



Exclusions

In amending the Freedom of Information Act in 1986, Congress created a novel mechanism for protecting certain especially sensitive law enforcement matters, under subsection (c) of the Act.¹ These three special protection provisions, referred to as record "exclusions," are reserved for certain specified circumstances. The record exclusions expressly authorize federal law enforcement agencies, under these exceptional circumstances, to "treat the records as not subject to the requirements of [the FOIA]."² Given their unique nature, any agency considering employing an exclusion or having a question as to their implementation should first consult with the Office of Information Policy, at (202) 514-3642.³

At the outset, it is important to recognize the somewhat subtle, but very significant distinction between the result of employing a record exclusion and the concept that is colloquially known as "Glomarization."⁴ That latter term refers to the situation in which an agency expressly refuses to confirm or deny the existence of records responsive to a request.⁵ (A more detailed discussion of "Glomarization" can be found under Exemption 1, In Camera Submissions and Adequate Public Record, above, and also under Exemption 7(C), above.) The application of one of the three record exclusions, on the other hand, results in a response to

¹ See 5 U.S.C. § 552(c)(1), (c)(2), (c)(3) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 18-30 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum]; cf. NARA v. Favish, 541 U.S. 157, 169 (2004) (noting the Supreme Court's reliance on "the Attorney General's consistent interpretation of" the FOIA in successive such Attorney General memoranda).

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

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

⁴ See id. at 26 & n.47; see also Benavides v. DEA, 968 F.2d 1243, 1246-48 (D.C. Cir. 1992) (initially confusing exclusion mechanism with "Glomarization"), modified, 976 F.2d 751, 752-53 (D.C. Cir. 1992) (clarifying that earlier opinion was not intended to rule on proper response when exclusion mechanism is applied); Valencia-Lucena v. DEA, No. 99-0633, slip op. at 8 (D.D.C. Feb. 8, 2000) (recognizing that Benavides "was subsequently clarified"), summary affirmance granted sub nom. Lucena v. DEA, No. 00-5117, 2000 WL 1582743 (D.C. Cir. Sept. 7, 2000).

⁵ See, e.g., Gardels v. CIA, 689 F.2d 1100, 1103 (D.C. Cir. 1982); Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976).

the FOIA requester stating that no records responsive to the FOIA request exist.⁶ While "Glomarization" remains adequate to provide necessary protection in most situations, these special record exclusions are invaluable in addressing the exceptionally sensitive situations in which even "Glomarization" is inadequate to the task.

The (c)(1) Exclusion

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

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

In most cases, the protection of Exemption 7(A) is sufficient to guard against any impairment of law enforcement investigations or proceedings through the FOIA.⁸ To avail itself of Exemption 7(A), however, an agency must routinely specify that it is doing so -- first administratively and then, if sued, in court -- even when it is invoking the exemption to withhold all responsive records in their entirety.⁹ Thus, in specific situations in which the very fact of an investigation's existence is yet unknown to the investigation's subject, invoking Exemption 7(A) in response to a FOIA request for pertinent records permits an investigation's subject to be "tipped off" to its existence.¹⁰ By the same token, any person (or entity) engaged in criminal activities could use a carefully worded FOIA request to try to determine whether he, she, or it is under federal investigation.¹¹ An agency response that does not invoke Exemption 7(A) to withhold law enforcement files tells such a requester that his activities

⁶ See Attorney General's 1986 Amendments Memorandum at 18, 29-30 (explaining that agencies "will respond to the request as if the excluded records did not exist"); see also Steinberg v. DOJ, No. 93-2409, 1997 WL 349997, at *1 (D.D.C. June 18, 1997) (explaining that "the government need not even acknowledge the existence of excluded information"); Tanks, 1996 WL 293531, at *5 (same).

⁷ 5 U.S.C. § 552(c)(1) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

⁸ See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 18-22 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum].

⁹ See id.

¹⁰ See id.

¹¹ See id. at 20.

have thus far escaped detection.¹²

The (c)(1) exclusion authorizes federal law enforcement agencies, under specified circumstances, to shield the very existence of records of ongoing investigations or proceedings by excluding them entirely from the FOIA's reach.¹³ To qualify for such exclusion from the FOIA, the records in question must be those which would otherwise be withheld in their entirety under Exemption 7(A).¹⁴ Further, they must relate to an "investigation or proceeding [that] involves a possible violation of criminal law."¹⁵ Hence, any records pertaining to a purely civil law enforcement matter cannot be excluded from the FOIA under this provision, although they may qualify for ordinary Exemption 7(A) withholding. However, the statutory requirement that there be only a "possible violation of criminal law," by its very terms, admits a wide range of investigatory files maintained by more than just criminal law enforcement agencies.¹⁶

Next, the statute imposes two closely related requirements which go to the very heart of the particular harm addressed through this record exclusion. An agency determining whether it can employ (c)(1) protection must consider whether it has "reason to believe" that the investigation's subject is not aware of its pendency and that, most fundamentally, the agency's disclosure of the very existence of the records in question "could reasonably be expected to interfere with enforcement proceedings."¹⁷

Obviously, where all investigatory subjects are already aware of an investigation's pendency, the "tip off" harm sought to be prevented through this record exclusion is not of concern.¹⁸ Accordingly, the language of this exclusion expressly obliges agencies contemplating its use to consider the level of awareness already possessed by the investigative subjects involved.¹⁹ Agencies must make this determination according to a good-faith, "reason to believe" standard.²⁰

This "reason to believe" standard for considering a subject's present awareness of the

¹² See *id.*

¹³ See *id.* at 18-22.

¹⁴ See *id.*

¹⁵ 5 U.S.C. § 552(c)(1)(A).

¹⁶ See Attorney General's 1986 Amendments Memorandum at 20 & n.37 (files of agencies that are not primarily engaged in criminal law enforcement activities may be eligible for protection if they contain information about potential criminal violations that are pursued with the possibility of referral to Department of Justice for further prosecution).

¹⁷ 5 U.S.C. § 552(c)(1)(B).

¹⁸ See Attorney General's 1986 Amendments Memorandum at 21.

¹⁹ See *id.*

²⁰ See *id.*

existence of an ongoing investigation "should afford agencies all necessary latitude in making such determinations."²¹ As the exclusion is phrased, this requirement is satisfied so long as an agency determines that it affirmatively has a "reason to believe" that the subject of the investigation does not, in fact, know of its existence.²² While it is always possible that an agency might possess somewhat conflicting or even contradictory indications on such a point, unless an agency can resolve that a subject is aware of an investigation, it should not risk impairing that investigation through a telling FOIA disclosure.²³ Moreover, agencies are not obligated to accept any bald assertions by investigative subjects that they "know" of ongoing investigations against them; such assertions might well constitute no more than sheer speculation.²⁴ Because such a ploy, if accepted, could defeat the exclusion's clear statutory purpose, agencies should rely upon their own objective indicia of subject awareness and consequent harm.²⁵

In the great majority of cases, invoking Exemption 7(A) will protect the interests of law enforcement agencies in responding to FOIA requests for active law enforcement files. The (c)(1) exclusion should be employed only in the exceptional case in which an agency reaches the judgment that, given its belief of the subject's unawareness of the investigation, the mere invocation of Exemption 7(A) could reasonably be expected to cause harm -- a judgment that should be reached distinctly and thoughtfully.²⁶

Finally, the clear language of this exclusion specifically restricts its applicability to "during only such time" as the above-required circumstances continue to exist.²⁷ This limitation comports with the extraordinary nature of the protection afforded by the exclusion, as well as with the basic temporal nature of Exemption 7(A) underlying it.²⁸ It means that an agency that has employed the exclusion in a particular case is obligated to cease doing so once the circumstances warranting it cease to exist.²⁹

Once a law enforcement matter reaches a stage at which all subjects are aware of its pendency, or at which the agency otherwise determines that the public disclosure of that pendency no longer could lead to harm, the exclusion should be regarded as no longer

²¹ See id.

²² See id.

²³ See id.

²⁴ See id. at n.38.

²⁵ See id.

²⁶ See id. at 21.

²⁷ 5 U.S.C. § 552(c)(1)(B)(ii).

²⁸ See Attorney General's 1986 Amendments Memorandum at 21.

²⁹ See id. at 22.

applicable.³⁰ If the FOIA request that triggered the agency's use of the exclusion remains pending administratively at such time, the excluded records should be identified as responsive to that request and then processed in an ordinary fashion.³¹ However, an agency is under no legal obligation to spontaneously reopen a closed FOIA request or a litigation case, even though records were excluded during its entire pendency: By operation of law, the records simply were not subject to the FOIA during the pendency of the request.³²

Where all of these requirements are met, and an agency reaches the judgment that it is necessary and appropriate that the (c)(1) exclusion be employed in connection with a request, the records in question will be treated, as far as the FOIA requester is concerned, as if they did not exist.³³ Where it is the case that the excluded records are just part of the totality of records responsive to a FOIA request, the request will be handled as a seemingly routine one, with the other responsive records processed as if they were the only responsive records in existence.³⁴ Where the only records responsive to a request fall within the exclusion, the requester will lawfully be told that no records responsive to his FOIA request exist.³⁵

In order to maintain the integrity of an exclusion, each agency that employs it must ensure that its FOIA responses are consistent throughout.³⁶ Therefore, all agencies that could possibly employ at least one of the three record exclusions should ensure that their FOIA communications are consistently phrased so that a requester cannot ever discern the existence of any excluded records, or of any matter underlying them, through the agency's response to his FOIA request.³⁷

The (c)(2) Exclusion

The second exclusion applies to a narrower situation, involving the threatened identification of confidential informants in criminal proceedings.³⁸ The "(c)(2) exclusion"

³⁰ See id.

³¹ See id.; see also Barnard v. DHS, 598 F. Supp. 2d 1, 4 n.4 (D.D.C. 2009) (noting that agency initially applied (c)(1) exclusion, but then determined it was no longer applicable and asserted exemptions).

³² See Attorney General's 1986 Amendments Memorandum at 22 n.39.

³³ See id. at 22.

³⁴ See id.

³⁵ See id.

³⁶ See id. at 27.

³⁷ See id.

³⁸ See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 22-24 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments (continued...)]

provides as follows:

Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of [the FOIA] unless the informant's status as an informant has been officially confirmed.³⁹

This exclusion contemplates the situation in which a sophisticated requester could try to identify an informant by forcing a law enforcement agency into a position in which it otherwise would have no lawful choice but to tellingly invoke Exemption 7(D) in response to a request which encompasses informant records maintained on a named person.⁴⁰ In the ordinary situation, Exemption 7(D) should adequately allow a law enforcement agency to withhold all items of information necessary to prevent the identification of any of its confidential sources.⁴¹ That is because, in most instances, the assertion of Exemption 7(D) does not identify a particular individual as a source. It only tells the requester that source-derived information is contained within some portion of the withheld records. As with Exemption 7(A), under ordinary circumstances the disclosure of this fact poses no direct threat. But under certain extraordinary circumstances, this disclosure could result in devastating harms to the source and to the system of confidentiality existing between sources and criminal law enforcement agencies.⁴²

One scenario in which the exclusion is likely to be employed is one in which the ringleaders of a criminal enterprise suspect that they have been infiltrated by a source and attempt to use the FOIA to identify that person within their criminal organization by submitting targeted FOIA requests for the records of these suspected sources.⁴³ Such requests would normally trigger a "Glomar" response, in which the agency would advise the requester that it can neither confirm nor deny the existence of law enforcement records on

³⁸(...continued)

Memorandum]; see also Tanks v. Huff, No. 95-568, 1996 WL 293531, at *5 (D.D.C. May 28, 1996), appeal dismissed, No. 96-5180 (D.C. Cir. Aug. 13, 1996).

³⁹ 5 U.S.C. § 552(c)(2) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

⁴⁰ See Attorney General's 1986 Amendments Memorandum at 23.

⁴¹ See, e.g., Keys v. DOJ, 830 F.2d 337, 345-46 (D.C. Cir. 1987); see also U.S. Dep't of Justice v. Landano, 508 U.S. 165, 179-81 (1993) (concluding that although "the Government is not entitled to a presumption that a source is confidential within the meaning of Exemption 7(D) whenever the source provides information to the FBI in the course of a criminal investigation," it should "often" be able to identify circumstances supporting an inference of confidentiality); FOIA Update, Vol. XIV, No. 3, at 10 (discussing Landano evidentiary requirements).

⁴² See Attorney General's 1986 Amendments Memorandum at 23.

⁴³ See id.

third parties pursuant to Exemption 7(C) of the FOIA,⁴⁴ thus adequately protecting any of the third parties who may actually be confidential sources.⁴⁵ This response will not be available, however, if the ringleaders force all participants in the criminal venture to execute privacy waivers authorizing disclosure of their files in response to third-party requests.⁴⁶ Absent the (c)(2) exclusion, a law enforcement agency could effectively be forced to acknowledge that a third party is considered to be a confidential source through the very invocation of Exemption 7(D)).⁴⁷

The (c)(2) exclusion is principally intended to address this unusual, but dangerous situation by permitting an agency to escape the necessity of giving a response that would be tantamount to identifying a named party as a law enforcement source.⁴⁸ Any criminal law enforcement agency is authorized to treat such requested records, within the extraordinary context of such a FOIA request, as beyond the FOIA's reach.⁴⁹ As with the (c)(1) exclusion, the agency would have "no obligation to acknowledge the existence of such records in response to such request."⁵⁰

By its terms, the exclusion simply becomes inapplicable if and when the individual's status as a source has been officially confirmed.⁵¹ But by merely confirming a source's status as such, a law enforcement agency does not thereby obligate itself to confirm the existence

⁴⁴ See 5 U.S.C. § 552(b)(7)(C).

⁴⁵ See Attorney General's 1986 Amendments Memorandum at 23.

⁴⁶ See id.

⁴⁷ See id.; Tanks, No. 95-568, 1996 WL 293531, at *5-6 (noting that purpose of (c)(2) exclusion is to "protect against the possible use of the FOIA to discover the identities of confidential informants" by placing law enforcement agency in "untenable position of having to respond [with an assertion of Exemption 7(D)] to a valid FOIA request directly targeted at a named informant's files").

⁴⁸ See Attorney General's 1986 Amendments Memorandum at 23-24; Tanks, 1996 WL 293531, at *6 (stating that "[t]he (c)(2) exclusion is principally intended to permit an agency to avoid giving a response that would identify a named party as a source" (citing Attorney General's 1986 Amendments Memorandum at 23)).

⁴⁹ See Attorney General's 1986 Amendments Memorandum at 23-24.

⁵⁰ S. Rep. No. 98-221, at 25 (1983).

⁵¹ See 5 U.S.C. § 552(c)(2); Gonzalez v. FBI, No. 99-5789, slip op. at 18 (E.D. Cal. Aug. 11, 2000) (recognizing that subsection (c)(2) "requires an agency to treat the records as subject to the requirements of [the FOIA] if the informant's status as an informant has been officially confirmed"), aff'd, 14 F. App'x 916 (9th Cir. 2001); Valencia-Lucena v. DEA, No. 99-0633, slip op. at 8 (D.D.C. Feb. 8, 2000) (concluding that "[subs]ection (c)(2) is irrelevant to the resolution of this action" because the subject's status as an informant was "officially confirmed at [the requester's] criminal trial"); Tanks, 1996 WL 293531, at *5 (holding that "given the fact that the status of [the subjects] as government informants in Plaintiff's case is confirmed, the (c)(2) exclusion simply has no bearing on the instant case").

of any specific records regarding that source.⁵² Thus, courts have not viewed the (c)(2) exclusion as automatically requiring disclosure of source-related information once a source has been officially acknowledged,⁵³ so long as such information may properly be protected under a FOIA exemption.⁵⁴

A criminal law enforcement agency forced to employ this exclusion should do so in the same fashion as it would employ the (c)(1) exclusion discussed above.⁵⁵ It is imperative that all information that ordinarily would be disclosed to a third-party requester acting with the consent of the subject, other than information which would reflect that an individual is a confidential source, be disclosed.⁵⁶ If, for example, the Federal Bureau of Investigation were to respond to a request for records pertaining to an individual having a known record of federal prosecutions by replying that "there exist no records responsive to your FOIA request," the interested criminal organization would surely recognize that its request had been afforded extraordinary treatment and would draw its conclusions accordingly.⁵⁷ Therefore, the (c)(2) exclusion must be employed in a manner entirely consistent with its clear source-protection

⁵² See Gonzalez, No. 99-5789, slip op. at 18 (E.D. Cal. Aug. 11, 2000) (finding that "nowhere within [subsection (c)(2)] does it state that the privacy exemptions found at subsections (b)(6) and (b)(7) are invalidated because a person is a confirmed informant"); Valencia-Lucena, No. 99-0633, slip op. at 8 (D.D.C. Feb. 8, 2000) (rejecting plaintiff's argument that when subsection (c)(2) does not apply, because subject is known DEA informant, FBI is barred from asserting "Glomar" response for any FBI records); Tanks, 1996 WL 293531, at *5-6 (holding that because "it is undisputed that the two subjects" of request were government informants in plaintiff's trial, no claim of subsection (c)(2) would have been appropriate, and yet, it still was appropriate to assert "Glomar" response for any possible unrelated law enforcement records).

⁵³ See Benavides v. DEA, 968 F.2d 1243, 1248 (D.C. Cir. 1992) ("There is no evidence that Congress intended subsection (c)(2) to repeal or supersede the other enumerated FOIA exemptions or to require disclosure whenever the informant's status has been officially confirmed."), modified on other grounds, 976 F.2d 751, 753 (D.C. Cir. 1992); cf. Valencia-Lucena, No. 99-0633, slip op. at 8-9 (D.D.C. Feb. 8, 2000) (holding that once subsection (c)(2) was rendered inapplicable by official confirmation of source's status as DEA source, FBI appropriately relied on Exemptions 6 and 7(C) to "Glomar" existence of any FBI records).

⁵⁴ See Benavides, 968 F.2d at 1248 ("The legislative history suggests, in fact, that Congress intended to permit the DEA to withhold documents under 7(C) and 7(D), even if the agency must, under subsection (c)(2), acknowledge their existence."); Tanks, 1996 WL 293531, at *6 ("Accepting the status of [two named individuals] as government informants, the FBI explained why disclosure of any information in its files unrelated to the Plaintiff and his prosecution would constitute an unwarranted invasion of personal privacy pursuant to Exemption 7(C), 5 U.S.C. § 552(b)(7)(C).").

⁵⁵ See Attorney General's 1986 Amendments Memorandum at 24.

⁵⁶ See id. at 22 (noting that (c)(2) applies only to a "narrower situation" where acknowledgment involves "threatened identification of confidential informants").

⁵⁷ See generally id. at 26-27 (noting generally that agencies must avoid "telling inferences" caused by inconsistent handling).

objective.⁵⁸

The (c)(3) Exclusion

The third of these special record exclusions pertains only to certain law enforcement records that are maintained by the FBI.⁵⁹ The "(c)(3) exclusion" provides as follows:

Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in [Exemption 1], the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of [the FOIA].⁶⁰

This exclusion recognizes the exceptional sensitivity of the FBI's activities in the areas of foreign intelligence, counterintelligence, and the battle against international terrorism, as well as the fact that the classified files of these activities can be particularly vulnerable to targeted FOIA requests.⁶¹ Sometimes, within the context of a particular FOIA request, the very fact that the FBI does or does not hold any records on a specified person or subject can itself be a sensitive fact, properly classified in accordance with the applicable executive order on the protection of national security information⁶² and protectible under FOIA Exemption 1.⁶³ Once again, however, the mere invocation of Exemption 1 to withhold such information can provide information to the requester which would have an extremely adverse effect on the government's interests.⁶⁴

Congress took cognizance of this through the (c)(3) exclusion, in which it authorizes the FBI to protect itself against such harm in connection with any of its records pertaining to

⁵⁸ See id. at 23 (commenting that Exemption 7(D) may be inadequate to protect source in targeted request).

⁵⁹ See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 24-27 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum].

⁶⁰ 5 U.S.C. § 552(c)(3) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

⁶¹ See Attorney General's 1986 Amendments Memorandum at 25.

⁶² See Exec. Order No. 12,958, as amended, § 3.6(a), 68 Fed. Reg. 15,315 (Mar. 28, 2003), reprinted in 50 U.S.C. § 435 note (2006) and summarized in FOIA Post (posted 4/11/03).

⁶³ See 5 U.S.C. § 552(b)(1); see also Attorney General's 1986 Amendments Memorandum at 25.

⁶⁴ See Attorney General's 1986 Amendments Memorandum at 25.

"foreign intelligence, or counterintelligence, or international terrorism."⁶⁵ To do so, the FBI must of course reach the judgment, in the context of a particular request, that the very existence or nonexistence of responsive records is itself a classified fact and that it need employ this record exclusion to prevent its disclosure.⁶⁶ By the terms of this provision, the excluded records may be treated as such so long as their existence, within the context of the request, "remains classified information."⁶⁷

Additionally, it should be noted that while the statute refers to records maintained by the FBI, exceptional circumstances could possibly arise in which it would be appropriate for another component of the Department of Justice or another federal agency to invoke this exclusion jointly on a derivative basis as well.⁶⁸ Such a situation could occur where information in records of another component or agency is derived from FBI records which fully qualify for (c)(3) exclusion protection.⁶⁹ In such extraordinary circumstances, the agency processing the derivative information should consult with the FBI regarding the possible joint invocation of the exclusion in order to avoid a potentially damaging inconsistent response.⁷⁰

Procedural Considerations

Several procedural considerations regarding the implementation and operation of these special record exclusions should be noted. First, it should be self-evident that the decision to employ an exclusion in response to a particular request must not be reflected on anything made available to the requester.⁷¹ This requires careful attention to the handling of a request at its earliest stages in order to ensure that an agency does not mistakenly speak of the existence (or even of the possible existence) of responsive records in its early administrative correspondence with the requester.⁷² When an agency reaches the judgment that it is necessary to employ an exclusion, it should do so as a specific official determination that is

⁶⁵ 5 U.S.C. § 552(c)(3).

⁶⁶ See id.; see also Attorney General's 1986 Amendments Memorandum at 25 n.44 (addressing overlap with subsection (c)(1)).

⁶⁷ 5 U.S.C. § 552(c)(3).

⁶⁸ See Attorney General's 1986 Amendments Memorandum at 25 n.45 (explaining that although this exclusion was created primarily for use by the FBI, "it is conceivable that records derived from such FBI records might be maintained elsewhere, potentially in contexts in which the harm sought to be prevented by this exclusion is no less threatened").

⁶⁹ See id.

⁷⁰ See id.

⁷¹ See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 27 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum].

⁷² See id. at 26.

reviewed carefully by appropriate supervisory agency officials.⁷³ The particular records covered by an exclusion action should be concretely and carefully identified and segregated from any responsive records that are to be processed according to ordinary procedures.⁷⁴

It must be remembered that providing a "no records" response as part of an exclusion strategy does not insulate the agency from either administrative or judicial review of the agency's action.⁷⁵ The recipient of a "no records" response might challenge it because he believes that the agency has failed to conduct a sufficiently detailed search to uncover the requested records.⁷⁶ Alternately, any requester, mindful of the exclusion mechanism and seeking information of a nature which could possibly trigger an exclusion action, could seek judicial review in an effort to pursue his suspicions and to have a court determine whether an exclusion, if in fact used, was employed appropriately.⁷⁷

Moreover, because the very objective of the exclusions is to preclude the requester from learning that there exist such responsive records, all administrative appeals and court cases involving a "no records" response must receive extremely careful attention.⁷⁸ If one procedure is employed in adjudicating appeals or litigating cases in which there actually are no responsive records, and any different course is followed where an exclusion is in fact being used, sophisticated requesters could quickly learn to distinguish between the two and defeat the exclusion's very purpose.⁷⁹

Consequently, agencies should prepare in advance a uniform procedure to handle administrative appeals and court challenges that seek review of the possibility that an exclusion was employed in a given case.⁸⁰ In responding to administrative appeals from "no record" responses,⁸¹ agencies should accept any clear request for administrative appellate review of the possible use of an exclusion and specifically address it in evaluating and

⁷³ See id. at 27.

⁷⁴ See id.

⁷⁵ See id. at 28-29.

⁷⁶ See id. at 29; see also Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 67 (D.C. Cir. 1990).

⁷⁷ See Attorney General's 1986 Amendments Memorandum at 28.

⁷⁸ See id.

⁷⁹ See id. at 29.

⁸⁰ See generally id. at 27-29.

⁸¹ See FOIA Update, Vol. XII, No. 2, at 5 ("OIP Guidance: Procedural Rules Under the D.C. Circuit's Oglesby Decision") (requiring agency to advise any requester who receives "no record" response of its procedures for filing administrative appeal) (superseding FOIA Update, Vol. V, No. 3, at 2).

responding to the appeal.⁸²

In the exceptional case in which an exclusion was in fact invoked, the appellate review authority should examine the correctness of that action and come to a judgment as to the exclusion's continued applicability as of that time.⁸³ In the event that an exclusion is found to have been improperly employed or to be no longer applicable, the appeal should be remanded for prompt conventional processing of all formerly excluded records, with the requester advised accordingly.⁸⁴ When it is determined either that an exclusion was properly employed or that, as in the overwhelming bulk of cases, no exclusion was used, the result of the administrative appeal should be, by all appearances, the same: The requester should be specifically advised that this aspect of his appeal was reviewed and found to be without merit.⁸⁵

Such administrative appeal responses, of course, necessarily must be stated in such a way that does not indicate whether an exclusion was in fact invoked.⁸⁶ Moreover, in order to preserve the exclusion mechanism's effectiveness, requesters who inquire in any way whether an exclusion has been used should routinely be advised that it is the agency's standard policy to refuse to confirm or deny that an exclusion was employed in any particular case.⁸⁷

Exclusion issues in court actions must be handled with similarly careful and thoughtful preparation.⁸⁸ First, it need be recognized that any judicial review of a suspected exclusion determination must of course be conducted *ex parte*, based upon an *in camera* court filing submitted directly to the judge.⁸⁹ Second, it is essential to the integrity of the exclusion mechanism that requesters not be able to determine whether an exclusion was employed at

⁸² See Attorney General's 1986 Amendments Memorandum at 29 (superseded in part by FOIA Update, Vol. XII, No. 2, at 5).

⁸³ See id. at 28.

⁸⁴ See id.; see also Barnard v. DHS, 598 F. Supp. 2d 1, 4 n.4 (D.D.C. 2009) (noting that agency initially applied (c)(1) exclusion, but then determined it was no longer applicable and asserted exemptions).

⁸⁵ See Attorney General's 1986 Amendments Memorandum at 28-29.

⁸⁶ See id. at 29.

⁸⁷ See id. at 29 & n.52; Steinberg v. U.S. Dep't of Justice, No. 93-2409, 1997 WL 349997, at *1 (D.D.C. June 18, 1997) (refusing to "confirm[] or deny[] the existence of any exclusion . . . and conclud[ing] that if an exclusion was invoked, it was and remains amply justified").

⁸⁸ See Attorney General's 1986 Amendments Memorandum at 29.

⁸⁹ See id.; see also Steinberg, 1997 WL 349997, at *1 (approving use of agency *in camera* declaration where plaintiff "alleged that certain requested information may have been excluded pursuant to [sub]section 552(c)").

all in a given case based upon how any case is handled in court.⁹⁰ Thus, it is critical that the in camera defenses of exclusion issues raised in FOIA cases occur not merely in those cases in which an exclusion actually was employed and is in fact being defended.⁹¹

Accordingly, it is the government's standard litigation policy in the defense of FOIA lawsuits that, whenever a FOIA plaintiff raises a distinct claim regarding the suspected use of an exclusion, the government will routinely submit an in camera declaration addressing that claim, one way or the other.⁹² When an exclusion was in fact employed, the correctness of that action will be justified to the court.⁹³ When an exclusion was not in fact employed, the in camera declaration will state simply that it is being submitted to the court so as to mask whether or not an exclusion is being employed, thus preserving the integrity of the exclusion process overall.⁹⁴ In either case, the government will of course urge the court to issue a public decision which does not indicate whether it is or is not an actual exclusion case.⁹⁵ Such a public decision, like an administrative appeal determination of an exclusion-related request for review, should specify only that a full review of the claim was had and that, if an exclusion was in fact employed, it was, and remains, amply justified.⁹⁶

⁹⁰ See Attorney General's 1986 Amendments Memorandum at 29.

⁹¹ See id.

⁹² See id. at 30; see also, e.g., Steinberg, 1997 WL 349997, at *1 (explaining that "the government is permitted to file an in camera declaration, which explains either that no exclusion was invoked or that the exclusion was invoked appropriately"); Steinberg v. U.S. Dep't of Justice, No. 91-2740, 1993 WL 524528, at *2 (D.D.C. Dec. 2, 1993) (noting that agency "volunteered an in camera submission related to the allegation of covert reliance on § 552(c)").

⁹³ See Attorney General's 1986 Amendments Memorandum at 30.

⁹⁴ See id.

⁹⁵ See id.

⁹⁶ See id.; see also, e.g., Steinberg, 1997 WL 349997, at *1 (where plaintiff alleged possible use of exclusion, "without confirming or denying the existence of any exclusion, the Court finds and concludes [after review of agency's in camera declaration] that if an exclusion was invoked, it was and remains amply justified"); Beauman v. FBI, No. CV-92-7603, slip op. at 2 (C.D. Cal. Apr. 12, 1993) ("In response to the plaintiff's claim of the (c)(1) exclusion being utilized in this action, . . . [w]ithout confirming or denying that any such exclusion was actually invoked by the defendant, the Court finds and concludes [after review of an in camera declaration] that if an exclusion was in fact employed, it was, and remains, amply justified.") (adopting agency's proposed conclusion of law).