The White House

Office of the Press Secretary

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Press Conference by the President

2:45 P.M. EDT

THE PRESIDENT: Good afternoon, everybody. Happy Friday. I thought I'd take some questions, but first, let me say a few words about the economy.

This morning, we learned that our economy created over 200,000 new jobs in July. That's on top of about 300,000 new jobs in June. So we are now in a six-month streak with at least 200,000 new jobs each month. That's the first time that has happened since 1997. Over the past year, we've added more jobs than any year since 2006. And all told, our businesses have created 9.9 million new jobs over the past 53 months. That's the longest streak of private sector job creation in our history.

And as we saw on Wednesday, the economy grew at a strong pace in the spring. Companies are investing. Consumers are spending. American manufacturing, energy, technology, autos -- all are booming. And thanks to the decisions that we've made, and the grit and resilience of the American people, we've recovered faster and come farther from the recession than almost any other advanced country on Earth.

So the good news is the economy clearly is getting stronger. Things are getting better. Our engines are revving a little bit louder. And the decisions that we make right now can sustain and keep that growth and momentum going.

Unfortunately, there are a series of steps that we could be taking to maintain momentum, and perhaps even accelerate it; there are steps that we could be taking that would result in more job growth, higher wages, higher incomes, more relief for middle-class families. And so far, at least, in Congress, we have not seen them willing or able to take those steps.

I've been pushing for common-sense ideas like rebuilding our infrastructure in ways that are sustained over many years and support millions of good jobs and help businesses compete. I've been advocating on behalf of raising the minimum wage, making it easier for working folks to pay off their student loans; fair pay, paid leave. All these policies have two things in common: All of them would help working families feel more stable and secure, and all of them so far have been blocked or ignored by Republicans in Congress. That's why my administration keeps taking whatever actions we can take on our own to help working families.

Now, it's good that Congress was able to pass legislation to strengthen the VA. And I want to thank the chairmen and ranking members who were involved in that. It's good that Congress was able to at least fund transportation projects for a few more months before leaving town -- although it falls far short of the kind of infrastructure effort that we need that would actually accelerate the economy. But for the most part, the big-ticket items, the things that would really make a difference in the lives of middle-class families, those things just are not getting done.

Let's just take a recent example: Immigration. We all agree that there's a problem that needs to be solved in a portion of our southern border. And we even agree on most of the solutions.

But instead of working together -- instead of focusing on the 80 percent where there is agreement between Democrats and Republicans, between the administration and Congress -- House Republicans, as we speak, are trying to pass the most extreme and unworkable versions of a bill that they already know is going nowhere, that can't pass the Senate and that if it were to pass the Senate I would veto. They know it.

They're not even trying to actually solve the problem. This is a message bill that they couldn't quite pull off yesterday, so they made it a little more extreme so maybe they can pass it today -- just so they can check a box before they're leaving town for a month. And this is on an issue that they all insisted had to be a top priority.

Now, our efforts administratively so far have helped to slow the tide of child migrants trying to come to our country. But without additional resources and help from Congress, we're just not going to have the resources we need to fully solve the problem. That means while they're out on vacation I'm going to have to make some tough choices to meet the challenge -- with or without Congress.

And yesterday, even though they've been sitting on a bipartisan immigration bill for over a year, House Republicans suggested that since they don't expect to actually pass a bill that I can sign, that I actually should go ahead and act on my own to solve the problem. Keep in mind that just a few days earlier, they voted to sue me for acting on my own. And then when they couldn't pass a bill yesterday, they put out a statement suggesting I should act on my own because they couldn't pass a bill.

So immigration has not gotten done. A student loan bill that would help folks who have student loan debt consolidate and refinance at lower rates -- that didn't pass. The transportation bill that they did pass just gets us through the spring, when we should actually be planning years in advance. States and businesses are raising the minimum wage for their workers because this Congress is failing to do so.

Even basic things like approving career diplomats for critical ambassadorial posts aren't getting done. Last night, for purely political reasons, Senate Republicans, for a certain period of time, blocked our new ambassador to Russia. It raised such an uproar that finally they went ahead and let our Russian ambassador pass -- at a time when we are dealing every day with the crisis in Ukraine.

They're still blocking our ambassador to Sierra Leone, where there's currently an Ebola outbreak. They're blocking our ambassador to Guatemala, even as they demand that we do more to stop the flow of unaccompanied children from Guatemala. There are a lot of things that we could be arguing about on policy -- that's what we should be doing as a democracy -- but we shouldn't be having an argument about placing career diplomats with bipartisan support in countries around the world where we have to have a presence.

So the bottom line is this: We have come a long way over the last five and a half years. Our challenges are nowhere near as daunting as they were when I first came into office. But the American people demand and deserve a strong and focused effort on the part of all of us to keep moving the country forward and to focus on their concerns. And the fact is we could be much further along and we could be doing even better, and the economy could be even stronger, and more jobs could be created if Congress would do the job that the people sent them here to do.

And I will not stop trying to work with both parties to get things moving faster for middle-class families and those trying to get into the middle class. When Congress returns next month, my hope is, is that instead of simply trying to pass partisan message bills on party lines that don't actually solve problems, they're going to be willing to come together to at least focus on some key areas where there's broad agreement. After all that we've had to overcome, our Congress should stop standing in the way of our country's success.

So with that, let me take a couple of questions. And I will start with Roberta Rampton of Reuters.

Q Thanks. I want to ask about the situation in the Middle East. And why do you think Israel should embrace a cease-fire in Gaza when one of its soldiers appears to have been abducted and when Hamas continues to use its network of tunnels to launch attacks? And also, have you seen Israel act at all on your call to do more to protect civilians?

THE PRESIDENT: Well, first of all, I think it's important to note that we have -- and I have -- unequivocally condemned Hamas and the Palestinian factions that were responsible for killing two Israeli soldiers and abducting a third almost minutes after a cease-fire had been announced. And the U.N. has condemned them as well.

And I want to make sure that they are listening: If they are serious about trying to resolve this situation, that soldier needs to be unconditionally released as soon as possible.

I have been very clear throughout this crisis that Israel has a right to defend itself. No country can tolerate missiles raining down on its cities and people having to rush to bomb shelters every 20 minutes or half hour. No country can or would tolerate tunnels being dug under their land that can be used to launch terrorist attacks.

And so, not only have we been supportive of Israel in its right to defend itself, but in very concrete terms -- for example, in support for the Iron Dome program that has intercepted rockets that are firing down on Israeli cities -- we've been trying to cooperate as much as we can to make sure that Israel is able to protect its citizens.

Now, at the same time, we've also been clear that innocent civilians in Gaza caught in the crossfire have to weigh on our conscience and we have to do more to protect them. A cease-

fire was one way in which we could stop the killing, to step back and to try to resolve some of the underlying issues that have been building up over quite some time. Israel committed to that 72-hour cease-fire, and it was violated. And trying to put that back together is going to be challenging, but we will continue to make those efforts.

And let me take this opportunity, by the way, to give Secretary John Kerry credit. He has been persistent. He has worked very hard. He has endured on many occasions really unfair criticism simply to try to get to the point where the killing stops and the underlying issues about Israel's security but also the concerns of Palestinians in Gaza can be addressed.

We're going to keep working towards that. It's going to take some time. I think it's going to be very hard to put a cease-fire back together again if Israelis and the international community can't feel confident that Hamas can follow through on a cease-fire commitment.

And it's not particularly relevant whether a particular leader in Hamas ordered this abduction. The point is, is that when they sign onto a cease-fire they're claiming to speak for all the Palestinian factions. And if they don't have control of them, and just moments after a cease-fire is signed you have Israeli soldiers being killed and captured, then it's hard for the Israelis to feel confident that a cease-fire can actually be honored.

I'm in constant consultation with Prime Minister Netanyahu. Our national security team is in constant communication with the Israel military. I want to see everything possible done to make sure that Palestinian civilians are not being killed. And it is heartbreaking to see what's happening there, and I think many of us recognize the dilemma we have. On the one hand, Israel has a right to defend itself and it's got to be able to get at those rockets and those tunnel networks. On the other hand, because of the incredibly irresponsible actions on the part of Hamas to oftentimes house these rocket launchers right in the middle of civilian neighborhoods, we end up seeing people who had nothing to do with these rockets ending up being hurt.

Part of the reason why we've been pushing so hard for a cease-fire is precisely because it's hard to reconcile Israel's legitimate need to defend itself with our concern with those civilians. And if we can pause the fighting, then it's possible that we may be able to arrive at a formula that spares lives and also ensures Israel's security. But it's difficult. And I don't think we should pretend otherwise.

Bill Plante.

Q Mr. President, like that cease-fire, you've called for diplomatic solutions not only in Israel and Gaza but also in Ukraine, in Iraq, to very little effect so far. Has the United States of America lost its influence in the world? Have you lost yours?

THE PRESIDENT: Look, this is a common theme that folks bring up. Apparently people have

forgotten that America, as the most powerful country on Earth, still does not control everything around the world. And so our diplomatic efforts often take time. They often will see progress and then a step backwards. That's been true in the Middle East. That's been true in Europe. That's been true in Asia. That's the nature of world affairs. It's not neat, and it's not smooth.

But if you look at, for example, Ukraine, we have made progress in delivering on what we said we would do. We can't control how Mr. Putin thinks. But what we can do is say to Mr. Putin, if you continue on the path of arming separatists with heavy armaments that the evidence suggests may have resulted in 300 innocent people on a jet dying, and that violates international law and undermines the integrity -- territorial integrity and sovereignty of Ukraine, then you're going to face consequences that will hurt your country.

And there was a lot of skepticism about our ability to coordinate with Europeans for a strong series of sanctions. And each time we have done what we said we would do, including this week, when we put in place sanctions that have an impact on key sectors of the Russian economy -- their energy, their defense, their financial systems.

It hasn't resolved the problem yet. I spoke to Mr. Putin this morning, and I indicated to him, just as we will do what we say we do in terms of sanctions, we'll also do what we say we do in terms of wanting to resolve this issue diplomatically if he takes a different position. If he respects and honors the right of Ukrainians to determine their own destiny, then it's possible to make sure that Russian interests are addressed that are legitimate, and that Ukrainians are able to make their own decisions, and we can resolve this conflict and end some of the bloodshed.

But the point is, though, Bill, that if you look at the 20th century and the early part of this century, there are a lot of conflicts that America doesn't resolve. That's always been true. That doesn't mean we stop trying. And it's not a measure of American influence on any given day or at any given moment that there are conflicts around the world that are difficult. The conflict in Northern Ireland raged for a very, very long time until finally something broke, where the parties decided that it wasn't worth killing each other.

The Palestinian-Israeli conflict has been going on even longer than you've been reporting. (Laughter.) And I don't think at any point was there a suggestion somehow that America didn't have influence just because we weren't able to finalize an Israeli-Palestinian peace deal.

You will recall that situations like Kosovo and Bosnia raged on for quite some time, and there was a lot more death and bloodshed than there has been so far in the Ukrainian situation before it ultimately did get resolved.

And so I recognize with so many different issues popping up around the world, sometimes it may seem as if this is an aberration or it's unusual. But the truth of the matter is, is that there's a big world out there, and that as indispensable as we are to try to lead it, there's still going to

be tragedies out there and there are going to be conflicts. And our job is to just make sure that we continue to project what's right, what's just, and that we're building coalitions of like-minded countries and partners in order to advance not only our core security interests but also the interests of the world as a whole.

Q Do you think you could have done more?

THE PRESIDENT: On which one?

Q On any of them? Ukraine?

THE PRESIDENT: Well look, I think, Bill, that the nature of being President is that you're always asking yourself what more can you do. But with respect to, let's say, the Israeli-Palestinian issue, this administration invested an enormous amount to try to bring the parties together around a framework for peace and a two-state solution. John Kerry invested an enormous amount of time. In the end, it's up to the two parties to make a decision. We can lead them to resolve some of the technical issues and to show them a path, but they've got to want it.

With respect to Ukraine, I think that we have done everything that we can to support the Ukrainian government and to deter Russia from moving further into Ukraine. But short of going to war, there are going to be some constraints in terms of what we can do if President Putin and Russia are ignoring what should be their long-term interests.

Right now, what we've done is impose sufficient costs on Russia that, objectively speaking, they should -- President Putin should want to resolve this diplomatically, get these sanctions lifted, get their economy growing again, and have good relations with Ukraine. But sometimes people don't always act rationally, and they don't always act based on their medium- or long-term interests. That can't deter us, though. We've just got to stay at it.

Wendell.

Q Mr. President, Republicans point to some of your executive orders as reason, they say, that they can't trust you to implement legislation that they pass. Even if you don't buy that argument, do you hold yourself totally blameless in the inability it appears to reach agreement with the Republican-led House?

THE PRESIDENT: Wendell, let's just take the recent example of immigration. A bipartisan bill passed out of the Senate, co-sponsored by not just Democrats but some very conservative Republicans who recognize that the system currently is broken and if, in fact we put more resources on the border, provide a path in which those undocumented workers who've been living here for a long time and may have ties here are coming out of the shadows, paying their taxes, paying a fine, learning English -- if we fix the legal immigration system so it's more

efficient, if we are attracting young people who may have studied here to stay here and create jobs here, that that all is going to be good for the economy, it's going to reduce the deficit, it might have forestalled some of the problems that we're seeing now in the Rio Grande Valley with these unaccompanied children.

And so we have a bipartisan bill, Wendell, bipartisan agreement supported by everybody from labor to the evangelical community to law enforcement. So the argument isn't between me and the House Republicans. It's between the House Republicans and Senate Republicans, and House Republicans and the business community, and House Republicans and the evangelical community. I'm just one of the people they seem to disagree with on this issue.

So that's on the comprehensive bill. So now we have a short-term crisis with respect to the Rio Grande Valley. They say we need more resources, we need tougher border security in this area where these unaccompanied children are showing up. We agree. So we put forward a supplemental to give us the additional resources and funding to do exactly what they say we should be doing, and they can't pass the bill. They can't even pass their own version of the bill. So that's not a disagreement between me and the House Republicans; that's a disagreement between the House Republicans and the House Republicans.

The point is that on a range of these issues, whether it's tax reform, whether it's reducing the deficit, whether it's rebuilding our infrastructure, we have consistently put forward proposals that in previous years and previous administrations would not have been considered radical or left wing; they would have been considered pretty sensible, mainstream approaches to solving problems.

I include under that, by the way, the Affordable Care Act. That's a whole other conversation.

And in circumstances where even basic, common-sense, plain, vanilla legislation can't pass because House Republicans consider it somehow a compromise of their principles, or giving Obama a victory, then we've got to take action. Otherwise, we're not going to be making progress on the things that the American people care about.

Q On the border supplemental -- can you act alone?

THE PRESIDENT: Well, I'm going to have to act alone because we don't have enough resources. We've already been very clear -- we've run out of money. And we are going to have to reallocate resources in order to just make sure that some of the basic functions that have to take place down there -- whether it's making sure that these children are properly housed, or making sure we've got enough immigration judges to process their cases -- that those things get done. We're going to have to reallocate some resources.

But the broader point, Wendell, is that if, in fact, House Republicans are concerned about me acting independently of Congress -- despite the fact that I've taken fewer executive actions

than my Republican predecessor or my Democratic predecessor before that, or the Republican predecessor before that -- then the easiest way to solve it is passing legislation. Get things done.

On the supplemental, we agreed on 80 percent of the issues. There were 20 percent of the issues that perhaps there were disagreements between Democrats and Republicans. As I said to one Republican colleague who was down here that I was briefing about some national security issues, why wouldn't we just go ahead and pass the 80 percent that we agree on and we'll try to work to resolve the differences on the other 20 percent? Why wouldn't we do that? And he didn't really have a good answer for it.

So there's no doubt that I can always do better on everything, including making additional calls to Speaker Boehner, and having more conversations with some of the House Republican leadership. But in the end, the challenge I have right now is that they are not able to act even on what they say their priorities are, and they're not able to work and compromise even with Senate Republicans on certain issues. And they consider what have been traditionally Republican-supported initiatives, they consider those as somehow a betrayal of the cause.

Take the example of the Export-Import Bank. This is an interesting thing that's happened. This is a program in which we help to provide financing to sell American goods and products around the world. Every country does this. It's traditionally been championed by Republicans. For some reason, right now the House Republicans have decided that we shouldn't do this -- which means that when American companies go overseas and they're trying to close a sale on selling Boeing planes, for example, or a GE turbine, or some other American product, that has all kinds of subcontractors behind it and is creating all kinds of jobs, and all sorts of small businesses depend on that sale, and that American company is going up against a German company or a Chinese company, and the Chinese and the German company are providing financing and the American company isn't, we may lose that sale.

When did that become something that Republicans opposed? It would be like me having a car dealership for Ford, and the Toyota dealership offers somebody financing and I don't. We will lose business and we'll lose jobs if we don't pass it.

So there's some big issues where I understand why we have differences. On taxes, Republicans want to maintain some corporate loopholes I think need to be closed because I think that we should be giving tax breaks to families that are struggling with child care or trying to save for a college education. On health care, obviously their view is, is that we should not be helping folks get health care, even though it's through the private marketplace. My view is, is that in a country as wealthy as ours, we can afford to make sure that everybody has access to affordable care.

Those are legitimate policy arguments. But getting our ambassadors confirmed? These are career diplomats, not political types. Making sure that we pass legislation to strengthen our borders and put more folks down there? Those shouldn't be controversial. And I think you'd be hard-pressed to find an example of where I wouldn't welcome some reasonable efforts to actually get a bill passed out of Congress that I could sign.

Last question, Michelle Kosinski.

Q You made the point that in certain difficult conflicts in the past, both sides had to reach a point where they were tired of the bloodshed. Do you think that we are actually far from that point right now? And is it realistic to try to broker a cease-fire right now when there are still tunnel operations allowed to continue? Is that going to cause a change of approach from this point forward?

THE PRESIDENT: Well, keep in mind that the cease-fire that had been agreed to would have given Israel the capability to continue to dismantle these tunnel networks, but the Israelis can dismantle these tunnel networks without going into major population centers in Gaza. So I think the Israelis are entirely right that these tunnel networks need to be dismantled. There is a way of doing that while still reducing the bloodshed.

You are right that in past conflicts, sometimes people have to feel deeply the costs. Anybody who has been watching some of these images I'd like to think should recognize the costs. You have children who are getting killed. You have women, defenseless, who are getting killed. You have Israelis whose lives are disrupted constantly and living in fear. And those are costs that are avoidable if we're able to get a cease-fire that preserves Israel's ability to defend itself and gives it the capacity to have an assurance that they're not going to be constantly threatened by rocket fire in the future, and, conversely, an agreement that recognizes the Palestinian need to be able to make a living and the average Palestinian's capacity to live a decent life.

But it's hard. It's going to be hard to get there. I think that there's a lot of anger and there's a lot of despair, and that's a volatile mix. But we have to keep trying.

And it is -- Bill asked earlier about American leadership. Part of the reason why America remains indispensable, part of the essential ingredient in American leadership is that we're willing to plunge in and try, where other countries don't bother trying. I mean, the fact of the matter is, is that in all these crises that have been mentioned, there may be some tangential risks to the United States. In some cases, as in Iraq and ISIS, those are dangers that have to be addressed right now, and we have to take them very seriously. But for the most part, these are not -- the rockets aren't being fired into the United States. The reason we are concerned is because we recognize we've got some special responsibilities.

We have to have some humility about what we can and can't accomplish. We have to

recognize that our resources are finite, and we're coming out of a decade of war and our military has been stretched very hard, as has our budget. Nevertheless, we try. We go in there and we make an effort.

And when I see John Kerry going out there and trying to broker a cease-fire, we should all be supporting him. There shouldn't be a bunch of complaints and second-guessing about, well, it hasn't happened yet, or nitpicking before he's had a chance to complete his efforts. Because, I tell you what, there isn't any other country that's going in there and making those efforts.

And more often than not, as a consequence of our involvement, we get better outcomes -- not perfect outcomes, not immediate outcomes, but we get better outcomes. And that's going to be true with respect to the Middle East. That's going to be true with respect to Ukraine. That's going to be certainly true with respect to Iraq.

And I think it's useful for me to end by just reminding folks that, in my first term, if I had a press conference like this, typically, everybody would want to ask about the economy and how come jobs weren't being created, and how come the housing market is still bad, and why isn't it working. Well, you know what, what we did worked. And the economy is better. And when I say that we've just had six months of more than 200,000 jobs that hasn't happened in 17 years that shows you the power of persistence. It shows you that if you stay at it, eventually we make some progress. All right?

Q What about John Brennan?

Q The Africa summit -- Ebola?

THE PRESIDENT: I thought that you guys were going to ask me how I was going to spend my birthday. What happened to the happy birthday thing?

Q Happy birthday.

Q What about John Brennan?

Q Africa summit?

THE PRESIDENT: I will address two points. I'll address --

Q And Flight 17?

THE PRESIDENT: Hold on, guys. Come on. There's just --

Q And Africa.

THE PRESIDENT: You're not that pent up. I've been giving you questions lately.

On Brennan and the CIA, the RDI report has been transmitted, the declassified version that will be released at the pleasure of the Senate committee.

I have full confidence in John Brennan. I think he has acknowledged and directly apologized to Senator Feinstein that CIA personnel did not properly handle an investigation as to how certain documents that were not authorized to be released to the Senate staff got somehow into the hands of the Senate staff. And it's clear from the IG report that some very poor judgment was shown in terms of how that was handled. Keep in mind, though, that John Brennan was the person who called for the IG report, and he's already stood up a task force to make sure that lessons are learned and mistakes are resolved.

With respect to the larger point of the RDI report itself, even before I came into office I was very clear that in the immediate aftermath of 9/11 we did some things that were wrong. We did a whole lot of things that were right, but we tortured some folks. We did some things that were contrary to our values.

I understand why it happened. I think it's important when we look back to recall how afraid people were after the Twin Towers fell and the Pentagon had been hit and the plane in Pennsylvania had fallen, and people did not know whether more attacks were imminent, and there was enormous pressure on our law enforcement and our national security teams to try to deal with this. And it's important for us not to feel too sanctimonious in retrospect about the tough job that those folks had. And a lot of those folks were working hard under enormous pressure and are real patriots.

But having said all that, we did some things that were wrong. And that's what that report reflects. And that's the reason why, after I took office, one of the first things I did was to ban some of the extraordinary interrogation techniques that are the subject of that report.

And my hope is, is that this report reminds us once again that the character of our country has to be measured in part not by what we do when things are easy, but what we do when things are hard. And when we engaged in some of these enhanced interrogation techniques, techniques that I believe and I think any fair-minded person would believe were torture, we crossed a line. And that needs to be -- that needs to be understood and accepted. And we have to, as a country, take responsibility for that so that, hopefully, we don't do it again in the future.

Q Mr. President --

THE PRESIDENT: Now, I gave you a question.

Q All right.

Q The summit -- the U.S.-Africa --

THE PRESIDENT: We've got a U.S.-Africa Summit coming up next week. It is going to be an unprecedented gathering of African leaders. The importance of this for America needs to be understood. Africa is one of the fastest-growing continents in the world. You've got six of the 10 fastest-growing economies in Africa. You have all sorts of other countries like China and Brazil and India deeply interested in working with Africa -- not to extract natural resources alone, which traditionally has been the relationship between Africa and the rest of the world -- but now because Africa is growing and you've got thriving markets and you've got entrepreneurs and extraordinary talent among the people there.

And Africa also happens to be one of the continents where America is most popular and people feel a real affinity for our way of life. And we've made enormous progress over the last several years in not just providing traditional aid to Africa, helping countries that are suffering from malnutrition or helping countries that are suffering from AIDS, but rather partnering and thinking about how can we trade more and how can we do business together. And that's the kind of relationship that Africa is looking for.

And I've had conversations over the last several months with U.S. businesses -- some of the biggest U.S. businesses in the world -- and they say, Africa, that's one of our top priorities; we want to do business with those folks, and we think that we can create U.S. jobs and send U.S. exports to Africa. But we've got to be engaged, and so this gives us a chance to do that. It also gives us a chance to talk to Africa about security issues -- because, as we've seen, terrorist networks try to find places where governance is weak and security structures are weak. And if we want to keep ourselves safe over the long term, then one of the things that we can do is make sure that we are partnering with some countries that really have pretty effective security forces and have been deploying themselves in peacekeeping and conflict resolution efforts in Africa. And that, ultimately, can save us and our troops and our military a lot of money if we've got strong partners who are able to deal with conflicts in these regions.

So it's going to be a terrific conference. I won't lie to you, traffic will be bad here in Washington. (Laughter.) I know that everybody has been warned about that, but we are really looking forward to this and I think it's going to be a great success.

Now, the last thing I'm going to say about this, because I know that it's been on people's minds, is the issue of Ebola. This is something that we take very seriously. As soon as there's an outbreak anywhere in the world of any disease that could have significant effects, the CDC is in communication with the World Health Organization and other multilateral agencies to try to make sure that we've got an appropriate response.

This has been a more aggressive Ebola outbreak than we've seen in the past. But keep in mind that it is still affecting parts of three countries, and we've got some 50 countries represented at this summit. We are doing two things with respect to the summit itself. We're taking the appropriate precautions. Folks who are coming from these countries that have even

a marginal risk or an infinitesimal risk of having been exposed in some fashion, we're making sure we're doing screening on that end -- as they leave the country. We'll do additional screening when they're here. We feel confident that the procedures that we've put in place are appropriate.

More broadly, the CDC and our various health agencies are going to be working very intently with the World Health Organization and some of our partner countries to make sure that we can surge some resources down there and organization to these countries that are pretty poor and don't have a strong public health infrastructure so that we can start containing the problem.

Keep in mind that Ebola is not something that is easily transmitted. That's why, generally, outbreaks dissipate. But the key is identifying, quarantining, isolating those who contract it and making sure that practices are in place that avoid transmission. And it can be done, but it's got to be done in an organized, systematic way, and that means that we're going to have to help these countries accomplish that.

All right? Okay.

Q Happy Birthday, Mr. President.

THE PRESIDENT: There you go, April. (Laughter.) That's what I was talking about -- somebody finally wished me happy birthday -- although it isn't until Monday, you're right.

Thank you so much.

END 3:34 P.M. EDT

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FOIA UPDATE: OIP GUIDANCE: DETERMINING THE SCOPE OF A FOIA REQUEST

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OIP Guidance

DETERMINING THE SCOPE OF A FOIA REQUEST

In their administration of the Freedom of Information Act, federal agencies devote much time and attention to the possible applicability of FOIA exemptions in order to determine the information to be disclosed. It is necessary that they do so, and to consider even exempt information for possible discretionary disclosure, in order to serve the Act's goal of "maximum responsible disclosure." Attorney General's Memorandum for Heads of Departments and Agencies Regarding the Freedom of Information Act (Oct. 4, 1993), *reprinted in FOIA Update*, Summer/Fall 1993, at 4.

It also is necessary, however, for agencies to pay careful attention to the records and information that they include as responsive to a FOIA request in the first place. After all, if something is not included by an agency for purposes of a FOIA request to begin with, then that alone will mean that it cannot be disclosed in response to that request. Consequently, an agency's interpretation of the particular scope of a FOIA request, and its determinations regarding exactly which information falls within it, are vitally important aspects of FOIA administration.

Liberal Interpretation of Requests

As a threshold matter, an agency should make sure that it carefully reads and fairly interprets the terms of the FOIA requests that it receives, in order to ensure that it is not unduly limiting the records found responsive to those requests. To be sure, the particular terms of a FOIA request are significant and, in making a FOIA request, a requester is obligated to "reasonably describe" what is being sought. 5 U.S.C. § 552(a)(3). But an agency "must be careful not to read [a] request so strictly that the requester is denied information the agency well knows exists in its files." *Hemenway v. Hughes*, 601 F. Supp. 1002, 1005 (D.D.C. 1985).

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In this regard, it is significant that President Clinton has called upon all agencies to heed "both the letter and spirit of the Act." President's Memorandum for Heads of Departments and Agencies Regarding the Freedom of Information Act, 29 Weekly Comp. Pres. Doc. 1999 (Oct. 4, 1993), *reprinted in FOIA Update*, Summer/Fall 1993, at 3. This holds strong applicability to matters of request interpretation -- meaning that FOIA requesters should not be held to the strict letter of their requests when an agency has good reason to conclude that a broader interpretation is more appropriate. *See, e.g.*, *Canning v. United States Dep't of Justice*, No. 92-0463, slip op. at 22 (D.D.C. Nov. 3, 1994) (holding that agency should have construed request as pertaining to more than single subject named, because it had good reason to do so). In short, as the Court of Appeals for the D.C. Circuit recently emphasized, agencies should interpret FOIA requests "liberally" when determining which records are responsive to them. *Nation Magazine v. United States Customs Serv.*, No. 94-5275, 1995 WL 722700, at *3 (D.C. Cir. Dec. 8, 1995).

The "Scoping" of Responsive Records

A more difficult question about the scope of a FOIA request sometimes can be presented by records that deal with multiple subjects, only one of which pertains to the subject of a particular FOIA request. It is not uncommon for both agency files and individual records within those files to deal with more than a single subject, possibly even a range of different subjects. In many instances, the multiple subjects of such records will be related in some substantive way, which can bring them all within a requester's evident scope of interest for a given FOIA request.

In other instances, however, there might be no connection between the subjects other than that the agency chose as a matter of administrative convenience to combine them together in a single document, possibly a lengthy one. For example, the State Department frequently aggregates multiple subjects within a document that is transmitted as a single diplomatic communication. Similarly, the records of complex law enforcement investigations sometimes contain several distinct subjects that are addressed as part of an overall area of investigative activity.

The question in such a case is whether the agency should draw a line between the different parts of a multiple-subject record for purposes of processing a FOIA request that pertains to only one of the subjects contained in that document. When it does so, an agency determines that part of the record is "outside the scope" of a request and it does not include it. This sometimes is referred to as the "scoping" of records in response to a FOIA request and it is something not to be done by any agency lightly.

Underlying Considerations

In determining what should be included within the scope of a FOIA request, agencies must bear in mind the following underlying considerations:

First, there is the basic fact that in most situations the FOIA requester will be unfamiliar with the exact nature of the agency's recordkeeping system, its filing practices, and the manner in which its files and records are compiled. FOIA requesters often are entirely "in the dark" about the structure and

arrangement of the files and records that an agency will be searching through in order to locate the particular records that are responsive to their FOIA requests. When they formulate their requests, therefore, FOIA requesters are generally using their best efforts to "reasonably describe" the particular records that they are seeking from an agency's files in light of this limited knowledge of what might actually be there.

Second, FOIA requesters seeking records on a certain subject often phrase their requests in very broad and all-encompassing terms, with the primary purpose of including any and all records pertaining to the subject or subjects in which they are interested. It is only natural for FOIA requesters to be concerned that records of interest to them might not be included by an agency as responsive to their FOIA requests. Especially when they are operating "in the dark," FOIA requesters tend to sweep broadly in their requests for fear that doing otherwise might unintentionally limit their requests and exclude something that they actually do seek to obtain.

Third, agencies tend to maintain their files and compile their records in the manner that is most efficient for them and best facilitates the performance of their primary agency missions. This means that they will combine different subjects within files and records whenever it is efficient for them to do so, even though this can cause some uncertainty and potential inefficiency in processing FOIA requests for records on individual subjects. Agencies should be mindful of this inherent conflict between standard recordkeeping and FOIA-processing practices.

Fourth, especially when a broad FOIA request is processed for wide-ranging agency files, there is at least some potential for question about the scope of the records that are responsive to that request. Because only the agency ordinarily is aware of exactly what records exist within its files, it is up to it to recognize a potential scope question and to handle it fairly from both its and the requester's perspective.

Fifth, from the FOIA requester's perspective, the primary interest is in obtaining the requested information as fully and as quickly as possible. However, FOIA requesters also are interested in understanding how agencies process their requests and in knowing of any assumption or conclusion that may be reached by an agency about them. Though a requester might not be interested in information pertaining to a subject beyond the stated scope of his or her request, that requester has a strong interest in learning about any determination that may be made regarding its scope -- including the full grounds for it in relation to the particular formats of existing documents. FOIA requesters are interested in being fully informed of all such scope matters and in having the opportunity to address them as a participant in the agency's administrative process.

Sixth, an additional consideration for many FOIA requesters is the potential cost involved. In determining the volume of records that are within the scope of a FOIA request, an agency in effect establishes the scope of FOIA fees that potentially will be charged to the requester for that request. In most cases, a FOIA requester will incur a document duplication charge for records processed and disclosed in response to a request, a charge that can range from ten cents per page to several times that amount at some agencies. In some cases, when a request is made for a commercial purpose, even more expensive "document review" charges can be incurred for the

documents that are included. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(I). A requester who receives and must pay for pages of documents that were not intended to be within the request's scope can be aggrieved by that agency action as well, so agencies have an obligation not to heedlessly include document pages on superficial grounds.

Seventh, from the agency's perspective, there is a practical need to conduct its FOIA operations without any unnecessary administrative burden. While agencies create multiple-subject documents for sound programmatic purposes, they retain an interest in not having their FOIA programs unduly encumbered by that. The "processing" of a record's contents under the FOIA can be a very labor-intensive and time-consuming process, a burden that can be compounded if a FOIA request proceeds to the level of administrative appeal and possibly to litigation. Agencies have a strong interest in not undertaking such heavy burdens unnecessarily.

Eighth, for any agency that currently has a heavy backlog of pending FOIA requests, an additional consideration is the importance of its efforts to deal with that backlog and to devote its limited resources to serving its large volume of FOIA requesters as efficiently and economically as reasonably possible. The efficiency of administrative communications with FOIA requesters regarding any scope-of-request matters is especially important to such agencies.

Ninth, a final consideration is the importance of the public's trust in the functioning of its government, which comes into play every time that an agency deals with a member of the public on a matter of concern to that person or institution. For many FOIA requesters, their dealings with a federal agency on a FOIA request are a major part of their dealings with the federal government overall, so it is all the more important that agencies communicate forthrightly with FOIA requesters about the details of their requests and about documents that may or may not be included on one stated basis or another.

Approach to Document "Scoping"

Based upon these considerations, agencies should use the following general approach to any potential "scoping" of a document in response to a FOIA request:

Within a document page. First and foremost, information should not be determined to be beyond the scope of a request on less than a page-by-page basis. In other words, there should be no "scoping" within any document page. If any of the information on a page of a document falls within the subject matter of a FOIA request, then that entire page should be included as within the scope of that request. Doing so provides useful context for the FOIA requester, involves no additional duplication cost to the requester, and ordinarily involves only a relatively minimal administrative burden on the agency.

Within a document. An agency may determine that only part of a multiple-subject document is responsive to a FOIA request (including any document page that is required for meaningful context), but any "scoping" of a document should be undertaken only when the circumstances fully justify such a step. The agency must have a firm basis for reaching the conclusion that the document pages in question deal with a subject that is

clearly beyond the scope of the requester's evident interest in the request. An agency can make use of its administrative experience in drawing such conclusions about the FOIA requests that it receives, but its communication with the individual requester is essential in addressing any scope question. While the patterns of such communications may vary from case to case, the requester should be fully informed of any "scoping" determination in all instances and should be given an opportunity to question or disagree with it. In any instance in which a requester disagrees, the document pages involved should be included without question by the agency.

Additionally, before an agency considers "scoping" a document, it should at least preliminarily review the contents of the document pages in question with an eye toward FOIA exemption applicability. In some cases, the potentially "scoped" document pages might contain little or no exempt information, such that they can be as easily included within the FOIA request as not. In such a case, there is no good reason for those pages to be "scoped" unless they are so voluminous that the agency is compelled to do so purely as a cost savings to the requester.

This approach to the potential "scoping" of responsive records should be a workable one for all federal agencies and is consistent with the few judicial precedents to have adjudicated such issues under the FOIA. *See Dettmann v. United States Dep't of Justice*, 802 F.2d 1472, 1474-77 (D.C. Cir. 1986); *Posner v. Department of Justice*, 2 Gov't Disclosure Serv. (P-H) ¶ 82,229, at 82,650 (D.D.C. Mar. 9, 1982); *Dunaway v. Webster*, 519 F. Supp. 1059, 1083-84 (N.D. Cal. 1981).

Conclusion

In sum, all federal agencies should go as far as they reasonably can to ensure that they include what requesters want to have included within the scopes of their FOIA requests. Agencies can best do so through liberal interpretations of FOIA requests and by limiting their use of document "scoping" to only those instances that are justified by its underlying considerations. In all instances, the key consideration is the need for full and open communication with the FOIA requester, so that the requester can make a fully informed decision about any document "scoping" as part of the agency's administrative process.

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Procedural Requirements

The Freedom of Information Act establishes a statutory scheme for the public to use in making requests for agency records and imposes requirements on agencies to make such records promptly available.[1] To provide a general overview of the Act's procedural requirements for responding to FOIA requests, this section follows a roughly chronological discussion of how a typical FOIA request is processed -- from the point of determining whether an entity in receipt of a request is subject to the FOIA in the first place to the review of an agency's initial decision regarding a FOIA request on administrative appeal. In administering the Act's procedural requirements, agencies should remember President Obama's pronouncement that "[a] democracy requires accountability, and accountability requires transparency."[2] Accordingly, agencies should administer the FOIA "with a clear presumption: [i]n the face of doubt, openness prevails."[3] Moreover, and equally important, the President has directed agencies to respond to requests "in a spirit of cooperation"[4] and the Attorney General has emphasized that "[u]nnecessary bureaucratic hurdles have no place in the 'new era of open Government' that the President has proclaimed."[5] In administering the FOIA, as a matter of sound administrative discretion, agencies should be

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[1] 5 U.S.C. § 552(a)(3)(A) (2006 & Supp. IV 2010); see also id. at § 552(a)(3)(E) (prohibiting certain agency FOIA disclosures to foreign governments or representatives of such governments); *FOIA Post*, "FOIA Amended by Intelligence Authorization Act" (posted 12/23/02) (advising on 2002 amendment of subsection (a)(3)).

[2] Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act [hereinafter President Obama's FOIA Memorandum], 74 Fed. Reg. 4683 (Jan. 21, 2009); see also Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 51879 (Oct. 8, 2009) [hereinafter Attorney General Holder's FOIA Guidelines]; *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

[3] President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683.

[4] Id.

[5] Attorney General Holder's FOIA Guidelines, 74 Fed. Reg. at 51879-02.

mindful of the importance and benefits of communicating with requesters to effectuate these principles.[6]

OPEN Government Act

The OPEN Government Act of 2007 amended several procedural aspects of the FOIA, setting forth new agency requirements and statutorily mandating existing practices that assist requesters and facilitate the processing of FOIA requests.[7] Among these practices, the Open Government Act requires that agencies assign request tracking numbers, provide request status information, and maintain a FOIA Public Liaison to assist requesters.[8]

Specifically, agencies must assign, and provide to requesters, an individualized tracking number for any request that will take longer than ten days to process.[9] Agencies must also establish a telephone line or an internet site where requesters, using the assigned tracking number, can obtain information regarding the status of their request, including the date the agency received the request and an estimated date when the agency will complete its action on it.[10]

The OPEN Government Act codified the role of FOIA Public Liaisons, who are "responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes."[11] Likewise, the role of the Chief FOIA Officer is codified.[12] This official has "agency-wide responsibility for efficient and appropriate compliance" with the FOIA and reports to top agency officials and to the Attorney General regarding the agency's performance in implementing the FOIA.[13]

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[6] *FOIA Post*, "OIP Guidance: The Importance of Good Communication with FOIA Requesters" (posted 3/1/10) (explaining that simple practices which increase communication can go a long way to ensuring that agencies are working with FOIA requesters in "spirit of cooperation" that President and Attorney General directed).

[7] See OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also *FOIA Post*, "Congress Passes Amendments to the FOIA" (posted 1/9/08) (summarizing substantive sections of OPEN Government Act).

[8] OPEN Government Act §§ 6, 7, 10 (codified at 5 U.S.C. § 552(a)(6)(B)(ii), (a)(7), (l)).

[9] Id. § 7 (codified at 5 U.S.C. § 552(a)(7)(A)); see *FOIA Post*, "OIP Guidance: Assigning Tracking Numbers and Providing Status Information for Requests" (posted 11/18/08).

[10] OPEN Government Act § 7 (codified at 5 U.S.C. § 552(a)(7)(B)); see *FOIA Post*, "OIP Guidance: Assigning Tracking Numbers and Providing Status Information for Requests" (posted 11/18/08).

[11] OPEN Government Act § 10 (codified at 5 U.S.C. § 552(l)).

[12] OPEN Government Act § 10 (codified at 5 U.S.C. § 552(j)).

[13] OPEN Government Act § 10 (codified at 5 U.S.C. § 552(k)).

In addition, the OPEN Government Act established an office within NARA to "offer mediation services to resolve disputes"[14] and it directed GAO to audit agencies on their implementation of the FOIA.[15] The OPEN Government Act set forth extensive new reporting requirements for agencies' annual FOIA reports[16] and established new reporting requirements for the Attorney General and the Special Counsel concerning referrals to the Special Counsel.[17] (For a discussion of these Attorney General and Special Counsel reporting requirements, see Litigation Considerations, Referral to Special Counsel and Limitations on Filing Frivolous Suits, below).

The OPEN Government Act also amended the definition of agency records,[18] and established new rules concerning FOIA's time limits,[19] routing of misdirected requests,[20] assessment of fees,[21] and document marking.[22] (For a discussion of these provisions, see Procedural Requirements, "Agency Records;" Procedural Requirements, Time Limits; and Procedural Requirements, "Reasonably Segregable" Obligation, below).

Finally, the Act codified the definition of a "representative of the news media"[23] for fee purposes, and the definition of a "substantially prevail[ing]" party for attorney fees

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[14] OPEN Government Act § 10 (codified at 5 U.S.C. § 552(h)); see *FOIA Post*, "OIP Guidance: Notifying Requesters of the Mediation Services Offered by OGIS" (posted July 9, 2010) (discussing creation of Office of Government Information Services at NARA).

[15] OPEN Government Act § 10 (codified at 5 U.S.C. § 552(i)).

[16] OPEN Government Act § 10 (codified at 5 U.S.C. § 552(e)); see *FOIA Post*, "2008 Guidelines for Agency Preparation of Annual FOIA Reports" (posted 5/22/08).

[17] OPEN Government Act § 5 (codified at 5 U.S.C. § 552(a)(4)(F)).

[18] OPEN Government Act § 6 (codified at 5 U.S.C. § 552(f)(2)); see *FOIA Post*, "OIP Guidance: Treatment of Agency Records Maintained For an Agency By a Government Contractor for Purposes of Records Management" (posted 09/09/08).

[19] OPEN Government Act § 6 (codified at 5 U.S.C. § 552(a)(6)(A)); see *FOIA Post*, "OIP Guidance: New Limitations on Tolling the FOIA's Response Time" (posted 11/18/08).

[20] OPEN Government Act § 6 (codified at 5 U.S.C. § 552(a)(6)(A)(ii)); see *FOIA Post*, "OIP Guidance: New Requirement to Route Misdirected FOIA Requests" (posted 11/18/08).

[21] OPEN Government Act § 6 (codified at 5 U.S.C. § 552(a)(4)(A)(viii)); see *FOIA Post*, "OIP Guidance: New Limitations on Assessing Fees" (posted 11/18/08).

[22] OPEN Government Act § 12 (codified at 5 U.S.C. § 552(b)); see *FOIA Post*, "OIP Guidance: Segregating and Marking Documents for Release in Accordance with the OPEN Government Act" (posted 10/23/08).

[23] OPEN Government Act § 3 (codified at 5 U.S.C. § 552(a)(4)(A)(ii)).

purposes.[24] (For a discussion of these provisions, see Fees and Fee Waivers, Fees, Requester Categories; and Attorney Fees, Eligibility, below).

Entities Subject to the FOIA

Agencies within the Executive Branch of the federal government, independent regulatory agencies, and some components within the Executive Office of the President, are subject to the FOIA.[25] Amtrak was made subject to the FOIA by statute.[26]

The Court of Appeals for the District of Columbia Circuit utilizes a functional definition of "agency" to determine if an office within the Executive Office of the President is subject to the FOIA. Offices within the Executive Office of the President that "'wield[] substantial authority independent of the President'" are subject to the FOIA.[27] The Council on Environmental Quality (a unit within the Executive Office of the President) has been found to be an agency subject to the FOIA because its investigatory, evaluative, and recommendatory functions exceed merely advising the President.[28] Similarly, because the Office of Management and Budget "exercises substantial independent authority" to prepare the annual budget and the Office of Science and Technology has independent authority to evaluate and fund research, both are subject to the FOIA.[29]

In contrast, the Office of the President, including the "'President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President'" are not agencies under the FOIA.[30] Under the advise and assist analysis, the

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[24] Id. § 4 (codified at 5 U.S.C. § 552(a)(4)(E)(ii)).

[25] 5 U.S.C. § 552(f)(1) (2006 & Supp. IV 2010); see, e.g., Energy Research Found. v. Def. Nuclear Facilities Safety Bd., 917 F.2d 581, 584-85 (D.C. Cir. 1990) (determining that Defense Nuclear Facilities Safety Board is an agency because its functions include, inter alia, "investigat[ing], evaluat[ing] and recommend[ing]").

[26] See Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat'l R.R. Passenger Corp., 376 F.3d 1270, 1277 n.5 (11th Cir. 2004) (citing 49 U.S.C. § 24301(e) (2006) and noting that "[a]lthough Amtrak is not a federal agency, it must comply with FOIA's requirements").

[27] Citizens for Responsibility & Ethics in Washington, 566 F.3d 219, 222-23 (D.C. Cir. 2009) (quoting Sweetland v. Walters, 60 F.3d 852, 854 (D.C. Cir. 1995)).

[28] Pac. Legal Found. v. Council on Envtl. Quality, 636 F.2d 1259, 1263 (D.C. Cir. 1980).

[29] Sierra Club v. Andrus, 581 F.2d 895, 902 (D.C. Cir. 1978); Soucie v. David, 448, F.2d 1067, 1073-75 (D.C. Cir. 1971).

[30] Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980) (quoting H.R. Rep. No. 93-1380, at 15, reprinted in House Comm. on Gov't Operations and Senate Comm. on the Judiciary, 94th Cong. 1st Sess., Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Sourcebook); see also Moore v. FBI, No. 11-1067, 2012 WL 3264566 (D.D.C. Aug.13, 2012); Taitz v. Ruemmler, No. 11-5306, 2012 U.S. App. LEXIS

Office of Counsel to the President,[31] the Executive Residence staff,[32] the National Security Council,[33] the National Energy Policy Development Group,[34] the Council of Economic Advisers,[35] the Vice President and his staff,[36] and the former Presidential Task Force on Regulatory Relief have all been found not to be agencies subject to the FOIA.[37]

Courts also have addressed whether the FOIA applies to the Smithsonian Institution,[38] and have held that it does not apply to state and local governments,[39] foreign

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10714 (D.C. Cir. May 25, 2012) (per curiam); Nat'l Sec. Archive v. Archivist of the United States, 909 F.2d 541, 544 (D.C. Cir. 1990).

[31] Nat'l Sec. Archive v. Executive Office of the President, 688 F. Supp. 29, 31 (D.D.C. 1988), aff'd sub nom. Nat'l Sec. Archive v. Archivist of the United States, 909 F.2d 541 (D.C. Cir. 1990).

[32] Sweetland v. Walters, 60 F.3d 852, 855-856 (D.C. Cir. 1995).

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

[34] Judicial Watch, Inc. v. DOE, 412 F.3d 125, 127 (D.C. Cir. 2005).

[35] Rushforth v. Council of Econ. Advisers, 762 F.2d 1038, 1042-43 (D.C. Cir. 1985).

[36] Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group, 219 F. Supp. 2d 20, 55 (D.D.C. 2002).

[37] Meyer v. Bush, 981 F.2d 1288, 1294 (D.C. Cir. 1993) (reasoning that Task Force chaired by Vice President and composed of cabinet members was not subject to FOIA because cabinet members acted not as heads of their departments "but rather as the functional equivalents of assistants to the President").

[38] See Cotton v. Heyman, 63 F.3d 1115, 1119 & n.2, 1123 (D.C. Cir. 1995) (refusing to examine district court's ruling that Smithsonian Institution was agency under FOIA due to doctrine of direct estoppel, but noting that Smithsonian Institution "could reasonably interpret our precedent to support its position that it is not an agency under FOIA" and stressing that agency status holding "is binding only between these two parties"); cf. Dong v. Smithsonian Inst., 125 F.3d 877, 879 (D.C. Cir. 1997) (holding that Smithsonian Institution is not an agency for purposes of Privacy Act of 1974 (5 U.S.C. § 552a (2006)), as it is neither "establishment of the [E]xecutive [B]ranch" nor "government-controlled corporation").

[39] See Sykes v. U.S., No. 11-4005, 2012 WL 5974285, at *7 (6th Cir. Nov. 29, 2012) (affirming district court dismissal of amended complaint because FOIA does not apply to state entities); Moreno v. Curry, No. 06-11277, 2007 WL 4467580, at *1-2 (5th Cir. Dec. 20, 2007) (unpublished disposition) (affirming district court finding that FOIA does not apply to state or municipal agencies); Dunleavy v. New Jersey, 251 F. App'x 80, 83 (3d Cir. 2007) (unpublished disposition) (stating that FOIA does not impose obligations on state agencies), cert. denied, 128 S. Ct. 1483 (2008); Blankenship v. Claus, 149 F. App'x 897, 898 (11th Cir. Sept. 7, 2005); Lau v. Sullivan County Dist. Att'y, 201 F.3d 431 (2d Cir. Nov. 12, 1999)

governments,[40] municipal entities,[41] the courts,[42] other entities of the Judicial Branch,[43] Congress,[44] and presidential transition teams.[45]

(unpublished disposition); Martinson v. DEA, No. 96-5262, 1997 WL 634559, at *1 (D.C. Cir. July 3, 1997); see also Willis v. DOJ, 581 F. Supp. 2d 57, 67-68 (D.D.C. 2008) (Missouri Police Department); Miller v. S.C. Dep't of Prob., Parole, and Pardon Servs., No. 08-3836, 2008 WL 5427754, at *3 (D.S.C. Dec. 31, 2008) (state agencies or departments); Rayyan v. Sharpe, No. 08-324, 2008 WL 4601427, at *3 (W.D. Mich. Oct. 15, 2008) (state agencies); Foley v. Village of Weston, No. 06-350, 2006 WL 3449414, at *5 (W.D. Wis. Nov. 28, 2006) (local county government, sheriff's department, and sheriff); Brown v. City of Detroit, No. 05-60162, 2006 WL 3196297, at *1 (E.D. Mich. Sept. 11, 2006) (magistrate's recommendation) (state or local governments), adopted, No. 05-60162, 2007 WL 1796228 (E.D. Mich. Oct. 30, 2006); Gabbard v. Hall County, Ga., No. 06-37, 2006 U.S. Dist. LEXIS 56662, at *4 (M.D. Ga. Aug. 14, 2006) (state or local agencies); Davis v. Johnson, No. 05-2060, 2005 U.S. Dist. LEXIS 12475, at *1 (N.D. Cal. June 20, 2005) (state or county agency); Dipietro v. EOUSA, 357 F. Supp. 2d 177, 182 (D.D.C. 2004) (citing Beard v. DOJ, 917 F. Supp. 61, 63 (D.D.C. 1996)) (county sheriff's department); Mount of Olives Paralegals v. Bush, No. 04-C-620, 2004 U.S. Dist. LEXIS 8085, at *6 (N.D. Ill. May 6, 2004) (state agencies); McClain v. DOJ, No. 97-C-0385, 1999 WL 759505, at *2 (N.D. Ill. Sept. 1, 1999) (state attorney general), aff'd, 17 F. App'x 471 (7th Cir. 2001); Beard v. DOJ, 917 F. Supp. 61, 63 (D.D.C. 1996) (District of Columbia Police Department).

[40] Moore v. United Kingdom, 384 F.3d 1079, 1089-90 (9th Cir. 2004).

[41] See Renfro v. City of Bartlesville, No. 12-CV-208-GKF-PJC, 2012 WL 5996376 (N.D. Okla. Nov. 30, 2012) (finding that FOIA does not apply to municipalities); Hammerlord v. City of San Diego, No. 11-1564, 2012 U.S. Dist. LEXIS 157740, at *16 (S.D. Cal. Nov. 2, 2012) (finding that housing commission not subject to FOIA despite fact commission receives federal funds) Nelson v. City of Plano, No. 06-102, 2007 WL 1438694, at *2 (E.D. Tex. May 14, 2007) (dismissing FOIA claims against municipal corporation); Cruz v. Superior Court Judges, No. 04-1103, 2006 WL 547930, at *1 (D. Conn. Mar. 1, 2006) (municipal police department); Jones v. City of Indianapolis, 216 F.R.D. 440, 443 (S.D. Ind. 2003) (municipal agencies).

[42] See Megibow v. Clerk of the U.S. Tax Court, 432 F.3d 387, 388 (2d Cir. 2005) (per curiam) (affirming district court's conclusion that U.S. Tax Court is not subject to FOIA); United States v. Casas, 376 F.3d 20, 22 (1st Cir. 2004) (stating that "[t]he judicial branch is exempt from the [FOIA]"); United States v. Choate, 102 F. App'x 634, 635 (10th Cir. 2004) (federal courts); United States v. Mitchell, No. 03-6938, 2003 WL 22999456, at *1 (4th Cir. Dec. 23, 2003) (same) (non-FOIA case); United States v. Alcorn, 6 F. App'x 315, 317 (6th Cir. 2001) (same) (non-FOIA case); Gaydos v. Mansmann, No. 98-5002, 1998 WL 389104, at *1 (D.C. Cir. June 24, 1998) (per curiam); Warth v. DOJ, 595 F.2d 521, 523 (9th Cir. 1979); Guidetti v. NFN Donahue, No. 6-11-1249-HMH-KFM, 2012 U.S. Dist. LEXIS 130368, (D.S.C. Sept. 13, 2012) (federal courts); United States v. Neal, No. 90-0003, 2007 U.S. Dist. LEXIS 10176, at *2 (D. Ariz. Feb. 13, 2007) (federal district courts); Benjamin v. U.S. Dist. Court, No. 05-941, 2005 WL 1136864, at *1 (M.D. Pa. May 13, 2005) (same).

[43] See Andrade v. U.S. Sentencing Comm'n, 989 F.2d 308, 309-10 (9th Cir. 1993) (Sentencing Commission, as independent body within judicial branch, is not subject to

In Forsham v. Harris, the Supreme Court held that private grantees receiving federal financial assistance are not agencies subject to the FOIA.[46] The Court reasoned that private

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FOIA.); Banks v. DOJ, 538 F. Supp. 2d 228, 231-32 (D.D.C. Mar. 16, 2008) (U.S. Probation Office and Administrative Office of the U.S. Courts); Coleman v. Lappin, No. 06-2255, 2007 WL 1983835, at *1 n.1 (D.D.C. July 3, 2007) (unpublished disposition) (stating that "Office of Bar Counsel is a creature of the District of Columbia Court of Appeals, and is not a federal agency to which the FOIA applies"); United States v. Richardson, No. 2001-10, 2007 U.S. Dist. LEXIS 77, at *3 (W.D. Pa. Jan. 3, 2007) (federal grand jury); Woodruff v. Office of the Pub. Defender, No. 03-791, slip op. at 3 (N.D. Cal. June 3, 2004) (Federal Public Defender's Office, which is controlled by courts, is not agency under FOIA.); Wayne Seminoff Co. v. Mecham, No. 02-2445, 2003 U.S. Dist. LEXIS 5829, at *20 (E.D.N.Y. Apr. 10, 2003) ("[T]he Administrative Office of the United States Courts is not an agency for purposes of FOIA."), aff'd, 82 F. App'x 740 (2d Cir. 2003); United States v. Ford, No. 96-00271-01, 1998 WL 742174, at *1 (E.D. Pa. Oct. 21, 1998) ("The Clerk of Court, as part of the judicial branch, is not an agency as defined by FOIA."); Callwood v. Dep't of Prob., 982 F. Supp. 341, 342 (D.V.I. 1997) ("[T]he Office of Probation is an administrative unit of [the] Court . . . [and] is not subject to the terms of the Privacy Act.").

[44] Dow Jones & Co. v. DOJ, 917 F.2d 571, 574 (D.C. Cir. 1990); see also Dunnington v. DOD, No. 06-0925, 2007 WL 60902, at *1 (D.D.C. Jan. 8, 2007) (ruling that U.S. Senate and House of Representatives are not agencies under FOIA); see also Mayo v. U.S. Gov't Printing Office, 9 F.3d 1450, 1451 (9th Cir. 1994) (deciding that Government Printing Office is part of congressional branch and therefore is not subject to FOIA); Owens v. Warner, No. 93-2195, slip op. at 1 (D.D.C. Nov. 24, 1993) (ruling that senator's office is not subject to FOIA), summary affirmance granted, No. 93-5415, 1994 WL 541335 (D.C. Cir. May 25, 1994).

[45] See Ill. Inst. for Continuing Legal Educ. v. U.S. Dep't of Labor, 545 F. Supp. 1229, 1231-33 (N.D. Ill. 1982); cf. Wolfe v. HHS, 711 F.2d 1077, 1079, 1082 (D.C. Cir. 1983) (dictum) (treating presidential transition team as not agency subject to FOIA and citing with approval Ill. Inst., 545 F. Supp. at 1231-33).

[46] 445 U.S. 169, 179-80 (1980); see also Missouri v. U.S. Dep't of Interior, 297 F.3d 745, 750 (8th Cir. 2002) (holding that "[t]he provision of federal resources, such as federal funding, is insufficient to transform a private organization into a federal agency"); Pub. Citizen Health Research Group v. HEW, 668 F.2d 537, 543-44 (D.C. Cir. 1981) (stating that medical peer review committees are not agencies under FOIA); Irwin Mem'l Blood Bank v. Am. Nat'l Red Cross, 640 F.2d 1051, 1057 (9th Cir. 1981) (determining that American National Red Cross is not an agency under FOIA); Holland v. FBI, No. 04-2593, slip op. at 8 (N.D. Ala. June 30, 2005) (citing Irwin Mem'l Blood Bank, 640 F. Supp. 2d 1051) (same); Gilmore v. DOE 4 F. Supp. 2d 912, 919-20 (N.D. Cal. 1998) (finding that privately owned laboratory that developed electronic conferencing software, for which government owned nonexclusive license regarding its use, is not "a government-controlled corporation" as it is not subject to day-to-day supervision by federal government, nor are its employees or management considered government employees); Leytman v. N.Y. Stock Exch., No. 95 CV 902, 1995 WL 761843, at *2 (E.D.N.Y. Dec. 6, 1995) (relying on Indep. Investor Protective League v. N.Y. Stock Exch., 367 F. Supp. 1376, 1377 (S.D.N.Y. 1973), to find that although "[t]he Exchange is subject to significant federal regulation . . . it is not an agency of the federal government");

grantees are not subject to the FOIA because Congress "exclud[ed] them from the definition of 'agency,' an action consistent with its prevalent practice of preserving grantee autonomy."[47] The Court observed that private grantees are not converted to government actors "absent extensive, detailed, and virtually day-to-day supervision."[48] In addition, courts have held that private citizens and corporations,[49] and non-profit organizations[50] are not subject to the FOIA.

Rogers v. U.S. Nat'l Reconnaissance Office, No. 94-B-2934, slip op. at 7 (N.D. Ala. Sept. 13, 1995) (observing that "[t]he degree of government involvement and control over [private organizations which contracted with government to construct office facility is] insufficient to establish companies as federal agencies for purposes of the FOIA").

[47] 445 U.S. at 179.

[48] Id. at 180 (citing United States v. Orleans, 425 U.S. 807, 818 (1976)). But see OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," 64 Fed. Reg. 54,926 (Oct. 8, 1999) (requiring agencies to make research data available to public through FOIA in response to "request for research data relating to published research findings produced under an award that were used by the [government] in developing an agency action that has the force and effect of law").

[49] See Henderson v. Office & Prof'l Employees Int'l Union, 145 F. App'x 741, 744 (9th Cir. 2005) (finding that "district court properly dismissed [FOIA claim] because union and union representative are not 'agencies' and therefore cannot be held liable under the FOIA"); Henderson v. Sony Pictures Entm't, Inc., 135 F. App'x 934, 935 (9th Cir. 2005) (same); Mitchell, 2003 WL 22999456, at *1 (private attorney and law firms); In re Olsen, No. UT-98-088, 1999 Bankr. LEXIS 791, at *11 (B.A.P. 10th Cir. June 24, 1999) (bankruptcy trustee); Buemi v. Lewis, 51 F.3d 271 (6th Cir. 1995) (unpublished table decision) (concluding that FOIA applies to federal agencies and not to private individuals); Rutland v. Santander Consumer USA, Inc., No. 11-15250, 2012 WL 3060949 (E.D. Mich. July 26, 2012) (finding private corporation not subject to FOIA); Jackson v. Ferrell, No. 09-00025, 2009 U.S. Dist. LEXIS 24893, at *3 (E.D. Mo. Mar. 25, 2009) (finding that federal attorney is not an agency); Montgomery v. Sanders, No. 07-470, 2008 WL 5244758, at *6 (S.D. Ohio Dec. 15, 2008) (analyzing defense contractor's relationship with agency and finding that contractor is not "government-controlled corporation" subject to FOIA); Few v. Liberty Mut. Ins. Co., 498 F. Supp. 2d 441, 452 (D.N.H. 2007) (private corporations and individuals); Furlong v. Cochran, No. 06-05443, 2006 WL 3254505, at *1 (W.D. Wash. Nov. 9, 2006) (lawyer and law firm); Torres v. Howell, No. 03-2227, 2004 U.S. Dist. LEXIS, at *8 (D. Conn. Dec. 6, 2004) (private business and nonfederal attorney); Allnutt v. DOJ, 99 F. Supp. 2d 673, 678 (D. Md. 2000) (private bankruptcy trustee), aff'd per curiam sub nom. Allnut v. Handler, 8 F. App'x 225 (4th Cir. 2001); Simon v. Miami County Incarceration Facility, No. 05-191, 2006 WL 1663689, at *1 (S.D. Ohio May 5, 2006) (communications company); Germosen v. Cox, No. 98 Civ. 1294, 1999 WL 1021559, at *20 (S.D.N.Y. Nov. 9, 1999) (private individuals); Allnutt v. U.S. Trustee, Region Four, No. 97-02414, slip op. at 6 (D.D.C. July 31, 1999) (private bankruptcy trustee), appeal dismissed for lack of jurisdiction, No. 99-5410 (D.C. Cir. Feb. 2, 2000).

Finally, certain operational files of some intelligence agencies are not within the scope of the FOIA. The Central Intelligence Agency Information Act of 1984 affords special FOIA treatment to CIA "operational files."[51] The National Defense Authorization Act for Fiscal Year 2006 placed the "operational files" of the Defense Intelligence Agency beyond the scope of the FOIA.[52] Section 933(a) of that Act added a section to the National Security Act of 1947 that provides that "[t]he Director of the Defense Intelligence Agency, in coordination with the Director of National Intelligence, may exempt operational files of the Defense Intelligence Agency from the provisions of [the FOIA]."[53] (For further discussion of this subject, see Exemption 3, "Operational Files" Provisions, below.)

"Agency Records"

As the Supreme Court noted in Forsham v. Harris, the FOIA originally did not define the term "agency records."[54] For context in defining the term, the Court in 1980 looked to the Records Disposal Act to determine Congress's intent regarding the definition of a "record."[55] The Records Disposal Act defines a record as "books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency."[56] Regarding the types of documentary material considered records under the FOIA, one court has determined that

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[50] Lazaridis v. DOJ, 713 F. Supp. 2d 64, 67-69 (D.D.C. 2010) (holding that National Center for Missing and Exploited Children and the International Centre for Missing and Exploited Children, both nonprofit organizations, were not subject to FOIA because their "seeming 'public authority' [are] 'entirely ancillary to its information and educational mission.'" (quoting Dong v. Smithsonian Inst., 125 F. 3d 877, 882 (D.C. Cir. 1997))).

[51] 50 U.S.C. § 431 (2006); see also Morley v. CIA, 508 F.3d 1108, 1116-19 (D.C. Cir. 2007) (concluding that request met criteria of exception to rule that CIA "[o]perational files are exempt from FOIA disclosure" and requiring agency to search such files upon remand since it had not initially done so); FOIA Update, Vol. V, No. 4, at 1-2 (discussing statutory removal of CIA "operational files" from scope of FOIA as threshold matter).

[52] Pub. L. No. 109-163, § 933(a), 119 Stat. 34 (codified at 50 U.S.C. § 432c (2006)); see also 50 U.S.C. § 432b (2006) (providing same protective treatment to "operational files" of NSA).

[53] 50 U.S.C. § 432c.

[54] 445 U.S. 169, 182-183 (1980).

[55] Id.

[56] Id. at 183 (quoting Records Disposal Act, 44 U.S.C. § 3301 (1980)).

"records" do not include tangible, evidentiary objects,[57] while other courts have found that audiotape and motion picture film are records.[58]

As a result of the 1996 amendments to the FOIA,[59] Congress included a definition of the term "records" in the FOIA, defining it as including "any information that would be an agency record . . . when maintained by an agency in any format, including an electronic format."[60] The question of whether computer software is included within the definition has been decided according to the particular nature and functionality of the software at issue.[61]

In DOJ v. Tax Analysts, the Supreme Court articulated a two-part test for determining when a "record" constitutes an "agency record" under the FOIA: "Agency records" are records that are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request.[62] Inasmuch as the "agency record" analysis

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[57] Nichols v. United States, 325 F. Supp. 130, 135-36 (D. Kan. 1971) (holding that archival exhibits consisting of guns, bullets, and clothing pertaining to assassination of President Kennedy are not "records"), aff'd on other grounds, 460 F.2d 671 (10th Cir. 1972).

[58] See N.Y. Times Co. v. NASA, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (holding that audiotape of Space Shuttle *Challenger* astronauts is "record," as "FOIA makes no distinction between information in lexical and . . . non-lexical form"); Save the Dolphins v. U.S. Dep't of Commerce, 404 F. Supp. 407, 410-11 (N.D. Cal. 1975) (finding that motion picture film is "record" for purposes of FOIA).

[59] Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048.

[60] 5 U.S.C. § 552(f)(2)(A) (2006 & Supp. IV 2010).

[61] Compare Gilmore v. DOE, 4 F. Supp. 2d 912, 920-21 (N.D. Cal. 1998) (holding that video conferencing software developed by privately owned laboratory was not a record under FOIA because it was "not designed to be . . . responsive to any particular database" and "does not illuminate anything about [agency's] structure or decision-making process"), with Cleary, Gottlieb, Steen & Hamilton v. HHS, 844 F. Supp. 770, 781-82 (D.D.C. 1993) (concluding that software program was a record because it was "uniquely suited to its underlying database" such that "the software's design and ability to manipulate the data reflect the [agency's study]," thereby "preserving information and 'perpetuating knowledge.'" (quoting DiViaio v. Kelley, 571 F.2d 538, 542 (10th Cir. 1978))). Cf. Essential Info., Inc. v. USIA, 134 F.3d 1165, 1166 n.3 (D.C. Cir. 1998) (dictum) (suggesting that internet addresses are not records but merely means to access records).

[62] 492 U.S. 136, 144-45 (1989) (holding that court opinions in agency files are agency records); see also Callaway v. Dep't of Treasury, No. 04-1506, 2012 U.S. Dist. LEXIS 141034, at *14 (D.D.C. Sept. 30, 2012) (holding that FOIA "'only obligates [Customs] to provide access to those [records] which it in fact has created and retained,'" and, "need not produce records maintained by another federal government agency or obtain records from any other sources" (quoting Kissinger v. Reporters Comm. For Freedom of the Press, 445 U.S. 136, 153 (1980))).

typically hinges upon whether an agency has "control" over a record,[63] courts have identified four factors to consider when evaluating agency "control" of a record: "'(1) the intent of the document's creator to retain or relinquish control over the record[ ]; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record systems or files.'"[64] Agency "control" is the

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[63] See, e.g., Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys., 601 F. 3d 158, 160-162 (2d Cir. 2010) (examining Board's regulations and authorizing statute to conclude that certain Federal Reserve Bank loan records were not agency records because they were not under Board control, but conversely that Bank administrative records are agency records); Int'l Bhd. of Teamsters v. Nat'l Mediation Bd., 712 F.2d 1495, 1496 (D.C. Cir. 1983) (determining that transitory possession of gummed-label mailing list, as required by court order, was not sufficient to give agency "control" over record); Am. Small Bus. League v. SBA, No. 08-00829, 2008 WL 3977780 (N.D. Cal. Aug. 26, 2008) (concluding that records in procurement database maintained by GSA were under SBA "control" because, inter alia, SBA directed GSA to analyze database and extract information for SBA use, and because fact that "a list was never printed out . . . or never exported and saved as a separate electronic file apart from the raw database" does not mean records were not "created" at time of FOIA request); McErlean v. DOJ, No. 97-7831, 1999 WL 791680, at *11 (S.D.N.Y. Sept. 30, 1999) (finding that agency had no "control" over requested records because it agreed to restrictions on their dissemination and use that were requested by confidential source who provided them); KDKA v. Thornburgh, No. 92-1536, 1992 U.S. Dist. LEXIS 22438, at *16-17 (D.D.C. Sept. 30, 1992) (concluding that Canadian Safety Board report of aircrash, although possessed by NTSB, is not under agency "control," because of restrictions on its dissemination imposed by Convention on International Civil Aviation); Teich v. FDA, 751 F. Supp. 243, 248-49 (D.D.C. 1990) (holding that documents submitted to FDA in "'legitimate conduct of its official duties'" are agency records notwithstanding FDA's presubmission review regulation allowing submitters to withdraw their documents from agency's files (quoting Tax Analysts, 492 U.S. at 145)); Rush v. Dep't of State, 716 F. Supp. 598, 600 (S.D. Fla. 1989) (finding that correspondence between former ambassador and Henry Kissinger (then Assistant to the President) were agency records of Department of State as it exercised control over them); McCullough v. FDIC, No. 79-1132, 1980 U.S. Dist. LEXIS 17685, at *6 (D.D.C. July 28, 1980) (concluding that state report transmitted to FDIC remains under state's control and is not agency record in light of state confidentiality statute, but that other reports transmitted to agency by state regulatory authorities might be agency records because "it is questionable whether [state authorities] retained control" over them); see also Baizer v. U.S. Dep't of the Air Force, 887 F. Supp. 225, 228-29 (N.D. Cal. 1995) (holding that database of Supreme Court decisions, used for reference purposes or as research tool, is not agency record); *FOIA Post*, "FOIA Counselor Q&A" (posted 1/24/06) (advising that "electronic databases to which an agency has no more than 'read only' access" -- e.g., "LexisNexis, Westlaw, and other such data services" -- are not "agency records" under FOIA); FOIA Update, Vol. XIII, No. 3, at 5 (advising that records subject to "protective order" issued by administrative law judge remain within agency control and are subject to FOIA).

[64] Burka v. HHS, 87 F.3d 508, 515 (D.C. Cir. 1996) (quoting Tax Analysts v. DOJ, 845 F.2d 1060, 1069 (D.C. Cir. 1988)); see also Judicial Watch v. Fed. Hous. Fin. Agency, 646 F. 3d 924, 928 (D.C. Cir. 2011) ("[W]here an agency has neither created nor referenced a

predominant consideration in determining whether records generated or maintained by a government contractor are "agency records" under the FOIA.[65] The FOIA's definition of

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document in the 'conduct of its official duties,' the agency has not exercised the degree of control required to subject the document to disclosure under FOIA" (quoting Tax Analysts, 492 U.S. at 145)); Consumer Fed'n of Am. v. USDA, 455 F.3d 283, 288 (D.C. Cir. 2006) (determining that agency employees' electronic calendars maintained on work computers were not agency records because they were not distributed to other employees so that they could perform their duties); Judicial Watch, Inc. v. DOE, 412 F.3d 125, 127 (D.C. Cir. 2005) (holding that "records created or obtained by employees detailed from an agency to the NEPDG [an advisory group within Office of the Vice President] are not 'agency records' subject to disclosure under the FOIA"); Missouri v. U.S. Dep't of Interior, 297 F.3d 745, 750-51 (8th Cir. 2002) (holding that records maintained in agency office by agency employee who was acting as full-time coordinator of nonprofit organization that had "cooperative" relationship with agency were not "agency records," because they were not integrated into agency files and were not used by agency in performance of its official functions); Katz v. NARA, 68 F.3d 1438, 1442 (D.C. Cir. 1995) (holding that autopsy x-rays and photographs of President Kennedy, created and handled as personal property of Kennedy estate, are presidential papers, not records of any agency); Gen. Elec. Co. v. NRC, 750 F.2d 1394, 1400-01 (7th Cir. 1984) (determining that agency "use" of internal report submitted in connection with licensing proceedings renders report an agency record); Wolfe v. HHS, 711 F.2d 1077, 1079-82 (D.C. Cir. 1983) (holding that transition team records, although physically maintained within "four walls" of agency, were not agency records under FOIA); Judicial Watch, Inc. v. U.S. Secret Service, 803 F. Supp. 2d 51, 56-60 (D.D.C. 2011) (analyzing four "control" factors to find that agency controls White House visitor access records despite agency's stated intent otherwise, as "intent" factor is "substantially outweighed" by other three factors); Reich v. DOE, 784 F. Supp. 2d 15, 21-23 (D. Mass. 2011) (applying control factors to conclude that contractor's constraints placed on documents and lack of reliance and integration render report not agency record), aff'd on reh'g, 811 F. Supp. 2d 52 (D. Mass. 2011); Marzen v. HHS, 632 F. Supp. 785, 801 (N.D. Ill. 1985) (declaring that records created outside federal government which "agency in question obtained without legal authority" are not agency records), aff'd on other grounds, 825 F.2d 1148 (7th Cir. 1987).

[65] Compare Burka, 87 F.3d at 515 (finding data tapes created and possessed by contractor to be agency records because of extensive supervision exercised by agency, which evidenced "constructive control"), Hercules, Inc. v. Marsh, 839 F.2d 1027, 1029 (4th Cir. 1988) (holding that army ammunition plant telephone directory prepared by contractor at government expense, bearing "property of the U.S." legend, is agency record), In Def. of Animals v. NIH, 543 F. Supp. 2d 83, 100-01 (D.D.C. 2008) (finding agency had control over chimpanzee clinical records located at contractor-operated facility where agency owned facility, chimpanzees, and chimpanzee clinical files, and contract provided for agency access to clinical records created and maintained on-site), Los Alamos Study Group v. DOE, No. 97-1412, slip op. at 4 (D.N.M. July 22, 1998) (determining that records created by contractor are agency records because government contract "establishes [agency] intent to retain control over the records and to use or dispose of them as they see fit" and agency regulation "reinforces the conclusion that [agency] intends to exercise control over the material"), and Chi. Tribune Co. v. HHS, No. 95-C-3917, 1997 WL 1137641, at *15-16 (N.D. Ill. Mar. 28, 1997) (finding that notes and audit analysis file created by independent contractor are agency records because they were created on behalf of (and at request of) agency and agency

"record" expressly provides that the term includes information that qualifies as a record under the FOIA and "is maintained for an agency by an entity under government contract, for the purposes of records management."[66]

On a related note, in Forsham v. Harris, the Supreme Court held that certain research data generated through federal grants are not considered agency records subject to the FOIA.[67] Nevertheless, agencies processing a FOIA request for grantee research data should review OMB Circular A-110 which sets forth uniform requirements for certain grants, including a requirement to make certain research data available to the public "through the procedures established under the FOIA."[68]

"effectively controls" them), with Amer. Small Bus. League v. SBA, 623 F. 3d 1052, 1053 (9th Cir. 2010) (reasoning that wireless provider's records were not agency records because no evidence supported that agency "extensively supervised or was otherwise entangled with [provider's] production and management of the records"), Ctr. for Medicare Advocacy v. HHS, No. 3:10cv645, 2011 WL 2119226, at *3 (D. Conn. May 26, 2011) (concluding that records maintained by sponsors of Medicare Advantage Plans under Medicare Part C are not agency records because they are not considered as such under agency regulations, nor are they created, obtained, or controlled by agency), Tax Analysts v. DOJ, 913 F. Supp. 599, 607 (D.D.C. 1996) (finding that electronic legal research database contracted by agency is not an agency record because licensing provisions specifically precluded agency control), aff'd, 107 F.3d 923 (D.C. Cir. 1997) (unpublished table decision), and Rush Franklin Publ'g, Inc. v. NASA, No. 90-CV-2855, slip op. at 10 (E.D.N.Y. Apr. 13, 1993) (finding that computer tape maintained by contractor is not an agency record in absence of agency control). See generally Sangre de Cristo Animal Prot., Inc. v. DOE, No. 96-1059, slip op. at 3-6 (D.N.M. Mar. 10, 1998) (holding that records that agency neither possessed nor controlled and that were created by entity under contract with agency, although not agency records, were accessible under agency regulation, 10 C.F.R. § 1004.3 (currently 2011), that specifically provided for public availability of contractor records).

[66] 5 U.S.C. § 552(f)(2)(B); see, e.g. Am. Small Bus. League, 623 F.3d at 1053-54 (holding that wireless provider's records were not agency "records" because records were not "'maintained for an agency by an entity under Government contract, for the purposes of records management'" (quoting 5 U.S.C. § 552(f)(2)(B)); see also *FOIA Post*, "Treatment of Agency Records Maintained for an Agency by a Government Contractor for Purposes of Records Management" (posted 9/09/08) (advising that term "records" includes agency records maintained for agency by government contractor for purposes of records management, even if such records are not physically in possession of agency).

[67] 445 U.S. at 186; see also ExxonMobil v. Dept. of Commerce, 828 F. Supp. 2d 97, 105-106 (D.D.C. 2011) (concluding that where agency served in "a limited, ministerial role" on behalf of Trustee Council, did not appropriate funds to private researchers, and studies were not conducted on agency's behalf, research data are not agency records).

[68] See OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," 64 Fed. Reg. 54,926 (Oct. 8, 1999) (codified at 2 C.F.R. § 215.36(d)(1)(2012)); see also Am. Chemistry Council, Inc. v. HHS, No. 12-1156, 2013 WL 524447, at *5 (D.D.C. Feb. 13, 2013) (noting that Circular A-110's requirements impose "a

Unlike "agency records," which are subject to the FOIA, "congressional records" are not.[69] "Congressional records" may include records received by an agency from Congress,[70] or records generated by an agency in response to a confidential congressional inquiry.[71] Ascertaining whether records in an agency's possession are "agency records" or "congressional records" depends upon whether Congress manifested an intent to exert control over those records[72] and on the particular contours of that reservation of control.[73] Congress's intent to exert control over particular records must be evident from the circumstances surrounding their creation or transmittal,[74] rather than accomplished on a

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dual responsibility upon agencies . . . [n]ot only must they produce their own responsive 'records,' but they must also request 'research data' from the grantees of the pertinent federally funded research study"); FOIA Update, Vol. XIX, No. 4, at 2 (discussing grantee records subject to FOIA under Circular A-110's definition of "research data").

[69] See, e.g., United We Stand Am. v. IRS, 359 F.3d 595, 597 (D.C. Cir. 2004) (observing that "[t]he Freedom of Information Act does not cover congressional documents").

[70] See, e.g., Goland v. CIA, 607 F.2d 339, 347 (D.C. Cir. 1978) (holding that agency acted merely "as a 'trustee' for Congress" in retaining copy of hearing transcript over which Congress "plainly" manifested intent to control by denominating it as "'secret'"); Hall v. CIA, No. 98-1319, slip op. at 15 (D.D.C. Aug. 10, 2000) (finding that Senate committee "unequivocally" stated its intent in writing to retain control over committee documents that it entrusted to National Archives).

[71] See Holy Spirit Ass'n v. CIA, 636 F.2d 838, 842-43 (D.C. Cir. 1980) (recognizing that agency-created records can become "congressional records"), vacated in part on other grounds, 455 U.S. 997 (1982); Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 12 (D.D.C. 1995) ("Even documents created by the agencies themselves may elude FOIA's reach if prepared on request of Congress with confidentiality restrictions."), aff'd, 76 F.3d 1232 (D.C. Cir. 1996).

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

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

[74] See United We Stand Am., 359 F.3d at 600 (holding that "under all of the circumstances surrounding the [agency's] creation and possession of the documents," there were "sufficient indicia of congressional intent to control" certain portions of those documents); see also Paisley, 712 F.2d at 694 ("[W]e find that neither the circumstances surrounding the creation of the documents nor the conditions under which they were transferred to the agencies manifests a clear congressional intent to maintain control."); Holy Spirit Ass'n, 636

"post hoc" basis "long after the original creation [or] transfer of the requested documents."[75] Absent evidence of such intent, the records may not be found to be "congressional records" and, accordingly, will be within the reach of the FOIA.[76]

In a similar vein, "agency records" are distinguishable from "personal records" -- records that might be physically maintained by agency employees at the agency, but that are not subject to the FOIA. In determining whether a record is a "personal record," an agency should examine "the totality of the circumstances surrounding the creation, maintenance, and use" of the record.[77] Factors relevant to this inquiry include, among others, (1) the purpose for which the document was created; (2) the degree of integration of the record into the agency's filing system; and (3) the extent to which the record's author or other employees used the record to conduct agency business.[78]

F.2d at 842 ("Nothing here either in the circumstances of the documents' creation or in the conditions under which they were sent to the [agency] indicates Congress' intent to retain control over the records."); Goland, 607 F.2d at 348 (holding that congressional hearing transcript maintained by agency was "not an 'agency record' but a Congressional document to which FOIA does not apply . . . because we believe that on all the facts of the case Congress' intent to retain control of the document is clear"); Judicial Watch, 880 F. Supp. at 11-12 (following Wash. Post v. DOD, 766 F. Supp. 1, 17 (D.D.C. 1991), to find that transcript of congressional testimony provided "solely for editing purposes," with cover sheet restricting dissemination, is not agency record), aff'd on other grounds, 76 F.3d 1232 (D.C. Cir. 1996); Ctr. for Nat'l Sec. Studies v. CIA, 577 F. Supp. 584, 586-90 (D.D.C. 1983) (holding that agency report, prepared "at the direct request of Congress" with intent that it remain secret and transferred to agency with congressionally imposed "conditions" of secrecy, is not agency record, nor is duplicate copy of report maintained in agency's files).

[75] United We Stand Am., 359 F.3d at 602; see Holy Spirit Ass'n, 636 F.2d at 843 (concluding that Congress's "post hoc" assertion of control, which came about "as a result of . . . the FOIA request and this litigation long after the actual transfer" of requested records, was "insufficient evidence of Congress' intent to retain control over th[o]se records").

[76] See, e.g., Paisley, 712 F.2d at 692-93 ("In the absence of any manifest indications that Congress intended to exert control over documents in an agency's possession, the court will conclude that such documents are not congressional records.").

[77] Bureau of Nat'l Affairs, Inc. v. DOJ, 742 F.2d 1484, 1492; see also Consumer Fed'n of Am., 455 F.3d at 287-88 (considering "[record] creation, location/possession, control, and use" -- the "principal factors" identified in Bureau of Nat'l Affairs -- and deciding that "use [of the records] is the decisive factor here" (emphasis added)); Spannaus v. DOJ, 942 F. Supp. 656, 658 (D.D.C. 1996) (finding that "'personal' files" of attorney no longer employed with agency were "beyond the reach of FOIA" if they were not turned over to agency at end of employment); Forman v. Chapotan, No. 88-1151, 1988 WL 524934, at *6 (W.D. Okla. Dec. 12, 1988) (rejecting contention that materials distributed to agency officials at privately sponsored seminar are agency records), aff'd, No. 89-6035 (10th Cir. Oct. 31, 1989); FOIA Update, Vol. V, No. 4, at 3-4 ("OIP Guidance: 'Agency Records' vs. 'Personal Records'").

[78] See, e.g., Consumer Fed'n of Am., 455 F.3d at 288-93 (reasoning that five officials' calendars were agency records where calendars were electronically distributed to staff and

FOIA Requesters

The FOIA generally requires federal agencies to make records "available to any person."[79] Although the FOIA does not itself define the term "person," it incorporates the

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relied upon for business use, but that sixth officials' calendar was personal record because it was created and used for his convenience and distributed only to his secretarial staff); Gallant v. NLRB, 26 F.3d 168, 171-72 (D.C. Cir. 1994) (ruling that letters written on agency time and equipment by board member seeking renomination, which were reviewed by other agency employees but not integrated into agency record system and over which author had not relinquished control, are not agency records); Bureau of Nat'l Affairs, 742 F.2d at 1489-96 (holding that officials' uncirculated appointment calendars and telephone message slips were personal records, used for personal convenience, whereas official's daily agendas were agency records as they were created for distribution to top agency staff to facilitate scheduling of agency business); Media Research Ctr. v. DOJ, 818 F. Supp. 2d 131, 140, (D.D.C. 2011) (holding that correspondence "created or received by the [Solicitor General] in her capacity as a judicial nominee" was not relied upon by the agency "in carrying out its business, but rather was used for a purely personal objective" and therefore were not agency records); Families for Freedom v. U.S. Customs & Border Prot., No. 10 Civ. 2705, 2011 WL 4599592, at *6 (S.D.N.Y. Sept. 30, 2011) (finding that notes taken by Assistant Chief Border Patrol Agent during meeting were agency records because document "memorialize[d] the discussion and outcomes of the meeting" and, therefore, "[took] the form of meeting minutes"); Fortson v. Harvey, 407 F. Supp. 2d 13, 16 (D.D.C. 2005) (finding that officer's investigation notes were personal records because notes were used only to refresh officer's memory and were neither integrated into agency files nor relied on by other agency employees), appeal dismissed, No. 05-5193, 2005 WL 3789054, at *1 (D.C. Cir. Oct. 31, 2005); Bloomberg, L.P. v. SEC, 357 F. Supp. 2d 156, 163-67 (D.D.C. 2004) (concluding that computer calendar, telephone logs, and message slips of SEC Chairman, and meeting notes of Chairman's chief of staff, were personal records where they were created for personal use of Chairman or chief of staff, were not incorporated into SEC files, and were not under SEC control, even though some records were maintained by SEC personnel and were automatically "backed-up" onto SEC computer server at regular intervals); Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys., No. 98-4608, 1998 WL 690371, at *6 (S.D.N.Y. Sept. 30, 1998) (ruling that handwritten notes neither shared with other agency employees nor placed in agency files were not "agency records" even though they may have furthered their author's performance of his agency duties), aff'd, 182 F.3d 900 (2d Cir. 1999) (unpublished table decision); Dow Jones & Co. v. GSA, 714 F. Supp. 35, 39 (D.D.C. 1989) (determining that agency head's recusal list, shared only with personal secretary and chief of staff, is not agency record); AFGE v. U.S. Dep't of Commerce, 632 F. Supp. 1272, 1277 (D.D.C. 1986) (finding that employee logs created voluntarily to facilitate work are not agency records even though they contained substantive information), aff'd, 907 F.2d 203 (D.C. Cir. 1990); see also FOIA Update, Vol. V, No. 4, at 3-4 ("OIP Guidance: 'Agency Records' vs. 'Personal Records'") (recognizing ten criteria "that should be evaluated by agencies in making all 'agency record/personal record' determinations").

[79] 5 U.S.C. § 552(a)(3)(A) (2006 & Supp IV 2010); see also 5 U.S.C. § 552(a)(3)(E) (prohibiting elements of intelligence community from disclosing records to foreign governments or their representatives).

definition of "agency" from the Administrative Procedure Act,[80] which in turn defines the term "person" as "an individual, partnership, corporation, association, or public or privacy organization other than an agency."[81] Courts rely on this definition of "person" in the FOIA context.[82]

An attorney or other representative may make a request on behalf of "any person."[83] The Court of Appeals for the District of Columbia Circuit has held that if a FOIA requester

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[80] See 5 U.S.C. § 552(f)(1) (incorporating definition of "agency" from Administrative Procedure Act, 5 U.S.C. § 551(1)(2006 & Supp. IV 2010), and providing further definition of term under FOIA).

[81] Administrative Procedure Act, 5 U.S.C. § 551(2).

[82] See SAE Prods., Inc. v. FBI, 589 F. Supp. 2d 76, 80 (D.D.C. 2008) (stating that "[a] 'person,' as defined under FOIA, includes a corporation" and citing Administrative Procedure Act); see also Arevalo-Franco v. INS, 889 F.2d 589, 591 (5th Cir. 1989) (holding that meaning of "person" under FOIA is not restricted to American citizens); Stone v. Exp.-Imp. Bank, 552 F.2d 132, 136-37 (5th Cir. 1977) (holding that Bank for Foreign Trade, agency of Soviet Union, was a "person" under FOIA's Exemption 4 and declaring that Administrative Procedure Act definition of "person" does not suggest "intention to limit [itself] . . . to American individuals and 'public or private' organization[s]"); O'Rourke v. DOJ, 684 F. Supp. 716, 718 (D.D.C. 1988) (concluding that requester's status as an alien did not exclude him from access to documents under the FOIA as he falls within statute's "any person"); cf. Judicial Watch v. DOJ, 102 F. Supp. 2d 6, 10 (D.D.C. 2000) (holding that because two related organizations "are separate corporations, . . . each is entitled to request documents under FOIA in its own right").

[83] See, e.g., Constangy, Brooks & Smith v. NLRB, 851 F.2d 839, 840 n.2 (6th Cir. 1988) (recognizing standing of attorney to request documents on behalf of client). See generally Burka v. HHS, 142 F.3d 1286, 1290 (D.C. Cir. 1998) (holding that when attorney makes request in his own name without disclosing that he is acting on behalf of a client, he may not later seek attorney fees for his legal work); McDonnell v. United States, 4 F.3d 1227, 1237-38 (3d Cir. 1993) (holding that person whose name does not appear on request does not have standing); Brown v. EPA, 384 F. Supp. 2d 271, 276-78 (D.D.C. 2005) (finding that plaintiff has standing where request stated that attorney was making request on behalf of client, and where "other correspondence . . . confirm[ed]" that all parties understood attorney to be acting on behalf of client); Mahtesian v. OPM, 388 F. Supp. 2d 1047, 1050 (N.D. Cal. 2005) (finding that lawyer's "reference to an anonymous client in a FOIA request, can not [sic], alone, confer standing on that client"); Hall v. CIA, No. 04-00814, 2005 WL 850379, at *4 (D.D.C. Apr. 13, 2005) (finding that requester organization was party to request where request letter stated that organization was "joining" request, even though organization's attorney did not sign letter); Three Forks Ranch Corp. v. Bureau of Land Mgmt., 358 F. Supp. 2d 1, 3 (D.D.C. 2005) (finding that corporation lacked standing to pursue FOIA action where its attorney did not indicate specifically that he was making FOIA request "on behalf of" corporation); Scaife v. IRS, No. 02-1805, 2003 WL 23112791, at *2-3 (D.D.C. Nov. 20, 2003) (finding that powers-of-attorney submitted with FOIA request were insufficient to vest requester with right to receive requested records); Dale v. IRS, 238 F. Supp. 2d 99, 107 (D.D.C. 2002) ("A party's counsel is not the 'requester' for purposes of a fee waiver.");

dies while his or her FOIA claim is in litigation, under some circumstances the FOIA claim may survive.[84] Further, individual members of Congress possess the same rights of access as those guaranteed to "any person."[85]

As mentioned, the FOIA incorporates the definition of "agency" as defined in the Administrative Procedure Act,[86] and that statute excludes federal agencies from the definition of "person,"[87] which thus precludes federal agencies from being FOIA requesters.[88] States and state agencies may, however, make FOIA requests.[89]

There are, however, three narrow exceptions to this broad "any person" standard. First, courts have denied relief under the FOIA to fugitives from justice if the requested

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MAXXAM, Inc. v. FDIC, No. 98-0989, 1999 WL 33912624, at *2 (D.D.C. Jan. 29, 1999) (finding that corporate plaintiff whose name did not appear on FOIA request made by its attorney "'has not administratively asserted a right to receive [requested records] in the first place'" (quoting McDonnell, 4 F.3d at 1237)).

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

[85] See FOIA Update, Vol. V, No. 1, at 3-4 (distinguishing between individual members of Congress and Congress as an institutional entity, which exercises its authority through its committee chairs); Frederick M. Kaiser, Walter J. Oleszek, Todd B. Tatelman, Cong. Research Serv., RL 30240, Congressional Oversight Manual (2011), at 55-57 (advising that congressional committees of jurisdiction can request agency information through "constitutionally-based right of access," but that members acting in individual capacity have access rights of "any person" under the FOIA); Application of Privacy Act Congressional-Disclosure Exception to Disclosures to Ranking Minority Members, Op. Off. Legal Counsel (Dec. 5, 2001), available at http://www.justice.gov/olc/2001/privacy_act_opinion.pdf (discussing congressional access under Privacy Act).

[86] 5 U.S.C. § 552(f) (incorporating definition of "agency" from Administrative Procedure Act, 5 U.S.C. § 551(1), and providing further definition of term under FOIA).

[87] See Administrative Procedure Act, 5 U.S.C. § 551(2).

[88] See Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill, 443 U.S. 340, 360 (1979) (stating, in context of FOIA's Exemption 4, that "person" is someone outside federal government and citing 5 U.S.C. § 551(2)).

[89] See, e.g., Texas v. ICC, 935 F.2d 728, 729 (5th Cir. 1991); Massachusetts v. HHS, 727 F. Supp. 35, 35 (D. Mass. 1989).

records relate to the requester's fugitive status.[90] Second, as amended by the Intelligence Authorization Act for Fiscal Year 2003,[91] the FOIA precludes agencies of the intelligence community[92] from disclosing records in response to FOIA requests made by any foreign government or international governmental organization, either directly or through a representative.[93] Finally, courts have held that a requester who has waived by plea

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[90] See Maydak v. U.S. Dep't of Educ., 150 F. App'x 136, 138 (3d Cir. 2005) (affirming district court's dismissal with prejudice as "there was enough of a connection between Maydak's fugitive status and his FOIA case"); Maydak, No. 02-5168, slip op. at 1 (D.C. Cir. Dec. 11, 2003) (refusing to dismiss because "[t]here is no substantial connection between [requester's] alleged fugitive status and his current [FOIA] action," which was filed four years before requester became a fugitive) (citing Daccarett-Ghia v. IRS, 70 F.3d 621, 626 & n.4 (D.C. Cir. 1995)); Doyle v. DOJ, 668 F.2d 1365, 1365-66 (D.C. Cir. 1981) (holding that fugitive is not entitled to enforcement of FOIA's access provisions because he cannot expect judicial aid in obtaining government records related to sentence that he was evading); Lazaridis v. DOJ, 713 F. Supp. 2d 64, 69-70 (D.D.C. 2010) (finding that agency failed to establish connection between requester's fugitive status and FOIA proceedings); Meddah v. Reno, No. 98-1444, slip op. at 2 (E.D. Pa. Dec. 3, 1998) (dismissing escapee's FOIA claim because escapee "request[ed] documents which were used to determine that he should be detained"); Javelin Int'l, Ltd. v. DOJ, 2 Gov't Disclosure Serv. (P-H) ¶ 82,141, at 82,479 (D.D.C. Dec. 9, 1981) (dismissing plaintiff corporation's FOIA claim because it was acting as agent on behalf of fugitive from justice); see also Daccarett-Ghia v. IRS, 70 F.3d 621, 626 & n.4 (D.C. Cir. 1995) (limiting applicability of "fugitive disentitlement doctrine" generally, but explaining that "holding in this case does not disturb that aspect of Doyle" in which court "recognize[d] one universally applied constraint on fugitive disentitlement doctrine" -- namely, that "[d]ismissal was appropriate in part because fugitive's [FOIA] suit sought records that were 'not devoid of a relationship' to criminal charges pending against him") (non-FOIA case). But cf. O'Rourke v. DOJ, 684 F. Supp. 716, 718 (D.D.C. 1988) (holding that convicted criminal, fugitive from his home country and undergoing U.S. deportation proceedings, qualified as "any person" for purpose of making FOIA request); Doherty, 596 F. Supp. at 424-29 (same).

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

[92] See 50 U.S.C. § 401a(4) (2006 & Supp. IV 2010) (provision of National Security Act of 1947, as amended, that specifies federal agencies and agency subparts deemed to be "elements of the intelligence community").

[93] 5 U.S.C. § 552(a)(3)(E); see All Party Parliamentary Grp. on Extraordinary Rendition v. DOD, 851 F. Supp. 2d 169, 174-77 (D.D.C. 2012) (dismissing plaintiff's claim upon finding that Parliamentary group was "government entity," member of Parliament was "representative" of "government entity" for purposes of FOIA, and therefore member's "request [was] barred by FOIA"); see also *FOIA Post*, "FOIA Amended by Intelligence Authorization Act" (posted 12/23/02) (advising that "for any FOIA request that by its nature appears as if it might have been made by or on behalf of a non-U.S. governmental entity, a covered agency may inquire into the particular circumstances of the requester in order to properly implement this new FOIA provision").

agreement his or her FOIA rights is precluded from making a FOIA request concerning any waived subject.[94]

In keeping with the broad "any person" standard, FOIA requesters generally do not have to justify or explain their reasons for making requests.[95] The Supreme Court has observed that a FOIA requester's identity generally "has no bearing on the merits of his or her FOIA request."[96] Moreover, the Supreme Court has held that a requester's basic access rights are neither increased nor decreased based upon the requester's particular interest in the records sought.[97] Although requesters have occasionally invoked the FOIA successfully

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[94] See Boyce v. U.S., No. 08-535, 2010 WL 2691609, at *1 (W.D.N.C. July 6, 2010) (finding that waiver in plaintiff's plea agreement, whereby he waived his rights to receive any investigation and prosecution records related to his criminal case, precludes his access under FOIA); Caston v. EOUSA, 572 F. Supp. 2d 125, 129 (D.D.C. 2008) (granting agency's motion to dismiss because "'use of a FOIA waiver in a valid and binding plea agreement is an enforceable provision'" that bars plaintiff's FOIA claim for records regarding his criminal case (quoting Patterson v. FBI, No. 08-186, 2008 WL 2597656, at*2 (E.D. Va. June 27, 2008))).

[95] See, e.g., NARA v. Favish, 541 U.S. 157, 172 (2004) ("[A]s a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information.").

[96] DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771 (1989); see Favish, 541 U.S. at 170 ("As a general rule, withholding information under FOIA cannot be predicated on the identity of the requester."); see also Lynch v. Dep't of the Treasury, 210 F.3d 384, at *4 (9th Cir. 2000) (unpublished table opinion) (upholding district court's decision to not consider identity of requester in determining whether records were properly withheld under Exemption 7(A)); Parsons v. Freedom of Info. Act Officer, No. 96-4128, 1997 WL 461320, at *1 (6th Cir. Aug. 12, 1997) ("[T]he identity of the requestor is irrelevant to the determination of whether an exemption applies."); United Techs. v. FAA, 102 F.3d 688, 692 (2d Cir. 1996) (rejecting plaintiff's argument that Exemption 4 should be applied "on a requester-specific basis," because "[u]nder that rule, the Government would be required in every FOIA case to conduct an inquiry regarding the identity of the requester and the circumstances surrounding its request," and "[t]he FOIA was not intended to be applied on such an individualized basis"); Swan v. SEC, 96 F.3d 498, 499 (D.C. Cir. 1996) ("Whether [a particular exemption] protects against disclosure to 'any person' is a judgment to be made without regard to the particular requester's identity."); Durns v. BOP, 804 F.2d 701, 706 (D.C. Cir. 1986) ("Congress granted the scholar and the scoundrel equal rights of access to agency records."), cert. granted, judgment vacated on other grounds & remanded, 486 U.S. 1029 (1988); FOIA Update, Vol. VI, No. 3, at 5 ("It is also well established that a FOIA requester cannot rely upon his status as a private party litigant -- in either civil or criminal litigation -- to claim an entitlement to greater FOIA access than would be available to the average requester").

[97] See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975) (recognizing that a requester's "rights under the Act are neither increased nor decreased by reason of the fact that [he or she] claims an interest in the [requested records] greater than that shared by the average member of the public"); see also Reporters Comm., 489 U.S. at 771 ("As we have

as a substitute for, or a supplement to, document discovery in civil[98] and criminal[99] litigation, there are several Supreme Court admonitions for restraint[100] and multiple other decisions where courts have declared that "while documents obtained through FOIA requests may ultimately prove helpful in litigation by permitting a citizen to more precisely target his discovery requests, FOIA is not intended to be a substitute for discovery."[101]

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repeatedly stated, Congress 'clearly intended' the FOIA 'to give any member of the public as much right to disclosure as one with a special interest [in a particular document].'" (quoting Sears, 421 U.S. at 149)); EPA v. Mink, 410 U.S. 73, 86 (1973) (declaring that FOIA "is largely indifferent to the intensity of a particular requester's need"); North v. Walsh, 881 F.2d 1088, 1096 (D.C. Cir. 1989) ("In sum, [FOIA requester's] need or intended use for the documents is irrelevant."); cf. Parsons, 121 F.3d 709, at *1 (rejecting plaintiff's argument that his "legitimate need for the documents superior to that of the general public or the press" warranted disclosure of exempt information).

[98] See, e.g., Jackson v. First Fed. Sav., 709 F. Supp. 887, 889 (E.D. Ark. 1989) (declaring that "there is no rule that the parties to a lawsuit may only gather evidence through the formal discovery devices" and "it is ordinarily unnecessary for the party seeking the material to take steps to compel what will be given freely"); see also In re F&H Barge Corp., 46 F. Supp. 2d 453, 454-55 (E.D. Va. 1998) (noting that "courts have allowed private litigants to obtain documents in discovery via the FOIA"); FOIA Update, Vol. III, No. 1, at 10 (acknowledging that "[u]nder present law there is no statutory prohibition to the use of FOIA as a discovery tool").

[99] See, e.g., North, 881 F.2d at 1096 (rejecting defendant's argument that, because plaintiff was using FOIA as an "adjunct discovery device" for his criminal case, Criminal Rule 16 materiality and relevance requirements should apply to his FOIA request, and holding that discovery limitations do not apply "when FOIA requests are presented in a discrete civil action" because plaintiff's "need or intended use for the documents is irrelevant to his FOIA action"); Bright v. Attorney Gen. John Ashcroft, 259 F. Supp. 2d 502, 503 & n.1 (E.D. La. 2003) (concluding that Brady v. Maryland "demands" that information withheld under Exemption 7(D) of FOIA be released to plaintiff).

[100] See United States v. Weber Aircraft Corp., 465 U.S. 792, 801-02 (1984) (rejecting construction of FOIA that would allow FOIA to be used to supplement discovery); Baldrige v. Shapiro, 455 U.S. 345, 360 n.14 (1982) (noting that "primary purpose of the FOIA was not . . . to serve as a substitute for civil discovery"); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (noting that "FOIA was not intended to function as a private discovery tool"); Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974) (noting that "discovery for litigation purposes is not an expressly indicated purpose of the Act").

[101] Comer v. IRS, No. 97-76329, 2000 WL 1566279, at *2 (E.D. Mich. Aug. 17, 2000); see, e.g., U.S. v. U.S. Dist. Court, Cent. Dist. of Cal., 717 F.2d 478, 480 (9th Cir. 1983) (holding that FOIA does not expand scope of criminal discovery permitted under Rule 16 of Federal Rules of Criminal Procedure); Martinez v. EEOC, No. 04-0391, 2004 WL 2359895, at *6 (W.D. Tex. Oct. 19, 2004) (concluding that requester "may not use the FOIA to circumvent the discovery process and thereby frustrate the investigative procedures of the EEOC"); Cantres v. FBI, No. 01-1115, slip op. at 5 (D. Minn. June 21, 2002) (magistrate's recommendation) (avouching that "[a] FOIA request is not a substitute for discovery in a

The requester's reason for making a FOIA request may, however, be considered in the context of certain procedural decisions made during the course of processing a request, such as when the agency determines whether to grant expedited processing, or to waive fees, or when a court decides whether to award attorney fees and costs to a successful FOIA plaintiff.[102]

Proper FOIA Requests

The FOIA specifies two requirements for an access request: It must "reasonably describe[]" the records sought and it must be "made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed."[103] The key to determining whether a request satisfies the first requirement is the ability of agency staff to reasonably ascertain exactly which records are being requested and to locate them.[104]

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habeas case," nor was FOIA "designed to supplement the rules of civil discovery"), adopted, No. 01-1115, slip op. (D. Minn. July 16, 2002); Envtl. Crimes Project v. EPA, 928 F. Supp. 1, 2 (D.D.C. 1995) (ordering stay of FOIA case "pending the resolution of the discovery disputes" in parties' related lawsuit in order to foreclose requester's attempt to "end run" or interfere with discovery); U.S. v. Agunbiade, No. 90-CR-610, 1995 WL 351058, at *7 (E.D.N.Y. May 10, 1995) (stating that FOIA requester "cannot employ the statute as a means to enlarge his right to discovery" in his criminal case); Johnson v. DOJ, 758 F. Supp. 2, 5 (D.D.C. 1991) ("Resort to Brady v. Maryland as grounds for waiving confidentiality is . . . outside the proper role of FOIA."); Stimac v. DON, 620 F. Supp. 212, 213 (D.D.C. 1985) ("Brady v. Maryland . . . provides no authority for releasing material under FOIA."); cf. Jones v. FBI, 41 F.3d 238, 250 (6th Cir. 1994) ("FOIA's scheme of exemptions does not curtail a plaintiff's right to discovery in related non-FOIA litigation; but neither does that right entitle a FOIA plaintiff to circumvent the rules limiting release of documents under FOIA."); Injex Indus. v. NLRB, 699 F. Supp. 1417, 1419 (N.D. Cal. 1986) (holding that FOIA cannot be used to circumvent nonreviewable decision to impound requested documents); Morrison-Knudsen Co. v. U.S. Dep't of the Army, 595 F. Supp. 352, 356 (D.D.C. 1984) ("[T]he use of FOIA to unsettle well established procedures governed by a comprehensive regulatory scheme must be . . . viewed not only 'with caution' but with concern."), aff'd, 762 F.2d 138 (D.C. Cir. 1985) (unpublished table decision).

[102] See 5 U.S.C. § 552 (a)(4)(A), (a)(6)(E) (taking into account "purpose" and "need" in fee waiver and expedited processing determinations); see, e.g., Davy v. CIA, 550 F.3d 1155 (D.C. Cir. 2008) (evaluating requester's interests in requested records as criteria in determining entitlement to attorney fees and costs).

[103] 5 U.S.C. § 552(a)(3)(A) (2006 & Supp. IV 2010).

[104] See, e.g., Yeager v. DEA, 678 F.2d 315, 322, 326 (D.C. Cir. 1982) (holding request encompassing over 1,000,000 computerized records to be valid because "[t]he linchpin inquiry is whether the agency is able to determine 'precisely what records [are] being requested'" (quoting legislative history)); Marks v. DOJ, 578 F.2d 261, 263 (9th Cir. 1978) (declaring that "reasonable description relates not only to subject matter, but . . . also relates to place of search" and ruling that FBI was not required to search all field offices pursuant to request for all records "under [my] name" because such "broad, sweeping requests" do not

Courts have recognized that the legislative history of the 1974 FOIA amendments indicates that a description of a requested record is sufficient if it enables a professional agency employee familiar with the subject area to locate the record with a "reasonable amount of effort."[105] Courts have also found that requests that are so broad and sweeping that they lack specificity are not reasonably described.[106]

Courts have explained that "[t]he rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters,"[107] or to allow requesters to conduct "fishing expeditions" through agency

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"reasonably describe" records sought); see also Wells v. U.S. Dep't of Educ. Office for Civil Rights, 450 Fed. Appx 431, 432 (5th Cir. 2011) ("As we cannot decipher which records the Appellants are seeking, we cannot say that the district court abused its discretion in dismissing the suit on this basis."); Stuler v. IRS, 216 F. App'x 240, 242 (3d Cir. 2007) (per curiam) (affirming district court's finding that requester failed to comply with agency regulations requiring "reasonably described" requests, where requester was not "clear in articulating the documents [she] sought"); Weewee v. IRS, No. 99-475, 2001 WL 283801, at *12 (D. Ariz. Feb. 13, 2001) (finding that request for records related to each occurrence of specific actions related to requester's tax return "does not appear to be too broad" given that agency was previously able to process a request that was "identically worded").

[105] H.R. Rep. No. 93-876, at 6 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6271; see, e.g., Truitt v. Dep't of State, 897 F.2d 540, 544-45 (D.C. Cir. 1990) (discussing legislative history of 1974 FOIA amendments as related to requirements for describing requested records); Ferri v. DOJ, 573 F. Supp. 852, 859 (W.D. Pa. 1983) (granting summary judgment where plaintiff failed to provide sufficient information to allow agency to retrieve requested information "with a reasonable amount of effort" (citing Marks, 578 F.2d at 263)).

[106] See, e.g., Gaunce v. Burnette, 849 F.2d 1475, 1475 (9th Cir. 1988) (affirming lower court's grant of summary judgment, and stating that request did not reasonably describe records sought, where it sought "'every scrap of paper wherever located within the agency'" related to requester's aviation activities (citing Marks, 578 F.2d at 263)); Marks, 578 F.2d at 263 (finding that even if plaintiff is considered to have requested search of every field office of FBI, "broad, sweeping requests lacking specificity are not permissible"); Freedom Watch, Inc. v. CIA, No. 12-0721, 2012 WL 4753281, at *6 (D.D.C. Oct. 5, 2012) (holding that request for "anything 'relating to' [several nations]" is "'so broad as to impose an unreasonable burden upon the agency'" (quoting Am. Fed'n of Gov't Employees, Local 2782 v. U.S. Dep't of Commerce, 907 F.2d 203, 209 (D.C. Cir. 1990)); Exxon Mobil Corp. v. U.S. Dep't of Interior, No. 09-6732, 2010 WL 2653353, at *8 (E.D. La June 29, 2010) (finding requests for "any and all documents, " "any documents," or "all documents" impermissibly broad).

[107] Assassination Archives & Research Ctr. v. CIA, 720 F. Supp. 217, 219 (D.D.C. 1989), aff'd in pertinent part, No. 89-5414, 1990 WL 123924 (D.C. Cir. Aug. 13, 1990) (per curiam); accord Nurse v. Sec'y of the Air Force, 231 F. Supp. 2d 323, 329 (D.D.C. 2002) (quoting Assassination Archives & Research Ctr., 720 F. Supp. at 219); see, e.g., Bloeser v. DOJ, 811 F. Supp. 2d 316, 321 (D.D.C. 2011) (reasoning that "[b]ecause 'FOIA' was not intended to reduce government agencies to full-time investigators on behalf of requesters, . . . [t]o the extent that plaintiff can identify documents which he believes exist in a particular office within [DOJ], such identifying information should have been included as part of his original

files.[108] Courts have recognized that an agency's FOIA staff is neither required to have "clairvoyant capabilities" to discern the requester's needs,[109] nor must they spend "countless numbers of personnel hours seeking needles in bureaucratic haystacks."[110]

FOIA request"); Satterlee v. IRS, No. 05-3181, 2006 WL 3160963, at *3 (W.D. Mo. Oct. 30, 2006) (finding that request was improper where it would require agency to "conduct legal research" and answer questions "disguised as . . . FOIA request"); Frank v. DOJ, 941 F. Supp. 4, 5 (D.D.C. 1996) (stating that agency is not required to "dig out all the information that might exist, in whatever form or place it might be found, and to create a document that answers plaintiff's questions"); Lamb v. IRS, 871 F. Supp. 301, 304 (E.D. Mich. 1994) (finding requests outside scope of FOIA when they require legal research, are unspecific, or seek answers to interrogatories); Trenerry v. Dep't of the Treasury, No. 92-5053, 1993 WL 26813, at *3 (10th Cir. Feb. 5, 1993) (holding that agency not required to provide personal services such as legal research).

[108] Immanuel v. Sec'y of the Treasury, No. 94-884, 1995 WL 464141, at *1 (D. Md. Apr. 4, 1995), aff'd, 81 F.3d 150 (4th Cir. 1996) (unpublished table decision); see also Dale v. IRS, 238 F. Supp. 2d 99, 104-05 (D.D.C. 2002) (concluding that request seeking "'any and all documents . . . that refer or relate in any way'" to requester failed to reasonably describe records sought and "amounted to an all-encompassing fishing expedition of files at [agency's] offices across the country, at taxpayer expense").

[109] Nurse v. Sec'y of the Air Force, 231 F. Supp. 2d 323, 330 (D.D.C. 2002); see also Amnesty Int'l USA v. CIA, 728 F. Supp. 2d 479, 499 (S.D.N.Y. 2010) (holding that plaintiffs cannot "rely on the argument that the CIA should have known what information Plaintiffs were seeking, for an agency receiving a FOIA request 'is not required to divine a requester's intent'") (quoting Landmark Legal Found. v. EPA, 272 F. Supp. 2d 59, at 64 (D.D.C. 2003); Benneville v. DOJ, No. 98-6137, slip op. at 10 (D. Or. June 11, 2003) (rejecting plaintiff's contention that agency should have provided him with information on all environmental groups, rather than just single group specifically named in request letter, because "the government should not be expected to determine [unnamed groups'] identit[ies] and determine if they should be involved in the search"); Malak v. Tenet, No. 01-3996, 2001 WL 664451, at *1 (N.D. Ill. June 12, 2001) (concluding that request's "discursive narrative doesn't even begin to approach the necessary job to permit performance of [agency's] FOIA responsibilities"); Kubany v. Bd. of Governors of the Fed. Reserve Sys., No. 93-1428, slip op. at 6-8 (D.D.C. July 19, 1994) (holding that request relying on exhibits containing "multiple, unexplained references to hundreds of accounts, and various flowcharts, and schematics" is "entirely unreasonable").

[110] Devine v. Marsh, 2 Gov't Disclosure Serv. (P-H) ¶ 82,022, at 82,186 (E.D. Va. Aug. 27, 1981); see also Goldgar v. Office of Admin., 26 F.3d 32, 35 (5th Cir. 1994) (holding that agency not required to produce information sought by requester -- "the identity of the government agency that is reading his mind" -- that does not exist in record form); Keys v. DHS, No. 08-0726, 2009 WL 614755, at *5 (D.D.C. Mar. 10, 2009) (stating that requester failed to reasonably describe records sought by not responding to agency's notice that he must specify which field offices he wanted agency to search); Satterlee, 2006 WL 3160963, at 3 (finding that requester did not reasonably describe records sought where his request asked IRS to "prove that it has jurisdiction over him"); Segal v. Whitmyre, No. 04-809795, 2005 WL 1406171, at *2 (S.D. Fla. Apr. 6, 2005) (finding that court lacks jurisdiction under

As a corollary to the "reasonably described" inquiry, courts have held that agencies are not required to conduct wide-ranging, "unreasonably burdensome" searches for records.[111] (For a discussion of "unreasonably burdensome" searches, see Procedural Requirements, Searching for Responsive Records, below).

Even if the request "is not a model of clarity," an agency should carefully consider the nature of each request and give a reasonable interpretation to its terms and overall content.[112] Courts have at times required agencies to clarify the scope of the request with

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FOIA because request "failed to assert exactly what records/documents" requester sought, but instead asked for "proof/documentation" that requester was not entitled to IRS tax hearing), aff'd on other grounds sub nom. Segal v. Comm'r, 177 F. App'x 29 (11th Cir. 2006); Judicial Watch v. Exp.-Imp. Bank, 108 F. Supp. 2d 19, 27-28 (D.D.C. 2000) (ruling that request did not reasonably describe records sought because plaintiff "fail[ed] to state its request with sufficient particularity, [and] it also declined [agency's] repeated attempts to clarify the request"); Graphics of Key W. v. United States, No. 93-718, 1996 WL 167861, at *7 (D. Nev. Feb. 5, 1996) (finding plaintiff's request letters to be "more arguments than clear requests for information"). But cf. Doolittle v. DOJ, 142 F. Supp. 2d 281, 285 (N.D.N.Y. 2001) (concluding that if description of records sought is otherwise reasonable, agency cannot refuse to search for records simply because requester did not identify them by date on which they were created).

[111] See, e.g., Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 892 (D.C. Cir. 1995) (agreeing that search requiring review of twenty-three years of unindexed files would be unreasonably burdensome, but disagreeing that search through chronologically indexed agency files for dated memoranda would be burdensome); AFGE v. U.S. Dep't of Commerce, 907 F.2d 203, 209 (D.C. Cir. 1990) (holding that "while [plaintiff's requests] might identify the documents requested with sufficient precision to enable the agency to identify them . . . it is clear that these requests are so broad as to impose an unreasonable burden upon the agency," because agency would have "to locate, review, redact, and arrange for [the] inspection [of] a vast quantity of material"); Weirich v. Bd. of Governors of the Fed. Reserve Sys., No. CV-10-5031, 2010 WL 4717211, at *4 (E.D. Wash. Nov. 15, 2010) (determining that not only do requests for "'any documents'" by "'any members'" concerning "'emergency funds'" for "'commercial banks which were nearly insolvent'" lack specificity, but plaintiff's request would "unduly burden the FOI Office and significantly interfere with the Board's operations"); Bailey v. Callahan, No. 3:09MC10, 2010 WL 924251, at *4-5 (E.D. Va. March 11, 2010) (holding that request is so overbroad that only if requester specified particular component of interest could agency conduct a search without an "unreasonable amount of effort"). But see Ruotolo v. DOJ, 53 F.3d 4, 9-10 (2d Cir. 1995) (finding that although request would require 803 files to be searched by "begin[ing] with the most current . . . and work[ing] backward in time," it was "reasonably described" and not "unreasonably burdensome"); FOIA Update, Vol. IV, No. 3, at 5 ("The sheer size or burdensomeness of a FOIA request, in and of itself, does not entitle an agency to deny that request on the ground that it does not 'reasonably describe' records within the meaning of [the FOIA].").

[112] LaCedra v. EOUSA, 317 F.3d 345, 347-48 (D.C. Cir. 2003) (concluding that agency failed to "liberally construe" request for "all documents pertaining to [plaintiff's] case" when it

the requester, particularly when doing so is required by the agency's regulations.[113] Such communication is also encouraged as a matter of sound administrative policy.[114]

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limited that request's scope to only those records specifically and individually listed in request letter, because "drafter of a FOIA request might reasonably seek all of a certain set of documents while nonetheless evincing a heightened interest in a specific subset thereof" (citing Nation Magazine, 71 F.3d at 890)); see, e.g., Miller v. Casey, 730 F.2d 773, 777 (D.C. Cir. 1984) (emphasizing that agency is required to read FOIA request as drafted, "not as either [an] agency official or [requester] might wish it was drafted"); Keys v. DHS, 570 F. Supp. 2d 59, 68-69 (D.D.C. 2008) (finding withholding improper where agency to which records were referred nonetheless still required requester to file additional request for public records even though such records were responsive to original request and were part of referred documents); Lawyers' Comm. for Civil Rights v. Dep't of the Treasury, 534 F. Supp. 2d 1126, 1135-36 (N.D. Cal. 2008) (ordering disclosure of records responsive to requests for "[t]he number and nature of complaints" because requests must be "interpreted liberally and . . . an agency cannot withhold a record that is reasonably within the scope of the request on the grounds that the record has not been specifically named by the requester"); Lawyer's Comm. for Civil Rights v. Dep't of the Treasury, No. 07-2590, 2008 WL 4482855, at *6 (N.D. Cal. Sept. 30, 2008) (finding that requester's "inartfully written" requests when "liberally construed" seek subject records); Martinez v. SSA, No. 07-01156, 2008 WL 486027, at *3 (D. Colo. Feb. 18, 2008) (finding that "request for aggregate data was encompassed within the Plaintiffs' FOIA request, even if the word 'aggregate' does not appear in it"); Landes v. Yost, No. 89-6338, 1990 WL 45054, at *3 (E.D. Pa. Apr. 12, 1990) (finding that request was "reasonably descriptive" when it relied on agency's own outdated identification code), aff'd, 922 F.2d 832 (3d Cir. 1990) (unpublished table decision); FOIA Update, Vol. XVI, No. 3, at 3-4 (advising agencies on interpretation of terms of FOIA requests). See generally Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) (directing agencies to respond to FOIA requests "in a spirit of cooperation").

[113] See, e.g., Ruotolo, 53 F.3d at 10 (stating that agency failed to perform its "duty" to assist requester in reformulating request); Stockton E. Water Dist. v. United States, No. 08-0563, 2008 WL 5397499, at *2 (E.D. Cal. Dec. 19, 2008) (noting that if defendants believed request did not sufficiently describe records sought, they were required to contact plaintiff to clarify what records were sought); Pub. Citizen Health Research Group v. FDA, No. 94-0018, slip op. at 2-3 (D.D.C. Feb. 9, 1996) (criticizing agency for failing to seek narrowing of request as required by agency regulations, and ordering parties to "seek to agree" on search breadth).

[114] *FOIA Post*, "OIP Guidance: The Importance of Good Communication with FOIA Requesters" (posted 3/1/10) (explaining that "good communication with requesters can also be exceedingly helpful in those instances where an agency is uncertain about the scope of what is being requested" because "[m]any times FOIA requesters do not know how agency records are organized or what might be involved in searching for the records they seek" and "[b]y engaging in a dialogue with the requester, both parties can ensure that they have a common understanding of what records are being sought").

The District Court for the District of Columbia has held that, "a person need not title a request for government records a 'FOIA request,'"[115] and, as a matter of policy, agencies should use sound judgment when determining the nature of an access request.[116] For example, as a matter of sound administrative policy, a first-party access request that cites only the Privacy Act of 1974[117] should be processed under both that statute and under the FOIA.[118] Likewise, an agency "must be careful not to read [a] request so strictly that the requester is denied information the agency well knows exists in its files, albeit in a different form from that anticipated by the requester."[119] Courts have, nevertheless, upheld agency decisions to limit the scope of a request when the agency acted reasonably in interpreting what the request sought.[120] Courts have also allowed agencies to "consider the configuration

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[115] Newman v. Legal Servs. Corp., 628 F. Supp. 535, 543 (D.D.C. 1986). But see Blackwell v. EEOC, No. 2:98-38, 1999 WL 1940005, at *2 (E.D.N.C. Feb. 12, 1999) (finding that request was not properly made because plaintiff failed to follow agency regulation requiring that request be denominated explicitly as request for information under FOIA).

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

[117] 5 U.S.C. § 552a (2006 & Supp. IV 2010).

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

[119] Hemenway v. Hughes, 601 F. Supp. 1002, 1005 (D.D.C. 1985); see also Allen v. BOP, No. 00-342, slip op. at 7-9 (D.D.C. Mar. 1, 2001) (concluding that agency took "an extremely constricted view" of plaintiff's FOIA request for all "records or transcripts" of intercepted phone calls by failing to construe audiotape recordings of those calls as being within request's scope), aff'd, 89 F. App'x 276 (D.C. Cir. 2004); Horsehead Indus. v. EPA, No. 94-1299, slip op. at 4 n.2 (D.D.C. Jan. 3, 1997) (ruling that "[b]y construing the FOIA request narrowly, [agency] seeks to avoid disclosing information").

[120] See, e.g., McLaughlin v. DOJ, 598 F. Supp. 2d 62, 66 (D.D.C. 2009) (concluding "[n]o reasonable fact finder could imply agency bad faith" from practice of generally treating requests as requests for non-public records and requiring submission of additional request for responsive public records); Adamowicz v. IRS, 552 F. Supp. 2d 355, 362 (S.D.N.Y. 2008) (finding agency's interpretation of request reasonable when agency determined that request seeking records pertaining to tax audit did not include records pertaining to appeal of tax audit); Mogenhan v. DHS, No. 06-2045, 2007 WL 2007502, at *3 (D.D.C. July 10, 2007) (stating that agency reasonably determined that scope of request for investigative file did not include employment file); Judicial Watch, Inc. v. DOD, No. 05-00390, 2006 WL 1793297, at *3 (D.D.C. June 28, 2006) (concluding that agency need not construe request for names of corporations related to particular subject to be request for all records related to that subject); Nat'l Ass'n of Criminal Def. Lawyers v. DOJ, No. 04-0697, 2006 WL 666938, at *2 (D.D.C. Mar. 15, 2006) (concluding that agency "reasonably" read request as seeking "'any reports or studies'" and that requester's attempt to narrow request resulted in request that is "substantially different" from original request).

of their records systems in deciding whether a FOIA request 'reasonably describes' the records sought."[121]

When determining the scope of a FOIA request, courts have generally held that agencies are not required to answer questions posed as FOIA requests,[122] nor are they

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[121] National Security Counselors v. CIA, Nos. 11-443, 11-444, 11-445, 2012 WL 4903377, at *26 (D.D.C. Oct. 17, 2012) (noting that agency is permitted to consider configuration of records system because "[a]n agency is not required to reorganize its files in the response to a plaintiff's request" (citing Goland v. CIA, 607 F.2d 339, 353 (D.C. Cir. 1978))).

[122] See, e.g., Zemansky v. EPA, 767 F.2d 569, 574 (9th Cir. 1985); DiViaio v. Kelley, 571 F.2d 538, 542-43 (10th Cir. 1978); Jean-Pierre v. BOP, No. 12-78, 2012 WL 3065377, at *6 (D.D.C. July 30, 2012) (concluding that request for objective pieces of information, such as "who gave the order" and "on what day," are not "cognizable under FOIA, because they ask questions calling for specific pieces of information rather than records"); Rodriguez-Cervantes v. HHS, 853 F. Supp. 2d 114, 116-17 (D.D.C. 2012) ("As [plaintiff's] letters merely pose questions . . . or ask for assistance in applying for Social Security benefits, they do not constitute valid FOIA requests."); Thomas v. Comptroller of the Currency, 684 F. Supp. 2d 29, 33 (D.D.C. 2010) ("To the extent that plaintiff's FOIA requests were questions or requests for explanations of policies or procedures, these are not proper FOIA requests requiring the OCC's response."); Amnesty Int'l v. CIA, No. 07-5435, 2008 WL 2519908, at *12-13 (S.D.N.Y. June 19, 2008) (rejecting claim that agency has duty to compile list of persons it deems subjects of "secret detention" and search for records related to them in order to respond to request for "secret detention" records because, in essence, request seeks answer to question); Francis v. FBI, No. 06-0968, 2008 WL 1767032, at *5-6 (E.D. Cal. Apr. 16, 2008) (magistrate's recommendation) (finding absence of proper FOIA request where requester asked agency to identify person in photograph); Stuler v. DOJ No. 03-1525, 2004 WL 1304040, at *3 (W.D. Pa. June 30, 2004) (concluding that FOIA does not give requester "opportunity to relitigate his criminal case," and that agency was not obligated to answer requester's questions), aff'd, 216 F. App'x at 242 (per curiam); Gillin v. Dep't of the Army, No. 92-325, slip op. at 10 (D.N.H. May 28, 1993) ("FOIA creates only a right of access to records, not a right to require an agency to disclose its collective reasoning behind agency actions, nor does FOIA provide a mechanism to challenge the wisdom of substantive agency decisions."), aff'd, 21 F.3d 419 (1st Cir. 1994) (unpublished table decision); Patton v. U.S. R.R. Ret. Bd., No. ST-C-91-04, slip op. at 3 (W.D.N.C. Apr. 26, 1991) (stating that FOIA "provides a means for access to existing documents and is not a way to interrogate an agency"), aff'd, 940 F.2d 652 (4th Cir. 1991) (unpublished table decision). But see Ferri v. Bell, 645 F.2d 1213, 1220 (3d Cir. 1981) (declaring that request "inartfully presented in the form of questions" could not be dismissed, partly because agency conceded that it could provide requester with records containing information he sought); Lawyers' Comm. for Civil Rights, 534 F. Supp. 2d at 1135-36 (ordering disclosure of records responsive to requests for "[t]he number and nature of complaints" because requests must be "interpreted liberally and . . . an agency cannot withhold a record that is reasonably within the scope of the request on the grounds that the record has not been specifically named by the requester"); FOIA Update, Vol. V, No. 1, at 5 (advising that "while agencies do not have to create or compile new records in response to FOIA requests (whether formulated in question form or not), they should make good faith efforts to assist requesters in honing any requests for

required to respond to requests by creating records,[123] such as by modifying exempt information in order to make it disclosable.[124] Courts have long held that agencies are not

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readily accessible records which are 'inartfully presented in the form of questions'" (quoting Ferri, 645 F.2d at 1220)).

[123] See, e.g., LaRoche v. SEC, 289 F. App'x 231, 231 (9th Cir. 2008) (explaining that agency was not required to create new documents to satisfy FOIA request when it could not readily reproduce records sought in searchable electronic format requested); Poll v. U.S. Office of Special Counsel, No. 99-4021, 2000 WL 14422, at *5 n.2 (10th Cir. Jan. 10, 2000) (recognizing that FOIA does not require agency "'to create documents or opinions in response to an individual's request for information'" (quoting Hudgins v. IRS, 620 F. Supp. 19, 21 (D.D.C. 1985))); Sorrells v. United States, No. 97-5586, 1998 WL 58080, at *1 (6th Cir. Feb. 6, 1998) (advising that agency is not required to compile document that "contain[s] a full, legible signature"); Krohn v. DOJ, 628 F.2d 195, 197-98 (D.C. Cir. 1980) (finding that agency "cannot be compelled to create the [intermediary records] necessary to produce" information sought); Schoenman v. FBI, No. 04-2202, 2009 WL 763065, at *17-18 (D.D.C. Mar. 19, 2009) (rejecting plaintiff's request for search slips, created by agency after date-of-search cut-off date, holding that "FOIA 'does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created or retained'" (quoting Schoenman v. FBI, 573 F. Supp. 2d 119, 140 (D.D.C. 2008))); Moore v. Bush, 601 F. Supp. 2d 6, 15 (D.D.C. 2009) (finding that agency properly refused to issue various statements regarding brain wave technology because FOIA does not require creation of records); West v. Spellings, 539 F. Supp. 2d 55, 61 (D.D.C. 2008) (recognizing that Department of Education had no duty to create list of uninvestigated complaints to satisfy request); Ctr. for Pub. Integrity v. FCC, 505 F. Supp. 2d 106, 114 (D.D.C. 2007) (concluding that plaintiff's suggestion that agency delete some data and replace it with data suggested by plaintiff amounts to creation of new records, something not required under FOIA); Stuler v. IRS, No. 05-1717, 2006 WL 891073, at *3 (W.D. Pa. Mar. 31, 2006) (stating that agency "is not required to create documents that don't exist"); Jones v. Runyon, 32 F. Supp. 2d 873, 876 (N.D. W. Va. 1998) (concluding that "because the FOIA does not obligate the [agency] to create records," it "acted properly by providing access to those documents already created"), aff'd, 173 F.3d 850 (4th Cir. 1999) (unpublished table decision); Bartlett v. DOJ, 867 F. Supp. 314, 316 (E.D. Pa. 1994) (ruling that agency is not required to create handwriting analysis). But cf. Martinez, 2008 WL 486027, at *2-3 (requiring agency to produce aggregate data); Schladetsch v. HUD, No. 99-0175, 2000 WL 33372125, at *3 (D.D.C. Apr. 4, 2000) ("Because [agency] has conceded that it possesses in its databases the discrete pieces of information which [plaintiff] seeks, extracting and compiling that data does not amount to the creation of a new record."), appeal dismissed voluntarily, No. 00-5220 (D.C. Cir. Oct. 12, 2000); Int'l Diatomite Producers Ass'n v. SSA, No. 92-1634, 1993 WL 137286, at *5 (N.D. Cal. Apr. 28, 1993) (giving agency choice of compiling responsive list or redacting existing lists containing responsive information), appeal dismissed, No. 93-16723 (9th Cir. Nov. 1, 1993).

[124] See American Civil Liberties Union v. DOJ, 681 F.3d 61, 71 (2nd Cir. 2012) (reversing district court's decision requiring agency to substitute purportedly neutral phrase composed by court for exempt material because substitution would effectively force agency to create records); FlightSafety Servs. Corp. v. Dep't of Labor, 326 F.3d 607, 613 (5th Cir. 2003) (per curiam) (recognizing that plaintiff's demand that agency "simply insert new information in

required to make automatic releases of records as they are created, rather proper FOIA requests are for records already created.[125]

In addition to reasonably describing the records sought, a proper FOIA request must be made in accordance with an agency's "published rules stating the time, place, fees (if any), and procedures to be followed."[126] The FOIA requires agencies to promulgate

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the place of the redacted information requires the creation of new agency records, a task that the FOIA does not require the government to perform"); Students Against Genocide v. Dep't of State, 257 F.3d 828, 837 (D.C. Cir. 2001) (rejecting plaintiff's argument that "even if the agencies do not want to disclose the photographs in their present state, they should produce new photographs at a different resolution in order to mask the [classified] capabilities of the reconnaissance systems that took them"). But see Nat'l Sec. Counselors, 2012 WL 4903377, at *26 (holding that "sorting a pre-existing database of information to make information intelligible does not involve the creation of a new record," but is instead, "just another form of searching that is within the scope of an agency's duties in responding to FOIA requests"); Jones v. OSHA, No. 94-3225, 1995 WL 435320, at *4 (W.D. Mo. June 6, 1995) (stating that agency must "retype," not withhold in full, documents required to be released by its own regulation, in order to delete FOIA-exempt information).

[125] See Tuchinsky v. Selective Serv. Sys., 418 F.2d 155, 158 (7th Cir. 1969) (holding that no automatic release is required of material related to occupational deferments until request is in hand; "otherwise, [agency] would be required to 'run [a] loose-leaf service' for every draft counselor in the country"); accord Mandel Grunfeld & Herrick v. U.S. Customs Serv., 709 F.2d 41, 43 (11th Cir. 1983) (determining that plaintiff not entitled to automatic mailing of materials as they are updated); Howard v. Sec'y of the Air Force, No. SA-89-CA-1008, slip op. at 6 (W.D. Tex. Oct. 2, 1991) (concluding that plaintiff's request for records on continuing basis would "create an enormous burden, both in time and taxpayers' money"); Lybarger v. Cardwell, 438 F. Supp. 1075, 1077 (D. Mass. 1977) (holding that "open-ended procedure" advanced by requester whereby records are automatically disclosed is not required by FOIA and "will not be forced" upon agency); see also Tax Analysts, 1998 WL 419755, at *4 (recognizing that court could not order relief concerning documents not yet created and "for which a request for release has not even been made and for which administrative remedies have not been exhausted").

[126] 5 U.S.C. § 552(a)(3)(A); see, e.g., Jones v. U.S., 412 Fed. Appx. 690, 691 (5th Cir. 2011) (affirming that request was not proper where plaintiff mailed request to address other than that specified in agency's FOIA regulations); Clemente v. FBI, 854 F. Supp. 2d 49, 56-57 (D.D.C. 2012) (granting summary judgment to agency because plaintiff failed to write directly to field office when seeking records from that office as required by agency's regulations); Davis v. FBI, 767 F. Supp. 2d 201, 204 (D.D.C. 2011) (granting agency's summary judgment motion where plaintiff "d[id] not refute [agencies'] evidence establishing that his request to those agencies failed to comply [with FOIA regulations]"); Ivey v. Snow, No. 05-1095, 2006 WL 2051339, at *4 (D.D.C. 2006) (granting summary judgment to agency because plaintiff failed to exhaust administrative remedies when requests failed to comply with agency regulations); Wicks v. Coffrey, No. 01-3664, 2002 WL 1000975, at *2 (E.D. La. May 14, 2002) ("The first step in exhausting administrative remedies under the FOIA is filing a proper FOIA request."). But see Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. DHS, No. C 11-02267 DMR, 2012 WL 6680228, at *7-*8 (N.D.

regulations specifying the schedule of fees to be charged and establishing procedures for the waiver of such fees.[127] The FOIA also requires regulations providing for expedited processing.[128] Agencies may promulgate regulations providing for aggregation of requests and multi-track processing.[129]

Significantly, courts have held that the requirements of the FOIA do not begin to apply until an agency receives a proper FOIA request -- one that reasonably describes the records sought and complies with published rules regarding procedures to be followed.[130]

Cal. Dec. 21, 2012) (holding that provision of agency regulations which required provision of consent or proof of death when seeking records on third parties was not permissible).

[127] 5 U.S.C. § 552(a)(4)(A).

[128] See id. § 552, (a)(6)(E).

[129] See id. § 552(a)(6)(B)(iv), (a)(6)(D); see also DOJ, OIP Guidance: Guidance for Further Improvement from 2012 Chief FOIA Officer Report Review and Assessment (2012) (encouraging agencies to utilize multi-track processing).

[130] See 5 U.S.C. § 552(a)(3)(A), (a)(6)(A); Borden v. FBI, No. 94-1029, 1994 WL 283729, at *1 (1st Cir. June 28, 1994) (per curiam) (affirming dismissal of case because request not proper where it failed to comply with agency regulations and did not reasonably describe records sought); Jean-Pierre v. BOP, 880 F. Supp. 2d 95 (D.D.C. 2012) (finding that plaintiff did not comply with all agency FOIA regulations and therefore he never properly initiated a FOIA request and his FOIA complaint is subject to dismissal); Moore v. FBI, No. 11-1067, 2012 WL 3264566, at *6 (D.D.C. Aug.13, 2012) (holding that request to CIA for "'consciousness-altering technology'" was not "reasonably descriptive to trigger [agency's] disclosure obligations"); Weirich v. Bd. of Governors of the Fed. Reserve System, No. CV-10-5031-EFS, 2010 WL 4717221, at *5 (E.D. Wash. Nov. 15, 2010) (concluding that because plaintiff had not submitted proper FOIA request, agency was under no obligation to adhere to statutory time requirements); Wills v. DOJ, 581 F. Supp. 2d 57, 68 (D.D.C. 2008) (finding agency has no obligation to respond to request which it did not receive when plaintiff provided no evidence to support contention that he submitted request); Banks v. Lappin, 539 F. Supp. 2d 228, 235 (D.D.C. 2008) (finding that "[i]t cannot be said that an agency improperly withheld agency records if the agency did not receive a request for those records"); Willis v. DOJ, 581 F. Supp. 2d 57, 68 (D.D.C. 2008) (declaring "[i]t is axiomatic that an agency has no obligation to respond to a request that it did not receive"); Antonelli v. ATF, No. 04-1180, 2006 WL 141732, at *2 (D.D.C. Mar. 17, 2006) (granting agency's motion for summary judgment because requester failed to comply with agency regulation requiring sufficient description of records sought in order that agency "with a reasonable amount of effort . . . [could] initiate a search" from among more than 100 systems of records); Hutchins v. DOJ, No. 00-2349, 2005 WL 1334941, at *1-2 (D.D.C. June 6, 2005) (finding that where agency does not receive request, it has no duty to search for or produce records, nor to respond); Carbe v. ATF, No. 03-1658, 2004 WL 2051359, at *8 (D.D.C. Aug. 12, 2004) (stating that agency "has no reason to search or produce records . . . and . . . has no basis to respond" if it does not receive FOIA request, even where requester claims to have submitted one); Wicks, 2002 WL 1000975, at *2 (dismissing case where requester "failed to comply with the published regulations governing proper FOIA requests").

Time Limits

The FOIA provides that when an agency receives a proper FOIA request, it "must determine within twenty [working] days . . . whether to comply with such request."[131] The Court of Appeals for the District of Columbia Circuit has held that "in order to make a 'determination' within the statutory time periods and thereby trigger the administrative exhaustion requirement, the agency need not actually produce the documents within the relevant time period . . . [b]ut the agency must at least indicate within the relevant time period the scope of the documents it will produce and the exemptions it will claim with respect to any withheld documents."[132] The FOIA also provides that "[u]pon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request."[133]

In "unusual circumstances," an agency can extend the twenty-day time limit for processing a FOIA request by written notice to the requester "setting forth the unusual circumstances for such extension and the date on which a determination is expected to be

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[131] 5 U.S.C. § 552(a)(6)(A)(i) (2006 & Supp. IV 2010).

[132] CREW v. FEC, 711 F.3d 180, 189 (D.C. Cir. 2013) (finding that if agency does not adhere to FOIA's explicit timelines, "'penalty'" is that agency cannot rely on administrative exhaustion requirement because statute: requires that agency immediately notify requester of determination of and reasons for whether to comply with request; requires that agency immediately notify requester of right to appeal to the head of the agency any adverse determination; creates unusual circumstances safety valve that permits agency to extend 20–working–day period for response by up to 10 additional working days; and provides that, once in court, agency may further extend its response time by means of exceptional circumstances safety valve). But see Dennis v. CIA, Nos. 12 CV 4207(JG), 12 CV 4208(JG), 12 CV 5334(JC), 2012 WL 5493377, at *2 (E.D.N.Y. Nov. 13, 2012) (holding that "interim response informing [plaintiff] that [agency] is in the process of addressing [plaintiff's] inquiry is sufficient to satisfy the requirement that [agency] reply within the statutory time period); Carson v. U.S. Merit Sys. Protect. Bd., No. 11-399, 2012 WL 2562370, *2 (E.D. Tenn. June 29, 2012) (dismissing complaint contending that agency failed to respond to request in timely manner because plaintiff submitted no evidence to suggest that agency was not acting in good faith and agency answered request prior to commencement of litigation).

[133] 5 U.S.C. § 552(a)(6)(C)(i); see CREW, 711 F.3d at 189 (holding that, after processing FOIA request and making determination, agency may still need some additional time to physically redact, duplicate or assemble for production documents located, however, "agency must do so and then produce records 'promptly'"); S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv., No. 06-2845, 2008 WL 2523819, at *15 (E.D. Cal. June 20, 2008) (supporting practice of releasing documents "on a rolling basis" if necessary, as this respects statute's "prompt release" requirement). But see Manos v. U.S. Dep't of the Air Force, No. C-92-3986, 1993 U.S. Dist. LEXIS 1501, at *14-15 (N.D. Cal. Feb. 10, 1993) (ruling that even mailing response within statutory time limit was insufficient and that requester must actually receive response within time limit).

dispatched."[134] The FOIA defines "unusual circumstances" as (1) the need to search for and collect records "from field facilities or other establishments that are separate from the office" processing the request; (2) the need to search for, collect, and examine "a voluminous amount" of records "demanded in a single request"; and (3) the need to consult with another agency or two or more agency components.[135] If the required extension exceeds ten days, the agency must allow the requester an opportunity to modify his or her request, or to arrange for an alternative time frame for completion of the agency's processing.[136] Each agency is required to make available its FOIA Public Liaison to aid the requester in this regard and to "assist in the resolution of any disputes."[137]

The FOIA provides that the standard twenty-day time period begins on the date the request is first received by the appropriate agency component (or office), but no later than ten days after the request is first received by any component within the agency that is designated by the agency's regulations to receive FOIA requests.[138] Accordingly, if a requester mistakenly sends a FOIA request to an agency component that is designated to receive FOIA requests, but is not itself the proper component within the agency to process that request, that receiving component is obligated to "route" the "misdirected" request to the appropriate component within that agency within ten days of receiving the request.[139] If

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[134] 5 U.S.C. § 552(a)(6)(B)(i); see CREW, 711 F.3d at 189 (D.C. Cir. April 2, 2013) (noting that agencies can extend twenty-working-day timeline to thirty-working-days if unusual circumstances delay ability to search for, collect, examine, and consult regarding responsive documents); Pub. Citizen, Inc. v. Dep't of Educ., No. 01-2351, slip op. at 17-23 (D.D.C. June 17, 2002) (ruling that because agency has discretion whether to invoke extension, agency is not obliged to send such notice unless it invokes extension).

[135] 5 U.S.C. § 552(a)(6)(B)(iii); see also Sierra Club v. U.S. Dep't of Interior, 384 F. Supp. 2d 1, 31 (D.D.C. 2004) (finding that "onerous request" and requester's "refusal to reasonably modify it or to arrange an alternative timeframe for release of documents certainly constituted 'unusual circumstances' that relieved the [agency] of the normal timeliness for release of documents under FOIA"); Al-Fayed v. CIA, No. 00-2092, slip op. at 5 (D.D.C. Jan. 16, 2001) (recognizing that circumstances "such as an agency's effort to reduce the number of pending requests, the amount of classified material, the size and complexity of other requests processed by the agency, the resources being devoted to the declassification of classified material of public interest, and the number of requests for records by courts or administrative tribunals are relevant to the Courts' determination as to whether [unusual] circumstances exist"), aff'd, 254 F.3d 300 (D.C. Cir. 2001).

[136] 5 U.S.C. § 552(a)(6)(B)(ii); cf. Al-Fayed, No. 00-2092, slip op. at 6 (D.D.C. Jan. 16, 2001) (observing that Act "places the onus of modification [of a request's scope] squarely upon the requester, and does not indicate that an equal burden rests with the agency to 'negotiate' an agreeable 'deadline'").

[137] 5 U.S.C. § 552(a)(6)(B)(ii).

[138] Id. § 552(a)(6)(A)(ii).

[139] See id.; see also *FOIA Post*, "OIP Guidance: New Requirement to Route Misdirected FOIA Requests" (posted 11/18/08).

the initial receiving component fails to route such a request to the proper component within ten days, the proper component's twenty-day time period to make a request determination begins to run nevertheless (provided that the request is otherwise a proper FOIA request).[140] The FOIA's routing requirement applies exclusively to components within an agency; it does not obligate components of an agency to route requests to components of a different agency.[141]

The FOIA permits agencies to toll the twenty-day time period (i.e., stop the clock) under two circumstances: (1) one time to obtain information from the requester; and (2) as "necessary" to clarify fee-related issues with the requester.[142] The one-time tolling permitted to seek information is limited to situations where the agency is awaiting information that it has "reasonably requested" from the requester.[143] While an agency may only toll once while seeking information from the requester, as a matter of sound administrative practice, an agency is not prohibited from contacting a requester as many times as needed to facilitate processing the request.[144]

An agency may also toll the time period "if necessary" to clarify with the requester issues pertaining to fee assessment.[145] Unlike the first circumstance, provided that tolling is necessary to clarify fee assessment issues, there is no statutory limit on the number of times an agency may toll for that purpose.[146] In either circumstance, the agency's receipt of the requester's response ends the tolling period and the response time clock resumes.[147]

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[140] See 5 U.S.C. § 552(a)(6)(A)(ii); see also *FOIA Post*, "OIP Guidance: New Requirement to Route Misdirected FOIA Requests" (posted 11/18/08).

[141] See 5 U.S.C. § 552(a)(6)(A)(ii); see also *FOIA Post*, "OIP Guidance: New Requirement to Route Misdirected FOIA Requests" (posted 11/18/08).

[142] See 5 U.S.C. § 552(a)(6)(A)(ii).

[143] Id. § 552(a)(6)(A)(ii)(I).

[144] Id.; see *FOIA Post*, "OIP Guidance: New Limitations on Tolling the FOIA's Response Time" (posted 11/18/08) (advising that if contacting requester for non-fee related information more than one time will facilitate processing of request, agency is free to do so, but clock will continue to run in that event); see also *FOIA Post*, "OIP Guidance: The Importance of Good Communication with FOIA Requesters" (posted 03/01/10) (noting that agencies should work "'in a spirit of cooperation'" with requesters and "'[u]nnecessary bureaucratic hurdles have no place in 'new era of open Government'").

[145] 5 U.S.C. § 552(a)(6)(A)(ii)(II); see also *FOIA Post*, "OIP Guidance: New Limitations on Tolling the FOIA's Response Time" (posted 11/18/08).

[146] See 5 U.S.C. § 552(a)(6)(A)(ii)(II); see also *FOIA Post*, "OIP Guidance: New Limitations on Tolling the FOIA's Response Time" (posted 11/18/08) (noting that fee issues may arise sequentially during processing of request and cannot always be resolved at one given point in time).

[147] See 5 U.S.C. § 552(a)(6)(A)(ii)(II).

The FOIA expressly authorizes agencies to promulgate regulations providing for "multitrack processing" of their FOIA requests -- which allows agencies to process requests on a first-in, first-out basis within each track, and also permits them to respond to relatively simple requests more quickly than requests involving complex and/or voluminous records.[148]

The FOIA provides that a requester is "deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions."[149] In this situation, a requester may seek judicial review.[150] (For a discussion of the requirements of constructive exhaustion, see Litigation Considerations, Exhaustion of Administrative Remedies, below.) Once in court, the agency may receive additional time to process the request if it shows that its failure to meet the statutory time limits is the result of "exceptional circumstances" and that it has exercised "due diligence" in processing the request.[151]

Finally, the FOIA provides that "[a]n agency shall not assess search fees (or in the case of a requester [who is an educational or noncommercial scientific institution or a representative of the news media, shall not charge], duplication fees) . . . if the agency fails to comply with any time limit under paragraph (6) [of the FOIA], if no unusual or exceptional circumstances (as those terms are defined [under the FOIA]) apply to the

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[148] 5 U.S.C. § 552(a)(6)(D); see, e.g., DOJ FOIA Regulations, 28 C.F.R. § 16.5(b) (2012); see also DOJ, OIP Guidance: Guidance for Further Improvement from 2012 Chief FOIA Officer Report Review and Assessment (2012) (encouraging agencies to consider adopting multi-track system which could allow for improved timeliness for "simple" track requests and allow requesters option of tailoring their request to fit within "simple" track system); FOIA Update, Vol. XVIII, No. 1, at 6 (discussing multitrack processing for agencies with decentralized FOIA operations); cf. *FOIA Post*, "2008 Guidelines for Agency Preparation of Annual FOIA Reports" (posted 5/22/2008) (reflecting reporting of multitrack-processing and data related to requests for expedited processing).

[149] 5 U.S.C. § 552(a)(6)(C)(i).

[150] See, e.g., CREW, 711 F.3d at 189 (holding that "if an agency does not adhere to certain statutory timelines in responding to a FOIA request, the requester is deemed by statute to have fulfilled the exhaustion requirement"); cf. Flaherty v. IRS, 468 Fed. Appx. 8, at 9 (D.C. Cir. 2012) (holding that administrative exhaustion requirement re-triggered by agency response after twenty-day limit, but before plaintiff filed complaint); Judicial Watch, Inc. v. U.S. Dep't of Energy, No. 11-2140, 2012 WL 3781865, at *3 (D.D.C. Aug. 31, 2012) (same); Perez-Rodriguez v. DOJ, No. 11-0556, 2012 WL 3764763, at *4 (D.D.C. Aug. 31, 2012) (same).

[151] See 5 U.S.C. § 552(a)(6)(C); CREW, 711 F.3d at 185 (holding that "[i]f exceptional circumstances exist, then so long as 'the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records.'" (quoting 5 U.S.C. § 552(a)(6)(C)(i))).

processing of the request."[152] In other words, in those situations where the request does not present unusual or exceptional circumstances, as described above, an agency is prohibited from assessing search fees (or duplication fees if the requester is an educational or noncommercial scientific institution or a representative of the news media) if the agency fails to comply with the FOIA's time limits.[153] Conversely, for those requests for which unusual or exceptional circumstances do exist, for example, when the request involves a voluminous amount of records or there is a need to search in separate facilities, agencies may assess appropriate fees.[154]

Expedited Processing

The FOIA requires agencies to issue regulations that provide for the expedited processing of FOIA requests for requesters who demonstrate "compelling need,"[155] or for any other case deemed appropriate by the agency.[156] Under the FOIA, a requester can show "compelling need" in one of two ways: (1) by establishing that his or her failure to obtain the records quickly "could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;"[157] or, (2) if the requester is a "person primarily engaged in

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[152] U.S.C. § 552(a)(4)(A)(viii); see also *FOIA Post*, "OIP Guidance: New Limitations on Assessing Fees" (posted 11/18/08).

[153] 5 U.S.C. § 552(a)(4)(A)(viii); see also *FOIA Post*, "OIP Guidance: New Limitations on Assessing Fees" (posted 11/18/08).

[154] 5 U.S.C. § 552(a)(4)(A)(viii); see Rosenberg v. ICE, No. 12-452, 2013 WL 3803899, at *6-8 (D.D.C. July 31, 2013) (holding that agency was not "time-barred from requesting search fees" because agency's "need[] to search for and collect records" offsite constituted "unusual circumstances" allowing agency to charge search fees "despite failing to comply with [FOIA's] timing requirements," and further finding that such fees were chargeable even though agency "did not comply with the procedural requirements for seeking additional time," and concluding that "fact that a fee request was made after the Plaintiff commenced litigation does not excuse the Plaintiff from paying the requested fees"); see also *FOIA Post*, "OIP Guidance: New Limitations on Assessing Fees" (posted 11/18/08).

[155] 5 U.S.C. § 552(a)(6)(E) (2006 & Supp. IV 2010).

[156] See 5 U.S.C. § 552(a)(6)(E)(i)(II); see also, e.g., DOJ FOIA Regulations, 28 C.F.R. § 16.5(d)(1)(iii), (iv) (2012) (providing that requests will be granted expedited processing if they involve "[t]he loss of substantial due process rights" or "a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence"); Dep't of State Regulation, 22 C.F.R. § 171.12(b)(1) (2011) (providing for expedited processing if "[f]ailure to obtain requested information on an expedited basis could reasonably be expected to . . . harm substantial humanitarian interests").

[157] 5 U.S.C. § 552(a)(6)(E)(v)(I); see Lawyers Comm. for Civil Rights of the San Francisco Bay Area v. U.S. Dep't of the Treasury, No. 07-2590, 2009 WL 2905963, at *2 (N.D. Cal. Sept. 8, 2009) (denying request for expedited processing because plaintiff "failed to adequately develop the arguments and authority in support of such a request"); Judicial

disseminating information,"[158] by demonstrating that there exists an "urgency to inform the public concerning actual or alleged Federal Government activity."[159]

Watch, Inc. v. Rossotti, No. 01-2672, 2002 WL 31962775, at *2 n.8 (D. Md. Dec. 16, 2002) (denying plaintiff's request for expedited processing because its allegations "that it was the victim of ongoing criminal activity" and that "it would be unable to vindicate its rights without the requested documents . . . . do[] not meet the statutory definition of 'compelling need'"), aff'd sub nom. Judicial Watch, Inc. v. United States, 84 F. App'x 335 (4th Cir. 2004).

[158] 5 U.S.C. § 552(a)(6)(E)(v)(II); see also, e.g., Landmark Legal Found. v. EPA, No. 12-1726, 2012 WL 6644362, at *4 (D.D.C. Dec. 21, 2012) (holding that information dissemination as "'part of [plaintiff's] mission,'" is not sufficient to demonstrate that plaintiff is "primarily, and not just incidentally, engaged in information dissemination"); Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (concluding that "plaintiff is primarily engaged in disseminating information . . . regarding civil rights"), appeal dismissed, No. 06-5055 (D.C. Cir. Apr. 28, 2006); Tripp v. DOD, 193 F. Supp. 2d 229, 241 (D.D.C. 2002) ("To be sure, plaintiff has been the object of media attention and has at times provided information to the media, but there is no evidence . . . that she is 'primarily' engaged in such efforts.").

[159] 5 U.S.C. § 552(a)(6)(E)(v)(II); see, e.g., DOJ FOIA Regulations, 28 C.F.R. § 16.5(d)(ii) (2012); see also Bloomberg, L.P v. FDA, 500 F. Supp. 2d 371, 377-78 (S.D.N.Y. 2008) (stating that information may "concern" government activity even if agency records did not originate within agency, and that urgency of public's need is not lessened by public's alleged inability to understand certain raw data contained in records); Long v. DHS, 436 F. Supp. 2d 38, 43 (D.D.C. 2006) (finding that requester failed to link need for records to "imminent action" that would affect usefulness of records); ACLU v. DOD, No. 06-1698, 2006 WL 1469418, at *7-8 (N.D. Cal. May 25, 2006) (finding that requesters established "public's need to know" as well as "urgency of the news" related to Pentagon intelligence program, and stating that "extensive media interest usually is a fact supporting not negating urgency"); IEEE Spectrum v. DOJ, No. 05-0865, slip op. at 2 (D.D.C. Feb. 16, 2006) (finding that requester failed to establish "'current exigency'" when it merely demonstrated its own desire to publish the requested information, "a self-serving assertion that carries very little weight"); Leadership Conference on Civil Rights, 404 F. Supp. 2d at 260 (finding that "[p]laintiff's FOIA requests could have a vital impact on development of the substantive record" related to issue of re-authorization of provisions of Voting Rights Act); Elec. Privacy Info. Ctr. v. DOD, 355 F. Supp. 2d 98, 101 (D.D.C. 2004) (finding that, by demonstrating public interest in only general topic rather than specific subject of its requests, requester failed to demonstrate "urgency to inform"); Tripp, 193 F. Supp. 2d at 241 (holding that plaintiff's "job application to the Marshall Center and the resulting alleged Privacy Act violations by DOD are not the subject of any breaking news story"); FOIA Update, Vol. XIX, No. 4, at 2 (discussing Nazi War Crimes Disclosure Act, 5 U.S.C. § 552 note (2006), which does not directly amend the FOIA, but which does "impact[] directly on the FOIA [in that it provides] that any person who was persecuted by the Nazi government of Germany or its allies 'shall be deemed to have a compelling need' under 'section 552(a)(6)(E) of title 5, United States Code'" in making requests for access to classified Nazi war-criminal records (quoting 5 U.S.C. § 552 note, § 4)).

The Court of Appeals for the District of Columbia Circuit has explained that the FOIA requires the consideration of several factors to determine if the "urgency to inform" standard is satisfied.[160] The factors for consideration include whether a request concerns a "matter of current exigency to the American public," whether the consequences of delaying a response would "compromise a significant recognized interest," whether the request concerns "federal government activity," and the credibility of the requester's "allegations regarding governmental activity."[161] In this regard, courts have found a distinction between the general public interest in the overall subject matter of a FOIA request and the public interest that might be served by disclosure of the actual records sought or those responsive to a particular FOIA request.[162]

Agencies must make a determination whether to grant a request for expedited access within ten calendar days of its receipt.[163] Agency denials of requests for expedited processing and the failure to respond timely to such a request are subject to judicial review.[164]

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[160] Al-Fayed v. CIA, 254 F.3d 300, 310 (D.C. Cir. 2001).

[161] Id.

[162] See, e.g., Electronic Privacy Info. Ctr. v. DOD, 355 F. Supp. 2d 98, 102 (D.D.C. 2004) (upholding denial of expedited processing when requester had "failed to present the agency with evidence that there is a 'substantial interest' in the 'particular aspect' of [its] FOIA request," finding that, "[t]he fact that [the requester] has provided evidence that there is some media interest in data mining as an umbrella issue does not satisfy the requirement that [it] demonstrate interest in the specific subject of [its] FOIA request"); Landmark Legal Found., 2012 WL 6644362, at *4 (rejecting notion that matter is urgent merely because it is of public interest or concerns public health and economic well-being because, "such a justification would likely sweep almost any FOIA request into the ambit of 'urgency' since FOIA requests are regularly designed to elicit information about how the government is performing its work"); ACLU of N. Cal. v. DOJ, No. 04-4447, 2005 WL 588354, at *13 (N.D. Cal. Mar. 11, 2005) (ruling in "expedited processing" context that "it was not sufficient for the plaintiffs to show [public] interest in only the general subject area of the request"); see also *FOIA Post*, "FOIA Counselor Q&A" (posted 1/24/06) (advising on "the meaning of an 'umbrella issue' under the FOIA," and noting that "[t]he term 'umbrella issue' is . . . one that has been used by agencies and courts alike to make important distinctions when considering public interest issues" in FOIA decisionmaking).

[163] 5 U.S.C. § 552(a)(6)(E)(ii)(I); see, e.g., DOJ FOIA Regulations, 28 C.F.R. § 16.5(d)(4); Dep't of Interior FOIA Regulations, 43 C.F.R. § 2.14(d).

[164] Id. § 552(a)(6)(E)(iii); see ACLU v. DOJ, 321 F. Supp. 2d 24, 29 (D.D.C. 2004) (stating that requester's failure to appeal agency's decision denying expedited processing "does not preclude judicial review of the decision").

An agency that grants expedited processing of a request must process it "as soon as practicable."[165] Some courts have held that an agency's failure to process such a request within the twenty-day non-expedited time limit raises a rebuttable presumption that the agency has failed to process the request "as soon as practicable."[166]

Searching for Responsive Records

The FOIA defines the term "search" as "to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request."[167] As a general rule, courts require agencies to undertake a search that is "reasonably calculated to uncover all relevant documents."[168] The Court of Appeals for the

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[165] 5 U.S.C. § 552(a)(6)(E)(iii); see Elec. Privacy Info. Ctr. v. DOJ, 416 F. Supp. 2d 30, 39 (D.D.C. 2006) ("The legislative history of the amendments makes clear that, although Congress opted not to impose a specific deadline on agencies processing expedited requests, its intent was to 'give the request priority for processing more quickly than otherwise would occur.'" (quoting S. Rep. No. 104-272, at 17 (1996))); Gerstein v. CIA, No. 06-4643, 2006 WL 3462658, at *8 (N.D. Cal. Nov. 29, 2006) (noting that "FOIA does not set forth a specific deadline by which expedited processing . . . must be concluded," but rather provides that requests granted expedited processing shall be processed "as soon as practicable"); ACLU v. DOD, 339 F. Supp. 2d 501, 503-04 (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." (citing § 552(a)(6)(E)(iii)).

[166] See, e.g., Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence, 542 F. Supp. 2d 1181, 1186 (N.D. Cal. 2008) (finding that agency processing expedited request "presumptively" failed to meet its expedited processing obligations when it failed to meet the standard twenty-day deadline (citing Elec. Privacy Info. Ctr., 416 F. Supp. 2d at 37-39)); Elec. Privacy Info. Ctr., 416 F. Supp. 2d at 37-39 (discussing presumption and stating that agencies can rebut it by presenting "credible evidence" that twenty-day time limit is "truly not practicable").

[167] 5 U.S.C. § 552(a)(3)(D)(2006 & Supp. IV 2010).

[168] See Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983); Campbell v. SSA, 446 F. App'x 477, 480 (3d Cir. June 3, 2011) (same) (citing Weisberg, 705 F.2d at 1351); see also Anderson v. DOJ, 326 F. App'x 591, 592 (2d Cir. 2009) (finding search reasonable and adequate where agency conducted two searches, and described in detail how it did so, including operation of database used); Miccosukee Tribe of Indians of Fla. v. United States, 516 F.3d 1235, 1257-58 (11th Cir. 2008) (reiterating that agency is obligated to show search was reasonably calculated to uncover all relevant documents, but rejecting assertion that this requires agency to provide testimony from each person involved in search, and declining to establish "what inference [as to search adequacy], if any, can be . . . drawn from the late production . . . of FOIA documents"); Lee v. U.S. Attorney, 289 F. App'x 377, 380-81 (11th Cir. 2008) (concluding that agency's search was reasonably calculated to uncover requested records and explaining that "FOIA does not require an agency to exhaust all files which conceivably could contain relevant information" (emphasis added) (quoting Ray v. DOJ, 908 F.2d 1549, 1558-59 (11th Cir. 1990), rev'd on other grounds, 502 U.S. 164 (1991)));

District of Columbia has held that "'the adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search.'"[169] The adequacy of an agency's search is judged by a test of "reasonableness," which will vary from case to case.[170] Courts have found searches to be reasonable when, among other things, they are based on a reasonable interpretation of the scope of the subject matter of the request.[171] Relatedly, courts have held that an agency's search is reasonable

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Williams v. DOJ, 177 F. App'x 231, 233 (3d Cir. 2006) (recognizing that an agency "has a duty to conduct a reasonable search for responsive records" (citing Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990))); Johnston v. DOJ, 163 F.3d 602, at *1 (8th Cir. 1998) (unpublished table opinion) (concluding that agency demonstrated that it conducted search reasonably calculated to uncover all responsive documents); Miller v. U.S. Dep't of State, 779 F.2d 1378, 1383 (8th Cir. 1985) (recognizing that search must be "'reasonably calculated to uncover all relevant documents'" (quoting Weisberg, 705 F.2d at 1351)); Media Research Ctr. v. DOJ, 818 F. Supp. 2d 131, 138 (D.D.C. 2011) (concluding that search was reasonably calculated because search terms would uncover responsive e-mail documents, even if all possible e-mail accounts were not searched); Kortlander v. Bureau of Land Mgmt., 816 F. Supp. 2d 1001, 1008 (D. Mont. 2011) (determining that twenty-one agency employees who searched eight offices, including multiple paper and electronic file systems, conducted reasonably calculated search for responsive records); Bonilla v. DOJ, 798 F. Supp. 2d 1325, 1330 (S.D. Fla. 2011) (finding search reasonably calculated when paralegal sent email to all personnel seeking responsive records, asked for records from attorney assigned to case, and conducted electronic search for documents using multiple search terms); Judicial Watch, Inc. v. DOJ, 806 F. Supp. 2d 74, 77-78 (D.D.C. 2011) (finding that agency's three-pronged search of emails, network and local files was reasonably calculated to return all responsive records); Allen v. U.S. Secret Serv., 335 F. Supp. 2d 95, 99 (D.D.C. 2004) (concluding that agency's search of its "comprehensive [Master Central Index] system is a search method that could be 'reasonably expected to produce the information requested'" (citing Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990))); cf. Comer v. IRS, No. 97-76329, 2000 WL 1566279, at *2 (E.D. Mich. Aug. 17, 2000) ("[T]he government is not required to expend the same efforts under FOIA that it would in response to a litigation-specific document request.").

[169] Jennings v. DOJ, 230 F. App'x 1, 1 (D.C. Cir. 2007) (quoting Iturralde v. Comptroller of Currency, 315 F.3d 311, 315 (D.C. Cir. 2003)); Delorme v. EOUSA, No. 12-0535, 2012 WL 5839513, at *1 (D.D.C. Nov. 16, 2012) (same).

[170] See Zemansky v. EPA, 767 F.2d 569, 571-73 (9th Cir. 1985) (observing that the reasonableness of an agency search depends upon the facts of each case (citing Weisberg, 705 F.2d at 1351)).

[171] See, e.g., Larson v. Dep't of State, 565 F.3d 857, 869 (D.C. Cir. 2009) (affirming adequacy of search based on agency's reasonable determination regarding records being requested and searched accordingly); Rein v. U. S. Patent & Trademark Office, 553 F.3d 353, 363 (4th Cir. 2009) (ruling that agency's "decision to use the searches conducted in response to [prior, similar] requests as the starting point for responding to [current] requests was not inherently unreasonable and appears to be a practical and common-sense approach" because "[t]he requests sought similar information related to the same subject matter"); Hayden v. DOJ, No. 03-5078, 2003 WL 22305071, at *1 (D.C. Cir. Oct. 6, 2003) (per

when it focused on the records specifically mentioned in the request.[172] At times the particular records custodians chosen by the agency to search are examined by the court,

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curiam) (rejecting plaintiff's argument that agency should have searched for records about him in case file of another individual who was mentioned during his criminal trial, because "[b]ased on [plaintiff's] FOIA requests, the [agency] reasonably limited the scope of its search to [his own] criminal case file"); Coal. on Political Assassinations v. DOD, 12 F. App'x 13, 13-14 (D.C. Cir. 2001) (finding that agency conducted reasonable search pursuant to "limited request" and "specific code words" later provided by requester); Williams v. Comm'r of Internal Revenue, No. 08-522-JJB-CN, 2010 U.S. Dist. LEXIS 128385, at *2 (M.D. La. Dec. 3, 2010) (concluding that agency conducted reasonable search when it located correct case file despite incorrect information provided by requester); Amnesty Int'l v. CIA, No. 07-5435, 2008 WL 2519908, at *13 (S.D.N.Y. June 19, 2008) (rejecting claim that search was too narrow, stating that where agency had no doubt about what request sought, agency not obligated to "'search anew based upon a subsequent clarification,'" as to do so would allow requester additional requests with same priority as original (quoting Kowalczyk v. DOJ, 73 F.3d 386, 388 (D.C. Cir. 1996)); Kidder v. FBI, 517 F. Supp. 2d 17, 23-24 (D.D.C. 2007) (holding that "based on plaintiff's clear request [that did not reference aliases], agency is under no obligation to search . . . any names other than [name stated in request]"); Rothschild v. DOE, 6 F. Supp. 2d 38, 40 (D.D.C. 1998) (declaring that agency is not required to search for records that "do not mention or specifically discuss" subject of request).

[172] See Ledesma v. U.S. Marshals Serv., No. 05-5150, 2006 U.S. App. LEXIS 11218, at *2 (D.C. Cir. Apr. 19, 2006) (finding that search was adequate where requester did not "specifically mention" cellblock video and agency did not conduct search for video); Gilliland v. BOP, No. 03-5251, 2004 WL 885222, at *1 (D.C. Cir. Apr. 23, 2004) (rejecting requester's claim that agency "should have contacted the federal officials connected with [the] allegedly missing documents," because his FOIA requests "did not specify these officials or otherwise indicate that they might have responsive records"); Halpern v. FBI, 181 F.3d 279, 289 (2d Cir. 1999) (holding cross-referenced files to be beyond scope of request because once agency "had requested such clarification [about requester's interest in receiving such records], it could then in good faith ignore the cross-referenced files until it received an affirmative response" from requester); Kowalczyk, 73 F.3d at 389 (finding search limited to headquarters' files reasonable because plaintiff sent request there and description of records sought did not alert agency that he sought records from field office); Maynard v. CIA, 986 F.2d 547, 560 (1st Cir. 1993) (finding that agency's search was properly limited to records about named individual, with no requirement that secondary references or variant spellings be checked); White v. DOJ, 840 F. Supp. 2d 83, 89-91 (D.D.C. 2012) (reasoning that EOUSA was not required to contact FBI to research criminal case number, instead EOUSA conducted adequate search based on FBI file number provided in request); Petit-Frere v. U.S. Attorney's Office for the S. Dist. of Fla., 800 F. Supp. 2d 276, 279-280 (D.D.C. 2011) (affirming agency's search using only variations of plaintiff's name, stating that request did not ask agency to search using names of plaintiff's co-defendants from his criminal trial); Truesdale v. DOJ, 803 F. Supp. 2d 44, 51 (D.D.C. 2011) (affirming agency's decision to search system of records specifically mentioned in plaintiff's clarification of his request); Antonelli v. ATF, No. 04-1180, 2006 WL 367893, at *7 (D.D.C. Feb. 16, 2006) (concluding that FBI's search of Central Records System was reasonable and that FBI was not obliged under FOIA to search its computer hard drives for preliminary work product

with searches found to be reasonable when the selection was adequately explained,[173] but found to be unreasonable when it was not.[174]

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when requester did not specifically request search of FBI's "I" drives); Hamilton Sec. Group v. HUD, 106 F. Supp. 2d 23, 27 (D.D.C. 2000) (finding that "[g]iven the exchange of correspondence between counsel and the agency relating to the scope of the request, there is no basis for plaintiff's claim that defendant should have understood that the request for a [single, specific record] was meant to include additional [records]"), aff'd per curiam, No. 00-5331, 2001 WL 238162 (D.C. Cir. Feb. 23, 2001); Murphy v. IRS, 79 F. Supp. 2d 1180, 1185-86 (D. Haw. 1999) (holding that agency "conducted a reasonable search in light of the fact that Plaintiff gave no indication as to what types of files could possibly contain documents responsive to this request or where they might be located"); cf. Ahanmisi v. U.S. Dep't of Labor, 859 F. Supp. 2d 7, 10-11 (D.D.C. 2012) (noting that although agency did not search using one variation of plaintiff's name, agency's search using multiple other name variations constituted reasonable search).

[173] See Adamowicz v. IRS, 402 F. App'x 648, 651 (2d Cir. 2010) (finding agency's search for records with "'sole employee'" who conducted investigation was "'reasonably calculated to discover the requested documents'") (citing Grand Cent. P'ship Inc. v. Cuomo, 166 F.3d 473, 489 (2d Cir. 1999); Rugiero v. DOJ, 257 F.3d 534, 547-48 (6th Cir. 2001) (rejecting plaintiff's contention that "agent [who] testified against him at trial" must have records about him given that agency established that employee who testified had no such records); Judicial Watch v. DOD, 857 F. Supp. 2d 44, 53-55 (D.D.C. 2012) (affirming DOD's search for records, noting that because request concerns "the most highly classified operation that this government has undertaken in many, many years . . . [i]f DOD has possession of these records, the relevant individuals are well aware of that fact"); Pub. Emps. for Envtl. Responsibility v. U.S. Section Int'l Boundary and Water Comm'n., 839 F. Supp. 2d 304, 317-18 (D.D.C. 2012) (concluding that agency's search was reasonable where its legal affairs staff assessed request and forwarded it to correct division, and employee with "significant experience" in the subject matter conducted search for responsive documents); Amnesty Int'l USA v. CIA, 728 F. Supp. 2d 479, 499-500 (S.D.N.Y. 2010) (concluding that "a search that included having the person most knowledgeable regarding [subject of request] inquire into the existence of [the records]" was thorough), aff'd in part, rev'd in part & remanded on other grounds, 539 F.3d 1143 (9th Cir. 2008); Blanton v. DOJ, 182 F. Supp. 2d 81, 85 (D.D.C. 2002) ("[T]he FOIA does not impose an obligation on defendant to contact former employees to determine whether they know of the whereabouts of records that might be responsive to a FOIA request."), aff'd on other grounds, 64 F. App'x 787 (D.C. Cir. 2003); Vigneau v. O'Brien, No. 99-37ML, slip op. at 5 (D.R.I. Aug. 3, 1999) (magistrate's recommendation) (finding search adequate when agency employee who plaintiff alleged wrote requested records provided affidavit stating that no such records ever existed); cf. Chilingirian v. U.S. Attorney Executive Office, 71 F. App'x 571, 572 (6th Cir. 2003) ("The record shows that defendants went beyond the requirements of a reasonable search by contacting the attorneys who might know of the existence of the [requested] records, even though they were no longer employed by defendants."); Atkin v. IRS, No. 04-0080, 2005 WL 1155127, at *3 (N.D. Ohio Mar. 30, 2005) (stating that "additional efforts to contact a former employee are irrelevant under the appropriate standard of reasonable effort" (citing Chilingirian, 71 F. App'x at 571, 572).

Courts have disfavored searches that are based on unreasonable interpretations of the scope of the request,[175] or which exclude files where records might have been located.[176] In

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[174] See Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 328 (D.C. Cir. 1999) (finding that because requester provided agency with name of agency employee who possessed requested records during requester's criminal trial, "[w]hen all other sources fail to provide leads to the missing records, agency personnel should be contacted if there is a close nexus, as here, between the person and the particular record"); Houghton v. U.S. Dep't of State, No. 11-869, 2012 WL 2855868, at *6 (D.D.C. July 12, 2012) (holding that search was inadequate because it did not include email account of individual who "may have been treated as an employee of State in some ways," and therefore, court could not rule out possibility that individual might have held State Department email account); Hardy v. DOD, No. 99-523, 2001 WL 34354945, at *5 (D. Ariz. Aug. 27, 2001) (requiring agency "to locate the presumably few witnesses who were responsible for operating the closed circuit television system, the robots, and any other video sources" who might have created requested tapes); Comer v. IRS, No. 97-76329, 1999 WL 1022210, at *1 (E.D. Mich. Sept. 30, 1999) (rejecting agency's assertion that it conducted a reasonable search when plaintiff "listed a small number of specific persons who might have knowledge of [requested documents] and specific places where they might be found" and agency did not indicate that it searched there).

[175] See, e.g., Ctr. for Biological Diversity v. Office of the U.S. Trade Representative, 450 Fed. Appx. 605, 607 (9th. Cir. 2011) (concluding that agency's limitation of search to documents from particular time period was unreasonable when request asked for documents likely generated before date restriction of agency search); Truitt v. Dep't of State, 897 F.2d 540, 544-46 (D.C. Cir. 1990) (stating that when request was "reasonably clear as to the materials desired," agency failed to conduct adequate search as it did not include file likely to contain responsive records); Nat'l Sec. Counselors v. CIA, 549 F. Supp. 2d 6, 12-13 (D.D.C. 2012) (agreeing that agency might have unreasonably limited scope of request because search results indicated that agency was aware that plaintiff sought records related to particular subject); Pub. Emps. For Envtl. Responsibility v. U.S. Int'l Boundary & Water Comm'n, 842 F. Supp. 2d 219, 224-26 (D.D.C. 2012) (noting that agency improperly limited scope of request when it responded to question not asked by plaintiff, and did not search for "all documents" related to request's subject); Amnesty Int'l USA, 728 F. Supp. 2d at 499 (finding that despite plaintiff's use of incorrect terminology in its request, "the accompanying definition [in attached memoranda] was sufficient to put the CIA on notice of the documents Plaintiffs requested"); Amnesty Int'l, 2008 WL 2519908, at *14-15 (noting that electronic searches "designed to return documents containing [for example] the phrase 'CIA detainees' but not 'CIA detainee' or 'detainee of the CIA'" are unreasonable); Jackson v. U.S. Attorney's Office, Dist. of N.J., 362 F. Supp. 2d 39, 42 (D.D.C. 2005) (concluding that agency's search was inadequate where, inter alia, it sought records pertaining to requester instead of records pertaining to investigation that requester wanted initiated); Wilderness Soc'y v. U.S. Bureau of Land Mgmt., No. 01-2210, 2003 WL 255971, at *5 (D.D.C. Jan. 15, 2003) (concluding that agency's search was inadequate because "responsive documents [possibly maintained] in the locations searched may not have been produced as a result of the [agency's] narrow interpretation of plaintiffs' request"); Doolittle v. DOJ, 142 F. Supp. 2d 281, 285 (N.D.N.Y. 2001) (concluding that as long as description of records sought is

addition, the reasonableness of an agency's search can depend on whether the agency properly determined where responsive records were likely to be found, and searched those locations,[177] or whether the agency improperly limited its search to certain record systems.[178]

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otherwise reasonable, agency cannot refuse to search for records simply because requester did not also identify them by date on which they were created).

[176] See, e.g., Miccosukee, 516 F.3d at 1252-55 (stating that agency's "self-imposed limitations on its search were unreasonable and inaccurately depicted what the Tribe really sought" where agency excluded from its search all publicly available documents when Tribe merely desired no voluminous publicly available records it already had); Info. Network for Responsible Mining v. Bureau of Land Mgmt., 611 F. Supp. 2d 1178, 1184-85 (D. Colo. 2009) (concluding that agency's search was not reasonable where agency searched project file of one employee despite fact that request identified twenty-four employees in four offices likely to have responsive records, and agency located only six responsive documents in project file); Wheeler v. EOUSA, No. 05-1133, 2008 WL 178451, at *8-9 (D.D.C. Jan. 17, 2008) (finding search unreasonable because agency did not search requester's co-defendant's files where request was for records related to criminal case, not just requester, and where requester also notified agency of this search deficiency); Jefferson v. BOP, No. 05-00848, 2006 WL 3208666, at *6 (D.D.C. Nov. 7, 2006) (finding search not reasonable when agency searched only its Central Records System database, where breadth of request warranted search of "I" drive database); Kennedy v. DOJ, No. 03-CV-6077, 2004 WL 2284691, at *4 (W.D.N.Y. Oct. 8, 2004) (finding search inadequate where agency did not search field office when request specifically mentioned that field office); Summers v. DOJ, 934 F. Supp. 458, 461 (D.D.C. 1996) (notwithstanding fact that plaintiff's request specifically sought access to former FBI Director J. Edgar Hoover's "commitment calendars," finding agency's search inadequate because agency did not use additional search terms such as "appointment" or "diary"); Canning v. DOJ, 919 F. Supp. 451, 460-61 (D.D.C. 1994) (indicating that when agency was aware that subject of request used two names, it should have conducted search under both names).

[177] See, e.g., Karantsalis v. DOJ, 635 F. 3d 497, 500-501 (11th Cir. 2011) (affirming district court's determination that agency searched for records in system most likely to store responsive records and described how it retrieved records from system); Lechliter v. Rumsfeld, 182 F. App'x 113, 115 (3d Cir. 2006) (concluding that agency fulfilled duty to conduct a reasonable search when it searched two offices that it "determined to be the only ones likely to possess responsive documents" (citing Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990))); McKinley v. Bd. of Governors of the Fed. Reserve Sys., 849 F. Supp. 2d 47, 55-56 (D.D.C. 2012) (concluding that agency's search was reasonable because agency determined that all responsive records were located in particular location created for express purpose of collecting records related to subject of request and searched that location); Performance Coal Co. v. U.S. Dep't of Labor, 847 F. Supp. 2d 6, 12-13 (D.D.C. 2012) (finding agency's search "reasonably tailored" when it identified two of eighteen regional offices most likely to maintain responsive records and it searched those offices' paper, electronic, and archived files); James Madison Project v. CIA, 605 F. Supp. 2d 99, 108 (D.D.C. 2009) (concluding that "search method could reasonably be expected to produce the information requested" because all agency regulations requested were maintained in one records system and agency searched that system for responsive records);

Brehm v. DOD, 593 F. Supp. 2d 49, 50 (D.D.C. 2009) (finding search was adequate where agency searched two systems likely to have responsive records and where agency also declared other systems were unlikely to have responsive records); Callaway v. Dep't of Treasury, 577 F. Supp. 2d 1, 1-3 (D.D.C. 2008) (concluding that search for proffer statement was not inadequate since not limited to documents titled "proffer statement," as previously believed, but rather included examination of document content); Knight v. NASA, No. 04-2054, 2006 WL 3780901, at *5 (E.D. Cal. Dec. 21, 2006) (stating that "there is no requirement that an agency search all possible sources in response to a FOIA request when it believes all responsive documents are likely to be located in one place"); Sakamoto v. EPA, 443 F. Supp. 2d 1182, 1198 (N.D. Cal. 2006) (finding agency's search within one region to be adequate when agency "reasonably concluded" that responsive documents would "most likely" be there); Blanton v. DOJ, 63 F. Supp. 2d 35, 41 (D.D.C. 1999) (noting that even though agency did not search individual informant files for references to requester, any responsive information in such files would have been identified by agency's "cross-reference" search using requester's name); Hall v. DOJ, 63 F. Supp. 2d 14, 17-18 (D.D.C. 1999) (finding that agency need not search for records concerning subject's husband even though such records may have also included references to subject); Iacoe v. IRS, No. 98-C-0466, 1999 WL 675322, at *4 (E.D. Wis. July 23, 1999) (recognizing that agency "diligently searched for the records requested in those places where [agency] expected they could be located"); Nation Magazine v. U.S. Customs Serv., No. 94-00808, slip op. at 8, 13-14 (D.D.C. Feb. 14, 1997) (stating that reasonable search did not require agency to search individual's personnel file in effort to locate substantive documents drafted by him).

[178] See, e.g., Calloway v. U.S. Dep't of Treasury, No. 08-5480, 2009 U.S. App. LEXIS 11941, at *3 (D.C. Cir. June 2, 2009) (finding that agency "should not have limited its search to the [plaintiff's] criminal investigative files, when the request appears to encompass additional material, which may not be located in a criminal investigative file"); Morley, 508 F.3d at 1119-20 (holding that because agency "retained copies of the records transferred to NARA and concedes that some transferred records are likely to be responsive, it was obligated to search those records in response to [request]"); Jefferson v. DOJ, 168 F. App'x 448, 450 (D.C. Cir. 2005) (reversing district court's finding of reasonable search when agency "offered no plausible justification" for searching only its investigative database and agency "essentially acknowledged" that responsive files might exist in separate database); Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990) (holding that agency may not limit search to one record system if others are likely to contain responsive records); Families for Freedom v. U.S. Customs & Border Prot., No. 10 Civ. 2705, 2011 WL 4599592, at *5 (S.D.N.Y. Sept. 30, 2011) (finding that agency inappropriately limited scope of search when it determined that "child" attachments, but not "parent" e-mails, were responsive to request); Concepcion v. U.S. Customs & Border Prot., 767 F. Supp. 2d 141,146 (D.D.C. 2011) (denying summary judgment for agency because it did "not demonstrate that responsive documents would not reasonably be found in other record systems or that it searched any other potential sources but found no responsive records"); Negley v. FBI, 658 F. Supp. 2d 50, 57-8 (D.D.C. 2009) (denying summary judgment for agency because it "refus[ed] to search" database most likely to contain responsive records); Islamic Shura Council of S. Cal. v. FBI, No. 07-01088, slip op. at 6-7 (C.D. Cal. Apr. 20, 2009) (ordering search of electronic surveillance indices and cross-reference search where agency had initially searched only Central Records System); Friends of Blackwater v. U.S. Dep't of the Interior, 391 F. Supp. 2d 115, 121 (D.D.C. 2005) (finding that search was inadequate because agency had evidence

An agency generally "is not obligated to look beyond the four corners of the request for leads to the location of responsive documents,"[179] but courts have found that an agency does "need to pursue a lead it cannot in good faith ignore, i.e., a lead that is both clear and certain."[180] Additionally, an agency is not generally required to conduct a search for records

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that documents existed that originated in leadership office, but did not forward request to leadership office in accordance with agency's regulations); Wilderness Soc'y v. U.S. Dep't of the Interior, 344 F. Supp. 2d 1, 21 (D.D.C. 2004) (concluding that search was inadequate because agency failed to search Office of Solicitor in response to request for lawsuit and settlement records); Bennett v. DEA, 55 F. Supp. 2d 36, 39-40 (D.D.C. 1999) (holding search inadequate when agency failed to search investigatory files for cases in which subject of request acted as informant, even though agency did not track informant activity by case name, number, or judicial district), appeal dismissed voluntarily, No. 99-5300 (D.C. Cir. Dec. 23, 1999); cf. Davis v. DOJ, 460 F.3d 92, 105 (D.C. Cir. 2006) (remanding case "to provide the agency an opportunity to evaluate [search] alternatives" including nonagency internet search tools); Pena v. BOP, No. 06-2480, 2007 WL 1434869, at *3 (E.D.N.Y. May 14, 2007) (finding, in case involving search that was initially done pursuant to subpoena during which NARA sent transferred records back to BOP and which BOP could not subsequently locate, that search will be deemed adequate "only if the BOP is unable to procure additional copies . . . [and that] if BOP can obtain [them] by making a request to the National Archives . . . it is obligated to do so"); People for the Am. Way Found. v. DOJ, 451 F. Supp. 2d 6, 15 (D.D.C. 2006) (ordering an agency to search a nonagency database because that database is "simply a tool to aid in identifying responsive records from [agency's] database of case files"); Peltier v. FBI, No. 02-4328, 2005 WL 1009595, at *2 (D. Minn. Apr. 26, 2005) (finding it "inexcusable" that agency withheld trial transcripts without first placing "a quick phone call to the Clerk's office" to determine whether documents were publicly available).

[179] Kowalczyk, 73 F.3d at 389; see, e.g., White v. DOJ, No. 12-5067, 2012 U.S. App. LEXIS 14864 (D.C. Cir. July 19, 2012) (concluding that agency's "failure to locate documents responsive to [the] request appears to be a function of the limited information provided in [the] request, and [requester] has not demonstrated that [agency] had a duty to investigate and provide additional search terms"); Rein, 553 F.3d at 363-65 (rejecting argument that searches were inadequate merely because "responsive documents refer to other documents that were not produced" and agency did not pursue "leads" appearing in uncovered documents, explaining that search need only be "reasonably calculated to uncover all relevant documents" based upon request); 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) (finding that agency was "'not obliged to look beyond the four corners of the request for leads to the location of responsive documents"' (quoting Kowalczyk); Cooper v. DOJ, No. 99-2513, 2012 WL 3939231, at *6-7 (D.D.C. Sept. 11, 2012) (finding search adequate because " as a matter of practice," agency does not "search for seized asset information unless [requested] or there is some indication in its records that assets were seized," and when, as here, agency followed "'clear and certain' leads after receiving additional information from [plaintiff],'" and "engaged in an ongoing effort to locate responsive documents" its search was reasonable).

[180] See, e.g., Kowalczyk, 73 F.3d at 389; Int'l Counsel Bureau v. DOD, 864 F. Supp. 2d 101, 108 (D.D.C. 2012) (finding search inadequate because agency did not provide "a satisfactory

outside its control.[181] Further, courts generally find that an agency's inability to locate every single responsive record does not undermine an otherwise reasonable search.[182] Finally,

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response to [plaintiff's] contention that it should have searched for records using an alternate spelling of [a detainee's] name that [plaintiff] discovered from the Department's own records"); see also, e.g., Juda v. U.S. Customs Serv., No. 99-5333, 2000 WL 1093326, at *1 (D.C. Cir. June 19, 2000) (per curiam) (concluding that agency improperly limited its search where it not only "fail[ed] to pursue clear leads to other existing records, but . . . [also] identified at least one other record system . . . likely to produce the information [plaintiff] requests"); Campbell v. DOJ, 164 F.3d 20, 28 (D.C. Cir. 1998) (holding that while "in any FOIA request, the existence of responsive documents is somewhat 'speculative,' . . . the proper inquiry is whether the requesting party has established a sufficient predicate to justify searching for a particular type of record"); El Badrawi v. DHS, 583 F. Supp. 2d 285, 302-03 (D. Conn. 2008) (finding search inadequate where agency did not search U.S. embassy in Beirut, but was aware that embassy likely had records, and where agency's other searches located records originating in embassy that suggested existence of additional embassy records); Natural Res. Def. Council, Inc. v. DOD, 388 F. Supp. 2d 1086, 1100-03 (C.D. Cal. 2005) (ordering new search where agency searched only one office and did not forward request to another office that agency knew to be lead office in subject area); Trentadue v. FBI, No. 04-772, slip op. at 5-6 (D. Utah May 5, 2005) (ordering additional search in part because agency conducted computer search only, even though agency previously limited ability of field offices to upload documents into computer database); Wolf v. CIA, 357 F. Supp. 2d 112, 119 (D.D.C. 2004) (ordering agency to conduct additional search of broader scope because agency failed to do so even though first search indicated that responsive records could be in another file), aff'd in part, rev'd in part & remanded on other grounds, 473 F.3d 370 (D.C. Cir. 2007); Ctr. for Nat'l Sec. Studies v. DOJ, 215 F. Supp. 2d 94, 110 (D.D.C. 2002) (holding that discovery of a document that "clearly indicates the existence of [other] relevant documents" creates an "obligation" for agency to conduct a further search for those additional documents), aff'd in part, rev'd in part & remanded on other grounds, 331 F.3d 918 (D.C. Cir. 2003); Tarullo v. DOD, 170 F. Supp. 2d 271, 275 (D. Conn. 2001) (declaring agency's search inadequate because "[w]hile hypothetical assertions as to the existence of unproduced responsive documents are insufficient to create a dispute of material fact as to the reasonableness of the search, plaintiff here has [himself provided copy of agency record] which appears to be responsive to the request"); Loomis v. DOE, No. 96-149, 1999 WL 33541935, at *5 (N.D.N.Y. Mar. 9, 1999) (determining search inadequate in light of agency's admission that additional responsive records may exist in location not searched), aff'd, 199 F.3d 1322 (2d Cir. 1999) (unpublished table decision); Kronberg v. DOJ, 875 F. Supp. 861, 870-71 (D.D.C. 1995) (holding that search was inadequate when agency did not find records required to be maintained and plaintiff produced documents obtained by other FOIA requesters demonstrating that agency possessed files which may contain records sought); cf. Grace v. Dep't of the Navy, No. 99-4306, 2001 WL 940908, at *5 (N.D. Cal. Aug. 13, 2001) (concluding that although agency apparently had misplaced records requested under FOIA, "[d]efendants have discharged their burden [by] making a good faith attempt to locate the missing files"), aff'd, 43 F. App'x 76 (9th Cir. 2002).

[181] See Jones-Edwards v. NSA, 196 F. App'x 36, 38 (2d Cir. 2006) (concluding that an "agency is not obliged to conduct a search of records outside its possession or control"); Skurow v. DHS, No. 11-1296, 2012 WL 4380895, at*6 (D.D.C. Sept. 26, 2012) (holding that FBI is not a component of DHS, and thus, TSA was under no obligation to search for FBI

records); James v. U.S. Secret Serv., 811 F. Supp. 2d 351, 357-58 (D.D.C. 2011) (holding that search "was reasonable under the circumstances" because responsive records were destroyed at time of request and therefore not under agency control); Hussain v. DHS, 674 F. Supp. 2d 260, 265-66 (D.D.C. 2009) (finding agency's search adequate because portion of records sought were maintained by another agency component and agency regulations did not require forwarding the request to appropriate component); Lewis v. DOJ, 867 F. Supp. 2d 1, 12-13 (D.D.C. 2011) (holding that U.S. Attorney's Office was not obligated to search court files, but rather only those records in its custody and control at time of request); Antonelli v. U.S. Parole Comm'n, 619 F. Supp. 2d 1, 4 (D.D.C. 2009) (rejecting plaintiff's challenge to agency's search based on claim that additional records exist in files of other DOJ components, because "an agency component is obligated to produce only those records in its custody and control at the time of the FOIA request"); Bonaparte v. DOJ, No. 07-0749, 2008 WL 2569379, at *1 (D.D.C. June 27, 2008) (finding search adequate when it revealed that records had been transferred to NARA, and stating that requester could request records from NARA); Jackson v. U.S. Dep't of Labor, No. 06-02157, 2008 WL 539925, at *5 n.2 (E.D. Cal. Feb. 25, 2008) (magistrate's recommendation) (finding that agency "is not required to pursue any records that may exist and be in possession of a retired employee"), adopted, No. 06-2157, 2008 WL 4463897 (E.D. Cal. Oct. 2, 2008); Pena v. Customs & Border Patrol, No. 06-2482, 2007 WL 1434871, at *2 (E.D.N.Y. May 14, 2007) (stating that "[i]ndeed, the [agency] is not required to procure documents not already in its possession" where it had no records and had referred request to other agency); Anderson v. DOJ, 518 F. Supp. 2d 1, 10 (D.D.C. 2007) (stating that an agency is not required to retain or retrieve documents which previously had been in its possession"); Askew v. United States, No. 05-00200, 2006 WL 3307469, at *10 (E.D. Ky. Nov. 13, 2006) (rejecting plaintiff's contention that FOIA requires an agency to search another agency's files); Williams v. U.S. Attorney's Office, No. 03-674, 2006 WL 717474, at *5 (N.D. Okla. Mar. 16, 2006) (stating that search obligations under FOIA require agency to search "its own records," not "records of third parties"). But see Parker v. EOUSA, 852 F. Supp. 2d 1, 9 (D.D.C. 2012) (finding that agency failed to conduct adequate search for records that may have been transferred to NARA because "no one has been able to inform plaintiff or the Court where the records are actually located . . . [a]nd, there does not appear to have been any serious effort made to track them down"); Chaplin v. Stewart, 763 F. Supp. 2d 1, 4 (D.D.C. 2011) (denying summary judgment for agency, noting that "[t]he fact that some records may have originated with [other entities] does not relieve EOUSA of its statutory obligation to search its files for any responsive records and to either release them to plaintiff or refer them to the [other agency] for further processing."); Citizens for Responsibility & Ethics in Washington v. DHS, 592 F. Supp. 2d 111, 117-19 (D.D.C. 2009) (granting summary judgment to requester and ordering agency to search for class of records not "'currently retained'" by agency but still under agency control).

[182] See Campbell v. SSA, 446 F. App'x 477, 480-81 (3rd. Cir. 2011) (noting that absence of particular documents, which plaintiff claims should be among responsive records, does not establish that agency's search was not reasonable); Batton v. Evers, 598 F.3d 169, 176 (5th Cir. 2010) (affirming district court's determination that search of locations most likely to hold responsive records was reasonable because "'the issue is not whether other documents may exist, but rather whether the search for undisclosed documents was adequate'" (quoting In re Wade, 969 F.2d 241, 249 n. 11 (7th Cir. 1992))); Moore v. FBI, 366 F. App'x 659, 661 (7th Cir. 2010) (noting that although agency had years earlier destroyed some

potentially responsive records, that fact does not invalidate its search); Lahr v. NTSB, 569 F. 3d 964, 988 (9th Cir. 2009) ("[T]he failure to produce or identify a few isolated documents cannot by itself prove the searches inadequate."); Hoff v. DOJ, No. 07-4499, slip op. at 4 (6th Cir. July 23, 2008) (unpublished disposition) (finding search adequate even though agency did not locate certain records at initial request stage because, inter alia, records "were kept in a general administrative file, rather than a file bearing [requester's] name, and they were not indexed by her name"); Piper v. DOJ, 222 F. App'x 1, 1 (D.C. Cir. Feb. 23, 2007) (unpublished disposition) (affirming district court's conclusion that alleged record destruction prior to FOIA request has no bearing on whether agency search was adequate), cert. denied, 128 S. Ct. 66 (2007); Iturralde v. Comptroller of the Currency, 315 F.3d 311, 315 (D.C. Cir. 2003) ("[I]t is long settled that the failure of an agency to turn up one specific document in its search does not alone render a search inadequate . . . . After all, particular documents may have been accidentally lost or destroyed, or a reasonable and thorough search may have missed them."); Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 489 (2d Cir. 1999) (declaring that fact that "some documents were not discovered until a second, more exhaustive, search was conducted does not warrant overturning the district court's ruling" that agency conducted a reasonable search); Campbell, 164 F.3d at 28 n.6 (holding that "the inadvertent omission of three documents does not render a search inadequate when the search produced hundreds of pages that had been buried in archives for decades"); Schwarz v. FBI, 161 F.3d 18, at *2 (10th Cir. 1998) (unpublished table opinion) (concluding that "the fact that the [agency's] search failed to turn up three documents is not sufficient to contradict the reasonableness of the FBI's search without evidence of bad faith"); Citizens Comm'n on Human Rights v. FDA, 45 F.3d 1325, 1328 (9th Cir. 1995) (determining that search was adequate when agency spent 140 hours reviewing relevant files, notwithstanding fact that agency was unable to locate 137 of 1000 volumes of records); Ethyl Corp. v. EPA, 25 F.3d 1241, 1246 (4th Cir. 1994) (reasoning that adequacy of search is not determined by "whether every single potentially responsive document has been unearthed"); Toensing v. DOJ, No. 11-1215, 2012 WL 4026099, at *19 (D.D.C. Sept. 13, 2012) ("[T]he mere fact that an otherwise adequate search did not uncover [requested] recordings does not automatically render that search inadequate"); Int'l Counsel Bureau v. DOD, 864 F. Supp. 2d 101, 109 (D.D.C. 2012) ("failure to uncover [ ] four additional videos [does not] render the original search inadequate"); Negley v. FBI, 825 F. Supp. 2d 63, 69-70 (D.D.C. 2011) (concluding that "[p]laintiff is challenging the failure to locate one document, and that is not sufficient to defeat summary judgment" given previous finding that agency complied with court's order specifying kind of search agency was required to perform); Campaign for Responsible Transplantation v. FDA, 219 F. Supp. 2d 106, 111 (D.D.C. 2002) (upholding adequacy of agency's search by declaring that agency's belated production of fifty-five additional documents that it located using information contained in plaintiff's summary judgment motion "is a proverbial 'drop in the bucket'" relative to 27,000 documents that agency already had provided to plaintiff); cf. Corbeil v. DOJ, No. 04-2265, 2005 WL 3275910, at *3 (D.D.C. Sept. 26, 2005) (declaring that "an agency's prompt report of the discovery of additional responsive materials may be viewed as evidence of its good faith efforts to comply with its obligations under the FOIA"); W. Ctr. for Journalism v. IRS, 116 F. Supp. 2d 1, 10 (D.D.C. 2000) (concluding that agency conducted reasonable search and acted in good faith by locating and releasing additional responsive records mistakenly omitted from its initial response, because "it is unreasonable to expect even the most exhaustive search to uncover every responsive file; what is expected of a law-abiding agency is that the agency admit and correct error when error is revealed"), aff'd, 22 F. App'x 14

courts have held that the FOIA does not require agencies to conduct "unreasonably burdensome" searches for records.[183]

(D.C. Cir. 2001). But see Oglesby v. U.S. Dep't of the Army, 79 F.3d 1172, 1185 (D.C. Cir. 1996) (acknowledging plaintiff's assertion that search was inadequate because of previous FOIA requester's claim that agency provided her with "well over a thousand documents," and holding that claim raises enough doubt to preclude summary judgment in absence of agency affidavit further describing its search); Hiken v. DOD, 521 F. Supp. 2d 1047, 1054 (N.D. Cal. 2007) (explaining that while search results are not focus of reasonableness inquiry, they are not entirely irrelevant, particularly where scope of request is broad and agency fails to produce any responsive documents).

[183] See Solar Sources, Inc. v. United States, 142 F.3d 1033, 1039 (7th Cir. 1998) (refusing to order agency to identify and segregate nonexempt documents from millions of pages of files in light of government's estimate that doing so would take eight work-years); Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 892 (D.C. Cir. 1995) (agreeing that search that would require review of twenty-three years of unindexed files would be unreasonably burdensome, but disagreeing that search through chronologically indexed agency files for dated memorandum would be burdensome); Van Strum v. EPA, Nos. 91-35404, 91-35577, 1992 WL 197660, at *1 (9th Cir. 1992) (accepting agency justification denying or seeking clarification of overly broad requests because agency not required to conduct search which would place inordinate burden on agency resources); Ancient Coin Collectors Guild v. U.S. Dep't of State, 866 F. Supp. 2d 28, 33 (D.D.C. Jun 11, 2012) (finding that "although other archival and backup systems do exist, attempting additional searches would not only be unlikely to result in additional responsive material, but would also be costly and inconvenient"); Cuban v. SEC, 795 F. Supp. 2d 43, 48-51 (D.D.C. 2011) (concluding that requiring manual search of "2064 linear feet of cabinet space" containing uncategorized forms constituted burdensome search, where agency already searched 145,000 forms electronically with no responsive results); Wilson v. DOT, 730 F. Supp. 2d 140, 150 (D.D.C. 2010) (finding "'unduly burdensome,' if not impossible, for [agency] to identify the records responsive to [plaintiff's] request" because records "simply do not exist in format he requests" (citing Nation Magazine, 71 F.3d at 891-92)); James Madison Project v. CIA, No. 1:08CV1323, 2009 WL 2777961, at *4-5 (E.D. Va. Aug. 31, 2009) (holding that plaintiff's request created undue burden for agency because it would require each agency component to "tailor a search specific to that component's records system configuration"); Wolf v. CIA, 569 F. Supp. 2d 1, 9 (D.D.C. 2008) (holding that search of microfilm files requiring frame-by-frame reel review that would take estimated 3675 hours and $147,000 constitutes unreasonably burdensome search); Schrecker v. DOJ, 217 F. Supp. 2d 29, 35 (D.D.C. 2002) (finding "that to require an agency to hand search through millions of documents is not reasonable and therefore not necessary," as agency already had searched "the most likely place responsive documents would be located"), aff'd, 349 F.3d 657 (D.C. Cir. 2003); Burns v. DOJ, No. 99-3173, slip op. at 2 (D.D.C. Feb. 5, 2001) (concluding that "given the capacity of the reels and the absence of any index," a request for specific telephone conversations recorded on reel-to-reel tapes was "unreasonably burdensome" because "it would take an inordinate [amount of] time to listen to the reels in order to locate any requested conversations that might exist"); Blackman v. DOJ, No. 00-3004, slip op. at 5 (D.D.C. July 5, 2001) (declaring request that would require a manual search through 37 million pages to be "unreasonable in light of the resources needed" to process it), appeal dismissed for lack of prosecution, No. 01-5431 (D.C. Cir. Jan. 2, 2003); O'Harvey v. Office of Workers' Comp.

With regard to electronic database searches, the FOIA requires agencies to make "reasonable efforts" to search for requested records in electronic form or format "except when such efforts would significantly interfere with the operation of the agency's automated information system."[184] Courts differ in whether an agency's involvement of information

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Programs, No. 95-0187, slip op. at 3 (E.D. Wash. Dec. 29, 1997) (finding request to be unreasonably burdensome because search would require agency "to review all of the case files maintained by the agency" and "would entail review of millions of pages of hard copies"), aff'd sub nom. O'Harvey v. Comp. Programs Workers, 188 F.3d 514 (9th Cir. 1999) (unpublished table decision); Spannaus v. DOJ, No. 92-372, slip op. at 6 (D.D.C. June 20, 1995) (finding that agency is not required to determine all persons having ties to associations targeted in bankruptcy proceedings "and then search any and all civil or criminal files relating to those persons"), summary affirmance granted in pertinent part, No. 95-5267, 1996 WL 523814 (D.C. Cir. Aug. 16, 1996); cf. Stewart v. U.S. Dep't of the Interior , 554 F.3d 1236, 1243-44 (10th Cir. Feb. 2, 2009) (affirming fee waiver denial because search of 610 computer backup tapes "would be unduly burdensome given the speculative nature" of request, but also stating that requester could proceed if it paid for search); Peyton v. Reno, No. 98-1457, 1999 WL 674491, at *1-2 (D.D.C. July 19, 1999) (finding that request for all records indexed under subject's name reasonably described records sought because agency failed to demonstrate that name search would be unduly burdensome). But see Dayton Newspapers, Inc. v. Dep't of the Air Force, 35 F. Supp. 2d 1033, 1035 (S.D. Ohio 1998) (preliminary ruling without entry of judgment) (concluding that an estimated fifty-one hours required to "assemble" requested information from an agency database "is a small price to pay" in light of FOIA's presumption favoring disclosure).

[184] 5 U.S.C. § 552(a)(3)(C); see Ancient Coin Collectors Guild v. U.S. Dep't of State, 866 F. Supp. 2d 28, 34 (D.D.C. 2012) (finding that agency's electronic backup system "was not designed to retain documents in an easily searchable form," and "therefore, any search efforts would 'significantly interfere' with the functioning of [agency's] entire information system"); Sun-Sentinel Co. v. DHS, 431 F. Supp. 2d 1258, 1276 (S.D. Fla. 2006) (stating that subsection (a)(3)(C) "addresses problems with searching for records as opposed to producing records," and deciding that evidentiary hearing is needed to determine whether agency's claim of significant interference relates to agency's "inability . . . to search for these records or to produce these records"); Baker & Hostetler LLP v. U.S. Dep't of Commerce, No. 02-2522, slip op. at 10-11 (D.D.C. Mar. 31, 2004) (finding database restoration would "significantly interfere with the operation of the agency's automated information system" where it would render servers unusable for other functions, and where database restoration attempts could fail due to absence of certain backup tapes), aff'd in pertinent part, 473 F.3d 312 (D.C. Cir. 2006); Schladetsch v. HUD, No. 99-0175, 2000 WL 33372125, at *5 (D.D.C. Apr. 4, 2000) (rejecting as insufficient agency affidavit that failed to show how creation and use of computer program to perform electronic database search for responsive information would require "unreasonable efforts" or would "substantially interfere" with agency's computer system), appeal dismissed voluntarily, No. 00-5220 (D.C. Cir. Oct. 12, 2000); see also FOIA Update, Vol. XVII, No. 4, at 2 (discussing electronic search requirements); cf. Hoffman v. DOJ, No. 98-1733-A, slip op. at 10-11 (W.D. Okla. Dec. 15, 1999) (finding that agency is not required to conduct physical search of records "if other computer-assisted search procedures available to [the] agency are more efficient and serve the same practical purpose of reviewing hard copies of documents"). But see Pub. Citizen, Inc. v. Dep't of Educ., 292 F. Supp. 2d 1, 8 (D.D.C. 2003) ("While a computerized search may well be far

technology professionals is required to perform a reasonable search for records,[185] but have recognized the challenge agencies face when conducting searches for records maintained in obsolete electronic media.[186] The Court of Appeals for the District of Columbia Circuit has touched on the issue of searching backup tapes in Ancient Coin Collectors Guild v. U.S. Department of State, where it remanded the case back to the district court because the possibility existed that backup tapes could fill gaps in responsive records.[187] However, on remand, the district court found that although backup tapes did exist, searching this

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more efficient and less costly than a manual search . . . it is apparent [under the facts of this particular case] that only the more cumbersome procedure is likely to turn up the requested information.").

[185] Compare Albino v. USPS, No. 01-C-563-C, 2002 WL 32345674, at *7 (W.D. Wis. May 20, 2002) (declaring a search for responsive e-mail messages spanning five years to be inadequate because agency "did not enlist the help of information technology personnel . . . [who] . . . would have access to e-mail message archives" possibly containing requested records), with Fox News Network v. Bd. of Governors of the Fed. Reserve Sys., 639 F. Supp. 2d 384, 397 (S.D.N.Y. 2009) (holding that agency's "failure to use computer experts to search for [deleted] files does not render the search inadequate" (citing Baker & Hostetler LLP v. U.S. Dep't of Commerce, 473 F.3d 312 (D.C. Cir. 2006) and CareToLive v. FDA, 631 F.3d 336, 343-44 (6th Cir. 2011) (finding that because search of deleted emails "would merely be cumulative" of records already provided to plaintiff, agency "need not attempt to recover electronic data that has been deleted in order to . . . perform a reasonable search" because to adopt such a requirement "could potentially cripple agencies by requiring that after following their normal search procedures, they must have an information technology expert scan relevant computers and servers for additional information that might have been deleted").

[186] See Jennings v. FBI, No. 03-1651, slip op. at 8-9 (D.D.C. May 6, 2004) (finding that agency's search was adequate even when "faulty computer mechanism" rendered identifiable tape recordings of telephone conversations irretrievable); Burns, No. 99-3173, slip op. at 2 (D.D.C. Feb. 5, 2001) (concluding that an agency need not search through reel-to-reel audiotapes containing requested recorded conversations, because "the equipment on which these reels could be played has broken and [has been] replaced with other, incompatible equipment," and agency is "not required to obtain new equipment to process [p]laintiff's FOIA request"); Lepelletier v. FDIC, No. 96-1363, transcript at 8 (D.D.C. Mar. 3, 2000) (refusing to require agency to undertake "an enormous effort that may not even work to try to convert [obsolete] computer files that nobody knows how to read now to provide information that [plaintiff] would like to have"), appeal dismissed as moot, 23 F. App'x 4 (D.C. Cir. 2001).

[187] 641 F.3d 504, 514-15 (D.C. Cir. 2011) (remanding for agency's explanation of "whether backup tapes of any potential relevance exist; if so whether their responsive material is reasonably likely to add to that already delivered; and, if these questions are answered affirmatively, whether there is any practical obstacle to searching them").

material would be unlikely to result in responsive records and would be costly and inconvenient and so did not require it to be done.[188]

A search for records has been found unnecessary when it was supported by an agency attestation that a person familiar with the records maintained by the agency had determined that no responsive records were, in fact, maintained.[189] In the absence of such a showing, however, courts have required agencies to perform a search.[190]

Courts have held that agencies responding to FOIA requests need not process and disclose non-responsive records or non-responsive portions of otherwise responsive records.[191]

Finally, courts have recognized that an agency's search obligations for each request necessarily have a temporal limitation, or a "cut-off" date.[192] Records created after the "cut-

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[188] 866 F. Supp. 2d 28, 33 (D.D.C. 2012) (finding that "although other archival and backup systems do exist, attempting additional searches would not only be unlikely to result in additional responsive material, but would also be costly and inconvenient").

[189] See Espino v. DOJ, 869 F. Supp. 2d 25, 28 (D.D.C. 2012) (upholding agency's action in not searching for records when agency declarations stated that agency did not maintain requested records); Thomas v. Comptroller of the Currency, 684 F. Supp. 2d 29, 33 (D.D.C. 2010) (affirming agency's decision not to search when it determined that given its system of records, "there was no reasonable expectation of finding responsive documents"); American-Arab Anti-Discrimination Comm. v. DHS, 516 F. Supp. 2d 83, 87-88 (D.D.C. 2007) (finding sufficient agency's statement that it "does not maintain [requested] information" and ruling search "unnecessary" since affiant spoke to several ICE agents and as "Deputy Assistant Secretary for Operations, . . . [was] presumed able to familiarize himself with what statistics ICE does and does not maintain").

[190] See Robert v. DOJ, No. 05-2543, 2008 WL 2039433, at *6-7 (E.D.N.Y. May 9, 2008) (ruling that agency's "conclusory statement that it does not maintain such documents" did not satisfy duty to search where unclear whether affiants had sufficient knowledge of agency practices and procedures to make such assertion); Defenders of Wildlife v. USDA, 311 F. Supp. 2d 44, 55 (D.D.C. 2004) (stating that an agency's "bare assertion that the Deputy Under Secretary saw the FOIA request and that he stated that he had no responsive documents is inadequate because it does not indicate that he performed any search at all").

[191] See Pub. Investors Arb. Bar Ass'n v. S.E.C., 2013 WL 987769, at *14 (D.D.C. 2013) (concluding that, " it is elementary that an agency's decision to withhold non-responsive material is not a violation of the FOIA"); Ctr. for Biological Diversity v. OMB, No. 07-04997, 2009 WL 1246690, at *5 (N.D. Cal. May 5, 2009) (finding that agency "is not required to produce information that is not responsive to a FOIA request"); Cal. ex rel. Brown v. NHTSA, No. 06-2654, 2007 WL 1342514, at *2 (N.D. Cal. May 8, 2007) (declining to order agency to disclose non-responsive information redacted from documents, and stating that "[a]n agency has no obligation to produce information that is not responsive to a FOIA request"); see also *FOIA Post*, "FOIA Counselor Q&A" (posted 1/24/06) (addressing document "scoping" in context of e-mail).

off" date are treated as not responsive to the request.[193] The D.C. Circuit declared that a cut-off date that is based on the date the agency conducts its search, "results in a much fuller search and disclosure" than a less inclusive "cut-off" date, such as one based on the date of the request or its receipt by the agency.[194] While courts have found that an agency may choose not to use a "date-of-search cut-off" if "specific circumstances" warrant,[195] the agency

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[192] See Bonner v. U.S. Dept. of State, 928 F.2d 1148, 1152 (D.C. Cir. 1991) (finding that, "[t]o require an agency to adjust or modify its FOIA responses based on post-response occurrences could create an endless cycle of judicially mandated reprocessing"); Church of Scientology v. IRS, 816 F. Supp. 1138, 1148 (W.D. Tex. 1993) (observing that "there has to be a temporal deadline for documents that satisfy [a FOIA] request"), appeal dismissed by stipulation, No. 93-8431 (5th Cir. Oct. 21, 1993); see also *FOIA Post*, "Use of 'Cut-Off' Dates for FOIA Searches" (posted 5/6/04) (explaining that "[t]he scope of a FOIA request has both substantive and temporal aspects").

[193] See Defenders of Wildlife v. U.S. Dep't of the Interior, 314 F. Supp. 2d 1, 12 n.10 (D.D.C. 2004) (recognizing that records created after date-of-search "cut-off" date specifically established by agency regulation "are not covered by [plaintiff's] request"); FOIA Update, Vol. IV, No. 4, at 14 (advising that records that "post-date" agency's "cut-off" date are not included within temporal scope of request); cf. James, 811 F. Supp. 2d at 358 (noting that agencies are not "require[d] to update or supplement a prior response to a request for records); Coven v. OPM, No. 07-1831, 2009 WL 3174423, at *5-10 (D. Ariz. Sept. 29, 2009) (agreeing that agency is not obligated to continually provide daily, updated versions of records on ongoing basis, nor is it required to produce records created after agency responded).

[194] McGehee v. CIA, 697 F.2d 1095, 1104 (D.C. Cir. 1983), vacated on other grounds on panel reh'g & reh'g en banc denied, 711 F.2d 1076 (D.C. Cir. 1983); see Pub. Citizen v. Dep't of State, 276 F.3d 634, 644 (D.C. Cir. 2002) (favoring "date-of-search cut-off" because its use "might . . . result[] in the retrieval of more [responsive] documents" than would a cut-off based on date of request); Van Strum, 972 F.2d 1348, at *2 (agreeing that date-of-search "cut-off" date is "the most reasonable date for setting the temporal cut-off in this case"); Ferguson v. U.S. Dep't of Educ., No. 09 Civ. 10057, 2011 WL 4089880, at *10 (S.D.N.Y. Sept. 13, 2011) (ordering agency to conduct search for records between date-of-request and date-of-search cut-off dates because agency improperly limited temporal scope of first search to records dated prior to date of request); Vento v. IRS, No. 08-159, 2010 WL 1375279, at *3 (D.V.I. March 31, 2010) (finding agency's regulations requiring date-of-request cut-off date unreasonable and favoring date-of-search cut-off date); Nielsen v. Bureau of Land Mgmt., 252 F.R.D. 499, 516 (D. Minn. 2008) (finding search not reasonable to extent agency employed date-of-request "cut-off" date); Edmonds Inst. v. U.S. Dep't of Interior, 383 F. Supp. 2d 105, 110-11 (D.D.C. 2005) (rejecting requester's call for use of date-of-release "cut-off" date in favor of date-of-search "cut-off" date, in accordance with agency's regulations).

[195] Pub. Citizen, 276 F.3d at 643; see, e.g., ACLU v. DHS, 738 F. Supp. 2d 93, 103-04 (D.D.C. 2010) (affirming agency's use of specific cut-off date agreed upon by plaintiff because it "did not appear under these circumstances to have been unreasonably utilized to improperly limit the scope of the plaintiff's request"); Jefferson v. BOP, 578 F. Supp. 2d 55, 60 (D.D.C. 2008) (recognizing that proper inquiry is "whether the cut-off date used was reasonable in

may be required to articulate a "compelling justification" for doing so,[196] and searches have been found to be unreasonable when the requester was not made aware of the cut-off date being used.[197]

"Reasonably Segregable" Obligation

The FOIA requires that "any reasonably segregable portion of a record" must be released "after deletion of the portions which are exempt" under the Act's nine exemptions.[198] The Court of Appeals for the District of Columbia Circuit opined about the

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light of the specific request" and concluding that date-of-request "cut-off" was reasonable because request sought records that had been created before request was made and that pertained to past events); Dayton Newspaper, Inc. v. VA, 510 F. Supp. 2d 441, 450-51 (S.D. Ohio 2007) (determining that date of 1995 final response was appropriate cut-off date "[i]n the absence of a record demonstrating the VA's cut-off date," because "at that point, Plaintiffs were put on notice that the VA was no longer searching for records"); Blazy v. Tenet, 979 F. Supp. 10, 17 (D.D.C. 1997) concluding that it was "reasonable under the circumstances" for agency to apply date-of-request "cut-off" to request that sought records concerning events that already had occurred (and records that already had been created) by time request was made), summary affirmance granted, No. 97-5330, 1998 WL 315583 (D.C. Cir. May 12, 1998); *FOIA Post*, "Use of 'Cut-Off' Dates for FOIA Searches" (posted 5/6/04) (describing circumstances under which use of different "cut-off" dates may be reasonable). But see Or. Natural Desert Ass'n v. Gutierrez, 419 F. Supp. 2d 1284, 1288 (D. Or. 2006) (concluding that agency's date-of-request "cut-off" date regulation "is not reasonable on its face and violates FOIA").

[196] Pub. Citizen, 276 F.3d at 644; see, e.g., Ferguson, 2011 WL 4089880, at *11 (ordering agency to conduct additional search because it failed to offer "more compelling justification" for using date-of-request cut-off date when performing search); In Def. of Animals v. NIH, 543 F. Supp. 2d 83, 98-99 (D.D.C. 2008) (finding search inadequate because agency failed to demonstrate reasonableness of date-of-search cut-off date that preceded final disclosure by eleven months, and ordering it to employ cut-off date no earlier than date of court's decision).

[197] See, e.g., In Def. of Animals, 543 F. Supp. 2d at 99 (finding search inadequate because, inter alia, agency failed to inform plaintiff of date-of-search cut-off date); Judicial Watch, Inc. v. DOE, 310 F. Supp. 2d 271, 305 (D.D.C. 2004) ("Because the [agency] imposed the . . . cut-off date without informing [requester] of its intention to do so, the court must conclude that [agency's] search was inadequate."), aff'd in part, rev'd in part & remanded on other grounds, 412 F.3d 125 (D.C. Cir. 2005); cf. Techserve Alliance v. Napolitano, 803 F. Supp. 2d 16, 25-26 (D.D.C. 2011) (suggesting that agency should have informed requester of cut-off date, but finding that subsequent searches cured any defects related to limited time frame of initial search).

[198] 5 U.S.C. § 552(b) (2006 & Supp. IV 2010) (sentence immediately following exemptions); see Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 51879 (Oct. 8, 2009) [hereinafter Attorney General Holder's FOIA Guidelines] (reminding agencies to "be mindful that the FOIA requires them to take reasonable steps to segregate and release

meaning of the segregation obligation decades ago in Mead Data Center, Inc. v. U.S. Department of the Air Force.[199] There, the Court held that "a court may decline to order an agency to commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content."[200] The D.C. Circuit also held in Mead Data that when nonexempt information is "inextricably intertwined" with exempt information, reasonable segregation is not possible.[201] The segregation analysis is frequently impacted by the volume of material

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nonexempt information" and encouraging disclosure of portions of records that "may be covered [by a statutory exemption] only in a technical sense unrelated to the actual impact of disclosure"); see also *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) ("Whether a release involves boxes of material, or only a few pages, it is important for agencies to remember that the increased transparency resulting from even a partial disclosure of records is worthwhile).

[199] 566 F.2d 242, 261 n.55 (D.C. Cir. 1977).

[200] Id.; accord Thomas v. DOJ, 260 F. App'x 677, 679 (5th Cir. 2007) (affirming denial of request for release of portions of audiotape transcripts reflecting requester's side of conversation while redacting third party's words because, given requester's interest in the third party's portion, release of solely requester's words would be "of little informational value" to requester (quoting FlightSafety Servs. v. Dep't of Labor, 326 F.3d 607, 613 (5th Cir. 2003))); Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 86 (2d Cir. 1979) (noting "banalit[y]" and "uselessness" of information district court ordered to be segregated and disclosed, and reversing such order); The Shinnecock Indian Nation v. Kempthorne, 652 F. Supp. 2d 345, 370 (E.D.N.Y. 2009) ("In light of the substantial disclosure already undertaken by the government, the [c]ourt decline[d] to compel the disclosure, line-by-line, . . . which . . . in the end, provide no useful additional information to the plaintiff.").

[201] Mead Data Cent., Inc., 566 F.2d at 260; see, e.g., Pub. Emps. for Envtl. Responsibility v. U.S. Section Int'l Boundary & Water Comm'n., 839 F. Supp. 2d 304, 328-29 (D.D.C. 2012) (accepting agency's assertion that "'any records withheld in full were [protected by Exemption 5] with any non-exempt portions being inextricably intertwined with exempt portions"); Fischer v. DOJ, 723 F. Supp. 2d 104, 115 (D.D.C. 2010) ("Having shown both the highly sensitive nature of the exempt information and that non-exempt information is so intertwined with exempt information that the [agency] could not release any meaningful portion without disclosing exempt information, [the agency] has satisfied its segregability burden."); Durrani v. DOJ, 607 F. Supp. 2d 77, 88 (D.D.C. 2009) (declaring that to justify withholdings, agencies must show that "exempt and nonexempt information are 'inextricably intertwined,' such that excision of exempt information would impose significant costs on the agency and produce an edited document with little informational value" (citing Mays v. DEA, 234 F.3d 1324, 1327 (D.C. Cir. 2000) (quoting Neufeld v. IRS, 646 F.2d 661, 666 (D.C. Cir. 1981)))); The Shinnecock Indian Nation, 652 F. Supp. 2d at 372-73 (finding that "the facts as presented by the author . . . are done in a fashion that 'reveal[s] the evaluative process by which [he, as a member of the decision-making chain] arrived at [his] conclusions and what those predecisional conclusions are'" and holding that factual information could not be reasonably segregated) (citing Lead Indus., 610 F.2d at 83); James Madison Project v. CIA, 607 F. Supp. 2d 109, 131 (D.D.C. 2009) (approving

at issue.[202] However, the D.C. Circuit has also ruled that segregability should not be determined based on an evaluation of whether nonexempt portions of documents would be "helpful" to the requester if segregated and released.[203]

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agency's determination that it could not reasonably segregate certain nonexempt material because it was "so inextricably intertwined" with exempt material consisting of classified information and information concerning intelligence sources and methods); Schoenman, 2009 WL 763065, at *26 (approving agency's determination "that the 'fragmented' and 'isolated' occurrences of non-exempt material . . . are so 'inextricably intertwined with the exempt information' that the non-exempt material could not be reasonably segregated"); cf. L.A. Times Commc'ns LLC v. U.S. Dep't of Labor, 483 F. Supp. 2d 975, 986-7 (C.D. Cal. 2007) (finding that agency met its segregability obligation where Exemption 6 protected information pertaining to civilian contractors "currently residing in Iraq or Afghanistan," and agency databases contained no information to distinguish which contractors (or families) still resided in those countries and which ones resided elsewhere). But see Antonelli v. BOP, 623 F. Supp. 2d 55, 60 (D.D.C. 2009) (rejecting agency's assertion that it withheld documents in full because segregating information would "destroy[] the integrity of [requested] document as whole" because such a standard failed to demonstrate that exempt and non-exempt information were inextricably intertwined and could not be reasonably segregated).

[202] Mead Data Cent., Inc., 566 F.2d at 261 & n.55; see also FlightSafety Servs. Corp. v. Dep't of Labor, 326 F.3d 607, 613 (5th Cir. 2003) (per curiam) (concluding that documents contained no reasonably segregable information because, inter alia, "any disclosable information is so inextricably intertwined with the exempt, confidential information that producing it would require substantial agency resources and produce a document of little informational value"); Solar Sources, Inc. v. United States, 142 F.3d 1033, 1039 (7th Cir. 1998) (finding that because agency would require eight work-years to identify all nonexempt documents in millions of pages of files, very small percentage of documents that could be released were not "reasonably segregable"); Doherty v. DOJ, 775 F.2d 49, 53 (2d Cir. 1985) ("The fact that there may be some nonexempt matter in documents which are predominantly exempt does not require the district court to undertake the burdensome task of analyzing approximately 300 pages of documents, line-by-line."); Yeager v. DEA, 678 F.2d 315, 322 n.16 (D.C. Cir. 1982) (noting that it was appropriate to consider factors of "intelligibility" and "burden" imposed by segregation of nonexempt material); Lead Indus. Ass'n, 610 F.2d at 86 (holding that information is not reasonably segregable "if the proportion of nonexempt factual material is relatively small and is so interspersed with exempt material that separation by the agency and policing . . . by the courts would impose an inordinate burden"); Brown v. DOJ, 734 F. Supp. 2d, 99, 110-11 (D.D.C. 2010) (finding agency's withholdings of plaintiff's name, cities, and file numbers proper where "there is no indication that the [agency] acted in bad faith in segregating and releasing nonexempt information in the nearly 1,000 pages released to plaintiff" and "[agency] need not expend substantial time and resources to 'yield a product with little, if any, informational value'"); Schoenman, 2009 WL 763065, at *26 (finding agency withholdings proper because, inter alia, "it makes little sense to require [agency] to spend time and resources redacting entire documents in order to provide Plaintiff with his name, dates he has already been provided, and the basic letterhead . . . of the document") (citing Mead Data Cent., Inc., 566 F.2d at 261 n.55); Arizechi v. IRS, No. 06-5292, 2008 WL 539058, at *5 (D.N.J. Feb. 25, 2008) (unpublished disposition) (stating that, regarding summonses, segregability requirement is

Courts have required agencies to demonstrate that they have disclosed all reasonably segregable, nonexempt information,[204] with some courts finding that the agency failed to

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"futile" because "[r]edaction of names and addresses of the witnesses and releasing a blank summons would serve no purpose and is not required"); Rugiero v. DOJ, 234 F. Supp. 2d 697, 707-09 (E.D. Mich. 2002) (concluding that "[i]n this case, the burden of segregation does not outweigh the significant value of the information to Plaintiff because it does not appear that the Government would have to expend a large amount of additional time and resources to provide Plaintiff with the segregable information" from 364 pages); Warren v. SSA, No. 98-0116, 2000 WL 1209383, at *5 (W.D.N.Y. Aug. 22, 2000) (refusing to order segregation of standard forms containing personal information because "if the [agency] were to redact the requested documents in a manner that would remove all exempted . . . information, the resulting materials would be little more than templates"), aff'd in pertinent part, 10 F. App'x 20 (2d Cir. 2001); Eagle Horse v. FBI, No. 92-2357, slip op. at 5-6 (D.D.C. July 28, 1995) (finding disclosure of polygraph examination -- after protecting sensitive structure, pattern, and sequence of questions -- was not feasible without reducing product to "unintelligible gibberish").

[203] See Stolt-Nielsen Transp. Group, Ltd. v. United States, 534 F.3d 728, 734 (D.C. Cir. 2008) (rejecting agency's assertion that "the redacted documents without names and dates would provide no meaningful information," and declaring that information need not be "helpful to the requestee [to require that] the government must disclose it"); see also Mead Data Cent., Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 261 n.55 (D.C. Cir. 1977) (stating that while "information content" is a legitimate consideration, it "does not mean that a court should approve an agency withholding because of the court's low estimate of the value to the requester of the information withheld"); Schoenman v. FBI, No. 04-2202, 2009 WL 763065, at *26 (D.D.C. Mar. 19, 2009) (upholding agency's segregation efforts and noting that they were not based upon an "impermissible determination that the substantive content of the [nonexempt] information, although reasonably segregable, 'provides no meaningful information'" (quoting Stolt-Nielsen Transp. Group, Ltd., 534 F.3d at 734)).

[204] See, e.g., Schoenman v. FBI, 841 F. Supp. 2d 69, 80 (D.D.C. 2012) (finding that agency's "line-by-line review of each document in an attempt to identify and release non-exempt portions of each document" satisfies requirement to reasonably segregate nonexempt information); Gray v. U.S. Army Criminal Investigation Command, 742 F. Supp. 2d 68, 75-6 (D.D.C. 2010) (noting that "every single one of the roughly 40 documents . . . is accompanied by a statement that the document is withheld "in its entirety under Exemptions [(6), (7)(A) and (7)(C)]'"); Showing Respect to Animals v. U.S. Dept. of Interior, 730 F. Supp. 2d 180, 199 (D.D.C. 2010) (finding that FOIA officer's declaration that she "personally reviewed each of the documents . . . and conducted a thorough segregability analysis" and "detailed descriptions of each document and portions that [were] withheld either in part or in whole" show that agency met segregability obligations); cf. Elec. Frontier Found. v. DOJ, No. 07-00403, slip op. at 17 (D.D.C. Aug. 14, 2007) (concluding that although agency declarations never explicitly used term "segregability," statements "[c]onsidered as a whole," demonstrate agency's segregability analysis), reconsideration denied, 532 F. Supp. 2d 22 (D.D.C. 2008); Anderson v. CIA, 63 F. Supp. 2d 28, 30 (D.D.C. 1999) (declining, "especially in the highly classified context of this case," to "infer from the absence of the word 'segregable' [in the agency's affidavit] that segregability was possible");

make the required showing.[205] Appellate courts have addressed the issue either by making their own determination or remanding the case for findings on this point.[206]

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see also FOIA Update, Vol. XIV, No. 3, at 11-12 ("OIP Guidance: The 'Reasonable Segregation' Obligation").

[205] See Stolt-Nielsen Transp. Group, Ltd., 534 F.3d at 734 (finding agency official's declaration that paralegal reviewed pages line-by-line to assure himself that he was withholding only exempt information to be insufficient for court to accept agency's segregability determinations); Davin v. DOJ, 60 F.3d 1043, 1052 (3d Cir. 1995) ("The statements regarding segregability are wholly conclusory, providing no information that would enable [plaintiff] to evaluate the FBI's decisions to withhold."); Patterson v. IRS, 56 F.3d 832, 840 (7th Cir. 1995) (finding that an agency is not entitled to withhold an entire document if only "portions" contain exempt information); Wightman v. ATF, 755 F.2d 979, 983 (1st Cir. 1985) (holding that detailed "process of segregation" is not unreasonable for request involving thirty-six document pages); Bristol-Myers Co. v. FTC, 424 F.2d 935, 938 (D.C. Cir. 1970) (stating that "statutory scheme does not permit a bare claim of confidentiality to immunize agency [records] from scrutiny" in their entireties); Chesapeake Bay Found. v. U.S. Army Corps. of Eng'rs., 677 F. Supp. 2d 101, 109 (D.D.C. 2009) (requiring agency to supplement its declarations and exhibits because there was "no evidence to support" that agency complied with its segregability obligation and refusing "to take on faith" agency's assertions that it had complied); In Def. of Animals v. NIH, 543 F. Supp. 2d 83, 107-08 (D.D.C. 2008) (ordering agency to segregate and release subject matter of invoices and equipment purchase-related e-mails even where sub-contractor and vendor names and estimated costs might be properly withheld under Exemptions 4 and 5); United Am. Fin., Inc. v. Potter, 531 F. Supp. 2d 29, 44-45 (D.D.C. 2008) (rejecting agency's conclusory statement that all reasonably segregable material was released because it failed to explain why factual information in an e-mail reporting or summarizing a telephone call, which was otherwise properly exempt under deliberative process privilege, was not reasonably segregable); ACLU v. FBI, 429 F. Supp. 2d 179, 193 (D.D.C. 2006) (finding that agency did not establish that factual portions of e-mail messages were inextricably intertwined with material exempt as deliberative); Mokhiber v. U.S. Dep't of the Treasury, 335 F. Supp. 2d 65, 70 (D.D.C. 2004) (granting plaintiff's motion for summary judgment when agency declarations failed to show that agency "even attempted" to meet segregability obligations); Neely v. FBI, No. 7:97-0786, Order at 1 (W.D. Va. Jan. 25, 1999) (finding that agency applied exemptions "in a wholesale fashion" and without adequate explanation), vacated & remanded on other grounds, 208 F.3d 461 (4th Cir. 2000); Church of Scientology v. IRS, 816 F. Supp. 1138, 1162 (W.D. Tex. 1993) ("The burden is on the agency to prove the document cannot be segregated for partial release.")

[206] See, e.g., Missouri Mo. Coal. for the Env't Found. v. U.S. Army Corps of Eng'rs, 542 F.3d 1204, 1211-13 (8th Cir. 2008) (declining to affirm application of exemption to all documents in their entireties and remanding case for segregability analysis because district court made no segregability findings); Stolt-Nielsen Transp. Group, Ltd., 534 F.3d at 734 (remanding for failure to make specific findings of segregability regarding withheld documents and stating that "[w]hile . . . we could conduct a further review in this court under our de novo standard, in the interest of efficiency" we "'leave it to the district court to determine on remand whether more detailed affidavits are appropriate or whether an alternative such as in camera review'" is best (quoting Krikorian v. Dep't of State, 984 F.2d 461, 467 (D.C. Cir.

When agencies demonstrate that the withheld records are exempt in their entireties, courts have upheld the determination that no segregation is possible.[207]

1993))); Juarez v. DOJ, 518 F.3d 54, 60-61 (D.C. Cir. 2008) (relying on affidavits to conduct segregability analysis itself, stating "we need not prolong the case further by remanding it . . . [a]s we have the same record before us as did the district court," and concluding that nothing was improperly withheld); Morley v. CIA, 508 F.3d 1108, 1123 (D.C. Cir. 2007) (recognizing district court's affirmative duty to consider segregability issue sua sponte and remanding for segregability determination); Trentadue v. Integrity Comm., 501 F.3d 1215, 1230-31 (10th Cir. 2007) (finding that district court "erred in refusing to conduct a severability analysis"); Trans-Pac. Policing Agreement v. U.S. Customs Serv., 177 F.3d 1022, 1027-28 (D.C. Cir. 1999) (remanding case to district court for determination of releasability of "four or six digits" of ten-digit numbers withheld in full); Isley v. EOUSA, No. 98-5098, 1999 WL 1021934, at *7 (D.C. Cir. Oct. 21, 1999) (remanding case to district court for segregability finding even though neither party raised segregability issue in district court).

[207] See, e.g., Judicial Watch, Inc. v. DOJ, 432 F.3d 366, 371-72 (D.C. Cir. 2005) (holding that because Exemption 5 protects from disclosure attorney work-product documents in full, including factual portions, such portions are not subject to segregability); Students Against Genocide v. Dep't of State, 257 F.3d 828, 837 (D.C. Cir. 2001) (declaring that an agency is not obligated to segregate and release images from classified photographs by "produc[ing] new photographs at a different resolution in order to mask the [classified] capabilities of the reconnaissance systems that took them"); ACLU v. CIA, No. 11-0933, 2012 WL 4356338, at *14 (D.D.C. Sept. 25, 2012) (holding that court need not determine whether "limited purely factual portions" should be segregated because it has already found that information was properly withheld under Exemptions 1 and 3); Elec. Frontier Found. v. DOJ, No. 11-939, 2012 WL 4319901, at *8 (D.D.C. Sept. 21, 2012) (finding that "although only portions of the OLC Opinion were withheld under Exemption 1, the entirety of the OLC Opinion was withheld under Exemption 5, leaving nothing significant that could be disclosed in a redacted format"); Jarvik v. CIA, 741 F. Supp. 2d 106, 121 (D.D.C. 2010) (holding that agency satisfied its burden of establishing that no portion of withheld documents could be segregated because "giving any information regarding the results of its search . . . 'would reveal sensitive intelligence capabilities and interests (or lack thereof)'"); The Shinnecock Indian Nation, 652 F. Supp. 2d at 370 ("With respect to the work product doctrine [under Exemption 5], because the protection applies to both factual and opinion-related material, no segregability issues arise."); Covington v. McLeod, 646 F. Supp. 2d 66, 72 (D.D.C. 2009) (noting that "the nature" of "an individual's statement or minutes of a grand jury proceeding" are "simply incompatible with segregation" under applicable exemptions), affirmed, No. 09-5336, 2010 WL 2930022, at *1 (D.C. Cir. 2010) (per curiam); Makky v. Chertoff, 489 F. Supp. 2d 421, 441 n.23 (D.N.J. 2007) (noting that "[t]he Court is not in a position to second-guess agency decisions relating to the segregability of non-exempt information when the information implicates national security concerns"); Nat'l Sec. Archive Fund, Inc. v. CIA, 402 F. Supp. 2d 211, 221-22 (D.D.C. 2005) (concluding that agency's declaration "[t]aken in its entirety" shows that 2004 National Intelligence Estimate (NIE) on Iraq is summarization of classified material, and that NIE contains no "segregable portions that might sensibly be released"); Aftergood v. CIA, No. 02-1146, slip op. at 4 n.1 (D.D.C. Feb. 6, 2004) ("Because the plaintiff seeks the disclosure of a single [budget] number, the court concludes that it would be impossible to segregate information from this request."), motion to alter or amend judgment denied, 2004 U.S. Dist. LEXIS 27035, at *8

On occasion, courts have addressed the issue of an agency's technological ability to segregate records maintained in non-traditional formats and have held that records "[are] not reasonably segregable where the agency attested that it lacked the technical capabilities to edit the records in order to disclose non-exempt portions."[208]

Finally, when an agency completes its segregability analysis and determines that portions of the responsive documents can be disclosed as nonexempt and other portions are appropriately withheld as exempt, the resulting partial record disclosure must satisfy statutory document marking obligations.[209] Agencies are required by the FOIA to mark partially-disclosed records so that the amount of deleted materials, and the exemption asserted are apparent, unless such markings would an interest protected by the exemption being asserted.[210] If technologically feasible, these markings should be placed in the record at the place where the deletion is made.[211]

Consultations and Referrals

When an agency locates records responsive to a FOIA request, it should determine whether another agency or agency component has a "substantial interest" in any of the records or information contained in the records.[212] As a matter of sound administrative

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(D.D.C. Sept. 29, 2004); Schrecker v. DOJ, 74 F. Supp. 2d 26, 32 (D.D.C. 1999) (finding that confidential informant "source codes and symbols are assigned in such a specific manner that no portion of the code is reasonably segregable"), rev'd & remanded in part on other grounds, 254 F.3d 162 (D.C. Cir. 2001).

[208] Milton v. DOJ, 842 F. Supp. 2d 257, 259-61 (D.D.C. 2012) (explaining that segregability analysis focuses on "the agency's current technological capacity" and holding that responsive telephone conversations were not reasonably segregable because agency did not possess technological capacity to segregate non-exempt portions of requested records); see also Mingo v. DOJ, 793 F. Supp. 2d. 447, 454-55 (D.D.C. 2011) (concluding that nonexempt portions of recorded telephone calls are inextricably intertwined with exempt portions because agency "lacks the technical capability" to segregate information that is digitally recorded); Antonelli v. BOP, 591 F. Supp. 2d 15, 27 (D.D.C. 2008) (same); Swope v. DOJ, 439 F. Supp. 2d 1, 7 (D.D.C. 2006) (same).

[209] See 5 U.S.C. § 552(b) (paragraph immediately following exemptions).

[210] Id; see *FOIA Post*, "OIP Guidance: Segregating and Marking Documents for Release In Accordance With the OPEN Government Act" (posted 10/23/08).

[211] 5 U.S.C. § 552(b); see *FOIA Post*, "OIP Guidance: Segregating and Marking Documents for Release In Accordance With the OPEN Government Act" (posted 10/23/08).

[212] See 5 U.S.C. § 552(a)(6)(B)(iii)(III) (2006 & Supp. IV 2010) (describing that one of three statutory circumstances where agencies can extend time to respond concerns "the need for consultation . . . with another agency [or among two or more agency components] having a substantial interest in the determination of the request").

practice, an agency should consult with any other agency or agency component whose information appears in the responsive records, especially if that other agency or component is better able to determine whether the information is exempt from disclosure.[213] The Department of Justice has issued detailed guidance for agencies to follow when consulting with other entities.[214]

When an agency locates records that originated with another agency or component, as a matter of sound administrative practice it should ordinarily refer those records to their originator so that that agency can make a direct response to the requester on those records.[215] The referring agency ordinarily should advise the requester of the referral and of the name of the agency FOIA office to which it was made.[216]

In Sussman v. U.S. Marshals Service, the Court of Appeals for the District of Columbia Circuit ruled that although consultations are the only procedure expressly mentioned in the FOIA to address situations where another agency has an interest in the handling of requested records, it was permissible for agencies to refer records to their originator for direct response to the requester.[217] The D.C. Circuit found that referring documents for direct response is a reasonable procedure so long as it does not "lead to improper withholding."[218] Additionally, the Department of Justice's guidance on referrals advises agencies not to refer records to an entity that is not itself subject to the FOIA.[219]

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[213] See DOJ, OIP Guidance: Referrals, Consultations, and Coordination: Procedures for Processing Records when Another Agency or Entity Has an Interest in Them (2011); cf. DOJ FOIA Regulations, 28 C.F.R. § 16.4(c)(1) (2012).

[214] DOJ, OIP Guidance: Referrals, Consultations, and Coordination: Procedures for Processing Records when Another Agency or Entity Has an Interest in Them (2011) (advising that agencies should utilize time-efficient mechanisms in conducting consultations, should provide copies of material that would assist other agency in its analysis, should conduct consultations simultaneously rather than sequentially whenever possible, and should provide requesters updates on status of ongoing consultations).

[215] See id. (explaining that referrals foster efficiency and ensure consistency of responses, as well as ensure that agencies making release determinations are fully informed about the content of the records).

[216] See id. (explaining that providing this information ensures that requesters understand what has happened to the documents that are responsive to their requests, are not disadvantaged by the referral process, and have a point of contact should they have any questions about their request).

[217] 494 F.3d 1106, 1118 (D.C. Cir. 2007) (quoting McGehee v. CIA, 697 F.2d 1095, 1110 (D.C. Cir. 1983) and holding that "McGehee's admonition that the agency receiving the initial request 'cannot simply refuse to act on the ground that the documents originated elsewhere . . . imposes a duty on that agency, but the agency may acquit itself through a referral, provided the referral does not lead to improper withholding'").

[218] Id; see also Inst. for Pol'y Stud. v. CIA, 885 F. Supp 2d 120, 241 (D.D.C. 2012) (citing Sussman, 494 F.3d at 1108, and upholding referral, noting that "[o]nce defendant

As addressed in the Department of Justice guidance, it may sometimes be necessary for agencies to "coordinate" with another agency rather than refer records to avoid compromising sensitive law enforcement information that could invade an individual's personal privacy or damage national security interests.[220]

Courts have held that even after agencies make referrals of records in response to FOIA requests, they retain the responsibility of defending any agency action taken on those

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discovered that some of the requested records originated with other agencies, it followed standard procedure by referring these documents to [those agencies] for [] direct response);Wilson v. DOT, 730 F. Supp. 2d 140, 154 (D.D.C. 2010) (observing that agency's referral of records was consistent with its regulations which permit referral to another agency "that originated or is substantially concerned with the records"); Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 770 (E.D. Pa. 2008) (finding referral process "not exceptionally lengthy" in light of nature of documents involved and "necessity of coordination among . . . various agencies"); El Badrawi v. DHS, 583 F. Supp. 2d 285, 310 (D. Conn. 2008) (granting summary judgment on "propriety and reasonableness of . . . referrals of certain records . . . to [those] . . . records' originating agencies"); Or. Natural Desert Ass'n v. Gutierrez, 409 F. Supp. 2d 1237, 1250 (D. Or. 2006) (concluding that agency's referral regulation "does not significantly impair the ability to get records" and that that regulation is "reasonable"); Rzeslawski v. DOJ, No. 97-1156, slip op. at 6 (D.D.C. July 23, 1998) (observing that an agency's "referral procedure is generally faster than attempting to make an independent determination regarding disclosure" and that "by placing the request in the hands of the originating agency, discretionary disclosure is more likely"), aff'd, No. 00-5029, 2000 WL 621299 (D.C. Cir. Apr. 4, 2000). But cf. Keys v. DHS, 570 F. Supp. 2d 59, 70 (D.D.C. 2008) (stating that referral was improper where agency referred records to incorrect agency and did not take steps to ensure that referred records were acted upon, and where second agency did not return incorrectly-referred records for nearly one year).

[219] See DOJ, OIP Guidance: Referrals, Consultations, and Coordination: Procedures for Processing Records when Another Agency or Entity Has an Interest in Them (2011) (stating that, prior to referring records to entity, agencies should ensure entity is subject to FOIA); see also EPIC v. NSA, 795 F. Supp. 2d 85, 94 (D.D.C. 2011) (holding that while "[i]t is true that agencies that receive FOIA requests and discover responsive documents that were created by another agency [they] may forward, or 'refer'" those documents to the originating agency, if the originating entity is not an agency subject to the FOIA, it "cannot unilaterally be made subject to the statute by any action of an agency, including referral"); Maydak v. DOJ, 254 F. Supp. 2d 23, 40 (D.D.C. 2003) (noting that agency's referral of records requested under FOIA to entity not subject to FOIA -- a United States Probation Office -- "raises a genuine legal issue about the propriety" of agency's action).

[220] See DOJ, OIP Guidance: Referrals, Consultations, and Coordination: Procedures for Processing Records when Another Agency or Entity Has an Interest in Them (2011) (detailing administrative procedures for coordinating a response and stressing that agency in receipt of request is responsible for providing status updates to requester during pendency of coordination process).

records if the matter proceeds to litigation,[221] which is typically done by submitting a declaration from the agency which processed the referral.[222] Additionally, as a matter of sound administrative practice agencies receiving referrals should handle them on a "first-in, first-out" basis among their other FOIA requests, according to the date of the request's initial receipt at the referring agency in order to avoid placing requesters at an unfair timing disadvantage through agency referral practices.[223]

Although a court has found that an agency generally is under no obligation to "forward" a request (which is distinct from "referring " records) to any other agency which might maintain records,[224] an agency has been found required to do so , when it obligated itself to through its own FOIA regulations.[225] As a matter of administrative discretion, an

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[221] See, e.g., Hall v. CIA, 668 F. Supp. 2d 172, 182 (D.D.C. 2010) (instructing agency to "take affirmative steps to ensure that its referrals are being processed"); Skinner v. DOJ, 744 F. Supp. 2d 185, 216 (D.D.C. 2010) (denying summary judgment in part "[b]ecause the results of the [agency's] referral of records to [two agencies] have not been explained"); Schoenman v. FBI, 604 F. Supp. 2d 174, 203-04 (D.D.C. 2009) (requiring agency to submit a "comprehensive" Vaughn Index that will include "a complete accounting of all referrals made and indicate whether all documents so referred have been processed and released to Plaintiff"); Keys, 570 F. Supp. 2d at 68-69 (stating that withholding was improper where neither referring agency nor referee agency explained nature of pages withheld on referral, and where referring agency did not explain why referee agency required requester to submit additional request for responsive public records); Hronek v. DEA, 16 F. Supp. 2d 1260, 1272 (D. Or. 1998) (noting that with respect to records referred to non-party agencies "the ultimate responsibility for a full response lies with the [referring] agencies"), aff'd, 7 F. App'x 591 (9th Cir. 2001).

[222] See, e.g., Hall v. CIA, No 04-814, 2012 WL 3143839, at *6 (D.D.C. Aug. 3, 2012) (concluding that agency "fulfilled its burden as to the coordination" of certain documents where it processed its own responsive records and provided "supporting declarations from the coordinating agencies").

[223] See DOJ, OIP Guidance: Referrals, Consultations, and Coordination: Procedures for Processing Records when Another Agency or Entity Has an Interest in Them (2011) (agency should order referral according to date FOIA request was first received by agency making referral, not according to date referral itself was received by agency); cf. Williams v. United States, 932 F. Supp. 354, 357 & n.7 (D.D.C. 1996) (urging agency to set up an "express lane" for referred records so as to not "tie up other agencies by taking an inordinate period of time to review referred records [and] unnecessarily inhibit[ing] the smooth functioning of the [other] agencies' well oiled FOIA processing systems").

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

[225] See Truesdale v. DOJ, 731 F. Supp. 2d 3, 6-8 (D.D.C. 2010) (denying in part defendant's motion for summary judgment because agency did not demonstrate compliance with own FOIA regulations concerning referrals).

agency may of course advise the requester of the name and address of other agencies that are likely to maintain records responsive to the request.[226]

Finally, the FOIA does impose a duty to route misdirected requests to the proper FOIA component within an agency.[227] Agency components must route misdirected requests within the agency within ten days of receipt, provided such requests are originally received by a component of the agency designated by the agency's regulations to receive FOIA requests.[228] (See Procedural Requirements, Time Limits, above, for a discussion of the requirement to route misdirected requests.)

Responding to FOIA Requests

The FOIA requires that each agency "shall make [disclosable] records promptly available" upon request.[229] The FOIA does not provide for limited disclosure; rather, it "speaks in terms of disclosure and nondisclosure [and] ordinarily does not recognize degrees of disclosure, such as permitting viewing, but not copying, of documents."[230] Because the statute does not provide for limited disclosure, the Supreme Court has opined that there is also "no mechanism under [the statute] for a protective order allowing only the requester to see [the information] or for proscribing its general dissemination."[231] In short, "once there is disclosure, the information belongs to the general public."[232]

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[226] See Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) (directing agencies to respond to FOIA requests "in a spirit of cooperation").

[227] 5 U.S.C. § 552(a)(6)(A); see also *FOIA Post*, "OIP Guidance: New Requirement to Route Misdirected FOIA Requests" (posted 11/18/08).

[228] 5 U.S.C. § 552(a)(6)(A); see also *FOIA Post*, "OIP Guidance: New Requirement to Route Misdirected FOIA Requests" (posted 11/18/08).

[229] 5 U.S.C. § 552(a)(3)(A) (2006 & Supp. IV 2010).

[230] Julian v. DOJ, 806 F.2d 1411, 1419 n.7 (9th Cir. 1986), aff'd, 486 U.S. 1 (1988); see NARA v. Favish, 541 U.S. 157, 172 (recognizing that information disclosed under FOIA "belongs to citizens to do with as they choose"), reh'g denied, 541 U.S. 1057 (2004); Berry v. DOJ, 733 F.2d 1343, 1355 n.19 (9th Cir. 1984); see also Seawell, Dalton, Hughes & Timms v. Exp.-Imp. Bank, No. 84-241-N, slip op. at 2 (E.D. Va. July 27, 1984) (stating that there is no "middle ground between disclosure and nondisclosure"). But see Antonelli v. ATF, No. 04-1180, 2006 WL 3147675, at *2 (D.D.C. Nov. 1, 2006) (finding that agency satisfied FOIA's requirements by making available for viewing inmate requester's presentence report); Chamberlain v. DOJ, 957 F. Supp. 292, 296 (D.D.C. 1997) (holding that FBI's offer to make "visicorder charts" available to requester for review at FBI Headquarters met FOIA requirements due to exceptional fact that charts could be damaged if photocopied), summary affirmance granted, 124 F.3d 1309 (D.C. Cir. 1997) (unpublished table decision).

[231] Favish, 541 U.S. at 174; see Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1082, 1088-89 (9th Cir. 1997) (rejecting plaintiff's offer to receive requested documents under a confidentiality agreement due to rule that "FOIA does not permit selective disclosure of

Upon receipt of a request that will take longer than ten days to process, the FOIA requires agencies to provide the requesters with an individualized tracking numbers and to maintain a telephone line or Internet service to provide requesters with information about the status of the request, including the date the agency originally received the request and the estimated date of its completion.[233]

When responding to a request, the FOIA requires agencies to "provide the [requested] record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format" and to also "make reasonable efforts to maintain its records in forms or formats that are reproducible" for such purposes.[234] These statutory provisions require agencies to not only honor a requester's choice of format among existing formats of a record, but to also make "reasonable efforts" to disclose a record in a format not in existence, when so requested, if the record is "readily reproducible" in that new format[235] If records are not readily reproducible by the agency in the format requested, courts have not required agencies to release the records in that format.[236]

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information to only certain parties, and that once the information is disclosed to [plaintiff], it must be made available to all members of the public who request it"); Swan v. SEC, 96 F.3d 498, 500 (D.C. Cir. 1996) ("Once records are released, nothing in the FOIA prevents the requester from disclosing the information to anyone else. The statute contains no provisions requiring confidentiality agreements or similar conditions."); Schiffer v. FBI, 78 F.3d 1405, 1410 (9th Cir. 1996) (reversing district court's conditional disclosure order, which is "not authorized by FOIA"); cf. Arieff v. U.S. Dep't of the Navy, 712 F.2d 1462, 1469 (D.C. Cir. 1983) (refusing to grant protective order that would allow plaintiff's counsel and medical expert to review exempt information).

[232] Favish, 541 U.S. at 174; see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) ("The well-known maxim under the FOIA that 'release to one is release to all' was firmly reinforced in the Favish decision.").

[233] 5 U.S.C. § 552(a)(7)(B)(ii); see Muttit v. U.S. Cent. Command, 813 F. Supp. 2d 221, 224, 226-30 (D.D.C. 2011) (noting requirement that agency provide status updates upon request); see also *FOIA Post*, "OIP Guidance: Assigning Tracking Numbers and Providing Status Information for Requests" (posted 11/18/08) (advising agencies of importance of providing FOIA requesters information on status of their requests so that they can readily learn when to expect response).

[234] 5 U.S.C. § 552(a)(3)(B); see also FOIA Update, Vol. XVII, No. 4, at 2 (discussing statutory provisions); cf. DOJ "Electronic Record" Report, reprinted in abridged form in FOIA Update, Vol. XI, No. 3, at 3-6 (discussing "choice of format" issues regarding "electronic records").

[235] See Sample v. BOP, 466 F.3d 1086, 1087, 1089 (D.C. Cir. 2006) (finding that statutory language "unambiguously requires" agency to disclose records in requested electronic format even though agency's regulations prohibit an inmate from possessing such electronically formatted material, without making any finding with respect to inmate "access or possession" of such records, as those questions were "not before the court"); TPS, Inc. v. DOD, 330 F.3d 1191, 1195 (9th Cir. 2003) (stating, in light of particular agency

When an agency denies a request in full or in part, the FOIA requires that it provide the requester with certain information about the action taken on the request. Agencies are required to "make a reasonable effort to estimate the volume" of any information withheld and should inform the requester of that estimate, unless doing so would harm an interest protected by an applied exemption.[237] For any records released in part, the FOIA requires that the released portions indicate the amount of information withheld and the exemption being asserted, unless doing so would harm an interest protected by the exemption being

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regulation, that the FOIA "requires that the agency satisfy a FOIA request [for the production of records in a certain format] when it has the capability to readily reproduce documents in the requested format"); see also FOIA Update, Vol. XIX, No. 1, at 6 (encouraging agencies to consider providing records in multiple forms as matter of administrative discretion if requested to do so); FOIA Update, Vol. XVIII, No. 1, at 5 (discussing agency obligations to produce records in requested forms or formats (citing H.R. Rep. No. 104-795, at 18, 21 (1996) (noting that amendments overrule Dismukes v. Dep't of the Interior, 603 F. Supp. 760, 761-63 (D.D.C. 1984), which previously allowed agency to choose format of disclosure if it chose "reasonably")))); cf. Snyder v. DOD, No. 03-4992, 2007 WL 951293, at *4-5 (N.D. Cal. Mar. 27, 2007) (ordering agency to produce file that was available on agency website, but corrupted or incomplete when viewed, and to produce re-formatted version of another file that it previously disclosed, but was also corrupted, explaining that "[a]bsent exceptional circumstances, release of information is required unless it falls under one of nine statutory exemptions" and that "the prospect of compliance expenses is not one of those exceptions"); Landmark Legal Found. v. EPA, 272 F. Supp. 2d 59, 63 (D.D.C. 2003) (concluding that agency had not violated the FOIA's "readily reproducible" provision by failing to retain electronic copies of e-mails that were retained in paper form only, because "the agency may keep its files in a manner that best suits its needs").

[236] See LaRoche v. SEC, 289 F. App'x 231, 231 (9th Cir. 2008) (affirming summary judgment in favor of agency because records sought were not readily reproducible in searchable electronic format plaintiff requested); Jackson v. U.S. Dep't of Labor, No. 06-02157, 2008 WL 539925, at *4, (E.D. Cal. Feb. 25, 2008) (magistrate's recommendation) (finding that "because [agency] has not developed a system to provide public online access, the records requested are not readily reproducible in that format"), adopted, No. 06-2157, 2008 WL 4463897, *1 (E.D. Cal. Oct. 2, 2008); Chamberlain, 957 F. Supp. at 296 ("The substantial expense of reproducing the visicorder charts, as well as the possibility that the visicorder charts might be damaged if photocopied, make the Government's proposed form of disclosure [i.e., inspection] even more compelling.").

[237] See 5 U.S.C. § 552(a)(6)(F); see also Mobley v. DOJ, 845 F. Supp. 2d 120, 123-24 (D.D.C. 2012) ("The plain text of the statute does not require agencies to provide a list of withheld documents, but only to make a reasonable effort to estimate the volume of the documents withheld."); FOIA Update, Vol. XVIII, No. 2, at 2 (discussing alternative methods of satisfying obligation to estimate volume of deleted or withheld information, including "forms of measurement" to be used).

asserted.[238] If "technically feasible," the FOIA requires this information to "be indicated at the place in the record where such deletion is made."[239](For a further discussion of the FOIA's portion-marking requirements, see Procedural Requirements, "Reasonably Segregable" Obligation, above.)

The agency response is required by the FOIA to include specific administrative information about the agency's action.[240] While "[t]here is no requirement that administrative responses to FOIA requests contain the same documentation necessary in litigation,"[241] a decision to deny an initial request must inform the requester of the reasons for denial, the right to appeal, and the name and title of each person responsible for the denial.[242] Agencies must also include administrative appeal rights notifications in any

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[238] See 5 U.S.C. § 552(b) (paragraph immediately following exemptions); see also *FOIA Post*, "OIP Guidance: Segregating and Marking Documents for Release In Accordance With the OPEN Government Act" (posted 10/23/08).

[239] See 5 U.S.C. § 552(b) (paragraph immediately following exemptions); see also Long v. DOJ, 703 F. Supp. 2d 84, 107-08 (N.D.N.Y. 2010) (accepting agency's explanation that it would not be technically feasible to show disputed redactions "because the method required to do so would cause 'system run-time problems'" and not produce results).

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

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

[242] See 5 U.S.C. § 552(a)(6)(A)(i), (a)(6)(C)(I); Stanley v. DOD, No. 93-4247, slip op. at 14-15 (S.D. Ill. July 28, 1998) (finding constructive exhaustion when agency failed to provide requester with notice of administrative appeal rights regarding disputed fee estimate); Mayock v. INS, 714 F. Supp. 1558, 1567 (N.D. Cal. 1989) (denying plaintiff's request for Vaughn Index at administrative level, but suggesting that agency regulations then in effect required "more information than just the number of pages withheld and an unexplained citation to the exemptions"), rev'd & remanded on other grounds sub nom. Mayock v. Nelson, 938 F.2d 1006 (9th Cir. 1991); Hudgins v. IRS, 620 F. Supp. 19, 20-21 (D.D.C. 1985) (suggesting that statement of appeal rights should be provided even when agency interprets request as not reasonably describing records), aff'd, 808 F.2d 137 (D.C. Cir. 1987).

responses to requesters where they are advising that no records responsive to the request could be located.[243]

Prior to transmitting responsive records to the requester courts have recognized that an agency may collect any fees owed on the request.[244]

One court has directly addressed the proper handling of records not written in English, ruling that the agency should translate the responsive records in order to make disclosure determinations.[245]

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

[244] See Farrugia v. EOUSA, 366 F. Supp. 2d 56, 60 (D.D.C. 2005) ("Where an agency already has processed a request, it is clear 'that the agency may require payment before sending the requested records.'") (quoting Trueblood v. U.S. Dep't of the Treasury, 943 F. Supp. 64, 68 (D.D.C. 1996)); Taylor v. U.S. Dep't of the Treasury, No. A-96-CA-933, 1996 WL 858481, at *2 (W.D. Tex. Dec. 17, 1996) (recognizing that agency may require payment before sending processed records); Putnam v. DOJ, 880 F. Supp. 40, 42 (D.D.C. 1995) (allowing agency to require payment of current and outstanding fees before releasing records); Crooker v. ATF, 882 F. Supp. 1158, 1162 (D. Mass. 1995) (finding no obligation to provide records until current and past-due fees are paid); Strout v. U.S. Parole Comm'n, 842 F. Supp. 948, 951 (E.D. Mich. 1994), aff'd, 40 F.3d 136 (6th Cir. 1994) (granting defendant's motion for summary judgment after finding agency regulation requiring payment prior to releasing records to requester valid).

[245] See Lawyers' Comm. for Civil Rights v. Dep't of the Treasury, No. 07-2590, 2009 WL 1299821, at *9 (N.D. Cal. May 11, 2009) (concluding that agency failed to demonstrate applicability of FOIA exemption to documents because it "did not bother to translate [them] into English for the court . . . so the court is unable to make a determination as to those [documents]"); see also *FOIA Post*, "The Limits of Agency Translation Obligations Under the FOIA" (posted 12/1/04) (discussing agency translation obligations in determining responsiveness of records, determining applicability of exemptions, and providing records in response to FOIA requests); cf. Essential Info., Inc. v. USIA, 134 F.3d 1165, 1172 (D.C. Cir. 1998) (Tatel, J., dissenting) (observing that "FOIA contains no . . . translation requirement" regarding disclosure of records in a specific language). But cf. McDonnell v. United States, 4 F.3d 1227, 1261 n.21 (3d Cir. 1993) (suggesting, in dictum, that agency might be compelled to create translation of any disclosable encoded information).

When responding to a request courts have found that agencies are not required to add explanatory materials to any records disclosed,[246] to certify records,[247] or to bates stamp or number the records.[248]

As a matter of sound administrative policy, when an agency receives a request that involves voluminous records or which requires searches in multiple locations, whenever feasible, the agency should provide interim releases to the requester instead of waiting until all records are located and processed.[249] As a further matter of administrative discretion in responding to requests, agencies should include any other helpful information such as, when appropriate, the agency's interpretation of the request.[250] Further, agencies are expected to provide requesters with the "best copy available" of a record,[251] and so as a

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[246] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 162 (1975) (holding that "insofar as the order of the court below requires the agency to create explanatory material, it is baseless"); see also Citizens Progressive Alliance v. U.S. Bureau of Indian Affairs, 241 F. Supp. 2d 1342, 1365 (D.N.M. 2002) ("Defendants may be required to disclose material pursuant to FOIA, but Defendants are not required to . . . explain any records produced."); Tax Analysts v. IRS, No. 94-923, 1998 WL 419755, at *2 (D.D.C. May 1, 1998) (declaring that "an agency need not add explanatory material to a document to make it more understandable in light of the redactions"); Gabel v. Comm'r, 879 F. Supp. 1037, 1039 (N.D. Cal. 1994) (noting that FOIA does not require agency "to revamp documents or generate exegeses so as to make them comprehensible to a particular requestor").

[247] See Knittel v. IRS, No. 07-1213, 2009 WL 2163619 (W.D. Tenn. July 20, 2009) (concluding that agencies are not required to provide certified copies of agency records in response to FOIA request); Jackman v. DOJ, No. 05-1889, 2006 WL 2598054, at *2 (D.D.C. Sept. 11, 2006) (stating that "questions about the authenticity and correctness of the released records are beyond the scope of the court's FOIA jurisdiction").

[248] See Brown v. DOJ, 734 F. Supp. 2d 99, 104 (D.D.C. 2010) (declining to extend agency's obligation to make records available in readily reproducible format to include bates-stamping records that were not already numbered).

[249] See *FOIA Post*, "The Importance of Good Communication with FOIA Requesters" (posted 3/4/10) (advising agencies to make interim releases when possible to facilitate access to requested material).

[250] See *FOIA Post*, "OIP Guidance: The Importance of Good Communication with FOIA Requesters" (posted 3/1/10) (advising agencies of benefits to both requesters and agencies to discuss scope of request with requester "to ensure that they have a common understanding of what records are being sought"); FOIA Update, Vol. XVI, No. 3, at 3-5 ("OIP Guidance: Determining the Scope of a FOIA Request") (emphasizing importance of communication with requester); see, e.g., Astley v. Lawson, No. 89-2806, 1991 WL 7162, at *2 (D.D.C. Jan. 11, 1991) (suggesting that agency "might have been more helpful" to requester by "explaining why the information he sought would not be provided").

[251] See McDonnell v. United States, 4 F.3d 1227, 1261 n. 21 (3d Cir. 1993) ("Of course, we anticipate that [plaintiff] will receive the best possible reproduction of the documents to which he is entitled."); Crummey v. SSA, 794 F. Supp. 2d 46, 62 (D.D.C. 2011) (accepting

matter of good policy should address any problems with the quality of disclosed records in the response.[252]

Finally, the President has instructed agencies to "use modern technology" to make information available to the public, both in response to requests and through proactive disclosures.[253] In addition to meeting their proactive disclosure obligations under the FOIA,[254] which includes the requirement that agencies post FOIA-processed versions of "frequently requested records," agencies should as a matter of sound policy identify and post any records in which they anticipate interest.[255] (For a discussion of proactive disclosures, see Proactive Disclosures, Disclosing Records Proactively to Achieve Transparency, above.)

Administrative Appeals

Under the FOIA's administrative appeal provision, a requester has the right to administratively appeal any adverse determination an agency makes on his or her FOIA

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that agency provided plaintiff with "best available records" even though plaintiff asserted that copies were illegible); see also FOIA Update, Vol. XVI, No. 3, at 5 (advising agencies that "before providing a FOIA requester with a photocopy of a record that is a poor copy or is not entirely legible," they should "make reasonable efforts to check for any better copy of a record that could be used to make a better photocopy for the requester").

[252] See FOIA Update, Vol. XVI, No. 3, at 7 (advising of procedures to be used in cases involving poor photocopies of records).

[253] See Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) [hereinafter President Obama's FOIA Memorandum]; accord Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 51879 (Oct. 8, 2009) [hereinafter Attorney General Holder's FOIA Guidelines]; *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

[254] See 5 U.S.C. § 552(a)(2)(D).

[255] See President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683 (directing all agencies to "take affirmative steps to make information public" and to "use modern technology to inform citizens about what is known and done by their Government"); accord Attorney General Holder's FOIA Guidelines, at 3, (stating that "agencies should readily and systematically post information online in advance of any public request" because doing so "reduces the need for individualized requests and may help reduce existing backlogs"); *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (recognizing proactive disclosure as a "key area where agencies can make real improvements in increasing transparency").

request.[256] Under DOJ regulations, for example, adverse determinations include denials of records in full or in part; "no records" responses; denials of requests for fee waivers; and denials of requests for expedited processing.[257]

The administrative appeal process is important to agencies and requesters for two reasons. First, the administrative appeal process provides an agency with an opportunity to review its initial action taken in response to a request to determine whether corrective steps are necessary.[258] Second, although failure to file an administrative appeal is not an absolute bar to judicial review, the Court of Appeals for the District of Columbia Circuit has held that exhaustion of the administrative appeal process is "'generally required before filing suit in federal court.'"[259]

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[256] See 5 U.S.C. § 552(a)(6)(A) (2006 & Supp. IV 2010).

[257] See DOJ FOIA Regulations, 28 C.F.R. § 16.6(c) (2012).

[258] See Wilbur v. CIA, 355 F.3d 675, 677 (D.C. Cir. 2004) (noting that policies of exhaustion requirement are "to prevent premature interference with agency processes, to give the parties and the courts benefit of the agency's experience and expertise and to compile an adequate record for review"); Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 61 (D.C. Cir. 1990) (recognizing that exhaustion of the administrative appeal process "allows the top managers of an agency to correct mistakes made at lower levels and thereby obviates unnecessary judicial review" (citing McKart v. United States, 395 U.S. 185, 194 (1969) (non-FOIA case))); Sieverding v. DOJ, No. 11-1032, 2012 WL 6608573, at *4 (D.D.C. Dec. 19, 2012) (finding that, in absence of appeal, allowing plaintiff to "to pursue her claim . . . in federal litigation would undermine [agency's] process for resolving such FOIA claims").

[259] Hidalgo v. FBI, 344 F.3d 1256, 1258 (D.C. Cir. 2003) (quoting Oglesby, 920 F.2d at 61); see, e.g., Lumarse v. HHS, 191 F.3d 460, at *5 (9th Cir. 1999) (unpublished table opinion) (affirming dismissal of plaintiff's FOIA claim for failure to exhaust administrative remedies because plaintiff did not administratively appeal and therefore did not attempt to comply with agency procedures); ACLU of Mich. v. FBI, No. 11-13154, slip op. at *4 (E.D. Mich. Sept. 30, 2012) (finding that court does not have subject matter jurisdiction over adequacy of agency's search because "nowhere in the Appeal [did] Plaintiff question or challenge the adequacy of Defendant's search"); Freedom Watch, Inc. v. CIA, No. 12-0721, 2012 WL 4753281, at *5, n. 2 (D.D.C. Oct. 5, 2012) (denying plaintiff's request for futility exception to the exhaustion requirement and noting that "binding Circuit precedent could not be clearer: exhaustion of administrative remedies 'is a mandatory prerequisite to a lawsuit under the FOIA'" (quoting Wilbur, 355 F.3d at 676 (emphasis added, internal quotation marks and citation omitted))); Williams v. VA, 510 F. Supp. 2d 912, 921 (M.D. Fla. 2007) (finding that "plaintiff's failure to administratively appeal precludes plaintiff from obtaining relief because "the requirement of exhaustion of administrative remedies prior to seeking redress in federal court, allows an agency to correct possible mistakes and alleviate the need for judicial review of the same"); Thomas v. IRS, No. 03-2080, 2004 WL 3185316, at *3 (M.D. Pa. Nov. 2, 2004) (finding that plaintiff failed to exhaust administrative remedies because, by not filing an administrative appeal, plaintiff "contravene[ed] Congress' purpose in creating a comprehensive administrative system for FOIA requests and disclosures"), aff'd, 153 F. App'x 89 (3d Cir. 2005); Comer v. IRS, No. 97-76329, 1999 WL 1022210, at *3-4 (E.D. Mich. Sept. 30, 1999) (finding that "administrative exhaustion is required so that

Courts have found that a requester must submit an administrative appeal pursuant to an agency's regulations, including regulations governing deadlines and procedures for submission.[260] Although the FOIA has a "constructive exhaustion" provision,[261] once an agency responds to a request, courts have found that the requester is obligated at that time to submit an administrative appeal even if the agency's response was untimely.[262]

The FOIA requires an agency to make a determination on an administrative appeal within twenty working days after its receipt,[263] but that period may be extended by written

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parties may take the opportunity to informally resolve disputed issues before going to the much more onerous time and expense of litigating in the courts").

[260] See, e.g., Thompson v. Dep't of the Navy, No. 11-11782, 2012 WL 4464648, at *1-*2 (11th Cir. Sept. 27, 2012) (finding that plaintiff did not exhaust administrative remedies where plaintiff's appeal was untimely); Bonilla v. DOJ, No. 11-20450, 2012 WL 3759024, at *5 (S.D. Fla. Aug. 29, 2012) (finding that plaintiff's attempt to appeal was untimely and therefore that plaintiff had not exhausted administrative remedies because regulatory language is not ambiguous and "agency's construction of its own regulations is entitled to substantial deference"); Ctr. for Biological Diversity v. Gutierrez, 451 F. Supp. 2d 57, 65-67 (D.D.C. Aug. 10, 2006) (concluding that requester failed to exhaust administrative remedies when electronically submitted appeal was received twelve minutes after expiration of agency's regulatory appeal deadline); Imamoto v. SSA, No. 08-00137, 2008 WL 5179104, at *5 (D. Haw. Dec. 9, 2008) (concluding that third party agency forwarding requester's letter to SSA is not valid administrative appeal of SSA's action); Sindram v. Fox, No. 07-0222, 2008 WL 2996047, at *5 (E.D. Pa. Aug. 5, 2008) (giving plaintiff thirty days to produce evidence that he exhausted administrative remedies in light of agency having no record of receiving administrative appeal); Fisher v. DOJ, No. 07-2273, 2008 U.S. Dist. LEXIS 38925 (D.N.J. May 9, 2008) (declining to exercise jurisdiction because plaintiff's appeal was received after sixty-day deadline established by agency regulation and rejecting prison mailbox rule where "'statutory or regulatory schemes . . . require[ ] actual receipt by a specific date'" (quoting Longenette v. Krusing, 322 F.3d 758, 764 (3d Cir. 2003))).

[261] See 5 U.S.C. § 552(a)(6)(C).

[262] See Oglesby, 920 F.2d at 61; see also Rease v. Harvey, 238 F. App'x 492, 495 (11th Cir. 2007) (unpublished disposition) (declaring that "requester still must exhaust his administrative remedies" even when agency response is untimely); Ivey v. Paulson, 227 F. App'x 1, 1 (D.C. Cir. 2007) (unpublished disposition) (affirming district court's dismissal for failure to exhaust because agency made response prior to requester filing suit, thereby reimposing requirement that requester submit administrative appeal); Arizechi v. IRS, No. 06-5292, 2008 WL 539058, at *5 (D.N.J. Feb. 25, 2008) (unpublished disposition) (finding that "[a]n administrative appeal is mandatory if the agency cures its failure to respond with the statutory period by responding to the FOIA request before suit is filed").

[263] See 5 U.S.C. § 552(a)(6)(A)(ii); see also Dennis v. CIA, No. 12-4207, 12-4208, 2012 WL 5493377, at *2 (E.D.N.Y. Nov. 13, 2012) (noting that "[u]nder FOIA, after an agency receives a FOIA request, it must 'determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) . . . whether or not to comply with such request,' and shall 'make a

notice if "unusual circumstances," as defined by the FOIA, apply.[264] An administrative appeal decision upholding an adverse determination must inform the requester of the provisions for judicial review of that determination in the federal courts.[265] As a matter of sound administrative practice, the department of Justice has advised agencies that they should include in their appeal determination letters notification to the requester of the mediation services offered by the Office of Government Information Services at the National Archives and Records Administration.[266] (For discussions of the various aspects of judicial review of agency action under the FOIA, see Litigation Considerations, below.)

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determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal.'"); Wildlands CPR v. U.S. Forest Serv., 558 F. Supp. 2d 1096, 1102-03 (D. Mont. 2008) (finding constructive exhaustion where agency did not timely adjudicate administrative appeal); Soghomonian v. United States, 82 F. Supp. 2d 1134, 1138 (E.D. Cal. 1999) (holding that twenty-day time period for responding to administrative appeal begins when agency receives appeal, not when requester mails it).

[264] See 5 U.S.C. § 552(a)(6)(B)(i); 5 U.S.C. § 552(a)(6)(B)(iii).

[265] See 5 U.S.C. § 552(a)(6)(A)(ii).

[266] See *FOIA Post*, "OIP Guidance: Notifying Requesters of the Mediation Services Offered by OGIS" (posted 07/09/10).