994).

holding.[415]

Thus, there are three distinct jurisdictional prerequisites to the initiation of a Special Counsel investigation under the FOIA: (1) the court must order the production of agency records found to be improperly withheld; (2) it must award attorney fees and litigation costs; and (3) it must issue a specific "written finding" of suspected arbitrary or capricious conduct. The imposition of sanctions, when all three prerequisites have been met, has occurred infrequently.[416] Nevertheless, agency FOIA personnel should not

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[415] 5 U.S.C. § 552(a)(4)(F) (2000 & Supp. IV 2004); see 5 U.S.C. § 1211 (2000) (establishing "Office of Special Counsel" independent of Merit Systems Protection Board); see also 1978 FOIA Amendment, Pub. L. No. 95-454, 92 Stat. 1111 (changing "Civil Service Commission" to "Special Counsel").

[416] See, e.g., O'Shea v. NLRB, No. 2:05-2808, 2006 WL 1977152, at *6 (D.S.C. July 11, 2006) (holding that referral to Office of Special Counsel was unwarranted because defendant agency was not improperly withholding documents); Hull v. U.S. Dep't of Labor, No. 04-1264, 2006 U.S. Dist. LEXIS 35054, at *21 (D. Colo. May 30, 2006) (concluding that, despite "bureaucratic mistakes," defendant did not lie or disobey or ignore court orders, and that defendant's conduct therefore did not warrant referral to Office of Special Counsel); Defenders of Wildlife v. USDA, 311 F. Supp. 2d 44, 61 (D.D.C. 2004) (declining to find that agency acted arbitrarily and capriciously, because court did not find that agency withheld nonexempt records); Al-Fayed v. CIA, No. 00-2092, slip op. at 3 (D.D.C. Apr. 25, 2002) (rejecting plaintiff's contention that agency document releases were unreasonably dilatory and thus refusing to impose sanctions when agency "released all responsive documents within the Court ordered time"); Chourre v. IRS, 203 F. Supp. 2d 1196, 1202 (W.D. Wash. 2002) (denying request for sanctions because there was "nothing in the record to suggest that [defendant] acted arbitrarily or capriciously"); Kempker-Cloyd v. U.S. Dep't of Justice, No. 5:97-253, 1999 U.S. Dist. LEXIS 4813, at *23 (W.D. Mich. Mar. 12, 1999) (finding that even though agency's action was "incomplete and untimely" and "not in good faith," there was no evidence of arbitrary or capricious behavior), motion for fees & costs granted, slip op. at 14 (W.D. Mich. Apr. 2, 1999) (magistrate's recommendations), adopted (W.D. Mich. Aug. 17, 1999); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 34 F. Supp. 2d 28, 43 n.9 (D.D.C.) (finding "merit in the view that the district court should be more willing to refer disciplinary matters to the Office of Special Counsel when agencies act arbitrarily and capriciously," but declining to consider appropriateness of referral until conclusion of litigation), further discovery ordered, 34 F. Supp. 2d 47 (D.D.C. 1998), partial summary judgment granted, 83 F. Supp. 2d 105 (D.D.C. 1999); Gabel v. IRS, No. 97-1653, 1998 WL 817758, at *5-6 (N.D. Cal. June 25, 1998) (declining to issue "sanctions" finding when all requested records had been produced and thus no records improperly were withheld); cf. Norwood v. FAA, No. 83-2315, slip op. at 20 (W.D. Tenn. Dec. 11, 1991) (finding that when a court denies fees on the

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overlook the importance and viability of this sanction provision.[417]

In addition, a provision of the Whistleblower Protection Act of 1989[418] authorizes the Office of Special Counsel to investigate certain allegations concerning arbitrary or capricious withholding of information requested under the FOIA. Unlike subsection (a)(4)(F) of the FOIA, this provision does not even require a judicial finding; indeed, no lawsuit need even be filed to invoke this other sanction mechanism.[419]

Further, as in all civil cases, courts may exercise their discretion to impose sanctions on FOIA litigants[420] as well as on government counsel[421]

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[416](...continued)
ground that the plaintiff is proceeding pro se, "the issuance of written findings pursuant to 5 U.S.C. § 552(a)(4)(F) would be inappropriate since both prerequisites have not been met"), aff'd in part & rev'd in part on other grounds, 993 F.2d 570 (6th Cir. 1993); Miller v. Webster, No. 77-C-3331, slip op. at 4 (N.D. Ill. Oct. 27, 1983) (refusing to refer "alleged violation" to Merit Systems Protection Board because violation was "de minimis"), summary judgment granted (N.D. Ill. Feb. 29, 1984).

[417] See Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 182-83 (D.D.C. 2004) (inviting the plaintiff to file an application for attorney fees and "to move for the Court to make any findings needed to cause referral of the DOC's activities to the Office of Special Counsel, pursuant to 5 U.S.C. § 552(a)(4)(F)," because of the agency's poor handling of the plaintiff's initial requests); Ray v. U.S. Dep't of Justice, 716 F. Supp. 1449, 1451-52 (S.D. Fla. 1989) (holding "court order" requirement satisfied even though no record was found to be improperly withheld); FOIA Update, Vol. IV, No. 3, at 5 (discussing FOIA provision mandating MSPB Special Counsel investigation in all qualifying cases of suspected "arbitrary and capricious" withholding).

[418] 5 U.S.C. § 1216(a)(3) (2000).

[419] See generally H.R. Rep. No. 95-1717, at 137 (1978), reprinted in 1978 U.S.C.C.A.N. 2723, 2870 ("[T]his provision is not intended to require that an administrative or court decision be rendered concerning withholding of information before the Special Counsel may investigate allegations of such a prohibited practice.").

[420] See, e.g., Johnson v. Comm'r, 68 F. App'x 839, 840 (9th Cir. 2003) (granting agency's motion for sanctions because appeal was "frivolous"); Taylor v. Blakey, No. 03-0173, 2006 WL 279103, at *7-8 (D.D.C. Feb. 6, 2006) (noting that res judicata bars the plaintiff's case, and warning the plaintiff's counsel that "his zeal fostered carelessness, which took him to the edge of acceptability, and to the brink of an unpleasant rendezvous with Rule 11"); Nash v. U.S. Dep't of Justice, 992 F. Supp. 447, 450 (D.D.C. 1998) (alternative holding) (dismissing suit as sanction for "continuing violation" of Rule
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who have violated court rules or shown disrespect for the judicial process. One court has even referred an Assistant United States Attorney who handled a FOIA requester's criminal case to the Department of Justice's Office of Professional Responsibility following a finding that he prematurely "destroyed records responsive to [the] FOIA request while [the FOIA] litigation was pending."[422] In general, claims of "bad faith" actions by a govern-

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[420](...continued)
11 of Federal Rules of Civil Procedure by plaintiff's counsel), summary affirmance granted, No. 98-5096 (D.C. Cir. July 20, 1998).

[421] See, e.g., Pac. Fisheries, Inc. v. IRS, No. 04-2436, 2006 WL 1635706, at *5 (W.D. Wash. June 1, 2006) (ordering agency to show cause why pursuant to 28 U.S.C. § 1927 attorney fees in form of sanctions should not be assessed, as it appeared that agency "unreasonably and vexatiously multiplied proceedings"); Landmark Legal Found. v. EPA, 272 F. Supp. 2d 70, 87 (D.D.C. 2003) (awarding attorney fees and costs as sanction for agency's violation of court order intended to preserve FOIA-requested records); Allen v. FBI, No. 00-342, slip op. at 9-10 (D.D.C. Aug. 26, 2002) (finding "inexcusable" the fact that the defendant agency "took no steps to preserve" records requested under the FOIA, and requiring it not only to pay plaintiff's litigation costs, but also to provide responsive records free of charge); cf. Nat'l Sec. Archive Fund, Inc. v. U.S. Dep't of the Air Force, No. 05-571, 2006 WL 1030152, at *5-6 (D.D.C. Apr. 19, 2006) (admonishing the Air Force for its mismanaged FOIA operations, and ordering the parties to meet at a status conference during which the Air Force was to present "an officer of sufficient rank over the 11th Communications Squadron to have the ability to order that things be done and to achieve results") (emphasis added); Elec. Privacy Info. Ctr. v. Dep't of Justice, No. 05-845, 2005 U.S. Dist. LEXIS 40318, at *3-4 (D.D.C. Nov. 16, 2005) (characterizing agency's efforts as "unnecessarily slow and inefficient," and ordering agency to "complete processing of 1500 pages every 15 calendar days"). But see Hull, 2006 U.S. Dist. LEXIS 35054, at *21-22 (declining to impose attorney fees in form of sanctions under 28 U.S.C. § 1927, because plaintiff asserted claim specifically against agency and "[r]elief under § 1927 is available only against attorneys"); Long v. U.S. Dep't of Justice, 207 F.R.D. 4, 7 (D.D.C. 2002) (declining to impose Rule 11 sanction for repeated errors in the defendant agency's summary judgment motions, but warning the agency that "further delays created by erroneous factual representations . . . may require the Court to revisit" the sanctions issue); Jefferson v. Reno, No. 96-1284, slip op. at 1 (D.D.C. Mar. 16, 2001) (rescinding a monetary sanction that had been imposed on the government "for the purpose of deterring future violations and highlighting the importance of [agency] complying with . . . [the] FOIA," because such a fine is, in fact, barred by sovereign immunity).

[422] Jefferson v. Reno, 123 F. Supp. 2d 1, 5 (D.D.C. 2000); cf. Miller v. Holzman, No. 95-01231, 2007 WL 172327, at *5-7 (D.D.C. Jan. 17, 2007) (magistrate's recommendation) (finding that agency's destruction of records -- collected in response to FOIA request and deemed non-responsive or exempt
(continued...)

ment agency ordinarily are considered in administrative proceedings or in judicial decisions on whether to grant attorney fees.[423]

In determining whether to impose sanctions on plaintiffs, district courts ordinarily review the number and content of court filings and their effect on the courts as indicia of frivolousness or harassment.[424] For exam-

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[422](...continued)
from disclosure -- was "potentially sanctionable").

[423] See, e.g., Schanen v. U.S. Dep't of Justice, 798 F.2d 348, 350 (9th Cir. 1986) (upholding exemption claims, but ordering government to pay plaintiff's attorney fees and costs due to government counsel's failure to competently defend claims); Landmark Legal Found., 272 F. Supp. 2d at 87 (ordering agency to pay plaintiff's attorney fees and costs because of its "contumacious" violation of order to preserve records); Jefferson, 123 F. Supp. 2d at 5 (assessing attorney fees and costs associated with reconstruction of records, following violation of court order that had required that records be reconstructed and sent to both plaintiff and his attorney); Ellis v. United States, 941 F. Supp. 1068, 1081 (D. Utah 1996); Okla. Publ'g Co. v. HUD, No. 87-1935-P, slip op. at 7 (W.D. Okla. June 17, 1988) (attorney fees assessed against government when counsel failed to comply with scheduling and disclosure orders); see also Allen v. Fed. Bureau of Prisons, No. 00-342, slip op. at 9-10 (D.D.C. Aug. 26, 2002) (imposing sanctions on agency in form of "reimbursement of Plaintiff of his filing fee and all postage and copying costs," and prohibiting agency from charging fee for processing of few remaining records after it "inexcusabl[y]" destroyed majority of requested records); Hill v. Dep't of the Air Force, No. 85-1485, slip op. at 7 (D.N.M. Sept. 4, 1987) (ordering documents processed at no further cost to plaintiff because of unreasonable delay in processing FOIA request), aff'd on other grounds, 844 F.2d 1407 (10th Cir. 1988). But see also Carlson v. USPS, No. 02-5471, 2005 WL 756573, at *9-10 (N.D. Cal. Mar. 31, 2005) (denying plaintiff's motion for sanctions because agency's "conduct did not rise to level of bad faith").

[424] See, e.g., Schwarz v. NSA, 526 U.S. 122, 122 (1999) (barring plaintiff from further filings, citing thirty-five frivolous petitions for certiorari); Schwarz v. USDA, 22 F. App'x 9, 10 (D.C. Cir. 2001) (affirming district court prohibition against plaintiff's filing of any further civil actions without first obtaining leave of court, because of her long and unwavering history of frivolous claims and litigation abuses); Schwarz v. CIA, No. 99-4016, 1999 WL 330237, at *1 (10th Cir. May 25, 1999) (admonishing plaintiff for "frivolousness" in light of "recurring pattern of similarly unsuccessful FOIA actions" and warning that "future frivolous filings . . . will result in sanctions"); see also, e.g., Hoyos v. VA, No. 98-4178, slip op. at 4 (11th Cir. Feb. 1, 1999) (affirming district court's order barring plaintiff from future filings without court's permission, and noting that plaintiff "has frivolously sued just about everyone even remotely associated with the VA . . . and has burdened the district court with over 130 motions and notices, many of them duplica-

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ple, as a sanction under Rule 11 of the Federal Rules of Civil Procedure, a frequent FOIA requester who filed nearly fifty FOIA lawsuits over the course of eight years and who routinely failed to oppose motions to dismiss was ordered to show cause in any subsequent lawsuit why the principle of res judicata did not bar the intended suit.[425] As a general rule, however, "mere litigiousness alone does not support the issuance of an injunction" against filing further lawsuits.[426]

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[424](...continued)
tive"); Goldgar v. Office of Admin., 26 F.3d 32, 35-36 & n.3 (5th Cir. 1994) (warning plaintiff that subsequent filing or appeal of FOIA lawsuits without jurisdictional basis may result in assessment of costs, attorney's fees and proper sanctions or that plaintiff may be required to "obtain judicial preapproval of all future filings"); Robert VIII v. Dep't of Justice, No. 05-CV-2543, 2005 WL 3371480, at *12-15 (E.D.N.Y. Dec. 12, 2005) (enjoining plaintiff from filing future actions without leave of court, as the plaintiff's "litigation history in the EDNY is vexatious," based on the twenty-four FOIA cases filed in the EDNY, which "have required a substantial use of judicial resources at considerable expense to Defendants"); Schwarz v. U.S. Dep't of the Treasury, 131 F. Supp. 2d 142, 148 (D.D.C. 2000) (threatening plaintiff with dismissal of claims as "malicious" if she makes any future attempts to litigate claims that already have been resolved against her), summary affirmance granted, No. 00-5453 (D.C. Cir. May 10, 2001); Peck v. Merletti, 64 F. Supp. 2d 599, 603 (E.D. Va. 1999) (noting plaintiff's "continued pursuit of nonexistent information . . . and the drain on valuable judicial and law enforcement resources," requiring that plaintiff's future filings comply with "Federal Rule of Civil Procedure 8 in regards to 'a short and plain statement of the claim'" (quoting Fed. R. Civ. P. 8(a)(2))); Wrenn v. Gallegos, No. 92-3358, slip op. at 1-2 (D.D.C. May 26, 1994) (barring plaintiff's future filings absent prior leave of court, because plaintiff "has been adjudicated a vexatious litigant in several other forums and remains so in this court").

[425] See Crooker v. U.S. Marshals Serv., 641 F. Supp. 1141, 1143 (D.D.C. 1986); see also Crooker v. ATF, No. 96-01790, slip op. at 1-2 (D.D.C. Nov. 22, 1996) (dismissing Complaint for failure to comply with requirements of Crooker v. United States Marshals Service).

[426] In re Powell, 851 F.2d at 434; cf. Zemansky v. EPA, 767 F.2d 569, 573-74 (9th Cir. 1995) (holding that district court exceeded its authority by requiring frequent requester, whose requests included "questions, commentary, narrative" and other extraneous material, to make future requests in "'separate document which is clearly defined as an FOIA request' and not 'intertwined with non-FOIA matters'"). But see Robert VIII, 2005 WL 3371480, at *15 (enjoining FOIA plaintiff from filing future actions without leave of court, in order "to disallow future complaints that do not comport with the Federal Rules or that lack merit or are duplicative"); Schwarz v. USDA, No. 01-1464, slip op. at 2-3 (D.D.C. Aug. 3, 2001) (enjoining plaintiff from filing civil actions unless plaintiff obtains leave of court), aff'd, 22 F. App'x 9, 10 (D.C. Cir. 2001); Hunsberger v. U.S. Dep't of Energy, No. 96-
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LITIGATION CONSIDERATIONS

In a related vein, the Prison Litigation Reform Act of 1995[427] provides that an action in forma pauperis cannot be filed by a prisoner who, on three or more prior occasions while incarcerated, "brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted."[428] Although this statute applies only to suits that have been brought in federal court, it applies both to federal prisoners and to state prisoners alike.[429]

Considerations on Appeal

As noted previously, an exceptionally large percentage of FOIA cases are decided by means of summary judgment.[430] While a decision on a motion for summary judgment usually is immediately appealable, not all orders granting judgment to a party on a FOIA issue are immediately appealable.[431] The grant of an Open America stay of proceedings, for example, is

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[426](...continued)
0455, slip op. at 2 (D.D.C. Mar. 14, 1996) (enjoining plaintiff from filing any further civil actions without first obtaining leave of court because "[p]laintiff's numerous actions have demanded countless hours from this Court").

[427] 28 U.S.C. § 1915A (2000).

[428] Id. § 1915A(b)(1); see, e.g., Wiggins v. Huff, No. C 98-1072, 1998 WL 226300, at *1 (N.D. Cal. Apr. 28, 1998) (denying request -- from prisoner who had three or more prior dismissals -- to proceed in forma pauperis, and dismissing FOIA action without prejudice to refiling it with payment of filing fee).

[429] See Wiggins, 1998 WL 226300, at *11 (dismissing state prisoner's FOIA suit against federal agency); Willis v. FBI, No. 2:96-cv-276, slip op. at 1-2 (W.D. Mich. Oct. 21, 1996) (ordering warden of state prison to "place a hold on plaintiff's prisoner account" to provide for payment of filing fee).

[430] See, e.g., Pub. Employees for Envtl. Responsibility v. EPA, 978 F. Supp. 955, 959 (D. Colo. 1997) (explaining that "FOIA claims are typically resolved on summary judgment" (citing KTVY-TV v. United States, 919 F.2d 1465, 1468 (10th Cir. 1990))); Cappabianca v. U.S. Customs Serv., 847 F. Supp. 1558, 1562 (M.D. Fla. 1994) ("[O]nce documents in issue are properly identified, FOIA cases should be handled on motions for summary judgment." (citing Miscavige v. IRS, 2 F.3d 366, 369 (11th Cir. 1993))).

[431] See, e.g., Loomis v. U.S. Dep't of Energy, No. 99-6084, 1999 WL 1012451, at *1 (2d Cir. Oct. 14, 1999) (holding that partial grant of summary judgment is not final order); Church of Scientology Int'l v. IRS, 995 F.2d 916, 921 (9th Cir. 1993) (ruling that document is "not exempt," without accompanying disclosure order, held nonappealable); Ferguson v. FBI, 957 F.2d 1059, 1063-64 (2d Cir. 1992) (noting that while "partial disclosure orders in FOIA cases are appealable," fact that district court may have erred in de-
(continued...)

not an appealable final decision.[432] Similarly, it has been held that an "interim" award of attorney fees is not appealable until the conclusion of the district court proceedings in the case.[433]

Once a case properly is on appeal, though, the government ordinarily must obtain a stay of any trial court disclosure order if disclosure is re-

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[431](...continued)
ciding question of law does not vest jurisdiction in appellate court when no disclosure order has yet been entered and, consequently, no irreparable harm would result); Ctr. for Nat'l Sec. Studies v. CIA, 711 F.2d 409, 413-14 (D.C. Cir. 1983) (finding no appellate jurisdiction to review court order granting summary judgment to defendant on only one of twelve counts in Complaint, because order did not affect "predominantly all" of merits of case and plaintiffs did not establish that denial of relief under 28 U.S.C. § 1292(a)(1) (2000) would cause them irreparable injury); Hinton v. FBI, 844 F.2d 126, 129-33 (3d Cir. 1988) (declining to review district court order that a Vaughn Index be filed); In re Motion to Compel filed by Steele, 799 F.2d 461, 464-65 (9th Cir. 1986); cf. Judicial Watch, Inc. v. Dep't of Energy, 412 F.3d 125, 128 (D.C. Cir. 2005) (denying motion to dismiss appeal because, although district court's order was not final as it did not resolve all issues, it was injunctive in nature and therefore appealable under 28 U.S.C. § 1292(a)(1)); John Doe Corp. v. John Doe Agency, 850 F.2d 105, 107-08 (2d Cir. 1988) (finding district court order denying motion for disclosure of documents, preparation of Vaughn Index, and answers to interrogatories appealable, and thereupon reversing on merits), rev'd on other grounds, 493 U.S. 146 (1989); Irons v. FBI, 811 F.2d 681, 683 (1st Cir. 1987) (allowing government to appeal motion for partial summary judgment for plaintiff, stating that appellate jurisdiction vests at time order requiring government to disclose records is issued).

[432] See Summers v. U.S. Dep't of Justice, 925 F.2d 450, 453 (D.C. Cir. 1991); Al-Fayed v. CIA, No. 00-2092, slip op. at 4 (D.D.C. Jan. 16, 2001) (refusing to treat plaintiff's motion for a stay as "akin" to a motion for summary judgment, because "in stark contrast to a motion for summary judgment, a motion for a stay does not evaluate the merits of a case"), aff'd on other grounds, 254 F.3d 300 (D.C. Cir. 2001).

[433] See Nat'l Ass'n of Criminal Def. Lawyers v. U.S. Dep't of Justice, 182 F.3d 981, 984-85 (D.C. Cir. 1999) (finding that award of "interim" attorney fees is appealable neither as final judgment nor as collateral order); Judicial Watch, Inc. v. U.S. Dep't of Justice, No. 01-5019, 2001 WL 800022, at *1 (D.C. Cir. June 13, 2001) (per curiam) (dismissing the appeal because the "district court's order holding that appellee is a representative of the news media for purposes of 5 U.S.C. § 552(a)(4)(A)(ii)(II) is not final in the traditional sense and does not meet the requirements of the collateral order doctrine").

quired by a date certain or, even worse, "forthwith."[434] The government's motion for such a stay should be granted as a matter of course as denial would destroy the status quo and would cause irreparable harm to the government appellant by mooting the issue on appeal.[435] In comparison,

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[434] But see Cooper Cameron Corp. v. U.S. Dep't of Labor, No. 00-21077, slip op. at 1 (5th Cir. Jan. 21, 2002) (refusing to stay a judgment because, according to the Fifth Circuit, "'forthwith' does not affect the time period for filing a petition for rehearing or rehearing en banc, during the running of which the mandate cannot issue").

[435] See, e.g., Rosenfeld v. U.S. Dep't of Justice, 501 U.S. 1227, 1227 (1991) (granting full stay pending appeal); John Doe Agency v. John Doe Corp., 488 U.S. 1306, 1307 (Marshall, Circuit Justice 1989) (granting stay based upon "balance of the equities"); see also Wash Post v. DHS, No. 06-5337 (D.C. Cir. Nov. 1, 2006) ("[Agency] has satisfied the stringent standards required for a stay pending appeal."); Nat'l Council of La Raza v. Dep't of Justice, No. 04-5474, slip op. at 2 (2d Cir. Dec. 20, 2004) (granting stay for duration of appeal, but subject to expedited briefing schedule); Providence Journal Co. v. FBI, 595 F.2d 889, 890 (1st Cir. 1979); Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 217 F. Supp. 2d 58, 58 (D.D.C. 2002) (explaining that "stays are routinely granted in FOIA cases," and granting stay because disclosure of detainee names would "effectively moot any appeal"), aff'd in part, rev'd in part & remanded, 331 F.3d 918 (D.C. Cir. 2003); Maine v. U.S. Dep't of the Interior, No. 00-122, 2001 WL 98373, at *3 (D. Me. Feb. 5, 2001) (relying on Providence Journal to grant stay pending appeal, and finding "most persuasive in this regard" irreparable harm to agency's right to appeal court's disclosure order); Antonelli v. FBI, 553 F. Supp. 19, 25 (N.D. Ill. 1982). But see Manos v. U.S. Dep't of the Air Force, No. 93-15672, slip op. at 2 (9th Cir. Apr. 28, 1993) (denying stay of district court disclosure order when government "failed to demonstrate . . . any possibility of success on the merits of its appeal," despite appellate court's recognition that such denial would render appeal moot); Sears, Roebuck & Co. v. GSA, 509 F.2d 527, 530 (D.C. Cir. 1974) (dissolving the district court's stay because the plaintiff "failed to demonstrate the probable success on the merits of its appeal required for continuance of the stay") ("reverse" FOIA suit); see also Long v. IRS, No. 74-724, 2006 WL 2222274, at *3 (W.D. Wash. Aug. 2, 2006) (denying motion for stay because motion was confusing, was ill-timed, and determinative factors for issuing stay did not tip in favor of agency); ACLU v. DOD, 357 F. Supp. 2d 708, 709 (S.D.N.Y. 2005) (denying motion for stay as defendant failed to demonstrate likelihood to suffer prejudice or to succeed on merits); Armstrong v. Executive Office of the President, 877 F. Supp. 750, 752-53 (D.D.C. 1995) (denying stay of its determination (later reversed on appeal) that National Security Council is an "agency" under FOIA); cf. Piper v. U.S. Dep't of Justice, 374 F. Supp. 2d 73, 81 (D.D.C. 2005) (noting that during pendency of plaintiff's appeal district court has no jurisdiction to entertain agency's Rule 60(b) motion even though motion seeks to protect third parties' interests); Bright v. Attorney Gen. John Ashcroft, 259 F. Supp. 2d 502, 502 (E.D. La. 2003) (disclosing contested material gratuitous-

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granting such a stay causes relatively minimal harm to the appellee.[436]

The circuit courts of appeals do not have uniform legal standards governing the scope of appellate review of FOIA decisions. The Courts of Appeals for the District of Columbia,[437] Second,[438] Sixth,[439] and Eighth Cir-

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[435](...continued)
ly and thus obviating government's appeal). See generally FOIA Update, Vol. XII, No. 3, at 1-2 (describing emergency Supreme Court action staying court-ordered disclosures in two FOIA cases).

[436] See Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat'l RR Passenger Corp., No. 02-126, slip op. at 2 (M.D. Fla. Sept. 4, 2003) (deciding to grant the defendant agency a stay "to test the merits of its arguments on appeal," and discerning "no evidence of a specific harm" to plaintiff from a delay in the disclosure of records); cf. Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Representative, 240 F. Supp. 2d 21, 23 (D.D.C. 2003) (recognizing harm to plaintiff if stay is granted, but granting it conditioned on agency seeking expedited review because of "serious legal question" at issue and irreparable harm to agency).

[437] See Assassination Archives & Research Ctr. v. CIA, 334 F.3d 55, 57 (D.C. Cir. 2003) ("We review the district court's grant of summary judgment de novo."); Landmark Legal Found. v. IRS, 267 F.3d 1132, 1134 (D.C. Cir. 2001) (referring to standard of review as "de novo"); Summers v. Dep't of Justice, 140 F.3d 1077, 1079 (D.C. Cir. 1998) ("[I]t is well-understood law that '[w]e review orders granting summary judgment de novo.'" (quoting Gallant v. NLRB, 26 F.3d 168, 171 (D.C. Cir. 1994))); Kimberlin v. Dep't of Justice, 139 F.3d 944, 947 (D.C. Cir. 1998) ("We review de novo the district court's grant of summary judgment, applying the same standards that governed the district court's decision."); see also Petroleum Info. Corp. v. U.S. Dep't of the Interior, 976 F.2d 1429, 1433 & n.3 (D.C. Cir. 1992) ("This circuit applies in FOIA cases the same standard of appellate review applicable generally to summary judgments." (explicitly contrasting Ninth Circuit's "clearly erroneous" standard, and more favorably citing Wash. Post Co. v. HHS, 865 F.2d 320, 325-26 & n.8 (D.C. Cir. 1989))).

[438] See Nat'l Council of La Raza v. Dep't of Justice, 411 F.3d 350, 355 (2d Cir. 2005) (reviewing "de novo a district court's grant of summary judgment in a FOIA case"); Tigue v. U.S. Dep't of Justice, 312 F.3d 70, 75 (2d Cir. 2002) (same); Perlman v. U.S. Dep't of Justice, 312 F.3d 100, 104 (2d Cir. 2002) ("We review an agency's decision to withhold records under FOIA de novo . . . ."); Halpern v. FBI, 181 F.3d 279, 287 (2d Cir. 1999) (applying de novo standard in FOIA cases "to determine whether there are genuine issues of material fact requiring trial").

[439] See Rugiero v. U.S. Dep't of Justice, 257 F.3d 534, 543 (6th Cir. 2001) ("[T]his court reviews the propriety of a district court's grant of summary judgment in a FOIA proceeding de novo."), cert. denied, 534 U.S. 1134
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cuits,[440] have applied a purely de novo standard of review. Such a standard is entirely consistent with the nearly universal practice of adjudicating FOIA cases on the basis of summary judgment motions -- which generally are utilized only in the absence of any material factual disputes when the moving party is entitled to a judgment as a matter of law.[441]

By contrast, the Courts of Appeals for the Third,[442] Fifth,[443] and Seventh Circuits,[444] while recognizing that issues of law generally are re-

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[439](...continued)
(2002); Sorrells v. United States, No. 97-5586, 1998 WL 58080, at *1 (6th Cir. Feb. 6, 1998) (deciding appeal "[u]pon de novo review"); Abraham & Rose, P.L.C. v. United States, 138 F.3d 1075, 1077 (6th Cir. 1998) (holding that grant of summary judgment is reviewed de novo on appeal). But see Vonderheide v. IRS, No. 98-4277, 1999 WL 1000875, at *1 (6th Cir. Oct. 28, 1999) ("Where an appeal concerns a factual attack on subject matter jurisdiction, this court reviews the factual findings of the district court for clear error and the legal conclusions de novo.").

[440] See Missouri v. U.S. Dep't of the Interior, 297 F.3d 745, 749 n.2 (8th Cir. 2002) (aligning the court with the Sixth, Tenth, and D.C. Circuits in "establish[ing] the de novo standard of review generally applicable in summary judgment cases"); see also Bilbrey v. U.S. Dep't of the Air Force, 20 F. App'x 597, 598 (8th Cir. 2001) (referring to "careful de novo review of the record"). But see also Johnston v. U.S. Dep't of Justice, No. 97-2173, 1998 WL 518529, at *1 (8th Cir. Aug. 10, 1998) ("We review the district court's factual findings for clear error and its legal conclusions de novo.").

[441] See Fed. R. Civ. P. 56(c).

[442] See, e.g., Sheet Metal Workers Int'l Ass'n v. VA, 135 F.3d 891, 896 & n.3 (3d Cir. 1998) (describing "two-tiered test" while recognizing that review standard is not uniform among circuits); McDonnell v. United States, 4 F.3d 1227, 1241-42 (3d Cir. 1993) (pointing to "unique configuration" of summary judgment in FOIA cases as basis for rejecting "familiar standard of appellate review" for summary judgment cases).

[443] See FlightSafety Servs. Corp. v. Dep't of Labor, 326 F.3d 607, 610-11 & n.2 (5th Cir. 2003) (per curiam) (applying de novo standard of review to district court's legal conclusions while recognizing potential applicability of different standard for factual determinations); Avondale Indus., Inc. v. NLRB, 90 F.3d 955, 958 (5th Cir. 1996) (finding de novo review appropriate when parties' dispute focuses '"not upon the unique facts of [the] case, but upon categorical rules,"' a question of law to which district court is not entitled to deference (quoting Halloran v. VA, 874 F.2d 315, 320 (5th Cir. 1989))).

[444] See Enviro Tech Int'l, Inc. v. EPA, 371 F.3d 370, 373-74 (7th Cir. 2004) (stating that "clearly erroneous" standard remains norm for FOIA cases in Seventh Circuit); Solar Sources, Inc. v. United States, 142 F.3d 1033, 1038
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viewed de novo, hold that review of FOIA cases, because of their "unique nature,"[445] should be undertaken under a two-pronged deferential standard: Whether the district court had an adequate factual basis for its decision and, if so, whether that decision is clearly erroneous. Similarly, the Fourth,[446] Ninth,[447] Tenth,[448] and Eleventh Circuits[449] distinguish between

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[444](...continued)
(7th Cir. 1998) ("[W]e continue to believe that the clearly erroneous standard remains appropriate in light of the unique circumstances presented by FOIA exemption cases."); Becker v. IRS, 34 F.3d 398, 402 (7th Cir. 1994) (explaining that whether withheld material fits within established standards of exemption reviewed is under two-pronged, deferential test).

[445] Minier v. CIA, 88 F.3d 796, 800 (9th Cir. 1996); see also Solar Sources, 142 F.3d at 1038 (referring to "the unique circumstances presented by FOIA exemption cases").

[446] See United States v. Mitchell, No. 03-6938, 2002 WL 22999456, at *1 (4th Cir. Dec. 23, 2004) (articulating the standard of review in this case as "limited to determining whether the district court had an adequate factual basis for its decision and whether upon this basis the decision was clearly erroneous"); Ethyl Corp. v. EPA, 25 F.3d 1241, 1246 (4th Cir. 1994) ("Although any factual conclusions that place a document within a stated exemption of FOIA are reviewed under a clearly erroneous standard, 'the question of whether a document fits within one of FOIA's prescribed exemptions is one of law, upon which the district court is entitled to no deference.'" (quoting City of Va. Beach v. Dep't of Commerce, 995 F.2d 1247, 1252 n.12 (4th Cir. 1993))); cf. Hanson v. Agency for Int'l Dev., 372 F.3d 286, 290 (4th Cir. 2004) (stating that grant of summary judgment in FOIA action is issue of law, which is reviewed de novo); Heily v. U.S. Dep't of Commerce, 69 F. App'x 171, 173 (4th Cir. July 3, 2003) (per curiam) (same).

[447] See Envtl. Prot. Info. Ctr. v. U.S. Forest Serv., 432 F.3d 945, 947 (9th Cir. 2005) (stating that district court is given deference on factual findings, which are reviewed only for clear error, but that application of particular FOIA exemption is reviewed de novo); Shors v. Treasury Inspector Gen. for Tax Admin., 68 F. App'x 99, 100 (9th Cir. June 9, 2003) (describing "two-part standard of review"); Carter v. U.S. Dep't of Commerce, 307 F.3d 1084, 1088 (9th Cir. 2002) (advising that "standard of review is not simply de novo," and that factual findings are reviewed for clear error, while legal conclusions are reviewed de novo); Klamath Water Users Protective Ass'n v. U.S. Dep't of the Interior, 189 F.3d 1034, 1036 (9th Cir. 1999) (explaining that standard is whether district judge had an adequate factual basis for decision; if so, district court's conclusions are reviewed de novo), aff'd on other grounds, 532 U.S. 1 (2001); Schiffer v. FBI, 78 F.3d 1405, 1409 (9th Cir. 1996) ("[W]hile we review the underlying facts supporting the district court's decision for clear error, we review de novo its conclusion [regarding the applicability of specific exemptions]."). But see Frazee v. U.S. Forest Serv., 97 F.3d 367, 370 (9th Cir. 1996) (describing "special standard" of re-
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the district court's factual basis for its decision, which is reviewed under a clearly erroneous standard, and the district court's application of FOIA exemptions to approve withholding of documents -- which, in these circuits, most often is reviewed de novo.[450] The end result has caused some confu-

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[447](...continued)
view of factual issues, i.e., whether adequate factual basis supports district court's ruling, appellate court overturns only if ruling "is clearly erroneous").

[448] See Casad v. HHS, 301 F.3d 1247, 1251 (10th Cir. 2002) (explaining that review is first "whether the district court had an adequate factual basis" for its decision, and then "de novo [of] the district court's legal conclusions that the requested materials are covered by the relevant FOIA exemptions"); Utah v. U.S. Dep't of the Interior, 256 F.3d 967, 969 (10th Cir. 2001) (same); Sheet Metal Workers Int'l Ass'n v. U.S. Air Force, 63 F.3d 994, 997 (10th Cir. 1995) ("[O]ur court reviews de novo any legal determinations made by the district court once we have assured ourselves that the district court 'had an adequate factual basis upon which to base its decision.'" (quoting Anderson v. HHS, 907 F.2d 936, 942 (10th Cir. 1990))).

[449] See Office of the Capital Collateral Counsel v. Dep't of Justice, 331 F.3d 799, 802 (11th Cir. 2003) (applying the de novo standard of review because "issues in this appeal are limited to the legal application of [a] FOIA exemption"); Catchpole v. Dep't of Transp., No. 97-8058, slip op. at 2 (11th Cir. Feb. 25, 1998) (applying de novo standard of review to FOIA case (citing Hale v. Tallapoosa County, 50 F.3d 1579, 1581 (11th Cir. 1995), and McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1557 (11th Cir. 1992)) (non-FOIA cases)). But see Brown v. U.S. Dep't of Justice, 169 F. App'x 537, 539 (11th Cir. 2006) (stating that a "district court's determinations under the FOIA are reviewed for clear error"); O'Kane v. U.S. Customs Serv., 169 F.3d 1308, 1309 (11th Cir. 1999) (while acknowledging that grants of summary judgment are reviewed de novo, states that "district court determinations under FOIA" are reviewed for "clear error"); see also Robinson v. Dep't of Justice, No. 00-11182, slip op. at 9 (11th Cir. Mar. 15, 2001) (without deciding the applicability of an exemption, vacating the district court opinion because the court "lacked an adequate factual basis for its decision").

[450] See, e.g., Office of the Capital Collateral Counsel, 331 F.3d at 802 (explaining that factual findings "would ordinarily be reviewed for clear error" but that the legal application of a FOIA exemption is reviewed de novo); Sheet Metal Workers Int'l Ass'n v. VA, 135 F.3d 891, 896 (3d Cir. 1998) ("The two tiered standard review of the district court's determination that a particular document is or is not properly subject to exemption does not, of course, preclude plenary review of issues of law."); Ethyl Corp., 25 F.3d at 1246 ("[T]he question of whether a document fits within one of FOIA 's prescribed exemptions is one of law, upon which the district court is entitled to no deference.").

sion in the standard for appellate review for FOIA cases,[451] because it is difficult to distinguish between the review standard for "any factual conclusions that place a document within a stated exemption of FOIA" (which is "clearly erroneous" in these circuits[452]) and the review standard for "whether a document fits within one of FOIA's prescribed exemptions"[453] (which is de novo).

This confusion is further illustrated by FOIA decisions of the First Circuit. In an early ruling, that circuit court eschewed any deference to the district court's decision in FOIA matters.[454] Then, in two decisions issued less than five months apart, it appeared to articulate opposite standards.[455] It applied a de novo standard of review in considering the district court's determination of whether the government supplied an adequate Vaughn Index.[456] This issue, however, logically falls within the category of whether the district court had an adequate factual basis for its determination, a question which is subject to de novo review even in those circuits employing the more deferential, two-pronged test.[457] In a recent opinion, though,

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[451] Schiffer, 78 F.3d at 1408 ("Determining the appropriate standard of review to apply to summary judgment in FOIA cases . . . has caused some confusion because of the peculiar circumstances presented by such cases.").

[452] Id. (quoting Ethyl Corp., 25 F.3d at 1246).

[453] Id.

[454] See New England Apple Council v. Donovan, 725 F.2d 139, 141 n.2 (1st Cir. 1984) ("Appellees incorrectly state that this court may reverse the district court only if its conclusions are 'clearly erroneous.' In summary judgment there can be no review of factual issues, because Rule 56(c) bars the district court from resolving any disputed factual issues at the summary judgment stage.").

[455] Compare Aronson v. HUD, 822 F.2d 182, 188 (1st Cir. 1987) ("In reviewing a district court's grant of summary judgment, we apply the same standard as the district court."), with Irons, 811 F.2d at 684 ("where the conclusions of the trial court depend on its . . . choice of which competing inferences to draw from undisputed basic facts, appellate courts should defer to such fact-intensive findings, absent clear error"; however, questions of pure legal interpretation reviewed de novo).

[456] See Church of Scientology Int'l v. U.S. Dep't of Justice, 30 F.3d 224, 231 (1st Cir. 1994).

[457] See, e.g., Davin v. U.S. Dep't of Justice, 60 F.3d 1043, 1048-49 (3d Cir. 1995) (explaining that review of adequacy of factual basis for district court's decision "is de novo and requires us to examine the affidavits below"); Wiener v. FBI, 943 F.2d 972, 978 (9th Cir. 1991) ("Whether the government's public affidavits constituted an adequate Vaughn index is a ques-

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the First Circuit alluded to its use of a "clearly erroneous" standard of review.[458]

In sum, the case law on this point simply cannot be reconciled among the various circuits, and conflicting decisions are not uncommon even within the same circuit.[459]

On another issue involving appeal considerations, the Court of Appeals for the District of Columbia Circuit, in a case of first impression, ruled that the standard of review of a district court decision on that portion of the FOIA's expedited access provision -- which authorizes expedited access "in cases in which the person requesting the records demonstrates a compelling need"[460] -- is de novo.[461] "Precisely because FOIA's terms apply nationwide," the D.C. Circuit decided not to accord deference to any particular agency's interpretation of this provision of the FOIA.[462] At the same time, however, the D.C. Circuit held that if an agency were to issue a rule consistent with the statutory language that permits expedition "in other cases determined by the agency,"[463] that rule would be entitled to judicial deference.[464] In any event, once an agency has acted upon the underlying request for which expedited access was requested, the FOIA itself removes

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[457](...continued)
tion of law reviewed de novo.").

[458] See Maine v. U.S. Dep't of the Interior, 285 F.3d 126, 134 (1st Cir) (stating that "we cannot say that the district court erred in this case" and also that "[w]e perceive no error by the court"), aff'd on reh'g, 298 F.3d 60 (1st Cir. 2002).

[459] See Enviro Tech Int'l, Inc., 371 F.3d at 374 (recognizing split amongst circuits as to appropriate standard of review in FOIA cases, and further noting inconsistencies within Seventh Circuit).

[460] 5 U.S.C. § 552(a)(6)(E)(i) (2000 & Supp. IV 2004).

[461] Al-Fayed v. CIA, 254 F.3d 300, 305 (D.C. Cir. 2001) (deciding that "the logical conclusion is that de novo review is the proper standard for a district court to apply to a denial of expedition"); see Tripp v. DOD, 193 F. Supp. 2d 229, 241 (D.D.C. 2002) (citing Al-Fayed).

[462] Id. at 307.

[463] Id. at 307 n.7 (citing portion of subsection 5 U.S.C. § 552(a)(6)(E)(i) that allows for expedition "in other cases determined by the agency").

[464] See Al-Fayed, 254 F.3d at 307 n.7 ("A regulation promulgated in response to such an express delegation of authority to an individual agency is entitled to judicial deference . . . as is each agency's reasonable interpretation of its own regulations.").

court oversight of the agency's decision on the issue of expedition.[465]

In contrast, it is well settled that a trial court decision refusing to allow discovery will be reversed only if the court abused its discretion.[466] Similarly, a "reverse" FOIA case -- which is brought under the Administrative Procedure Act[467] -- is reviewed only with reference to whether the agency acted in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," based upon the "whole [administrative] record."[468] (For a further discussion of this point, see "Reverse" FOIA, Standard of Review, below.)

It is noteworthy that in a routine FOIA case where the merits and law of the case are so clear as to justify summary disposition, summary affirmance or reversal may be appropriate.[469] An otherwise routine case, how-

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[465] See 5 U.S.C. § 552(a)(6)(E)(iii); see also Judicial Watch, Inc. v. U.S. Naval Observatory, 160 F. Supp. 2d 111, 112 (D.D.C. 2001) ("[B]ecause defendant has . . . provided a complete response to the request for records, this Court no longer has subject matter jurisdiction over the claim that defendant failed to expedite processing of plaintiff's request.").

[466] See Anderson v. HHS, 80 F.3d 1500, 1507 (10th Cir. 1996) (holding that district court decision to deny further discovery on attorney fees issue "was not an abuse of discretion"); Church of Scientology v. IRS, 991 F.2d 560, 562 (9th Cir. 1993), vacated in part on other grounds & remanded, No. 91-15730 (9th Cir. July 14, 1994); Meeropol v. Meese, 790 F.2d 942, 960 (D.C. Cir. 1986); Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 399 (D.C. Cir. 1988).

[467] 5 U.S.C. §§ 701-706 (2000).

[468] AT&T Info. Sys. v. GSA, 810 F.2d 1233, 1236 (D.C. Cir. 1987) (citing Chrysler Corp. v. Brown, 441 U.S. 281, 318 (1979)); see Reliance Elec. Co. v. Consumer Prod. Safety Comm'n, 924 F.2d 274, 277 (D.C. Cir. 1991) (explaining that agency decisions to release information under FOIA are "informal adjudications" reviewed under arbitrary and capricious standard of Administrative Procedure Act); Daisy Mfg. Co. v. Consumer Prod. Safety Comm'n, 133 F.3d 1081, 1083 (8th Cir. 1998) (same); see also Doe v. Veneman, 230 F. Supp. 2d 739, 747 (W.D. Tex. 2002) (recognizing that "reverse" FOIA suits are "cognizable under the Administrative Procedures [sic] Act") aff'd in pertinent part & rev'd in part on other grounds, 380 F.3d 807, 813-14 (5th Cir. 2004); cf. Campaign for Family Farms v. Glickman, 200 F.3d 1180, 1187 n.6 (8th Cir. 2000) (explaining that review ordinarily is based upon administrative record, but noting that de novo review could be appropriate if it is shown that agency's "factfinding procedures in ["reverse"] FOIA cases are inadequate").

[469] See, e.g., Barreiro v. Executive Office for U.S. Attorneys, No. 04-5071, 2004 WL 2451753, at *1 (D.C. Cir. Nov. 1, 2004) (granting summary affirm-

(continued...)

ever, could be remanded if the district court fails to make a segregability finding -- even if the district court's decision is in all other respects entirely correct.[470] (For a further discussion of this point, see Litigation Considerations, "Reasonably Segregable" Requirements, above.) Other procedures are available for discharging the appellate court's functions in unusual procedural circumstances.[471]

It also is noteworthy that courts ordinarily will not consider issues raised for the first time on appeal by FOIA litigants.[472] For this reason,

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[469](...continued)
ance); Pinnavaia v. FBI, No. 04-5115, 2004 WL 2348155, at *1 (D.C. Cir. Oct. 19, 2004) (same); Hayden v. Dep't of Justice, No. 03-5078, 2003 WL 22305071, at *1 (D.C. Cir. Oct. 6, 2003) (same); Daniel v. Dep't of Justice, No. 01-5119, 2001 WL 1029156, at *1 (D.C. Cir. Aug. 28, 2001) (citing Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam), and Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir. 1980) (per curiam)).

[470] See, e.g., James Madison Project v. NARA, No. 02-5089, 2002 WL 31296220, at *1 (D.C. Cir. Oct. 11, 2002) (denying summary affirmance in part and remanding for "a more precise finding by the district court as to segregability"); Trans-Pac. Policing Agreement v. U.S. Customs Serv., 177 F.3d 1022, 1028 (D.C. Cir. 1999) ("[T]he District Court had an affirmative duty to consider the segregability issue sua sponte."); Kimberlin, 139 F.3d at 949-50 (remanding because district court failed to make segregability finding).

[471] See, e.g., Constangy, Brooks & Smith v. NLRB, 851 F.2d 839, 842 (6th Cir. 1988) (determining that it is inappropriate to vacate district court order, after fully complied with, when attorney fees issue pending; proper procedure is to dismiss appeal); Larson v. Executive Office for U.S. Attorneys, No. 85-6226, slip op. at 4 (D.C. Cir. Apr. 6, 1988) (concluding that when only issue on appeal is mooted, initial lower court order should be vacated without prejudice and case remanded).

[472] See, e.g., Judicial Watch, Inc. v. United States, 84 F. App'x 335, 338 (4th Cir. 2004) (refusing to entertain new arguments from appellant on adequacy of agency's search, despite appellant's characterization of them as "further articulation" of points made below); Blanton v. Dep't of Justice, 64 F. App'x 787, 789 (D.C. Cir. 2003) (per curiam) (rebuffing appellant's efforts to challenge adequacy of agency's Vaughn Index, because issue was not raised in district court); Iturralde v. Comptroller, 315 F.3d 311, 314 (D.C. Cir. 2003) (rejecting appellant's efforts to challenge sufficiency of agency's affidavits, because he did not raise issue in district court); James Madison Project, 2002 WL 31296220, at *1 (deciding that appellant waived challenges to agency's invocation of FOIA exemptions by failing to address arguments supporting withholding that were made in agency's summary affirmance motion); Greyshock v. U.S. Coast Guard, No. 96-15266, 1997 WL

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agencies should ensure that they raise or preserve all exemption claims at the district court level.[473] Failure to do so might result in waiver of these claims.[474] (See Litigation Considerations, Waiver of Exemptions in Litigation, above.)

Lastly, Rule 39(a) of the Federal Rules of Appellate Procedure is applied to award costs to the government when it is successful in a FOIA appeal; the D.C. Circuit has held that this rule's presumption favoring such awards of costs is fully applicable in FOIA cases.[475]

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[472](...continued)
51514, at *3 (9th Cir. Feb. 5, 1997) (declining to consider a challenge to a separate FOIA request that was not "mentioned in the complaint or any other pleading before the district court"); McCutchen v. HHS, 30 F.3d 183, 186-87 (D.C. Cir. 1994) (refusing to consider correctness of agency's interpretation of FOIA request when issue was raised for first time on appeal); see also Students Against Genocide v. Dep't of State, 257 F.3d 828, 835 (D.C. Cir. 2001) (refusing to consider argument made for first time in appellate reply brief); OSHA/Data/CIH, Inc. v. U.S. Dep't of Labor, 220 F.3d 153, 169 n.35 (3d Cir. 2000) (refusing to permit supplementation of record on appeal). But see also Trans-Pac., 177 F.3d at 1027 (allowing segregability issue to be raised for first time on appeal, because "appellants' failure to raise segregability certainly was not a knowing waiver of that argument"); Carter v. U.S. Dep't of Commerce, 830 F.2d 388, 390 n.8 (D.C. Cir. 1987) (considering sua sponte new theories of public interest in Exemption 6 balancing that were not raised by plaintiff at district court); Farese v. U.S. Dep't of Justice, No. 86-5528, slip op. at 9-10 (D.C. Cir. Aug. 12, 1987) (finding plaintiff not estopped from challenging use of specific exemptions at appellate stage when he argued at trial court level merely that agency had failed to meet its burden of establishing that documents were exempt).

[473] See *FOIA Post*, "Supreme Court Declines to Review Waiver Case" (posted 8/7/01) (advising agencies to pay special attention to "the issue of waiver of FOIA exemptions during the course of litigation"); see also Ryan v. Dep't of Justice, 617 F.2d 781, 792 n.38a (D.C. Cir. 1980) (explaining that "raising" an exemption means "identifying it at the district court level" and then demonstrating the applicability of any pertinent exemption).

[474] Tax Analysts v. IRS, 152 F. Supp. 2d 1, 25-26 (D.D.C. 2001) (refusing to allow an agency to invoke an exemption that it had previously abandoned, based upon rule forbidding new exemption claims after "the judge has ruled in the other party's favor" (citing Grumman Aircraft Eng'g Corp. v. Renegotiation Bd., 482 F.2d 710, 721-22 (D.C. Cir. 1973)), aff'd in part & rev'd in part, 294 F.3d 71 (D.C. Cir. 2002); see also, e.g., *FOIA Post*, "Supreme Court Is Asked to Review Law Enforcement Case" (posted 5/30/01) (discussing circumstances of D.C. Circuit's Maydak decision, and describing its approach to Exemption 7(A)).

[475] See Baez v. U.S. Dep't of Justice, 684 F.2d 999, 1005-07 (D.C. Cir. 1982) (continued...)